Privy Council Appeal No. 32 of 1972

Southern Portland Cement Limited – – – – *Appellants*

v.

Rodney John Cooper (an Infant by his next Friend Peter Alphonsus Cooper) – – – – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH NOVEMBER, 1973

Present at the Hearing:

LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD WILBERFORCE
LORD SIMON OF GLAISDALE
LORD SALMON

[*Delivered by* LORD REID]

This is an appeal from a decision of the High Court of Australia in an action for damages for personal injury in which the present respondent is plaintiff and the present appellants are defendants. The action was tried in the Supreme Court of New South Wales by Collins J. and a jury. The jury found for the plaintiff and awarded $56,880 as damages. In the Court of Appeal this verdict was set aside but on appeal to the High Court the jury's verdict was restored.

There is little or no dispute about the facts. The plaintiff sustained very severe injuries while a trespasser on land occupied by the defendants by coming in contact with a 33,000 volt electric cable. He was then 13 years of age. The defendants carried on a business of quarrying limestone at South Marulan in a rather remote area. There was a township of over 40 dwelling houses, most being occupied by the defendants' employees, with a school and other buildings situated immediately east of the working area where limestone was quarried, crushed and loaded into railway wagons. Over 40 children attended the school. The quarry was in the southern part of the working area. Limestone was crushed near the quarry and then conveyed in a north westerly direction to " bins " adjacent to and over a railway line so that wagons could be loaded there. This line ran north and south and was joined to the main line some distance away to the north. South of the bins there was a part of the line referred to as the backshunt with a slight gradient so that when a wagon was loaded at the bins it was run down the backshunt to buffers. When a sufficient number of wagons had been loaded a locomotive took them northwards to the main line.

A high tension electric cable belonging to the County Council brought power for the defendants' operation. It was carried by poles some twenty feet above the ground and it ran to the west of and nearly parallel with the railway line. Some months before the accident it was decided to extend the backshunt southwards to give room for more and larger wagons. To make this extension it was necessary to raise the ground level considerably. So waste material from the crushing operations referred to as " fines " or coarse sand had to be dumped there in large quantities. It spread outwards and created a slope of some 60° and in the course of spreading it partially buried some of the poles which carried the electric cable. It was decided that the cable should be moved but for some reason this operation was postponed.

Some two months before the accident to the plaintiff the distance between the sloping surface of the dumped fines and the cable was only about 12 feet at one point and the defendants' Superintendent gave orders that no more material should be dumped there. But these orders were disobeyed.

When the place was inspected on 27th July 1967 it was found that the gap between the sloping surface and the cable had become much smaller and as a matter of urgency the defendants arranged with the County Council that the cable should be moved on the following Monday July 31st. But nothing was done to protect the place meanwhile and it would seem that more material may have been put on the slope, narrowing the gap still further, between 27th July and Sunday 30th July when the accident happened.

The school children were in the habit of playing at various places not far from the working area. They were informed that this area was out of bounds and there does not seem to have been much trespassing on this area at least during working hours. Fines had previously been dumped so as to form a slope on the east side of the working area. Children found this " sandhill " alluring and no objection was taken to their playing there. There were two other areas to the west of the working area to which children went to play. These areas were not on the defendants' land but they were only a few hundred yards from the backshunt and the growth of another " sandhill " there was plainly visible from these areas.

On the afternoon of Sunday 30th July the plaintiff and a companion had been playing in one of the areas to the west of the defendants' land. When returning home by crossing the railway line to the north of the bins they met three other children and they all decided to walk southwards along the railway line past the bins to the backshunt sandhill. There they began to play. While the plaintiff was on the slope his arm came in contact with the electric cable with disastrous results. It was within his reach and it would seem that he must have grabbed it either when stumbling or for some other reason.

The issues for trial contained five counts. At the end of the trial the learned judge directed the jury to return a verdict for the defendants on counts 1, 2, 4 and 5 but left the third count to the jury. It was as follows:

> " And for a third count the plaintiff sues the defendant as aforesaid for that at all relevant times the defendant was the occupier of certain premises and there was on the said premises a certain pile of rubble which was alluring to children and such as was likely to induce the presence on the said premises of children and the plaintiff was a child who was on the said premises and was allured by the said heap of rubble and thereupon the defendant by itself its servants and agents was so careless negligent and unskilful in and about

allowing the said pile of rubble to be in close proximity to a high tension electricity line that the plaintiff sustained the injuries and suffered the damage more particularly set out in the first count hereof."

It is argued for the defendants that the trial judge misdirected the jury in several respects. In particular two passages are said to contain serious misdirections in law. They are as follows:

> " The occupier of premises is bound by a duty to take reasonable care to protect children from risk to which they are exposed by a dangerous condition of part of the premises if that part of the premises constitutes an allurement to children to enter on to the premises and approach that dangerous part. The part must be dangerous in the sense that it is a concealed danger or a trap. Its existence and dangerous quality must be known to this occupier of the premises and unknown and not obvious to the children. Further, it should be known to the occupier that there is a likelihood that there will be in or near the premises children who will be subject to the allurement and who will in fact be allured by it. The word 'allurement' is a traditional word. What is a thing that is alluring to children?—something that is attractive to children, something that attracts them to approach it and perhaps play about it or approach it in any other way."

> " Then, as I told you, it must be known or at least be foreseeable and foreseen by the occupier that there was a likelihood that there would be in or near the premises children who would be subject to the allurement that existed on the premises. Again, it is idle to give illustrations of other situations. You bear the situation in mind here of the village, its locality: its proximity to the works and all the other evidence about how children had conducted themselves in and about and near these premises over the weekends for years before the accident. And also, as I told you, it must be foreseeable by the occupier that this part would be an allurement to children."

The appellants base their argument primarily on the decision of the Board in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054. They maintain that, if the principles there set out are applied to the facts of this case, the above quotations contain fundamental misdirections and that it is impossible to find any breach of any duty owed by them to the plaintiff. Their Lordships will therefore first consider that case in some detail.

The facts are so well known that it is unnecessary to do more than recall that a trespasser driving a truck over a private level crossing at 5.20 a.m. was struck by a train coming round a bend in the line which failed to give timely warning of its approach. The main argument for him was that, as he was " reasonably to be anticipated to be present ", there was " a new fact which introduces a relationship between the occupier of proximity with the intruder ". Then it was said that the occupier's duty fell to be " determined upon the nature of that proximity and not upon the duty as provided in the category cases ". The argument was that the duty was to use reasonable care (p. 1061).

Their Lordships think it important to have in mind that the judgment of the Board was primarily directed to combatting that argument. Lord Radcliffe said (at p. 1069):

> " the jury must have received the definite impression that the law that they were to apply to the facts was that, once they thought that there was a 'likelihood' of people coming to the crossing and that the appellant was aware of such a likelihood, the appellant owed a

general duty to the respondent as 'a member of the public' to take reasonable precautions to secure his safety, and that this duty was not affected by the fact that the respondent was a trespasser. In their Lordships' opinion this direction was not in accordance with law."

Then, having mentioned *Donoghue v. Stevenson* [1932] A.C. 562, Lord Radcliffe said:

"They cannot see that there is any general principle to be deduced from that decision which throws any particular light upon the legal rights and duties that arise when a trespasser is injured on a railway level crossing where he has no right to be: more particularly, they consider that it is not correct in principle to suppose that the mere fact that there was a likelihood, apparent to the occupier, of a trespasser being present on the crossing at some time or another is sufficient to impose upon the occupier any general duty of care towards such a trespasser. The consequences of such a supposition would be far reaching indeed."

As to that their Lordships are in full agreement with the Board in *Quinlan's* case, but that passage is only dealing with the argument that there can be a general duty of care independent of or different from the ordinary duty which an occupier owes to a trespasser. It does not deal with the more difficult question of the nature and extent of an occupier's ordinary duty to a trespasser in various circumstances.

The Board in *Qinlan's* case give a compelling reason for that view. Lord Radcliffe said (at p. 1085):

"Suppose, however, the case in which the occupier, having no definite knowledge of anyone being on his land but having notice that the presence of someone at some point of time is possible or likely; can that circumstance by any process of reasoning give such a trespasser a higher measure of protection, the right to claim a general duty of care, which would not be owed to him if he were actually present before the eyes of the occupier?"

Their Lordships agree. But again that throws no light on the nature and extent of the occupier's ordinary duty to trespassers. And it in no way contradicts the view that the extent of that ordinary duty may vary according to the degree of likelihood of the coming of trespassers, and other factors.

Having rejected the argument based on a general duty of care the Board had to consider the nature and extent of the ordinary duty owed by an occupier to trespassers. Any consideration of that matter must start—and the Board did start—with an examination of the decision of the House of Lords in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* [1929] A.C. 358. In that case there was a haulage system, which was worked intermittently, on the Company's land. The Company had tried unsuccessfully to prevent trespassing near it. On one occasion when the mechanism was put in motion a young child was playing with it. When it started he was caught in it and killed. It was held that

"there was no legal duty cast upon the appellants to afford protection against the danger which they must have known use of the land by the children almost necessarily involved." (*per* Lord Buckmaster at p. 380).

The law was set out in two well known passages:

"Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to

some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser." (*per* Lord Hailsham L.C. at p. 365.)

"In the present case, had the child been a licensee I would have held the defenders liable; *secus* if the complainer had been an adult. But if the person is a trespasser, then the only duty the proprietor has towards him is not maliciously to injure him: he may not shoot him; he may not set a spring gun, for that is just to arrange to shoot him without personally firing the shot. Other illustrations of what he may not do might be found, but they all come under the same head—injury either directly malicious or an acting so reckless as to be tantamount to malicious acting." (*per* Viscount Dunedin at p. 376.)

So apart from an obligation not to do anything on his land maliciously directed against a future trespasser, the occupier was held to have no duty towards a trespasser until he knew that the trespasser had arrived on his land. There was no argument and no indication that ordinary humanity might in some circumstances require some protective action to be taken before the trespasser arrived.

The Board in *Quinlan's* case did not rigidly adhere to the law laid down in *Addie's* case. The first extension which they recognised on p. 1076 is, in their Lordships' view, wholly consistent with the *Addie* principle.

"It is true however that an occupier can be treated as having knowledge of a trespasser's presence even though the latter is not visibly before his eyes at the time when the act that causes injury is done. He can be in a position in which he 'as good as' knows that the other is there."

In many branches of the law, civil and criminal, it is now well established that a man who deliberately shuts his eyes to the truth will not be heard to say that he did not know it. Then the Board refer to the case of *Excelsior Wire Rope Company Ltd. v. Callan and others* [1930] A.C. 404 and appear to have adopted what is probably the best explanation of that difficult case: it was known by the Company's servants to be "extremely likely" (*per* Lord Buckmaster) that the children were there when they started the mechanism and therefore they "as good as knew" that the children were there.

But then the Board went a great deal farther without giving any reasons for doing so. What is said on p. 1077 shews that the Board were prepared to hold not merely that a duty would arise as soon as the occupier knew facts which made it extremely likely that a trespasser had already arrived, but also that a duty would arise before the arrival of the trespasser as soon as it became extremely likely that he would come in future. That puts a very much greater burden on the occupier.

The essence of the *Addie* principle is that an occupier need neither give any consideration to a trespasser's safety nor do anything for his protection until he knows or as good as knows that the trespasser is already on his land. It will then generally be too late to remove or protect dangerous things on his land. So all that he can do at that stage is to refrain from or modify further operations on the land which would endanger the trespasser. But if the occupier's duty to trespassers arises as soon as he knows or as good as knows that it is extremely likely that a trespasser will come he may have sufficient time and therefore an obligation to remove or protect dangerous things on the land as well as being bound to modify any dangerous operation which he is carrying out before the trespasser arrives.

That in their Lordships' view amounts not merely to an extension but to a transformation of the *Addie* principle. It introduces a new element—that the occupier is bound to exercise foresight with regard to trespassers, and to consider in advance of the arrival of a trespasser whether or not it is extremely likely that he will come. That an occupier has to exercise some foresight is recognised by the Board. Lord Radcliffe said at p. 1072:

> " The truth seems to be that, when the relationship of occupier and trespasser comes in question, that relationship is expressive of certain incidents such as the unpredictability of the trespasser's presence, movements and purposes, which themselves condition the amount of foresight that the law will require of the occupier in determining what kind of duty he owes to a trespasser."

Again on p. 1087 it is said:

> " Alternatively, could a jury, properly directed, find on the evidence that the respondent's presence on the crossing was, to the appellant's knowledge, a very probable event? "

That must mean that if Quinlan's presence on the crossing at the time of the accident had been very probable he could have been entitled to succeed because the Commissioner would then have had a duty of care towards him as soon as his servants knew that it was probable that Quinlan would come at that time.

In their Lordships' view it is one thing to say that an occupier must act with due regard to the trespasser's safety from the time when he knows or as good as knows that the trespasser is there—but it is quite a different thing to say that the occupier may have to regulate his activities at a much earlier time as soon as he knows that the arrival of the trespasser at some future time is very probable. And the matter does not stop there. If the occupier knows facts from which he ought to infer that the coming of the trespasser is very likely, he will not be heard to say that he shut his eyes to those facts or did not realise this probability. He as good as knew it.

So long as the enquiry is limited to the question whether the occupier knew or as good as knew that a trespasser had arrived on his land the criterion of extreme likelihood must be right. If the degree of likelihood known to the occupier is less than that it could not be said that he as good as knew that a trespasser was on his land. It could only be said that he had more or less strong reasons for suspecting that a trespasser might be there. And under the *Addie* principle that would not be sufficient to impose any duty on the occupier.

But when one passes from knowledge of something that has already happened to foresight of what may happen in future, the justification for limiting the imposition of a duty to cases of extreme likelihood disappears. In their Lordships' judgment there is neither logical nor practical justification for holding that an occupier comes under a duty to potential trespassers if he estimates or ought to estimate that the arrival of one or more trespassers on his land is extremely likely, but that he has no duty to them if he merely estimates or ought to estimate that the chance probability or likelihood of their arrival on his land is somewhat less than extremely high. Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. It is neither practicable nor reasonable to draw a line at extreme probability.

It is perhaps not very surprising that the Board in *Quinlan's* case proceeded with caution. The law generally develops by degrees. It is plain that the Board wished to keep as near as they could to the *Addie* principle, and perhaps they did not realise how far they were departing from it. But in their Lordships' judgment it is now necessary to re-examine this part of their opinion and abandon the limitation of extreme likelihood. But their Lordships will complete their examination of *Quinlan's* case before dealing further with this matter.

Quinlan's case was not directly concerned with child trespassers, but the Board took occasion to deal with the matter when considering (at p. 1083) the case of *Commissioner for Railways (N.S.W.) v. Cardy* (1959–1960) 104 C.L.R. 274. The facts were set out shortly—

> "A boy of 14 sustained grievous injuries by burning from sinking his feet through the crust of an ash-tip, which contained a mass of red hot material. A pathway that was freely used by pedestrians ran along one side of this tip, and people, particularly children, frequently visited the tip despite 'casual and intermittent warnings' by railway servants."

Lord Radcliffe then said:

> "The circumstances seemed to place the case squarely among those 'children's cases' in which an occupier who had placed a dangerous 'allurement' on his land is liable for injury caused by it to a straying child. . . . Children's cases in this context do unavoidably introduce considerations that do not apply where the sufferer of injury is an adult. What is allurement to a child and, being so, imposes by itself a measure of responsibility, is not an allurement to an adult: and those conceptions of licence or permission, which may be highly relevant for the determination of the adult's rights, are virtually without meaning, at any rate as applied to small children."

The latter part of this quotation appears to echo a passage in the judgment of Dixon C. J. (104 C.L.R. at pp. 282, 285):

> "One may venture to think that no person who came to the case familiar with general juristic concepts but unindoctrinated with the notion that to be a trespasser is to be *caput lupinum* would expect to find a system of law which denied altogether the existence in the Commissioner of any duty of any sort in reference to the likelihood of persons coming to the site and suffering grievous injury. He would find that our law has not denied the duty but has placed it upon the supposal of a licence so that there will be no trespass. But is it necessary that we should go on ever constructing the liability out of the materials that can be found for inferring, implying or imputing a licence, fictional though it must inevitably seem?"

> "But it is at least clear that in England to impute a licence is now to place upon the occupier a duty of care measured by a much higher standard. Whatever may be the outcome it involves a distinct point of departure from the law obtaining in Australia. Why should we here continue to explain the liability which that law appears to impose in terms which can no longer command an intellectual assent and refuse to refer it directly to basal principle?"

If the conception of licence is "virtually without meaning" as applied to children, if placing an allurement on his land "imposes by itself a measure of responsibility" on the occupier, then the Board must in their Lordships' judgment have gone a long way beyond the *Addie* principle at least with regard to allurement cases, because this necessarily involves the proposition that if an occupier places a dangerous allurement on his land he thereby undertakes a duty towards children who may

later be allured by it. For the moment their Lordships are not concerned with the extent of that duty. They are only concerned to shew that the Board recognised that such an occupier comes under a duty long before the allured children arrive on his land. And it is not said that that duty is limited to cases in which it is extremely probable that children will be allured.

It is true that on the following page it is said:

> "Their Lordships take it that in such a situation it is to be presumed that the occupier's conduct is so callous as to be capable of constituting wanton or intentional harm, and, no doubt, in such circumstances it could be so regarded."

But their Lordships have sought in vain for any indication in the long report of *Cardy's* case that any conduct of any of the numerous responsible railway servants concerned was or could be regarded as callous or wanton or intended to harm trespassers. Their Lordships must therefore conclude that this was an attempt to reconcile the Board's view of the law with the *Addie* principle by means of a legal fiction.

Then it is said on p. 1084:

> "If on the evidence a plaintiff is a trespasser, a person present without right or licence, the occupier's duty to him is determined by the general formula as laid down in *Addie's* case. That formula may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity."

Their Lordships agree with the Board's view that an occupier who allows things naturally dangerous to be accessible to children may come under some duty towards them but they do not think that this can be said only to arise if there is "reckless lack of care". They are of the opinion that recklessness differs in kind from lack of care. They agree with the view of Lord Pearson with regard to the "Addie formula" expressed in *Herrington v. British Railways Board* [1972] A.C. 877 at p. 928:

> "I think the word reckless in the context does not mean grossly negligent but means that there must be a conscious disregard of the consequences—in effect deciding not to bother about the consequences. Thus a subjective mental element, a sort of *mens rea* is required as a condition of liability."

Their Lordships are the more inclined to take that view because the common law has always refused to recognise degrees of civil negligence: reckless lack of care is no more than negligence with a vituperative epithet. So again the Board appear to be placing a strained interpretation on the *Addie* formulation in order to reconcile it with what they hold to be the law.

Their Lordships recognise that it is possible to give more than one interpretation to the judgment of the Board in *Quinlan's* case. But they prefer the interpretation which they have put upon it because it gives more weight to views expressed on specific matters than to more general statements expressing approval of the Addie doctrine.

On this interpretation it is not necessary to alter any specific finding of the Board except that relating to extreme probability and their Lordships have already given their reasons for holding that to be necessary.

But in view of the wide variety of views which have been expressed in numerous cases they think it necessary to re-examine and re-state the basis of the law relating to the duty of an occupier to a trespasser. They do not propose to refer to many of these cases. They have in mind the words of Viscount Dunedin in *Addie's* case:

> " Judgments on this class of case are so numerous that it is impossible to review them all and a mere citation of a string of authorities is inimical to clear decision, . . . " (p. 372).

The fundamental difference between the relationship of occupier and trespasser and other relationships which give rise to a duty of care is that the occupier's relationship with a trespasser is forced on him against his will, whereas other relationships are generally undertaken voluntarily. So it cannot be said in this case that a man ought not to enter into a relationship with others unless he has the ability and resources necessary for the proper performance of the duties which that relationship entails.

Their Lordships are breaking no new ground in holding that the nature and extent of an occupier's duty to a trespasser must be based on considerations of humanity. As long ago as 1820 in *Ilott v. Wilkes* 3 B. and Ald. 304, a case dealing with injury to a trespasser by a spring gun, Best J. said:

> " The law of England will not sanction what is inconsistent with humanity ".

In *Grand Trunk Ry. v. Barnett* [1911] A.C. 361, the judgment of the Board refers to:

> " wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care ".

In their Lordships' judgment the *Addie* formulation of the occupier's duty is so narrow that it will not cover many cases where humane considerations would clearly impel an occupier to do something to avoid or lessen danger to trespassers. It is not enough to say that he must not act recklessly or maliciously. His duty must be formulated in broader terms.

It was urged in argument that an occupier's duty to a trespasser cannot be extended so as to make it exceed his duty to a licensee. Their Lordships agree. The passage in the Board's judgment in *Quinlan's* case on p. 1083 to which their Lordships have already referred appears to warrant affording to trespassing children, at least in some cases, rights substantially equivalent to those of a child licensee. It was there stated that the Board were at one with Dixon C. J. in finding it unnecessary to resort to the categorisation of licensee in order to give to children the legal remedy that is felt to be their due.

The occupier's duty to an adult licensee was limited to giving warning. Their Lordships observe that Fullagar J. in *Cardy's* case said (104 C.L.R. on p. 294):

> " The rules for which we refer primarily to *Indermaur v. Dames* (L.R. 2C.P. 311) and *Gautret v. Egerton* (L.R. 2C.P. 371) are now (rightly I think) regarded as part of the general law relating to negligence."

Whether that means that these rules are now more flexible than were formerly supposed, their Lordships do not stop to consider. The finding in favour of the plaintiff in the present case was based on allurement. Most if not all of the allurement cases were based on the injured child having been impliedly a licensee. But so far as their Lordships are aware no difficulty was ever felt in holding that, in a case where any warning

would have been ineffective, the occupier was bound to do a good deal more than merely give warning. So this limitation does not prevent a broad formulation of the occupier's duty to a child trespasser.

Next, their Lordships have in mind the classic passage from Lord Atkin's speech in *Donoghue v. Stevenson* [1932] A.C. 562:

> " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." (p. 580.)

But in applying that passage to trespassers it must be remembered that the neighbourhood relationship has been forced on the occupier by the trespasser and it would therefore be unjust to subject him to the full obligations resulting from it in the ordinary way.

The rights and interests of the occupier must have full consideration. No unreasonable burden must be put on him. With regard to dangers which have arisen on his land without his knowledge he can have no obligation to make enquiries or inspection. With regard to dangers of which he has knowledge but which he did not create he cannot be required to incur what for him would be large expense.

If the occupier creates the danger when he knows that there is a chance that trespassers will come that way and will not see or realise the danger he may have to do more. There may be difficult cases where the occupier will be hampered in the conduct of his own affairs if he has to take elaborate precautions. But in the present case it would have been easy to prevent the development of the dangerous situation which caused the plaintiff's injuries. The more serious the danger the greater is the obligation to avoid it. And if the dangerous thing or something near it is an allurement to children that may greatly increase the chance that children will come there.

Next comes the question to whom does the occupier owe a duty. Their Lordships have already rejected the view that no duty is owed unless the advent of a trespasser is extremely probable. It was argued that the duty could be limited to cases where the coming of trespassers is more probable than not. Their Lordships can find neither principle nor authority nor any practical reason to justify such a limitation. The only rational or practical answer would seem to be that the occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at least to give consideration to the matter when he knows facts which show a substantial chance that they may come there.

Such consideration should be all-embracing. On the one hand the occupier is entitled to put in the scales every kind of disadvantage to him if he takes or refrains from action for the benefit of trespassers. On the other hand he must consider the degree of likelihood of trespassers coming and the degree of hidden or unexpected danger to which they may be exposed if they come. He may have to give more weight to these factors if the potential trespassers are children because generally mere warning is of little value to protect children.

It is easy to be wise after an accident has occurred. In considering whether the occupier did all that he ought to have done before the accident the Court or jury must endeavour to put itself back in the

situation which confronted the occupier before the trespassers arrived. It is not enough to consider the point where the accident occurred if there are other danger points which the occupier would also have had to protect.

The problem then is to determine what would have been the decision of a humane man with the financial and other limitations of the occupier. Would he have done something which would or might have prevented the accident, or would he, regretfully it may be, have decided that he could not reasonably be expected to do anything. Their Lordships adopt the statement of Lord Uthwatt in *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156 at 185:

> " there is demanded of him a standard of conduct no higher than what a reasonably minded occupier of land, with due regard to his own interests, might well agree to be fair and no lower than a trespasser . . . might in a civilised community reasonably expect."

Australian Courts have tended to proceed on somewhat different lines, perhaps in order to avoid restrictions flowing from the decisions in *Addie's* and *Quinlan's* cases. This has led to some intricate and possibly confusing arguments as to whether, in a given state of facts, there are two duties, existing side by side, falling upon an occupier towards trespassers or potential trespassers. These complications become unnecessary if it is right, as their Lordships think it is, to state the occupier's duty towards trespassers in wider terms than appear in *Addie's* case, or in some passages in *Quinlan's* case. Once it is accepted that the nature of this duty cannot be determined without reference to such all-embracing considerations as their Lordships have mentioned, the need for the imposition of two separate parallel duties disappears. Their Lordships believe that the above reformulation of the law would achieve results not substantially different from those achieved by recent decisions of the High Court. They believe moreover that it is substantially in line with the development in English law as expressed by the House of Lords in *Herrington v. British Railways Board* [1972] A.C. 877.

Their Lordships have already set out the manner in which the trial judge in this case directed the jury as to the law. His directions differ to some extent from the law as their Lordships have now stated it. The High Court have had to consider such a situation in several cases. In *Cardy's* case (104 C.L.R. at p. 287) Dixon C. J. said:

> " One difficulty may be suggested. The trial went upon the conventional or traditional theory of liability. Neither judge nor jury dealt with application to the facts of the principle of liability as it is here formulated. It is a difficulty which has caused me to hesitate as to the necessity of a new trial. But after consideration I have concluded that a new trial ought not to be directed. After all a new trial is not granted where justice does not require it and independently of all discretion the facts implicit in the findings which upon the summing up the jury must be considered to have made really cover the ground and, as I see the matter, both upon those findings and upon the evidence, the liability of the defendant Commissioner is satisfactorily made out."

The whole matter was summarised by Barwick C. J. at the end of his judgment in this case.

> " After verdict, bearing in mind the summing up, it must be taken that the jury found that the respondent had created a situation of danger on its land. That situation was the proximity of the surface of the batter of the platform to the uninsulated high voltage transmission line. That situation of danger could only be regarded as

highly dangerous to human life and safety. Then, the jury must be taken to have found that the respondent knew of the existence and dangerous quality of what they must have concluded as a concealed trap as far as children were concerned. Further, because the place of the danger was attractive to children seeking their amusement in the remote area where they lived, and having regard to the terms of the summing up, the jury must have concluded that the respondent must have known that it was likely that children would be attracted to the place of danger. In my opinion, that finding in the circumstances of the case is the equivalent of a finding that the presence of the children in the area was to be expected by the respondent. Upon the possible view of the facts, which I have already indicated, there was, in my opinion, sufficient evidence to support such findings. They are sufficient, in my opinion, to support a verdict against the respondent on the footing that, having created a situation highly dangerous to human life, the proximate presence of children was to be expected by it, with the consequence that the respondent owed the appellant a duty to take reasonable steps to prevent the appellant suffering injury by that highly dangerous situation. If there was any duty, there can be no question that the respondent failed to perform it.

Therefore, because of the findings inherent in it, and upon the basis I have indicated, I would not disturb the verdict of the jury. A comparable course taken in *Cardy's* case does not seem to have excited criticism in the Privy Council in *Quinlan's* case. In my opinion, the appeal should be allowed and the verdict of the jury restored."

Their Lordships agree and they will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs.

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In the Privy Council

SOUTHERN PORTLAND CEMENT LIMITED

v.

RODNEY JOHN COOPER
(an Infant by his next Friend Peter Alphonsus Cooper)

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LORD REID

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