The Law Commission

(LAW COM. No. 75)

REPORT ON LIABILITY FOR DAMAGE OR INJURY TO TRESPASSERS AND RELATED QUESTIONS OF OCCUPIERS' LIABILITY

ADVICE TO THE LORD CHANCELLOR UNDER SECTION 3(1)(*e*)
OF THE LAW COMMISSIONS ACT 1965

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The Commissioners are—

The Honourable Mr. Justice Cooke, *Chairman*.
Mr. Aubrey L. Diamond.
Mr. Stephen Edell.
Mr. Derek Hodgson, Q.C.
Mr. Norman S. Marsh, Q.C.

The Secretary of the Law Commission is Mr. J. M. Cartwright Sharp and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

CONTENTS

	Paragraph	Page
I INTRODUCTION	1–3	1
II THE PRESENT LAW AND THE NEED FOR ITS CLARIFICATION	4–13	2
A. *Herrington's* case	4–7	2
B. Developments in the law since *Herrington's* case	8–11	4
C. Response to Working Paper No. 52	12–13	7
III THE DUTY OF CARE TOWARDS TRESPASSERS	14–35	8
A. The approach of Working Paper No. 52	14–18	8
B. A new approach	19–34	9
1. Formulation of the new duty of care	21	10
2. Premises	22	10
3. Dangers due to the state of the premises	23	11
4. The occupier	24	12
5. The burden of proof	25	12
6. The circumstances in which a duty arises and the extent of that duty	26–29	12
7. Limitation of the duty to cases of personal injury and death	30	14
8. Other possible limitations upon the duty of care	31–34	14
C. Summary	35	16
IV THE DUTY OF CARE TOWARDS OTHER NON-VISITORS	36–59	16
A. Entrants by virtue of an access agreement or order	37–41	17
B. Persons on land in exercise of a right of way	42–56	18
1. Public rights of way maintainable at public expense	45–47	19
2. Public rights of way not maintainable at public expense	48–51	20
3. Private rights of way	52–56	22
C. Entry under compulsory powers	57–58	23
D. Conclusion and summary	59	24
V EXEMPTION FROM LIABILITY	60–79	24
A. The present law	60–66	24
B. Proposals as to exemption clauses	67–73	26
C. Control by the reasonableness test	74–75	28
D. Assumption of risk	76–78	29
E. Summary	79	30
VI SUMMARY OF RECOMMENDATIONS	80	31
APPENDIX A Draft Occupiers' Liability Bill with Explanatory Notes		33
APPENDIX B List of commentators on Working Paper No. 52		40

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Advice to the Lord Chancellor under section 3(1)(e) *of the Law Commissions Act* 1965

To the Right Honourable the Lord Elwyn-Jones, Lord High Chancellor of Great Britain

I. INTRODUCTION

1. On 21 April 1972 the then Lord Chancellor, Lord Hailsham of St. Marylebone asked us, under section 3(1)(e) of the Law Commissions Act 1965—

> "to consider in the light of the decision of the House of Lords in *British Railways Board* v. *Herrington*[1], the law relating to liability for damage or injury suffered by trespassers."

In pursuance of that reference we published a working paper[2] in July 1973 which examined in detail the development of the law relating to this subject and the effect upon it of the decision in *Herrington's* case. The paper took the view that, having regard to that decision, some reform of the law was desirable and it put forward provisional proposals with that aim for amendments to the Occupiers' Liability Act 1957. It also made further proposals for certain related matters, in particular the extent to which an occupier should be permitted by means of exempting conditions to divest himself of liability towards both trespassers and other entrants upon his land.

2. The working paper evoked a very wide and diverse response[3]. A few of those commenting considered that no reform of the law was desirable; and among the majority who did consider that reform was desirable, there was again a wide spectrum of views as to the desired result and the best means of achieving it. We have given very close regard to this consultation, and, in the light of the views expressed, the recommendations which we now put forward in this report differ in some respects in substance and more especially in form from our provisional proposals. The recommendations are put in legislative form in the draft clauses set out in Appendix A. Before considering the changes which we now think should be made to the law, we outline the present legal position.

3. By way of a preliminary to exposition of the law as it now stands, we observe that our present consideration of the law and the recommendations we make for changes are made against the background of the broader consideration of the law at present being undertaken by the Royal Commission on civil liability[4]. That Commission has within its terms of reference consideration of

[1] [1972] A.C. 877; throughout this report we refer to this as *Herrington's* case.

[2] Working Paper No. 52, "Liability for damage or injury to trespassers and related questions of occupiers' liability."

[3] Those responding to our request for comments are listed in Appendix B.

[4] The setting up of the Commission, under the chairmanship of Lord Pearson, was announced by the then Prime Minister in the House of Commons on 19 December 1972 (*Hansard*, Vol. 848, Col. 119).

the whole subject of compensation for the death of or any personal injury to all types of entrant on property belonging to or occupied by another. By contrast, our concern for the purposes of this report with injuries to persons other than trespassers is marginal. It arises first in the context, already mentioned, of conditions by an occupier exempting himself from liability to all entrants; and secondly in those cases where the liability which we recommend should rest on the occupier towards the trespasser might create an anomaly in respect of some lesser liability at present owed by the occupier to persons who are not "visitors" within the meaning of that term in the Occupiers' Liability Act 1957[5]. Furthermore, our consideration of liability to trespassers is limited by the assumption that such liability is based on "fault". It is, therefore, essential for us to consider in what circumstances an occupier should be under a duty to exercise care towards a trespasser and to what extent, if any, the law should specify the degree of such care. The Royal Commission, however, is not limited in this way in their consideration of what should be the general principles of liability of an occupier to, or of compensation in respect of, those killed or injured on the property of another.

II. THE PRESENT LAW AND THE NEED FOR ITS CLARIFICATION

A. *Herrington's* case

4. We summarised the facts of *Herrington's* case[6] in our working paper as follows—

> The plaintiff in the case was a boy aged nine. On June 7th, 1965, being Whit Monday and a Bank Holiday, he was playing with his two brothers, who were a little older than he was, in Bunce's Meadow, near Mitcham, a National Trust property open to the public. The Meadow was bounded on one side by an electrified railway line protected by a chain fence four feet high, supported by concrete posts eight feet six inches apart. Beyond the railway line was a second line of fencing separating the railway line from another National Trust property, Morden Hall Park, also open to the public. The Meadow was situated in a heavily populated suburban area and was used by children as a playground. A path crossed the Meadow in the direction of the railway, turning to the right shortly before the railway fence and leading to a footbridge to the Park on the other side of the line. At the turning another path led straight on to the fence, which at this point was detached from one of the posts and pressed down so that the top was about ten inches from the ground; the results was that "anybody, adult or child, could quite easily get across on to the line." Directly opposite the dilapidated fence there was a hole in the fence on the Morden Hall Park side of the line, showing how people could use the gaps in the two fences as a short cut between the Meadow and the Park. The fence had been in its dilapidated condition for a considerable time before the accident. Shortly after noon the plaintiff was missed by his brothers who found him on the railway line between the conductor rail and the running rail; he was severely burnt. Nearly two months before the accident a railway guard had seen children on the line between Mitcham and Morden. There were, it was said, three places in the vicinity where children could get through the fence.

[5] We discuss these special cases at para. 36 *et seq.*

[6] [1972] A.C. 877.

The plaintiff was held able to recover at first instance and also, successively, in the Court of Appeal and the House of Lords. The decision of the House of Lords was unanimous, although all the speeches were separately argued.

5. There is no doubt that the speeches in the House of Lords brought about a change in the law as to the liability for injuries suffered by a trespasser on an occupier's property. All five members of the House of Lords recognised at the very least that their decision represented a considerable development of the principle laid down in *Addie* v. *Dumbreck*[7] that, for an injured trespasser to have a remedy against the occupier, there had to 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"[8].

6. There did not, however, emerge from *Herrington's* case a clear principle applicable to the generality of cases. It is clear that no member of the House of Lords considered that the occupation of land in itself created a situation whereby the occupier owed a duty to all persons on his land; that arose only where persons were lawfully on the land. Before it could be said that a duty was owed to a trespasser, and before consideration could be given to the content of that duty, there had to be a finding of some additional and special facts which would entitle a court to hold that the occupier owed a duty to the trespasser. These special facts or special situations were variously described. Lord Reid said[9] that the occupier had to have knowledge of a "substantial probability" of the presence of trespassers, while Lord Pearson[10], by contrast, thought that the presence of the trespasser had "reasonably to be anticipated". This test is similar to that formulated by Lord Diplock, that the occupier must either know that a trespasser is present or have knowledge of facts from which a reasonable man would recognise that a trespasser was likely to be present on the land[11]. Lord Wilberforce said, however, that the duty-creating facts must satisfy a test more specific than that of "foresight of likelihood of trespass"[12], which might suggest a test more difficult to surmount than Lord Diplock's, although both of them were prepared to take into account, in determining whether a duty had arisen, the "lethal character" of the danger. Lord Morris did not purport to lay down a general rule as to when an occupier has a duty of care towards a trespasser, but listed the particular features of the case, "all known and obvious", which led him to the conclusion that there was in the particular instance a duty of care[13]. It is, therefore, difficult to conclude that the question as to when the special facts gave rise to a duty to the trespasser received an entirely consistent answer in *Herrington's* case.

7. It is also difficult to give, on the basis of *Herrington's* case, a simple answer as to the content of the occupier's duty once it can be said, on the facts, to have arisen. Lord Diplock required an occupier, once he is under a duty, to take "reasonable steps to enable a trespasser to avoid the danger"[14]. But in regard to this question, the four other members of the House of Lords made some

[7] [1929] A.C. 358.
[8] *ibid.*, at p. 365 *per* Lord Hailsham L.C.
[9] [1972] A.C. 877, 897–8.
[10] *ibid.*, at p. 927.
[11] *ibid.*, at p. 941.
[12] *ibid.*, at p. 919.
[13] *ibid.*, at p. 909.
[14] [1972] A.C. at p. 941.

reference to the test of "humanity". Lord Reid said that the question to be asked was whether a "conscientious humane man", with the knowledge, skill and resources of the occupier, could reasonably be expected to have done or refrained from doing before the accident something which would have avoided it[15]. Lord Pearson referred to the occupier's duty to treat the trespasser with "ordinary humanity"[16], while Lord Morris considered the duty to be "to take such steps as common sense or common humanity would dictate"[17]. Lord Wilberforce, in reference to the duty owed to a trespasser, thought that there must be "a compromise between the demands of humanity and the necessity to avoid placing undue burdens on occupiers".[18] It is not entirely clear what standard of duty the concept of "humanity" imposes in regard to liability towards trespassers, or whether, indeed, the members of the House of Lords were in agreement on their understanding of what this concept involves. In any event, both Lord Wilberforce and Lord Reid, together with Lord Diplock[19], made clear that, however it might be described, the test fell short of the entirely objective standard of reasonable care, in so far as they would take into account not only the expense of precautions in relation to a particular danger (as would in any event be done in assessing what is reasonable) but also their expense in relation to the occupier's particular resources.

B. Developments in the law since *Herrington's* case

8. There have been a number of decisions since *Herrington's* case in which liability to trespassers has had to be considered, which we describe in the following paragraphs. In *Pannett* v. *McGuinness*[20], the infant plaintiff, aged five, had frequently trespassed on and been chased off a site, adjoining a public park in a densely populated area. The defendants were demolition contractors engaged by a local authority to demolish a warehouse on the site. The watchman posted in order to keep a look-out to prevent children entering the site where fires had been lit failed in this purpose. The plaintiff entered the site and fell into a fire, being severely injured. At first instance and unanimously in the Court of Appeal he was held able to recover damages. Lord Denning M.R. did not, in his judgment, distinguish sharply between the existence of a duty of care affecting the particular occupier and the standard of care which the occupier, assuming he is under a duty of care, should show towards the trespasser. He summed up the position of the occupier in a sentence[21] which seemed tantamount to saying that he must behave reasonably to the trespasser having regard to all the circumstances. Edmund Davies L.J., while referring to the presence of children upon the site as being "distinctly likely"[22], was again mainly concerned with the standard of care, referring in this connection both to Lord Wilberforce's "compromise . . . between the demands of humanity and the necessity to avoid placing undue burdens on occupiers" and to the standard laid down by Lord Reid of the "conscientious human man"[23]. Lawton L.J. in

[15] [1972] A.C. 877, 899.
[16] *ibid.*, at p. 927.
[17] *ibid.*, at p. 909.
[18] *ibid.*, at p. 920.
[19] *ibid.*, at, respectively, pp. 920, 899 and 942.
[20] [1972] 2 Q.B. 599.
[21] "The long and the short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did": [1972] 2 Q.B. 599, 606–7.
[22] *ibid.*, at p. 608.
[23] *ibid.*, at p. 610.

a short judgment said that as a matter of "common sense and humanity" the defendants were trying to prevent children from entering a site where a fire had been lit, but owing to the watchman's failure the plaintiff entered and was injured. This failure brought the case within the *ratio decidendi* (not otherwise elaborated) of *Herrington's* case[24]. The last-mentioned case was also referred to in *Westwood* v. *The Post Office*[25], in which an employee of the Post Office trespassed by entering a part of the premises forbidden to him and there suffered a fatal accident. Lawton L.J. singled out Lord Reid's test of whether the occupier knew there was a "substantial probability" of the presence of a trespasser and, holding that there was no such probability, found there was no liability on the defendant.

9. In *Penny* v. *Northampton Borough Council*[26] an eight year old child, who was injured by an exploding aerosol can thrown by another child onto a fire on a local rubbish tip fifty acres in area, failed to recover damages against the local council. The part of the tip where the accident occurred was no longer in use as such and had the appearance of a rough field. The local authority provided full protection against trespassers in those parts of the tip which were still in use, and council workmen frequently warned children off the remainder of the tip; the plaintiff and the other children were thus aware that they were not entitled to go in the area where the accident occurred. Megaw L.J., in discussing the circumstances in which a duty towards a trespasser arises, referred both to the "special circumstances" noted by Lord Morris in *Herrington's* case[27] and to the test formulated by Lord Diplock[28] and concluded that "there must be knowledge of facts, relevant to the time and place of the accident, which would fairly lead a humane and sensible man, reflecting upon those facts known to him which such a man would take into account, to draw the inference that there was a likelihood—a real possibility—that in the absence of precautions, or of further precautions, an accident could happen of the nature of the accident which thereafter in fact happened—or, at least, some serious accident." The council, he concluded, did not and could not have known of such facts; and even if it were assumed that they had such knowledge (and, it would seem, that a duty was therefore owed), it did not follow that the defendants "ought, giving humane and commonsense consideration to the risk of an accident to children trespassers such as the plaintiff, to have had in mind, and to have taken steps with regard to, the likelihood, or even the substantial possibility, that a child trespasser would be endangered" in the way in which the plaintiff was endangered. Stephenson L.J. referred to the "humanitarian duty" owed to the trespasser, and to the special factor of dangerous allurements on an occupier's land which, in the case of the child trespasser, brought him into a neighbour relationship "by something like invitation." He considered that there was no such allurement in the instant case. He held further that the defendants were not in the circumstances of the case in breach of the limited duty owed to trespassers which was dictated by "commonsense and common humanity". James L.J. said that the duty owed

[24] *ibid.*, at p. 611.

[25] [1973] 2 W.L.R. 135. The plaintiffs succeeded on appeal to the House of Lords on other grounds: [1974] A.C.1.

[26] *The Times* 20 July 1974. A transcript of the judgments has been examined for the purpose of this report.

[27] [1972] A.C. 877, 909; see para. 6, above.

[28] See para. 6, above.

to the trespasser was stated in *Herrington's* case: "the trespasser trespasses at his peril, but . . . circumstances may arise in which principles of commonsense and humanity impose a duty on the occupier to avoid contact between the trespasser and a danger which the occupier knows to be on the land." Where the trespasser is a child and there is some allurement or known danger on the land "the occupier cannot be heard to say that the presence of the child trespasser was forced upon him and the duty owed to such a trespasser is substantially the same as that owed to a visitor." In the present case, the "extent of the duty owed [was] the duty to act with commonsense and humanity in respect of known danger" which did not require the defendant to have done more than he did.

10. Two further cases may be mentioned more briefly. In *Harris* v. *Birkenhead Corporation*[29], a child fell from the second floor window of a derelict house in a clearance area which was subject to compulsory acquisition, and was injured. The house was held to be in the occupation of the corporation, since the owner had vacated it pursuant to the corporation's notice of entry. Kilner Brown J. held that the corporation must have known of the condition of the house and therefore had knowledge of relevant facts from which they should have anticipated an accident of the kind that happened; and a derelict house openly available to a child of four years was a potentially dangerous situation against which any humane and commonsense person ought to take precautions. The corporation were therefore liable. The "humanity" test was again applied in the Australian case of *Southern Portland Cement Ltd.* v. *Cooper*[30] on appeal to the Privy Council. Here the defendants occupied a site which they used to dump spoil near which, to their knowledge, children played. The heap of spoil grew to such an extent that, again to their knowledge, high tension cables could be reached from the top of it. The plaintiff trespasser, aged thirteen, was injured when he touched the cable from the top of the mound. The Privy Council rejected the principle of *Addie* v. *Dumbreck*[31] and *Commissioner for Railways* v. *Quinlan*[32] and stated instead that the question to be determined was "what would have been the decision of a humane man with the financial and other limitations of the occupier". In the circumstances it was held, affirming the judgment of the High Court of Australia, that the appellants were liable for the injuries sustained by the boy.

11. In our working paper[33] we pointed out that what is important in this, as in other areas of the law, is not the ease with which a court, having decided on which side justice lies, can find ways of fitting its conclusion within principles laid down by a higher court. Rather, these principles should afford some reasonably certain guide to the law before cases are actually decided. The decisions reached on the question of liability towards trespassers since *Herrington's* case add weight to the importance which we attach to this consideration. We have no reason to doubt that on the facts of these cases the right conclusions were reached and that, accordingly, justice was done in them. We do have considerable doubt, however, as to whether they afford clarification of the two questions of when the duty of care towards a trespasser can be said to arise

[29] [1975] 1 C.L. 230.
[30] [1974] A.C. 623 (P.C.).
[31] [1929] A.C. 358; see para. 5, above.
[32] [1964] A.C. 1054 (P.C.).
[33] Working Paper No. 52, para. 31.

and, when this is established, what the content of that duty may be said to be. In the absence of such clarification, it is to be expected that cases will continue to arise in which extended litigation will be necessary before a satisfactory conclusion is reached[34]. And as we have shown, *Herrington's* case leaves some uncertainty on both of the questions referred to. It will have been noted in this connection that Lord Denning M.R. in *Pannett* v. *McGuinness* seems not to have drawn any sharp distinction between the two questions, while Edmund Davies L.J., in answering the second question, relied upon the observations of both Lord Reid and Lord Wilberforce which refer respectively to the standard of the humane man, and to a compromise between the demands of humanity and the avoidance of undue burdens being placed on the occupier. In regard to both this case and the other cases outlined in the foregoing paragraphs it may be observed that, while the concept of "humanity" is relied upon and elaborated to a very considerable degree, it is difficult to gather from them in precisely what way that concept differs from that of reasonableness. We conclude, therefore, that recent cases have not been consistent in the answer they give as to the circumstances in which a duty on the part of the occupier arises, nor, more especially, have they indicated with precision how far the standard of the "humane" man which is to be applied as the appropriate standard of care towards the trespasser differs from a standard of reasonable care.

C. Response to Working Paper No. 52

12. The large majority of those responding to the request for comment on our working paper thought that some reform of the law in this area was necessary, having regard to its unsatisfactory nature and absence of clarity after the decision in *Herrington's* case. In particular there was a wide measure of agreement on two matters upon which we expressed our provisional view: that the distinction made in *Herrington's* case between the standards of care represented by the terms "humanity" and "reasonableness" was not likely to be satisfactory or workable in any future legislation; and, secondly, that the standard of care required of occupiers should not differ according to their financial resources[35].

13. A minority of those commenting on our working paper took the view that the present state of the law was not unsatisfactory and that therefore legislative intervention was unnecessary. However, we agree with the majority that clarification of the law is desirable; even if the principles applied produce an acceptable result, these principles are in themselves somewhat lacking in certainty. Another minority among our commentators considered that trespassers should take the land as they found it; that trespassing should be done at the risk of the trespasser; and that, with the exception of the special cases of children and the infirm, no duty should be owed by the occupier towards them. We think the underlying misgivings expressed by these commentators will largely be met if our reformulation of the law makes it clear that the occupier will not be under a duty to take care unless in all the circumstances it is reasonable for him to do so. We therefore turn in the next section to the central questions of whether there should be a duty of care and, if so, how the duty of care is to be formulated.

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[34] It will be noted that all save one of cases reported since *Herrington's* case are decisions of appellate courts.

[35] *cf.* the views of Lord Reid, Lord Wilberforce and Lord Diplock in *Herrington's* case [1972] A.C. 877; see n. 19, above.

III. THE DUTY OF CARE TOWARDS TRESPASSERS

A. The approach of Working Paper No. 52

14. In our working paper[36] we put forward proposals in the alternative for the treatment of trespassers[37], the first entailing the imposition automatically of a duty of care towards all trespassers, the second retaining the issue as to whether there was a duty of care in a particular case as a separate question for decision as a point of law by the courts. In the first alternative we proposed that the Occupiers' Liability Act 1957 should be amended to bring trespassers within the common duty of care owed at present to "visitors" under that Act[38]. The objective of this proposal was to impose upon occupiers a duty in all cases to show reasonable care towards the trespasser, the question of whether the occupier did so in a particular case being decided as an issue of fact having regard to the circumstances. In this respect, our proposal bore a close resemblance to the law at present obtaining in Scotland under the Occupiers' Liability (Scotland) Act 1960. We further suggested in regard to this first alternative that the amending provision might be supplemented by guidelines to assist in determining what may reasonably be expected of an occupier as far as trespassers are concerned, but on balance we thought that such guidelines would not be necessary[39].

15. The second alternative would have involved amending the Occupiers' Liability Act 1957 to provide (i) that the mere relationship of occupier and trespasser does not of itself give rise to a duty of care; but (ii) that the occupier owes that duty to any trespasser whom, in the light of all the circumstances, he ought as a reasonable man to have in contemplation as likely to be affected by his acts or omissions; and (iii) that the determination whether there is in the particular case a duty of care owed to a trespasser is a matter of law to be decided by the court.

16. The comments we received on the alternative proposals showed only qualified support for either of them. A majority among those who favoured some reform were critical of the second approach as being unduly complicated and a potential source of legal argument. But among these commentators there was disagreement as to whether more detailed guidelines were required in relation to the first alternative as to the reasonable care to be expected of an occupier towards trespassers. A few wanted further and more detailed guidelines in the interests of certainty, and it was thought preferable by some that there should be a legal framework within which the decisions of fact could be made. As against this, other commentators pointed out that these guidelines

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[36] See Working Paper No. 52, para. 41 *et seq.*

[37] These proposals also covered the treatment of certain other categories of persons who are not "visitors" within the meaning given to that term in the Occupiers' Liability Act 1957 (see n. 38, below). We refer again to these categories at para. 36 *et seq.*

[38] By s. 1(2) of the Act "the persons who are to be treated as an occupier and his visitors are the same . . . as the persons who would at common law be treated as an occupier and as his invitees or licensees". By s. 2(2) "the common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

[39] These guidelines would have drawn attention to—(i) the likelihood of the presence of the trespasser on the land; (ii) the degree of risk of injury or damage to the trespasser or to property he has brought on the land; (iii) the seriousness of the injury or damage which may occur if that risk is realised; (iv) in the light of the foregoing, the extent to which it is reasonable to require the occupier to take preventive measures against the injury or damage.

would be unable to deal with the multiplicity of possible fact situations in all the cases which might arise; that experience of the Occupiers' Liability (Scotland) Act 1960[40] showed that they were unnecessary; and that more flexible guidelines might in any event be developed by the courts, which would be preferable to statutory ones themselves liable to judicial interpretation.

17. Among the minority who would on the whole have preferred our second alternative approach, there were some who pointed out that it would be inappropriate to draft any reforming legislation so as to give trespassers the benefit of the "common duty of care" under the 1957 Act. That duty, it was pointed out, was defined by the Act by reference to the care which it was reasonable to take to see that visitors would be reasonably safe in using the premises for the purposes for which they were permitted or invited to be there[41]. Since trespassers were neither permitted nor invited, the "common duty", it was argued, could hardly be applied to them.

18. In the light of the comments of those whom we consulted, and upon further consideration, we are convinced that our tentative inclination towards a reform of the law which would involve the initial imposition upon the occupier of a general duty of care towards the trespasser remains the preferable course. However, the comments have caused us to reconsider the form in which our final recommendations should be expressed, and we have accordingly adopted a third approach in place of the two alternatives set out in our working paper. Upon the question of whether guidelines should be provided, we think that the arguments advanced by those not in favour of them are convincing. In particular, as we ourselves indicated in our working paper[42], it would seem that the Scottish experience does not indicate that their absence causes difficulty; and we believe that the possibility that their presence might inhibit the judicial development of perhaps more satisfactory guidelines, and that they might be subject to possibly restrictive or otherwise undesirable interpretation, are factors which weigh against their provision in new legislation.

B. A new approach

19. The new approach we are now adopting would give weight to two major objections of substance to the first approach encountered in consultation upon our working paper. First, there was the point referred to in paragraph 17 above, that a trespasser is neither invited nor permitted to be on premises. Thus a new duty of care towards a trespasser could hardly be introduced by including trespassers within the "common duty of care" in the Occupiers' Liability Act, with its reference to the purposes for which a visitor is invited or permitted to be on the premises in question. This is, in our view, an insuperable objection to an amendment to the Act in the form proposed in our working paper, and referred to again in paragraph 14 above. Nor do we think it advisable or necessary to change the definition of the common duty of care, which has

[40] Sect. 2(1) of this Act states: "The care which an occupier of premises is required by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger." See further para. 34, below.

[41] See n. 38, above.

[42] See Working Paper No. 52, para. 43(A).

worked well in the cases to which it applies. Introduction by legislation of any duty of care to trespassers must, therefore, take a different form.

20. The second objection is the more general one already referred to at paragraph 13 which could perhaps be summarised by the views expressed by certain recipients of our working paper that trespassers should take the land as they find it, and that trespassing should be an activity undertaken at the trespassers' risk. Thus it is argued that there is no case for the introduction of a general duty of care which might alleviate for the trespasser the consequences of his own wrongdoing. We recognise that, in putting forward their objections to reform of the law in this form, our commentators indicate their opposition to the imposition of any duty of care which would as a result require occupiers of land to make their land safe for persons whom they do not desire to be present upon it at all; it was said that in many cases such a duty would be almost impossible to discharge. We make clear at this juncture that the imposition of such a duty is not the purpose of the present exercise; rather, its overall purpose is a clarification of the present somewhat unsatisfactory legal position. This objective we have kept in the forefront of our considerations in reformulating our recommendations, both in this report and in the annexed draft clauses which are intended to give legislative shape to these recommendations.

1. *Formulation of the new duty of care*

21. Having regard to these considerations, we now recommend that the existing provisions of the Occupiers' Liability Act 1957, relating to liability to "visitors" should in the main[43] be left unchanged. Instead, we recommend that provision should be made by a new Act dealing specifically with the trespasser[44]. This should provide that, where in the case of any premises there is a danger due to the state of the premises, or to anything done or omitted to be done on them, an occupier of premises owes a duty to a trespasser upon them in respect of such a danger if it is one against which, in all the circumstances of the case, the occupier can reasonably be expected to offer him some protection. The duty owed by the occupier should be a duty to take such care as is reasonable in all the circumstances of the case to see that the trespasser does not suffer personal injury or death by reason of the danger. We recommend that this duty of care should have effect in place of the rules of the common law described in Part II of this report; and we comment in the following paragraphs under separate headings upon particular aspects of the foregoing formulation of our recommendations.

2. *Premises*

22. Section 1(3)(*a*) of the Occupiers' Liability Act 1957 provides that—

> "The rules [enacted in sections 2 and 3] in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate (*a*) the

[43] Subject to the question of the operation of exemption clauses, dealt with in Part V of this report.

[44] In the present context our recommendations refer only to the duty to the trespasser. We consider later the duty to other non-visitors: see para. 36 *et seq.* In the draft clauses trespassers and other non-visitors are termed "uninvited entrants": see Appendix A, clause 1(2)(*c*).

obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft . . ."

The precise meaning and extent of this provision is by no means clear[45]; but there is judicial support[46] for the view that the provision does no more than make it clear that premises include fixed and movable structures. However that may be, in our view the term "premises" should, for the purposes of the new Act, have this extended meaning, and accordingly the draft clauses provide simply that "premises" includes any fixed or movable structure, including any vehicle, vessel or aircraft[47].

3. *Dangers due to the state of the premises*

23. The proposed duty of care is to apply in cases "where there are dangers due to the state of the premises, or to anything done or omitted to be done on them". This phraseology is similar to that used in the Occupiers' Liability Act 1957[48]. The precise effect of these words in the 1957 Act has been the subject of some dispute[49]. It seems clear that the wording is apt to cover conduct on the premises which causes a continuing source of danger, thereby rendering it unsafe[50]. It is less clear whether the words have the effect of bringing within the scope of the 1957 Act all claims for injuries on the occupier's premises arising from every kind of activity or omission on them irrespective of whether they are connected with the safety of those premises as such. The opinion of a majority of commentators is that the words in question do not have this effect; and consequently that an activity or omission on the premises not in itself affecting their safety falls outside the scope of the 1957 Act, so that the liability in respect of such an activity or omission (if any) falls to be determined by general principles of negligence at common law. Having regard to section 1(2) of the Occupiers' Liability Act 1957[51], we agree with the majority view, and we consider it right in principle that a new provision relating to the occupier's liability to the trespasser should, in this respect, have the same scope as that already applying in relation to the liability towards a visitor. Accordingly, our draft clauses so provide. In consequence, any case in which the danger arises from some activity for which the person sought to be made liable is not responsible in his capacity as an occupier of the premises will continue to be treated in accordance with ordinary principles of negligence at common law. Thus, if a person (whether an occupier or not) while shooting rabbits injures another person (whether a trespasser or not), whether he is liable will depend on the ordinary principles of negligence at common law. The fact that the

[45] See North, *Occupiers' Liability*, p. 44 *et seq* where it is pointed out that, taken together, s. 1(1) and 1(3) may mean either that rules applicable to "premises" apply also to "fixed and moveable structures", or that the rules applicable to premises apply to the same extent as they applied at common law to cases of fixed and moveable structures.

[46] See *Bunker* v. *Charles Brand & Son Ltd.* [1969] 2 Q.B. 480, 486 *per* O'Connor J.

[47] See Appendix A, clause 1(2)(*a*).

[48] See s. 1(1); and see Appendix A, clause 1(1).

[49] See North, *Occupiers' Liability* (1971) p. 80 *et seq* and the commentators there cited at notes 80–82.

[50] See North, *op. cit.* p. 80.

[51] Sect. 1(2) states in part: "The rules so enacted [*i.e.*, in ss. 2–3 of the Act] shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises . . . ."

injured person was a trespasser might be a relevant consideration in determining whether the shooting was negligent having regard to the likelihood of a trespasser being there.

4. *The occupier*

24. In our working paper[52] we discussed, without coming to a decided conclusion, whether provisions imposing liability upon the occupier should also extend to a person who is not the occupier of the premises, but is carrying on activities there as a contractor. No liability is imposed on this class of person by the Occupiers' Liability Act in relation to persons entering the premises with permission. In our view it is unnecessary in this report to propose a statutory liability upon contractors in relation to persons entering without permission. In many cases a contractor would, in accordance with our recommendation in paragraph 22, be liable as a person in control of a fixed or movable structure on the land; and, where this does not apply, we consider that the question of liability should be left to be determined in accordance with the general principles of negligence. Accordingly we recommend no extension of the meaning of occupier beyond that resulting from the extended meaning of the term "premises" referred to in paragraph 22.

5. *The burden of proof*

25. As in all claims for injuries under the law as it now stands, it will be necessary for the claimant to show that the injury suffered was due to the failure of the occupier to comply with the requisite standard. The fact that the statutory scheme which we recommend in relation to liability towards the trespasser imposes a duty of care upon the occupier in certain circumstances is not intended to affect this general principle: the trespasser must always prove his case.

6. *The circumstances in which a duty arises and the extent of that duty*

26. As now formulated in paragraph 21 above, the duty of care, while it is owed potentially to all trespassers, is to be entirely separate from the "common duty of care" owed to visitors in the Occupiers' Liability Act 1957. It is our recommendation that new provisions embodying this duty of care should be enacted alongside the existing provisions of the 1957 Act, in place of the rules of common law as to trespassers, and draft clauses in Appendix A annexed to this report set out our recommendation in legislative form. In the following paragraphs we explain how, in practice, we would expect the duty of care to operate in particular circumstances.

27. It is important to stress that the occupier, under our recommendations, only owes a duty to a trespasser upon the premises in respect of a danger if the danger is one against which, in all the circumstances of the case, the occupier can reasonably be expected to offer him some protection. In many circumstances it will be entirely unreasonable to expect the occupier so to offer protection, and in those circumstances the duty will, therefore, not arise. Where, however, the circumstances are such that it is reasonable to offer the particular trespasser some protection, our recommendations provide further that the duty to be owed by the occupier is to take such care as is reasonable in all the circumstances

[52] Working Paper No. 52, para. 45.

of the case to see that that trespasser does not suffer personal injury or death by reason of the danger in question.

28. It will be evident that the duty towards the trespasser under our recommendations is of a quite different character from the "common duty of care" under the Occupiers' Liability Act 1957[53]. Under the latter that duty is, in short, owed to all visitors and the occupier has to take reasonable care to see that they are reasonably safe. Under the former, while the duty is one which is owed potentially to all trespassers, the question of the extent of the duty does not arise at all unless, in the first place, the court decides as a question of fact that the danger is one against which, in all the circumstances, it is reasonable for the occupier to offer some protection. In consequence, given identical circumstances, the fulfilment of the common duty of care towards a visitor may be expected in many instances to produce results entirely dissimilar from the fulfilment of our recommended duty of care towards the trespasser. To take a few very obvious examples: if one of the steps upon the stairs in his house is temporarily missing while it is being repaired, an occupier may be expected to warn his visitor making use of the stairs of this fact in order to render him reasonably safe. But it would, in our view, be entirely unreasonable in the circumstances to expect the occupier to offer a burgler at night any protection at all in respect of this danger; and under our recommendations, therefore, no duty would be owed if the burglar were injured in consequence of this danger. Again, a farmer selling livestock might be expected to keep a path reasonably safe for a customer who visits him to view the stock and to give him warning of, or protection in respect of, any dangers he might meet with in the course of his inspection. But he could not reasonably be expected to take the same precautions in respect of a thief engaged in stealing the stock. Such a person may enter at night by places other than the usual entrance and might injure himself on farm implements left lying off the path or on rusty nails on gates which he is unable to see; or he may even encounter dangers of an entirely natural character, such as a stream in which he falls and is injured or even drowned. In those circumstances it might very well be unreasonable to expect the farmer to offer any protection; and if so, again no duty at all would arise. Finally, it may well be that in some circumstances it will be reasonable to offer some protection to the trespasser who is a child. This does not, however, mean that all child trespassers will be owed a duty: each case will depend upon its facts as to whether it would be reasonable in the circumstances to expect some protection to be given. Examples could, of course, be multiplied; but we give here sufficient only to indicate that the duty we are recommending is far less onerous than the common duty of care owed to the visitor, in that a positive answer must be given to the first element of the proposed duty before any consideration at all is given to the extent of the duty owed.

29. When a court has decided as a question of fact that an occupier did in the particular circumstances of a case owe some protection to a trespasser, the question then to be decided, in accordance with our recommendations, is whether the occupier has discharged the duty on him by taking such care as is reasonable in all the circumstances of the case to see that the trespasser did not suffer personal injury or death by reason of the danger upon the premises. In the range of circumstances to which the courts will have regard in deciding whether the occupier has acted reasonably, the application of the duty towards

[53] See n. 38, above.

trespassers may again be expected to differ markedly from the common duty of care. We emphasise that it will, of course, be incumbent on the court, in accordance with the duty as expressed, to have regard to all the circumstances of the particular case; and this in itself is, as we have seen[54], one reason why we have rejected the possibility of guidelines to assist in determining what may reasonably be expected of an occupier. Nevertheless, it is obvious that regard will be had to certain circumstances common to all cases involving trespassers. Those circumstances will, in the first place, necessarily include the fact that the claimant is a trespasser; and they will further include the age and character of the trespasser (whether a child, an adult or a person suffering from infirmity by reason of age or otherwise) and the nature and purpose of the trespassory entry upon the occupier's property (whether or not, for example, in pursuance of a criminal purpose). Another example of the circumstances to be taken into consideration is the question of costs necessary in taking precautions. We have pointed out[55] that in consultation upon our working paper most of those favouring reform of the law agreed with the provisional view we expressed that the standard of care required of occupiers towards trespassers should not differ according to their financial resources. We adhere to this view and we therefore do not regard the financial resources of the individual occupier as being a matter which should be taken into consideration in deciding whether he has in all the circumstances of the case taken reasonable steps. Nevertheless, in considering whether an occupier has acted reasonably in the circumstances, it will clearly be open to the courts to have regard in a particular case to the fact that the cost which would be involved in ensuring that the trespasser does not suffer injury would be high.

7. *Limitation of the duty to cases of personal injury and death*

30. The concluding part of the duty of care, as formulated, refers to the reasonable care to be taken to see that the trespasser does not suffer personal injury or death by reason of dangers on the premises. Our working paper[56] discussed the question whether the liability of the occupier towards trespassers should be limited to personal injury or death, or should extend to damage to property. The working paper regarded it as an open question and put forward arguments both for and against the extension to property. Our commentators were fairly evenly divided on that point. On reconsideration, we do not think that the duty of care towards trespassers should in any case extend to the taking of steps to safeguard his property. We have considered whether an exception could be made to this general principle, limiting liability to the clothes which a trespasser is wearing when he enters, but we think that any such limited exception would be arbitrary and illogical. Accordingly, we recommend that the duty should be limited to taking reasonable care to see that trespassers do not suffer personal injury or death.

8. *Other possible limitations upon the duty of care*

31. We have given close consideration to a suggestion by one of our commentators that, whatever the general rule as to the existence or application of a duty of care may be, that rule should be excluded where a trespasser enters

[54] See para. 18, above.
[55] See para. 12, above.
[56] See Working Paper No. 52, para. 44.

upon, uses or leaves the premises in the course of a "serious criminal enterprise", and that towards this category of trespasser there should be no duty in any circumstances. The suggestion was made in order to take account of the view (with which, naturally, we have considerable sympathy) that, while an occupier may appreciate the justice of there being some kind of duty of care towards, for example, a child trespasser who strays on his property by accident or in order to recover a ball, no-one could be expected to discern any merit or justice in the existence of a duty of care towards adults who deliberately enter for purposes of burglary or violence.

32. For a number of reasons, we take the view that we should not make any recommendation for an exception of this kind to the duty of care we have proposed. In the first place, we have, after consideration, come to the conclusion that what for this purpose would constitute a "serious criminal enterprise" could be defined only in terms which either would be unacceptably wide or would be unattractively complex. The most obvious means of definition would be one by reference to any offence punishable with a particular maximum period of imprisonment. This would clearly be far too wide. Theft is punishable with a maximum period of ten years' imprisonment, whether the object of the theft is an apple in an orchard or the Crown Jewels. Entirely to exclude the possibility of there being a duty of care when a child trespasser suffers injury in the course of stealing an apple (assuming the child to be of the age of criminal responsibility) would, we think, be quite unacceptable[57]. Any alternative would require more detailed guidelines which, in our view, could scarcely avoid reference to the intent, or the presumed intent, of the trespasser; and we do not think that the existence of a duty of care in a particular case should be dependent upon an examination of questions of this nature.

33. A second reason for not introducing a restriction upon the type of trespasser to whom a duty should be owed lies in the nature and the extent of the basic duty which we recommend. The duty only arises when the danger on the premises is one against which, in all the circumstances, the occupier can reasonably be expected to offer the particular trespasser protection; and if it does arise, the duty is to take such care as is reasonable in all the circumstances of the case. Put in this way, it will be evident, as we have pointed out[58], that it will be open to the court to consider freely what it is reasonable for the occupier to do or not to do in particular circumstances; and among the circumstances which will be taken into consideration are the nature of the trespassory entry and the age and character of the trespasser. Given this degree of freedom in assessing the circumstances, it is in our view clear that a restriction of the kind suggested would be incompatible with the general test we have proposed.

34. In this connection we may observe that the Scottish test, which entails a statutory duty towards all entrants including trespassers[59], has not proved inconsistent with a flexible application of the law in particular circumstances.

[57] In this respect we do not find the definition of the "protected" trespasser in the Report of the New Zealand Torts and General Law Committee (1970) of assistance. In so far as the trespasser without protection is defined in that Report by reference to his criminal activities, the definition specifies "an offence punishable by imprisonment", and, at any rate in the law applying in England and Wales, it thus meets with the objection already raised to a definition by reference to an offence with a particular maximum period of imprisonment. The Committee's recommendations are set out in full in Working Paper No. 52, Appendix 2, para. 10.

[58] See para. 28, above.

[59] Sect. 2(1) of the Occupiers' Liability (Scotland) Act 1960 is set out at n. 40, above.

In *McGlone* v. *British Railways Board*[60] the House of Lords held that a child trespasser on railway premises was on the facts unable to recover. Lord Reid considered that in the circumstances of that case an occupier had fulfilled his statutory duty to act reasonably "if he erects an obstacle which a boy must take some trouble to overcome before he can reach the dangerous apparatus." The House of Lords emphasised[61] that under the Scottish Act, the question of what is reasonable care is one of fact to be determined by reference to all the circumstances of the case. We would expect the same consideration to apply to the more qualified duty of care towards trespassers which we recommend.

C. Summary

35. We recommend that there should be new provisions enacted in place of the rules of common law to introduce a duty of care towards the trespasser. They should provide that—

(i) where, in the case of any premises there is a danger due to the state of the premises or to anything done or omitted to be done on them, the occupier owes a duty to a trespasser on the premises in respect of such a danger if it is one against which, in all the circumstances of the case, the occupier can reasonably be expected to offer him some protection;
(ii) the duty owed by the occupier to the trespasser should be a duty to take such care as is reasonable in all the circumstances of the case to see that the trespasser does not suffer personal injury or death by reason of the danger;
(iii) for the foregoing purposes, "premises" should include any fixed or movable structure and any vehicle, vessel or aircraft (clause 2(1) and 2(2) and clause 1(1)).

IV. THE DUTY TOWARDS OTHER NON-VISITORS

36. Reference has been made to the fact that there exist categories of entrants other than trespassers to whom at present, because they are not regarded as "visitors" for the purposes of the Occupiers' Liability Act 1957, the common duty of care prescribed by that Act does not apply. In the case of some of these classes it is difficult to discern what standard of care would be applicable to them if the question of liability towards them were to be in issue; in other cases it seems clear that at present the principles which would be applied are those now applicable to the trespasser at common law. In our working paper[62] we took the view that, in order to avoid possible anomalies in relation to these residual classes of entrants which the introduction of new statutory principles of liability towards the trespasser might entail, the opportunity should be taken to clarify the position as regards liability both to these residual classes and to the trespasser. In the following paragraphs we indicate how we propose that our revised recommendations should apply to these residual classes.

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[60] 1966 S.C. (H.L.) 1. Compare *Telfer* v. *Glasgow Corporation* 1974 S.L.T. 51 (Outer House, Lord Stott), where a child trespasser recovered losses for injury sustained in a derelict building which afforded "every possible allurement" to the children of the neighbourhood.

[61] See, *e.g.*, Lord Guest, 1966 S.C. (H.L.) 1, 15.

[62] See Working Paper No. 52, paras. 37–40.

A. Entrants by virtue of an access agreement or order

37. The first among these residual categories to which we refer covers those entering upon land in exercise of rights conferred by virtue of an access agreement or order under section 60(1) of the National Parks and Access to the Countryside Act 1949. The Law Reform Committee recommended[63] that this class of person should not be affected by their other recommendations, and in particular that they should not be deemed to be visitors. Section 1(4) of the Occupiers' Liability Act 1957 gives effect to this recommendation. And by section 66(2) of the 1949 Act, the operation of section 60(1) of that Act in relation to any land— —

> "shall not increase the liability, under any enactment not contained in this Act or under any rule of law, of a person interested in that land or adjoining land in respect of the state thereof or of things done or omitted thereon."

This provision in substance means that an occupier of the land subject to an access order or agreement shall have no greater liability towards persons entering it by virtue of the agreement or order than he would have if they were trespassers.

38. In our working paper we thought that this class of person should not, by virtue of any new provisions relating to the duty towards trespassers, be put in a worse position than a trespasser. We therefore took the view that our proposals applying to trespassers, whatever the shape they might take, should also apply to this class of persons. Some of those with an obvious interest in our provisional proposal[64] agreed with us in their comments that persons in this class should be treated in the same way as trespassers. These commentators were, however, among those who were not in sympathy with the view that a new duty of care towards trespassers should be imposed upon the occupier. We have, therefore, had to consider whether our revised recommendations should apply to this category of entrant or whether they should be excluded.

39. Were this category of entrant to be excluded from our recommendations as to trespassers, their position would, unless specific provision were made for them, continue to be governed by the common law. At the time when the 1949 Act was passed, the liability towards the trespasser, following *Addie* v. *Dumbreck*[65], was extremely limited. Following *Herrington's* case[66], that liability was broadened, although to what extent it is not, as we have seen, possible to determine with certainty. If, therefore, the entrant under the 1949 Act were to be excluded from our recommendations as to the trespasser, it seems that liability towards him would be governed now by the principles of *Herrington's* case. We do not think it would be satisfactory for the law governing trespassers to be embodied in the legislation we recommend, while other non-visitors would continue to be governed by the unsatisfactory rule in *Herrington's* case.

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[63] See *Third Report of the Law Reform Committee*, (*Occupiers' Liability to Invitees, Licensees and Trespassers*) (1954) Cmd. 9305, para. 82.

[64] The Country Landowners' Association and the National Farmers' Union.

[65] [1929] A.C. 358; see para. 5, above.

[66] [1972] A.C. 877; see para. 4 *et seq.*

40. If it is accepted that this class of persons should continue to be excluded from the concept of the "visitor" under the 1957 Act, the other courses open to us are either the creation of specific provisions applying only to this category of entrant or the application to them of the duty of care we recommend in relation to trespassers. We do not favour the first course which would complicate the law with a general provision applying to a very small class of people[67].

41. We have come to the conclusion that by far the most satisfactory course would be the application to this category of entrant of the rule we have recommended to govern the liability towards the trespasser[68]. In our view the rules we have recommended in relation to trespassers would be entirely apt to produce justice in the case of injuries to this kind of entrant. Our view is reinforced by two considerations. In the first place, we have had regard to the conditions upon which members of the public are permitted entrance upon land subject to an access agreement or order. By section 60(1) of the National Parks and Access to the Countryside Act 1949 a person entering such land for recreation is deemed not to be a trespasser provided that he does so "without breaking or damaging any wall, fence, hedge or gate". Thus, any person who on entering such land does any of these things does, in fact, become a trespasser; consequently, in the case of injury, his position would, after implementation of our recommendations, be governed by the new duty of care for which they provide. It would, we think, be anomalous if a person who did not break or damage anything were to be in a position in any way disadvantageous by comparison with a trespasser, particularly if the difference in their position were to depend on the perhaps chance dislodgement of a brick or stone. Another consideration relates to the type of country which is the subject of access agreements or orders. By virtue of section 59 of the 1949 Act such agreements or orders can only be made in respect of "open country"[69]. In this type of country it may well be that the first limb of our recommended duty[70] will operate in many cases in such a way as to exclude recovery, because the natural hazards of such terrain will frequently not be dangers against which, in all the circumstances, the occupier of the land can reasonably be expected to offer the entrant any protection. As a matter of policy, we would regard this as the right conclusion, and we think it probable that the position of this kind of occupier will in most cases remain in substance unchanged from what it is under the law at present. In our view, therefore, there is no obstacle to the application of our recommendation as to liability towards the trespasser to the entrant upon land subject to an access agreement or order. Accordingly the draft clauses so provide[71].

B. Persons on land in exercise of a right of way

42. Persons lawfully using a public or private right of way are most probably not covered by the provisions of the Occupiers' Liability Act 1957. Section 2(6) of that Act states that persons who enter premises for any purpose in exercise

[67] There appears to be no reported case dealing with liability towards entrants under access agreements.

[68] See para. 35, above.

[69] This is defined in that section as "any area appearing . . . to consist wholly or predominantly of mountain, moor, heath, down, cliff or foreshore (including any bank, barrier, dune, beach, flat or other land adjacent to the foreshore)".

[70] See para. 35(i), above.

[71] See clause 1(2)(*c*) for the definition of "uninvited entrant"; and see para. 59, below.

of a right "conferred by law" are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not. Without more, this would seem to include the class of persons under discussion within the concept of a "visitor". But section 2(6) is preceded by the words "for the purpose of this section", which defines the extent of the occupiers' duty to acknowledged visitors. These, according to section 1(2), are those who, before the Act, would have been, or would have been treated as, invitees or licensees at common law. Persons entering by virtue of a public right of way were not so treated. Accordingly, in *Greenhalgh* v. *British Railways Board*[72], it was held that a person exercising a public right of way was not a visitor for the purposes of the Act and therefore could not recover damages for injuries received during the course of that exercise.

43. So far as the exercise of a private right of way is concerned, Lord Denning M.R. in *Greenhalgh* v. *British Railways Board*[73] stated, obiter, that no persons entering either by virtue of a public *or* private right of way were treated as invitees or licensees at common law. We refer again later to the legal position of persons lawfully using private rights of way; but it is in any event clear that it was the intention of the Law Reform Committee in their Third Report which led to the 1957 Act[74] that an occupier of land over which there was a private right of way should not be subject to the common duty of care in respect of persons exercising that right[75].

44. In our working paper[76] we considered together liability to all of those exercising public or private rights of way. On reconsideration and in the light of response to this paper, we have found it necessary, for reasons which will be apparent, to treat them separately. Accordingly they are dealt with in the following paragraphs under separate headings commencing with public rights of way.

1. *Public rights of way maintainable at public expense*

45. In considering all instances of the liability of an occupier towards a person lawfully exercising a right of way over his land, it is necessary to ask in the first instance who, for this purpose, is the occupier. Where there is a public right of way (that is, a "highway"), in many, but not all, instances the surface of the land in question is maintainable at public expense, normally by the highway authority in whom it is vested under the Highways Act 1959[77]. This being so, it would seem appropriate to regard that authority, rather than the occupier of adjoining land, as the occupier for present purposes.

46. In our working paper[78], we suggested that the occupier of land subject to a right of way should in all instances be subject to a liability towards those lawfully exercising the right no less onerous than that of an occupier towards a trespasser. Where, however, the highway authority is responsible for maintaining the highway at public expense, we now think on reconsideration, that no

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[72] [1969] 2 Q.B. 286.

[73] *ibid.*, at p. 292–3.

[74] (1954) Cmd. 9305, para. 34.

[75] This was also the understanding of the Standing Committee of the House of Commons which considered the Bill: Standing Committee A, Official Report, *Occupiers' Liability Bill*, 26 March 1957, Cols. 5–7.

[76] See Working Paper No. 52, paras. 38–40.

[77] See ss. 38(2) and 226–230.

[78] Working Paper No. 52, paras. 39–40.

such liability should be imposed. Any duties to be imposed on highway authorities by legislation would have to be imposed side by side with provisions which are already on the statute book. For example, section 59 of the Highways Act 1959 prescribes the method whereby the highway authority may be obliged to repair a highway which is out of repair, while section 129[79] imposes on the authority a duty to remove obstructions upon the highway, whether arising from accumulations of snow, the falling down of banks on the side of the highway or from any other cause. From the point of view of liability towards those using the highway, the central provision is section 1 of the Highways (Miscellaneous Provisions) Act 1961 which enables an injured person to sue the highway authority for damages resulting from their failure to maintain a highway maintainable at public expense, whether in consequence of misfeasance or non-feasance on their part. While under that section the authority is not liable if it proves that it had taken "such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic"[80], it is no defence that the authority "had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions".[81] By so making the highway authority liable in certain circumstances for the negligence of an independent contractor, the 1961 Act to that extent makes provision which is rather more favourable to the victim of an accident than the action which can be brought by a visitor against an occupier of premises under the Occupiers' Liability Act 1957.

47. In our view, the law as to the liability of the highway authority as Parliament has now left it is satisfactory, and we therefore see no need to make any recommendations in relation to public rights of way maintainable at public expense.

2. *Public rights of way not maintainable at public expense*

48. The case of *Greenhalgh* v. *British Railways Board*[82], to which we have already referred, points to the existence of a lacuna in the law as to the liability towards those injured while lawfully exercising a public right of way. In that case it was held that a person exercising a public right of way over a bridge owned by British Railways in which there was a pothole could not claim under the Occupiers' Liability Act 1957 that she was a visitor *vis-à-vis* the owners of the bridge. Such a person, said Lord Denning M.R.,[83] had never been regarded as an invitee or licensee, nor treated as such, and the dictum of Willes J. in *Gautret* v. *Egerton*[84] was still relevant and applicable—

> "But what duty does the law impose upon these defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and

[79] As substituted by the Highways (Amendment) Act 1965, s. 1.
[80] Sect. 1(2).
[81] Sect. 1(3).
[82] [1969] 2 Q.B. 283.
[83] *ibid.*, at p. 293.
[84] (1867) L.R. 2 C.P. 371, 373.

holes the public must take it as it is. If I dig a pit in it, I may be liable for the consequences, but, if I do nothing, I am not."

In our working paper[85] we took the provisional view that those using this class of right of way should not be in a worse position than a trespasser; and that therefore the occupier of land over which there is a public right of way not maintainable at public expense should owe to persons lawfully exercising that right a duty of care not lower than that which would, under the proposals made in our working paper, be owed to a trespasser. For the purposes of this proposal, we thought that the "occupier" should be the owner of land over which the right of way subsists, since he retains effective control of the land.

49. Despite the obvious gap in the law which *Greenhalgh's* case discloses, we have for a number of reasons come to the conclusion that our present recommendation as to the duty of care towards the trespasser should not be applicable to a person lawfully exercising this type of right of way. In the first place, there is a technical question as to whether it is proper for the occupier of the land over which runs the right of way to be described as an "occupier" of the right of way. Much more important than this technical point, however, are the nature and extent of the rights of way in question (which, of course, are "highways" even though not maintained at public expense), and the character of the duties which would be imposed upon the owner of the land in consequence of the application to him of the duty towards trespassers we now recommend. Although information as to the relative extent of public rights of way maintainable at public expense and those not so maintainable appears not to be readily available, it is probably correct that the latter class is quite extensive and embraces a wide variety of physical configurations from the farm track to the heavily used traffic bridge of the kind whereon Mrs. Greenhalgh's accident occurred. Their common factor is the right of the public lawfully to exercise a right of way upon them. Application to the owner of the servient land of our recommendations would mean that a duty in respect of a danger on the rights of way would be owed whenever it would be, in all the circumstances, reasonable to expect some protection to be offered in respect of it[86]. It might well be that the occasions when the duty might arise would be frequent. In these circumstances, it seems to us inappropriate that the owner from time to time of the servient land should be subject to any duty other than such as at common law may already exist. We conclude that the duty which we recommend in relation to trespassers[87] should not be applied to the owners of servient land towards those exercising over that land a public right of way not maintainable at public expense.

50. Notwithstanding the conclusion to which we have come in relation to the public rights of way under discussion, there is, as we have seen from *Greenhalgh's* case, a major point of importance here. It seems clear that there is a lacuna in the law as to where the liability for injuries arising from defects on the right of way ought properly to fall. As Lord Denning M.R. remarked of the bridge owned by British Railways which figured in *Greenhalgh's* case[88]—

[85] See Working Paper No. 52, para. 40.
[86] See para. 35(i), above.
[87] See para. 35, above.
[88] [1969] 2 Q.B. 283, 293–4.

"It is the local authorities who built the great housing estates in the vicinity. It is they who made approach roads right up to the bridge on both sides. It is they who invited the public to use it by vehicles and on foot. It is their responsibility, therefore, to maintain and repair the bridge in a state fit to take the traffic. The burden on the railway company is not to be increased by saying that they submitted to the increased user."

But this is a matter which, though clearly requiring attention, would go far beyond the bounds of the exercise we have set ourselves in this report.

51. There is a possible anomaly arising out of our recommendation not to extend the duty towards the trespasser to those lawfully exercising a public right of way not maintainable at public expense. Where a person is exercising that right, but not in a lawful manner—as, for example, where his activity on the way causes an obstruction—he becomes a trespasser upon the right of way. As such, he might in certain circumstances be owed the duty of care which, for reasons given in preceding paragraphs, we have decided not to recommend in relation to those lawfully exercising the right of way. The possibility of a claim in respect of injuries received while trespassing on this kind of right of way is, perhaps, remote. Nevertheless, we do not think that this anomaly should be permitted to arise. Accordingly the clauses are so drafted as to exclude our recommendations from applying in any circumstances to public rights of way whether or not maintainable at public expense[89].

3. *Private rights of way*

52. The present legal position of those lawfully exercising private rights of way is more complex than that pertaining to the two categories dealt with in the preceding paragraphs. As we have noted, Lord Denning M.R. stated obiter in *Greenhalgh* v. *British Railways Board*[90] that "a 'visitor' does not include a person who crosses land in pursuance of a public *or private* right of way. Such a person was never regarded as an invitee or licensee, or treated as such" (emphasis added)[91]. It seems to be true that as a general rule at common law no claim would lie against the owner of the servient tenement by a person injured while lawfully exercising a private right of way as a result of the way's want of repair, whether that person was the grantee, his successors in title or someone authorised by him or them. This is a consequence of the nature of easements which generally do not impose any obligations upon the occupier of the servient tenement to do anything. "Apart from any special local custom or express contract, the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment of the easement by the owner of the dominant tenement".[92]

53. Parallel to the position as to easements broadly described in the last paragraph, there were, however, two decisions[93] of the House of Lords which proceeded upon the footing that in some closely analogous situations there was what would now, in terms of the Occupiers' Liability Act 1957, be a relation-

[89] See clause 1(3); and, as to highways maintainable at public expense, para. 47, above.

[90] [1969] 2 Q.B. 286, 293.

[91] As to the intention of the Law Reform Committee and of the Standing Committee of the House of Commons considering the Occupiers' Liability Bill, see para. 43 and n. 75, above.

[92] *Gale on Easements* (14th ed., 1972), p. 47 and cases there cited.

[93] *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74; *Jacobs* v. *L.C.C.* [1950] A.C. 361.

ship of occupier and visitor between on the one hand a landlord and on the other his tenants and those visiting them. This was, in particular, the position where the landlord of premises let in multiple tenancies retained under his control the means of access used by the tenants and those living with them or visiting them. Accordingly, those living with or visiting the tenant could recover for injuries sustained while using these means of access upon the principles of liability towards invitees and licensees. Having regard to the Occupiers' Liability Act 1957, the common duty of care would now apply in the two cases referred to.

54. Where there is no possibility of establishing the occupier-visitor relationship, there remains the question whether the position of persons exercising a private right of way should remain in doubt. What that position now is cannot be stated with certainty but, in the absence of authority, the courts might take the view that at least it should not be worse than that of a trespasser at common law (that is, as stated by the House of Lords in *Herrington's* case)[94]. But if our recommendations regarding liability to trespassers were accepted, it would be somewhat anomalous for the law governing trespassers to be embodied in the legislation recommended in this report, while those using private rights of way would continue to be governed by *Herrington's* case.

55. We have come to the conclusion that the preferable course in regard to those lawfully exercising private rights of way is the application to them of the duty of care we recommend in relation to the trespasser. That conclusion is reached, not only having regard to the unacceptable anomaly referred to in the last paragraph, but also having regard to the merits of the case. Whatever may be the position in the law of property—and we do not question the statement of the law which we have set out above[95]—it seems to us that from the point of view of liability in tort, the person who is in effective control of the land on which runs a private right of way is the occupier of the servient land. Accordingly it is to him that the person lawfully exercising the right of way should be able to turn if he is injured in consequence of the dangerous state of the land upon which the right of way runs.

56. As in the case of trespassers[96], it will be necessary for the court to decide in the first place whether, having regard to all the circumstances, the danger on the right of way was one against which the occupier of the servient land could reasonably be expected to offer the user of the right of way some protection. If the answer to this is in the positive, one of the circumstances of the case to which the court will then have regard in deciding whether reasonable care has been taken to see that the plaintiff does not suffer personal injury or death is the fact that, unlike the trespasser[97], the person lawfully exercising a private right of way is in fact *lawfully* on the premises.

C. Entry under compulsory powers

57. The circumstances of those entering upon land in the exercise of a compulsory power of entry conferred by law is one which was mentioned only

[94] [1972] A.C. 877; see para. 4, above.
[95] See para. 52, above.
[96] See para. 35, above.
[97] See para. 29, above.

in passing in our working paper[98]. For the avoidance of doubt, we now consider it in rather more detail.

58. There is a wide variety of circumstances in which a person may enter another person's land in the exercise of a compulsory power of entry conferred by law. Police may enter under the authority of a search warrant. Bailiffs may enter under the authority of a writ of possession or execution. And there are numerous Acts which confer compulsory powers of entry on inspectors to see whether an enactment is being or has been contravened, or on officials to survey land with a view to its being compulsorily acquired, or on employees of public utility undertakings for the purpose of reading meters, carrying out repairs, laying mains or cables and so on. It appears to be generally accepted that all persons entering in the exercise of compulsory powers are included in the class of persons referred to in section 1(2) of the Occupiers' Liability Act 1957 as persons to whom the occupier "is to be treated as giving" permission to enter; that accordingly they are "visitors" within the meaning of the Act of 1957; and the "common duty of care" is adapted to fit them by section 2(6) of the Act. In these circumstances, we take the view that this is a class of person for whom provision is already made under the existing law, and we therefore make no recommendation for changes in the law in relation to them.

D. Conclusion and summary

59. We believe that trespassers, with whom we have dealt in Part III, and the persons referred to in paragraphs 37–56 above are the only persons who are not "visitors" for the purposes of the Occupiers' Liability Act 1957. But if there are any other such persons, we are sure that their position should not be permitted to continue anomalously after the implementation of our recommendations. With the aim of ensuring that the legislation is all-inclusive, and with the aim also of designating conveniently all those to whom the duty of care under our recommendations is to be owed, we have used the term "uninvited entrants" in the draft clauses[99], defined as all persons (including trespassers) entering premises occupied or controlled by another, other than persons who are visitors of the occupier for the purposes of the 1957 Act. Accordingly, the duty of care is, under the clauses, expressed to be owed to all uninvited entrants. In practice, this term will comprise, as the preceding paragraphs have indicated, the following classes of persons—

(*a*) trespassers;
(*b*) persons entering land subject to an access agreement or order in force under the National Parks and Access to the Countryside Act 1949; and
(*c*) persons exercising a private right of way.

It will, however, exclude all persons using the highway, whether or not the way is maintained at public expense[100].

V. EXEMPTION FROM LIABILITY

A. The present law

60. Whether it is possible in the present state of the law for an occupier to exclude his potential liability to trespassers (or to other categories of uninvited

[98] See Working Paper No. 52, para. 38.
[99] Appendix A, clause 1(2)(*c*).
[100] See para. 51, above and clause 1(3).

entrants[101]) is far from clear. So long as the law was thought to be as laid down in *Addie* v. *Dumbreck*[102]—liability only for "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"—it would scarcely have been conceivable that notice boards could be erected bearing words which would effectively confer a virtual licence to injure. Since the decision of the House of Lords in *Herrington's* case it has been suggested to us that the duty laid down in that case is incapable of exclusion, on the basis that the duty of humanity represents a minimum standard of conduct below which an occupier will not be permitted to go. This is an interesting argument, and if valid it would presumably apply to attempts to exclude or limit liability to trespassers whether by notice or by contract. At the moment, however, the argument is mere conjecture.

61. There is, however, no doubt that in some circumstances the common duty of care owed to visitors under the Occupiers' Liability Act 1957 can be excluded. Section 2(1) of the 1957 Act, imposing the common duty of care upon the occupier in respect of visitors, is qualified in that the occupier's duty is owed "except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise." Although *Ashdown* v. *Samuel Williams & Sons Ltd.*[103] was decided under the common law before the 1957 Act, there is no reason to think that it is not still a useful illustration of a valid exemption from the liability of an occupier.

62. The facts in *Ashdown* v. *Williams*[104] may be briefly stated. The plaintiff was making use of a short cut across a dock estate occupied by the defendants in order to reach her place of work and was held to be a licensee of the defendants. While crossing the defendants' land she was knocked down and injured by a railway truck which was being negligently shunted on rails which crossed the short cut. There was a notice visible to those using the short cut which in effect stated that the property was private property, that persons thereon were there at their own risk and that no claim would lie against the defendants in respect of their negligence or breach of duty. The Court of Appeal held that the conditions on the notice had been sufficiently drawn to the plaintiff's attention and that the licence to use the short cut was subject to those conditions.

63. If it is the law that liability to a visitor under the Occupiers' Liability Act 1957 can be excluded by contract or notice, but that liability at common law to a trespasser cannot be excluded, this would raise the question whether it would be acceptable that the lawful visitor should be in a more vulnerable position than a trespasser. But even if liability to a trespasser can be excluded, there is a further question that must be considered.

64. This is the problem that would face an occupier who sought to exclude his potential liability to a trespasser. The question is, what methods are open to him to do so? On the face of it, the two methods available for an exemption from liability are a contract and a notice. Clearly, if exemption is possible in law then a contract between a trespassing entrant and the occupier would be an effective way of ensuring that the exemption clause was binding on the entrant.

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[101] See Part IV, above.
[102] [1929] A.C. 358, 365.
[103] [1957] 1 Q.B. 409.
[104] *ibid.*; the facts given here are limited to the claim against the first defendants.

It would only be in somewhat unusual circumstances that a contract between an occupier and a potential trespasser could come into existence, but such a contract is not impossible. It might arise, for example, if an occupier made a contract with a person to carry out work on a defined part of his land and made it a term of the contract that if that person without his permission entered any other part of his land he was to owe that person no duty as a trespasser. Similarly, a contract for admission to a zoo might include a term that the proprietors accepted no liability as occupiers in respect of injury to persons who entered any part of the gardens marked "No admittance". Nevertheless, we believe that contracts with trespassers must be regarded as exceptional.

65. It is more difficult to see how an exempting notice can become effective as against a trespasser where there is no contract. In *Ashdown* v. *Williams*[105] the plaintiff, a licensee, was bound by an exemption set out in a notice which she had seen; she had not read it all but reasonable steps had been taken to bring the terms to her attention and knowledge of them was imputed to her. It was accepted that there was no contract between the plaintiff and the occupiers, but the Court of Appeal held that the terms were binding on the plaintiff because she entered upon the premises by licence and the licence was subject to the conditions contained in the notice. If the entrant is a trespasser the problem is to find a sufficient nexus between the entrant and the occupier to give the terms legal effect. We can assume for this purpose that the trespasser is aware of the terms, but in the absence of a contract there is a difficulty in finding that the terms have become effective. If the justification for the decision in *Ashdown* v. *Williams*[106] is that an occupier may attach such terms as he pleases to a licence to enter his land, that reasoning cannot support the imposition of terms as to liability on a trespasser since by definition he has no licence to which terms can be attached. There is no question of the occupier giving the trespasser a "licence to trespass" subject to the term that he is to have no rights against the occupier.

66. If this reasoning is valid we find that exemptions may become effective against lawful visitors by contract or by notice. Even if liability to trespassers can, in law, be excluded[107], then exemptions contained in contracts are possible but rare and notices which fall short of a contract will not be effective. It seems to us unacceptable for the question whether a notice has come into operation or not to depend on whether the entrant was a lawful visitor or a trespasser. It would in our view be extraordinary if, to avoid a notice being brought into operation against her, a person in the position of Mrs. Ashdown were able to argue that she was a trespasser rather than a lawful entrant.

B. Proposals as to exemption clauses

67. Our conclusion is that it would be wrong for the situation to arise, if our main recommendations as to the duty of care that might be owed to trespassers are accepted, in which trespassers could be in a more favourable position in relation to exempting notices than lawful visitors. As we recommend that occupiers should be subject to the same duty in respect of trespassers and certain

[105] [1957] 1 Q.B. 409. See para. 62, above.

[106] *ibid.*

[107] See para. 60, above.

categories of uninvited entrants[108], we think that our policy as to exemption clauses should be the same for all these uninvited entrants. We therefore recommend that it be made clear that the duty under our recommendations towards the uninvited entrant is one which, subject to the controls over exclusions of liability which we discuss below[109] is capable of exclusion or modification.

68. There is a further matter to be borne in mind. Trespassers frequently, indeed usually, enter an occupier's land at points other than an entrance where a notice may be expected to be displayed. It would be impracticable and inequitable to require an occupier to position his exempting notices along the entire perimeter of his property if he desired to ensure that an exclusion of liability was brought to the attention of every trespasser who succeeded in gaining entry. We therefore recommend that an occupier shall be taken to have sufficiently drawn a notice to the attention of an uninvited entrant (including a trespasser) if he has taken such steps as in all the circumstances of the case are reasonable for the purpose.

69. These recommendations would ensure that uninvited entrants are in a no better position than lawful visitors so far as exemptions from liability are concerned, but by themselves they would, we think, make it too easy for an occupier to exclude his duty to such entrants under our main recommendations by exempting notices. We have seen that it is argued by some that in the present state of the law the duty not to injure deliberately and the duty of humanity cannot be excluded at all. Whether or not this is so, we think that some control over exempting conditions is needed.

70. Neither the duty not to injure nor the duty of humanity features as such in the duty of care we recommend, though we have already indicated that we think that cases where liability has been based on a breach of the duties as hitherto described might well be decided in the same way if our proposals are implemented. It would no doubt be possible to introduce a control over exemption clauses by making them void in so far as they purported to reduce the occupier's duty to a standard lower than that recognised in *Addie* v. *Dumbreck*[110] or in *Herrington's* case[111], but we do not think that that would be a convenient way of controlling exemptions. We think that a more flexible technique would be that which we have recommended elsewhere. In our *Second Report on Exemption Clauses*[112] we considered the use of exemption clauses in the course of a business. We recommended, among other things, that, where an occupier was in breach of the common duty of care imposed by the Occupiers' Liability Act 1957 with regard to his occupation of premises used for business purposes, a contract term or notice excluding or limiting his liability should generally be subject to a test of reasonableness[113] and should in certain circumstances be made void[114].

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[108] See para. 59, above.
[109] See paras. 69–76, below.
[110] [1929] A.C. 358.
[111] [1972] A.C. 877.
[112] (1975) Law Com. No. 69, Scot. Law Com. No. 39, (1974–75) H.C. 605.
[113] *ibid.*, para. 69.
[114] *ibid.*, para. 94.

71. In our working paper examining the law relating to liability for injury suffered by trespassers[115] we put forward provisional proposals for controlling exemption clauses as they operate both against trespassers and as against lawful visitors. Those whom we consulted did not dissent from our provisional view that there should be no general provision making void all exempting conditions in relation to occupiers' liability, and we now adhere to that view. Any recommendation we make must not therefore have the effect in substance of a total ban on exempting conditions either in relation to visitors or in relation to non-visitors. For this reason we now reject a possible provision that we put up for consideration in the working paper. This was that there might be an absolute ban on exempting conditions contained in notices and in tickets, passes, programmes and similar documents of admission, so far as death or personal injury was concerned. As our recommendation as to a duty of care towards uninvited entrants now relates only to death or personal injury[116], the absolute ban we suggested as a possibility would now amount in substance to a total ban on exempting conditions and we no longer support it.

72. The other possibility put forward in our working paper was in effect that exempting conditions should all be subject to a test of reasonableness. This proposal, which would apply in relation to the liability of occupiers both to visitors and to uninvited entrants (including trespassers), evoked a wide and extremely diverse response from those consulted. While we have, of course, given due weight to the many arguments presented to use, our reconsideration of exemption clauses and notices in the present context has also been influenced by the form now taken by our recommendations as to the duty towards uninvited entrants.

73. As we have seen, we believe it necessary for our recommendations to deal with the question whether an occupier may validly exclude or restrict his duty to an uninvited entrant (including a trespasser) to avoid the risk that a trespasser might otherwise be in a better position than a lawful visitor where exempting conditions are displayed or issued. We also believe that it would be wrong for legislation simply to permit exclusions and that some control over exempting terms is necessary. Such control should, we believe, apply to all terms which purport to exclude or restrict the duty or liability of an occupier whether to uninvited entrants or to lawful visitors, and should apply to all occupiers whether the premises are business premises or not, except in so far as our recommendations in the *Second Report on Exemption Clauses*[117] already apply to exemptions in relation to premises used for business purposes. We have come to the conclusion that the appropriate form of control is the reasonableness test which we suggested in our working paper and which is the basic control recommended in our *Second Report on Exemption Clauses* in relation to exemptions from a duty to take reasonable care.

C. Control by the reasonableness test

74. We accordingly recommend that control should be introduced over all attempts by occupiers, whether by contract terms or by notice, to exclude or restrict liability to entrants under the proposals in this report or under the

[115] Working Paper No. 52, para. 63.
[116] See paras. 21 and 30, above.
[117] (1975) Law Com. No. 69, Scot. Law Com. No. 39 (1974–75) H.C. 605.

provisions of the Occupiers' Liability Act 1957 (except in so far as our recommendations in the *Second Report on Exemption Clauses* would already cover exemptions in relation to premises used for business purposes). The control should provide that such terms and notices are to be ineffective so far as it is shown that it would not be fair or reasonable to allow reliance on them.

75. The question arises whether the legislation should supply any guidelines. It will be recalled that, in our recommendation as to the duty towards the trespasser, we have rejected any provision for guidelines which would assist in determining what may reasonably be expected of an occupier as far as trespassers are concerned[118]. We are similarly disinclined to provide guidelines to assist in determining what is reasonable in relation to an exemption clause. We are aware that the Supply of Goods (Implied Terms) Act 1973 provides a precedent for the incorporation of guidelines[119]. But that legislation deals only with certain aspects of the supply of goods and the situations which may arise under it are far less varied in character than those which may arise under the whole field of occupiers' liability towards visitors and uninvited entrants. As we pointed out in our *Second Report on Exemption Clauses*[120], one of the consequences of listing certain matters in the Supply of Goods (Implied Terms) Act 1973 is that it is now clear that Parliament does not intend the courts to approach the question of reasonableness in a narrow way and to exclude evidence of matters that might arguably not be relevant to mere questions of construction. We therefore think that it is enough to provide that regard shall be had to all the circumstances of the case, and we do not think that each new enactment of a reasonableness test in relation to exemptions from liability needs to drive home the point that such a phrase is to be interpreted widely. We conclude, therefore, that we should not recommend that guidelines in relation to exemption clauses should be provided in the legislation envisaged by this report.

D. Assumption of risk

76. Section 2(5) of the Occupiers' Liability Act 1957 preserves in relation to the common duty of care the common law principles of assumption of risk[121]. In our working paper[122] we considered the relationship between a warning notice[123], a notice containing exempting conditions and the doctrine of assumption risk. This doctrine rests on the plaintiff's agreement, and was expressed by Wills J. in these terms: "if the defendants desire to succeed on the ground that the maxim 'volenti non fit injuria' is applicable, they must obtain a finding of fact 'that the plaintiff freely and voluntarily, with full

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[118] See paras. 18 and 28, above.

[119] See s. 12(4), paras. (*a*) to (*e*) and s. 4, amending s. 55 of the Sale of Goods Act 1893.

[120] (1975) Law Com. No. 69, Scot. Law Com. No. 39, (1974–75) H.C. 605, para. 191.

[121] Sect. 2(5) reads: "the common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

[122] Working Paper No. 52, para. 65.

[123] Sect. 2(4)(*a*) of the Occupiers' Liability Act 1957 provides that: "In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that for example—(*a*) 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".

knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it' ".[124] We expressed the view that a finding that the plaintiff had agreed to assume the risk of the defendant's breach of duty ought not to depend solely on an objective construction of words in a notice. As a result, we canvassed whether, in this context, the defence of assumption of risk should be abolished and section 2(5) of the 1957 Act repealed. The proposal, however, met with considerable misgivings and we have decided not to recommend it in this report.

77. The question still remains, however, of the extent to which the existence of a purported exclusion of liability is to be taken into account in deciding whether the entrant voluntarily accepted the risk of injury[125]. The vexed question of whether an entrant voluntarily accepted the risk of injury (and thus the implications of the existence of an exemption from liability) does not need to be decided in two cases. Where as well as excluding liability the notice warns of the danger in such a way as to enable the entrant to be reasonably safe, the occupier will have shown that he has discharged his duty to the entrant (in the case of a visitor, under section 2(4)(*a*) of the Occupiers' Liability Act 1957 and in the case of a non-visitor, in accordance with general principles), and the occupier will not be liable regardless of whether the entrant voluntarily assumed the risk of injury. Again, where the court holds that reliance on a purported exclusion of liability is reasonable the occupier will not be liable regardless of the defence of assumption of risk. But where reliance on an exclusion of liability, whether in a contract or a notice, is not found to be reasonable the question arises whether it is open to an occupier to argue that the plaintiff's awareness of the purported exclusion indicates conclusively that the plaintiff voluntarily accepted any risk of injury. In our view the plaintiff's awareness of the contents of a purported exclusion of liability should be taken into account but should not be conclusive evidence that he voluntarily accepted the risk of injury; the court should have regard to all the circumstances of the case.

78. Accordingly, to clarify the position as to assumption of risk, we recommend that where an occupier purports to exempt himself from liability or to limit his liability towards an entrant, and that exemption or limitation is ineffective, the fact that a person agreed to or was aware of the exemption of limitation should not of itself be regarded as conclusive evidence that he willingly accepted the risk.

E. Summary

79. To summarise, we recommend that—

(*a*) an occupier shall be taken to have sufficiently drawn a notice exempting or limiting liability to the attention of an uninvited entrant, including a trespasser, if he has taken such steps as in all the circumstances of the case are reasonable for the purpose;

(*b*) there should be no absolute ban on exempting conditions in relation to occupiers' liability to entrants; but

(*c*) all terms, in whatever form, purporting to restrict or exclude, or having the effect of restricting or excluding, the occupiers' duty of care or

[124] *Osborne* v. *London and North Western Railway Co.* (1888) 21 Q.B.D. 220, 223–4, citing Lord Esher M.R. in *Yarmouth* v. *France* (1887) 19 Q.B.D. 647.

[125] As to the present position see *Buckpitt* v. *Oates* [1968] 1 All E.R. 1145 and *Bennett* v. *Tugwell* [1971] 2 Q.B. 267.

any liability for breach thereof towards visitors or uninvited entrants should be ineffective so far as it is shown that it would not be fair or reasonable to allow reliance on them; and

(*d*) in regard to assumption of risk, where any notice or term purporting to exclude or limit liability towards an entrant is ineffective, the fact that an entrant was aware of the notice or term shall not of itself be regarded as conclusive evidence that he willingly accepted the risk (clauses 2(4) and 3).

VI. SUMMARY OF RECOMMENDATIONS

80. (1) Our recommendations may be summarised as follows—

(i) there should be new provisions separate from the Occupiers' Liability Act 1957 dealing with the liability of the occupier towards the trespasser and other entrants who are not visitors within the meaning ascribed to that term in the 1957 Act. These provisions should have effect in place of the rules of common law at present applying in respect of liability towards these entrants (paragraphs 21, 26, 59 and clause 1(1));

(ii) the new provisions should not, however, have any application to persons using highways or affect the duties of anyone towards such persons (paragraph 51 and clause 1(3));

(iii) the persons to whom the new provisions apply should be known as "uninvited entrants" (paragraph 59 and clause 1(2)(*c*)).

(2) The new provisions should state that—

(i) where, in the case of any premises there is a danger due to the state of the premises or to anything done or omitted to be done on them, the occupier owes a duty to an uninvited entrant on them in respect of the danger if it is one against which, in all the circumstances of the case, the occupier can reasonably be expected to offer him some protection;

(ii) the duty owed by the occupier to the uninvited entrant should be a duty to take such care as is reasonable in all the circumstances of the case to see that the uninvited entrant does not suffer personal injury or death by reason of the danger (paragraph 35 and clause 1(1) and clause 2(1) and (2));

(iii) for the foregoing purpose, "premises" should include any fixed or movable structure and any vehicle, vessel or aircraft (paragraph 22 and clause 1(2)(*a*)).

(3) As regards the operation of conditions purporting to exempt an occupier from liability towards entrants—

(i) an occupier shall be taken to have sufficiently drawn a notice exempting or limiting liability to the attention of an entrant, including a trespasser, if he has taken such steps as in all the circumstances of the case are reasonable for the purpose;

(ii) there should be no absolute ban on exempting conditions; but,

(iii) all terms, in whatever form, purporting to restrict or exclude, or having the effect of restricting or excluding, the occupier's duty of care or any liability for breach thereof towards visitors or towards uninvited entrants should be ineffective so far as it is shown that it would not be fair or reasonable to allow reliance on them; and

(iv) if the defence of assumption of risk is in issue, where any notice or term purporting to exclude or limit liability towards an entrant is ineffective, the fact that an entrant was aware of the notice or term shall not of itself be regarded as conclusive evidence that he willingly accepted the risk (paragraph 79 and clauses 2(1) and 3).

(*Signed*) SAMUEL COOKE, *Chairman.*
AUBREY L. DIAMOND.
STEPHEN EDELL.
DEREK HODGSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

22 *January* 1976.

APPENDIX A

Draft Occupiers' Liability Bill

ARRANGEMENT OF CLAUSES

Liability of occupiers of premises to uninvited entrants

Clause

1. Introductory.
2. Occupier's duty to uninvited entrants.

Contract terms and notices excluding or restricting occupier's liability

3. Effect of terms and notices purporting to exclude occupier's liability.

General

4. Application to Crown.
5. Short title, commencement and extent.

Occupiers' Liability Bill

DRAFT

OF A

BILL

TO

A.D. 1976

AMEND the law of England and Wales as to the liability of occupiers for injury to trespassers and certain other persons on any land or other property from dangers due to the state of the property or things done or omitted to be done thereon; to impose further limits on the extent to which the liability of occupiers for injury to persons on any property from such dangers can under the law of England and Wales be avoided; and for purposes connected therewith.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Liability of occupiers of premises to uninvited entrants

Introductory.

1.—(1) The provisions of section 2 below shall have effect, in place of the rules of the common law, to regulate the duty which a person occupying or having control of premises owes to persons entering the premises, other than visitors for the purposes of the Occupiers' Liability Act 1957, in respect of dangers due to the state of the premises or to things done or omitted to be done on them (and references in those provisions to an occupier and to dangers shall be construed accordingly).

1957 c. 31.

(2) For the purposes of those provisions—

(*a*) "premises" includes any fixed or movable structure, including any vehicle, vessel or aircraft,

(*b*) the persons who are to be treated as an occupier of premises are the same as the persons who are to be treated as an occupier of premises for the purposes of the common duty of care imposed by the Occupiers' Liability Act 1957, and

(*c*) "uninvited entrants" means all persons who enter (including trespassers) other than persons who are visitors of the occupier for the purposes of that Act.

(3) Nothing in this Act imposes a duty on any person to persons using a highway or affects any duty owed by any person to any such persons.

Clause 1

1. In *subsection* (1) the rules of the common law referred to (as explained in paragraphs 36–56 of the report) are those which regulate the duty (if any) of an occupier of premises not only to a trespasser but also to an entrant upon land in exercise of rights conferred by virtue of an access agreement or order under section 60(1) of the National Parks and Access to the Countryside Act 1949 and to any other person (in particular a person entering premises in exercise of a private right of way) who is not a "visitor" for the purposes of the Occupiers' Liability Act 1957. The subsection abolishes these rules and replaces them by the provisions of Clause 2. However, the Clause, and the Bill, must be read subject to subsection (3) of Clause 1 which makes it clear that no duty is imposed by the Bill on any person to persons using a highway (whether lawfully or unlawfully, and whether or not the highway is maintainable at the public expense—see paragraph 51 of the report); nor is any existing duty owed by any person to such persons affected.

2. *Subsection* (2) explains the significance of "premises", "occupier of premises" and "uninvited entrants". As explained in paragraph 24 of the report, subsection (2)(*b*) does not affect the liability for the purposes of Clause 2 of any persons, such as contractors doing work on premises, who are not "occupiers" of "premises". Subsection (2)(*c*) must be read subject to subsection (3) of Clause 1; see note 1 above.

3. As to *subsection* (3), see note 1 above.

Occupier's duty to uninvited entrants.

2.—(1) An occupier of premises owes a duty to an uninvited entrant upon the premises in respect of a danger if, but only if, the danger is one against which, in all the circumstances of the case, the occupier can reasonably be expected to offer him some protection.

(2) The duty owed by an occupier in accordance with subsection (1) above is a duty to take such care as is reasonable in all the circumstances of the case to see that the entrant does not suffer personal injury or death by reason of the danger.

(3) An occupier owes no duty to protect an uninvited entrant on the premises against dangers the risk of which is willingly accepted by the entrant (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(4) So far as he is free to do so, having regard to section 3 below or any other enactment or rule of law, an occupier may (apart from excluding or restricting the duty by agreement) exclude or restrict his duty under this section by notice to the entrant, whether given to the particular entrant or to entrants generally; and an occupier shall be taken to have sufficiently drawn such a notice to the attention of an entrant if he has taken such steps as in all the circumstances of the case are reasonable for that purpose.

EXPLANATORY NOTES

Clause 2

1. *Subsection* (1) (in accordance with paragraphs 21, 27 and 28 of the report) lays down that an occupier owes a duty to an "uninvited entrant" (as defined by Clause 1(2)(*c*)) only in respect of dangers against which it is reasonable in all the circumstances to protect that entrant. The duty (as explained in paragraph 30 of the report) relates only to a danger of personal injury or death. This is one respect in which the duty differs from the "common duty of care" owed by an occupier under section 1(3)(*b*) of the Occupiers' Liability Act 1957; but (as pointed out in paragraph 28 of the report) subsection (1) envisages circumstances in which, even where there may be some danger of death or personal injury, there would be no duty on the occupier to the "uninvited entrant", whereas in otherwise similar circumstances the occupier would owe the "common duty of care" to a "visitor" under the Occupiers' Liability Act 1957.

2. As explained in paragraph 29 of the report, *subsection* (2) enables the court to decide, once a duty to an "uninvited entrant" has arisen, whether the duty has been fulfilled in the light of all the circumstances of the case.

3. *Subsection* (3) in accordance with paragraph 76 of the report provides for a similar limitation on the duty of care owed to an "uninvited entrant" to that applying under section 2(5) of the Occupiers' Liability Act 1957 to the common duty of care owed to a "visitor".

4. *Subsection* (4), in accordance with the recommendation in paragraph 67 of the report, allows the duty to the "uninvited entrant" to be extended or restricted by agreement or by notice, if the occupier is free to do so, having regard to Clause 3 of the Bill, and if he has taken such steps as in all the circumstances are reasonable to draw the notice to the attention of the particular entrant or to entrants generally. This qualification resembles the exception to the common duty of care to "visitors" under section 2(1) of the Occupiers' Liability Act 1957 whereby that duty may be excluded or restricted "by agreement or otherwise".

Contract terms and notices excluding or restricting occupier's liability

Effect of terms and notices purporting to exclude occupier's liability.

3.—(1) The following provisions of this section shall have effect in relation to contract terms and notices given either to persons generally or to particular persons, being terms or notices which purport to, or the effect of which would be to, exclude or restrict, or exclude or restrict liability in respect of a breach of—

(*a*) the duty of care imposed on an occupier by this Act, or

(*b*) the common duty of care imposed on an occupier by the Occupiers' Liability Act 1957 [, so far as it relates to the occupation of premises not used for business purposes within the meaning of the Exemption Clauses (England and Wales) Act 1976 (section 7 of which makes provision with respect to contract terms and notices excluding or restricting liability by virtue of the common duty of care as respects the occupation of business premises)].

1957 c. 31.

(2) Any such contract term or notice is ineffective to the extent that it is shown that, in all the circumstances of the case, it would not be fair or reasonable to allow reliance on it.

(3) Where under this section a contract term or notice is ineffective neither a person's agreement to, nor his awareness of, the exempting or restricting effect of the term or notice is itself to be taken as conclusive that he willingly accepted any risk.

General

Application to Crown.

4. This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947; and that Act and in particular section 2 of it shall apply in relation to the duty under section 2 above as a statutory duty.

1947 c. 44.

Short title, commencement and extent.

5.—(1) This Act may be cited as the Occupiers' Liability Act 1976.

(2) This Act shall come into force at the expiration of the period of three months beginning with the day on which it is passed.

(3) This Act extends to England and Wales only.

Clause 3

1. *Subsection* (1) defines the duties of care to which subsections (2) and (3) (which restrict the power of an occupier to exclude or restrict his liability) apply. These are the duties imposed on an occupier by Clause 2(1) of the Bill and the common duty of care imposed on an occupier by the Occupiers' Liability Act 1957. In the latter case, however, the draft Bill contingently (hence the square brackets) confines the operation of the clause to premises not used for business premises. This is because the draft Exemption Clauses (England and Wales) Bill accompanying the Law Commission's Second Report on Exemption Clauses (Law Com. No. 69; Scot. Law Com. No. 39) contains provisions, as regards premises used for business purposes, corresponding to those in the present clause. The passage in square brackets in the present clause allows for the possibility that the Exemption Clauses (England and Wales) Bill will have been promoted and become law before the present Bill (if promoted) is passed.

2. *Subsection* (2) implements the recommendation made in paragraph 74 of the report.

3. *Subsection* (3) implements the recommendation made in paragraphs 77–78 of the report.

Clause 4

Clause 4 is in similar terms, as regards application to the Crown, to section 6 of the Occupiers' Liability Act 1957, which makes provision for the application to the Crown of that Act.

APPENDIX B

List of commentators on Working Paper No. 52

1. *Individuals*

Master Ball, M.B.E.
The Honourable Mr. Justice Bristow
His Honour Judge Buckee, D.S.O.
The Right Honourable Lord Justice Cairns
Mr. J. D. Foy
His Honour Judge Francis
His Honour Judge Bruce Griffiths, Q.C.
Mr. J. F. Keeler
The Honourable Mrs. Justice Lane, D.B.E.
Mr. W. A. Leitch, C.B.
The Right Honourable Lord Justice Ormrod
Mr. J. B. Shrive
The Right Honourable Lord Justice Stephenson
Mr. Max Weaver

2. *Organisations*

General Council of the Bar
British Insurance Association
British Waterways Board
Cheshire County Council
Society of Conservative Lawyers (Mr. Claud G. Allen)
Country Landowners' Association
Imperial Chemical Industries Ltd.
The Law Society
Lloyd's
London Boroughs Association
Association of Municipal Corporations
National Coal Board
National Farmers' Union
Society of Public Teachers of Law
Royal Institution of Chartered Surveyors
Incorporated Society of Valuers and Auctioneers
Women's National Commission

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