certainly now the rule about liability for the tort of negligence and it is a matter of convenience whether we say that where the damage is not of this kind there may be a breach but no liability, or whether we prefer to say that the defendant has not committed the relevant breach. But it seems that in the present case there was a difference in the factual assumptions on which Diplock, L.J. and the other judges proceeded, and not a mere difference in mode of analysis.

VIII *Doughty* v. *Turner Manufacturing Co. Ltd.*: *Its Contribution to the Rules of Remoteness*

Lord Pearce and Harman, L.J., by treating the issue of damage as the central one in the case, at least demonstrated that it is not merely the kind of *injury*, which could certainly have been regarded as of the foreseeable kind in the present case, but the kind of *accident* which must be foreseeable in order to involve the defendant in liability. It is still, unfortunately, uncertain whether we regard the requirement that the kind of intervening circumstances should be foreseeable as part of the causation of damage issue or as part of the remoteness issue, the reliance by Lord Pearce on Lord Reid having continued the suggestion that it is part of the causation issue. It appears, in any case, that Lord Pearce insisted on proof that the kind of intervening events were foreseeable for one reason or another, and Harman, L.J. seems to agree with this, though his language is less clear.

Considered as a case concerned with the damage element in negligence, the distinction between this case and *Hughes* v. *Lord Advocate* is much less clear than Diplock, L.J. was able to make it. For all the argumentation of Lord Pearce and Diplock, L.J., it is submitted that there was no indisputably correct theoretical answer on this basis to the argument of plaintiff's counsel. But the result in any case confirms the earlier submission that questions of the "kind of accident" are questions of fact not to be determined on the basis of broad categories laid down by law.

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THE DUTY OF CARE OWED BY AN OCCUPIER TO A TRESPASSER

COMMISSIONER FOR RAILWAYS v. *QUINLAN*[1]

On 5th January, 1956 Q was injured when a truck which he was driving collided with a steam train operated by the Commissioner for Railways at a private level crossing, guarded by unlocked gates, which gave access to a farm upon one side and to a public highway upon the other. In the weeks immediately prior to the accident, the crossing had been used by vehicles in connection with building operations carried on by the Housing Commission of New South Wales on the farm side of the line, although the Commissioner for Railways had no actual or imputed knowledge of the use of the crossing in connection with these or any other operations. In 1955 the Housing Commission had sought permission to use the crossing and this had been refused.

Evidence adduced at the hearing disclosed that the gates had been open at the time of the accident, that Q had halted at the gates and had neither

[1] (1965) 38 A.L.J.R. 10.

seen nor heard the approaching train, that the train driver might not have sounded a whistle before approaching the crossing and that on each side of the line there had been a notice "Beware of trains". A verdict was found in favour of the plaintiff, Quinlan.

The Commissioner for Railways appealed twice to the Full Court of the Supreme Court of New South Wales. On the first appeal[2] the Full Court held:

(i) that there was no evidence of an implied licence, hence Q was a trespasser;

(ii) that an occupier's liability for activities conducted upon his land is determined by reference to the general principles of liability for negligence, and is not dependent upon the categorisation of the entrant as an invitee, licensee or trespasser,

and ordered a new trial.

On the second occasion[3] the Full Court upheld the jury's verdict and dismissed the Commissioner's appeal. It stated that it was "a case laying down no general questions of principle"[4] and following the then recent decision in *Commissioner for Railways* v. *Cardy*[5] held that:

> in the case of a level crossing adjacent to a public highway which is not secured by a locked gate, there is a duty owed by Railway Authorities to take reasonable care toward persons to whom injury may reasonably and probably be anticipated if the duty is not observed.[6]

Implicit in this decision are the findings that the defendant could reasonably foresee the presence of a trespasser on the line, and therefore the defendant owed him, notwithstanding his status as a trespasser, a duty to take reasonable care. The Commissioner then appealed to the Privy Council.

In substance their Lordships held that a trespasser must take the land and the activities conducted by the occupier on that land as he finds them subject to the qualification that once the occupier knows of the presence of a trespasser then he must not injure him by wilful or reckless conduct. This is a restatement of the traditional law as to the liability of an occupier to a trespasser as laid down in *Robert Addie & Sons Collieries* v. *Dumbreck*[7] and *Degg* v. *Midland Railway Company*.[8]

However, in deference to a series of decisions by the High Court of Australia[9] the Privy Council laid down the following important qualification to these accepted principles, and it is with this qualification that we are primarily concerned:

> . . . so long as the relationship of occupier and trespasser is or continues to be *a relevant description of the relationship* between the person who is injured . . . the occupier's duty is limited in the accepted terms.[10]

As their Lordships at no stage in their advice explain when the categorisation of the parties as occupier and trespasser is relevant to a determination of the nature and extent of the duty owed by the one to the other, it is necessary to examine these Australian decisions and discover to what extent the principles laid down by the various judges have been restricted or rejected.

First in point of time is the decision of the High Court in *Thompson* v. *Bankstown Corporation*.[11] In that case a boy aged 13 years placed his bicycle

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[2] (1960) 77 W.N. (N.S.W.) 409.
[3] (1963) 80 W.N. (N.S.W.) 820.
[4] *Supra* at 827.
[5] (1960-1961) 104 C.L.R. 274.
[6] (1963) 80 W.N. (N.S.W.) at 825.
[7] (1929) A.C. 358.
[8] (1857) 1 H. and N. 773.
[9] *Rich* v. *Commissioner for Railways* (1959-1960) 101 C.L.R. 135; *Thompson* v. *Council of the Municipality of Bankstown* (1952-1953) 87 C.L.R. 619; *Commissioner for Railways (N.S.W.)* v. *Cardy* (1960-1961) 104 C.L.R. 274.
[10] (1965) 38 A.L.J.R. at 14—italics added.
[11] (1952-1953) 87 C.L.R. 619.

against a telegraph pole and climbed on it for the purpose of reaching a bird's nest. The nest had been built in a decayed portion of the pole and was some eight or ten feet above the ground. A loose earth wire charged with electricity came into contact with the frame of the bicycle and the infant received an electric shock and suffered severe injuries. Kitto, J. held it to be a misconception of the rules relating to the liability of an occupier to regard them as precluding the application of the general rules of negligence ". . . to a case where an occupier, in addition to being an occupier stands in some other relationship to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour. . . ."[12]

The infant plaintiff in that case was held to be a person to whom injury might reasonably be foreseen and because of this likelihood of injury the relationship between the parties was such that the Corporation owed him a duty to take reasonable care in the conduct of its operations.

In a joint judgment, Dixon, C.J. and Williams, J. were of the opinion that the issue did not depend upon "the occupation of the (telegraph) pole or the character the plaintiff assumed in reference to the pole"[13] but was dependent upon the liability imposed upon those involved in dangerous undertakings to take reasonable care for the safety of those who might be injured by failure so to do. In a separate judgment, McTiernan, J. held that:

> . . . it does not matter whether the plaintiff was a trespasser on the pole, for the liability of the defendant does not depend upon the law governing the obligations of an owner or occupier of property towards persons who came upon it.[14]

In His Honour's opinion the Corporation's liability arose because of the failure to take reasonable care in the conduct of a dangerous activity upon a public place.

Their Lordships expressly upheld the decision of the High Court in *Thompson's Case.* At page 17 of their reasons for judgment, their Lordships state:

> It was one of those (cases) in which the court, for sufficient reason, is able to hold that as regards the accident and the injury caused, the relation of occupier and trespasser does not bear upon the situation of the parties. The reason there held sufficient was that the Corporation was maintaining on and over a public place a highly dangerous electric transmission system in a defective condition.

Explicit, then, in their Lordships approval of the decision, expressed in the above extract, is the proposition that in *Thompson's Case* the categorisation of the parties as occupier and trespasser was not a relevant description of their relationship because of the dangerous nature of the undertaking and because it was conducted on and over a public place. It is submitted that the "public place" was relevant only because it established that the Corporation could reasonably have foreseen that persons were likely to be in the vicinity of the danger, and thus were likely to be injured by a failure to take reasonable care. On this aspect of the matter Dixon, C.J. and Williams, J. in the High Court had stated:

> It seems proper to impute to the defendant in carrying on its undertaking a knowledge that children in their peregrinations through the streets and highways of Bankstown would be apt . . . to attain some level on or in connection with its (the pole's) parts higher than their unaided reach from the ground would allow. Why should not this probability or

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[12] *Supra* at 642, 643.
[13] *Supra* at 628.
[14] *Supra* at 637.

> possibility be regarded as within reasonable foresight? If so, it ought to bring children within the class or description of persons likely to be endangered. . . .[15]

Their Lordships offer no criticism of the reason for the displacement of the accepted rules as advanced by their Honours.

Before any attempt is made to draw any statement of principle from the High Court's decision in *Thompson's Case* and to equate it with the decision of the Privy Council in *Quinlan's Case*, two matters raised by their Lordships have to be considered. Firstly, their Lordships expressly disapproved of the statement made by Kitto, J., cited above, that a general duty of care is owed to a trespasser, if, in addition to being a trespasser, he is also the occupier's neighbour. The Privy Council must be taken to have rejected the proposition that the mere fact that some trespassing is known to have occurred is sufficient to convert a trespasser into the occupier's neighbour and to impose upon the latter a general duty of care.

Secondly, whilst the facts in *Quinlan's Case* dealt with an adult travelling over an enclosed railway crossing, those in *Thompson's Case* dealt with an infant boy attempting to obtain a bird's nest situated some distance from the ground in a telegraph pole. It is submitted that the fact that Thompson was an infant was relevant only in that the presence of an adult on a telegraph pole could not reasonably be foreseen. It is submitted that proof of infancy was relevant to foreseeability and to the likelihood of injury. It did not establish that there was some special duty of care owed to an infant merely because he is an infant, which is entirely distinct and separate from that owed to an adult. Admittedly, the nature and extent of the duty may vary between children and adults, but the existence of a duty depends upon foreseeability and likelihood of injury. The fact that the injured party is a child may be relevant to one or both of these issues, and may determine what action must be taken by the person on whom the duty is imposed to discharge it. However, this is its only relevance.

Thus, it is submitted, that implicit in their Lordships approval of *Thompson's Case* must be the approval of the proposition that the creation or continuing in existence of a *dangerous undertaking* combined with the *likelihood of injury* to some person, creates a duty upon the person conducting those operations to take reasonable care for the safety of such a person.

In *Rich* v. *Commissioner for Railways*,[16] another level crossing case, Fullager, J. laid down the proposition that, co-existent with the special restricted duties of care owed by an occupier to the various classes of entrant, there may be a general duty of care not related to the condition of the premises nor dependent upon the fact of occupation, but which arises from the general circumstances of the case.[17] Windeyer, J. adopted the statement of Kitto, J. in *Thompson's Case*, cited above, and stated at page 158 of his judgment, the fact that ". . . a person is a trespasser determines the nature and extent of the duty which the occupier owes to him. It does not mean that no duty is owed to him". The duty is one of reasonable care in the circumstances.

Their Lordships attempted to explain the decision in *Rich's Case* by maintaining that evidence of known, repeated trespassing may have been sufficient to convert Rich from a trespasser into licensee.[18] It is submitted that the rejected evidence would not have been sufficient to establish that Rich

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[15] *Supra* at 631.
[16] (1959-1960) 101 C.L.R 135.
[17] *Supra* at 144.
[18] (1965) 38 A.L.J.R. at 18.

fell into this category, and the fiction of an imputed licence was rejected both by the Privy Council and by Dixon, C.J. in *Cardy's Case*.[19] However, referring to the opinions of Fullager and Windeyer JJ., their Lordships state that:

> . . . they would find great difficulty in accepting a proposition couched quite in these terms . . . the character in which the injured person was upon the occupier's premises is an unescapable element in the determination of the extent or limit of the latter's duty towards that person; and mere knowledge of some unprevented trespassing would not convert the occupier's limited duty into "a general duty of care" which is said to arise from "the general circumstances of the case". . . .[20]

Although the nature and extent of the duty is couched in broad terms and without reference to dangerous operations in *Rich's Case*, and it is this broad formulation which met with the criticism of the Privy Council, it is submitted that Dixon, C.J. correctly restated the position in *Cardy's Case* when he stated:

> . . . a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into the proximity of the danger and has the means of preventing it, or of averting the danger, or of bringing it to their knowledge. . . .[21]

Whilst he rejected the view that an occupier owed no duty to a trespasser other than one of abstention from wilful or wanton injury, His Honour was not prepared to adopt unequivocably the principle that whenever the parties were neighbours then the general law of negligence applied.[22] What His Honour did say, was that it was not mere knowledge of unprevented trespassing which converted an occupier's duty into a general duty of care, but that it was a combination of a dangerous undertaking and the likelihood of persons being in proximity to it which created a duty on the occupier, the nature and extent of which would vary with the circumstances of the case.

The essential difference between a trespasser and a person lawfully on the land is that the presence of the trespasser cannot ordinarily be foreseen. However once circumstances have arisen such that an occupier knows of the likelihood of persons being present on the land, and when he conducts a dangerous activity on that land, then, on the reasoning of Dixon, C.J., it is submitted that a duty of care arises, the nature and extent of which will depend upon the circumstances. It is submitted that relevant circumstances would be the fact that the entrant was a trespasser, the degree of danger and the relative likelihood of injury to the intruder.

The duty may be less onerous where the entrant is a trespasser than where he is lawfully on the land. It may perhaps be discharged simply by notice of the danger, by warning or by fencing, depending upon the circumstances of the case. In both *Thompson's Case* and *Cardy's Case* the facts that the undertaking was of a highly dangerous nature, that the trespassers were children, that there was an extreme likelihood of injury, made the duty more onerous than in the instant case where, it is submitted, the erection of warning signs, and, possibly, a warning of the approach of the train would have discharged the obligations imposed upon the Commissioner. Of course, a duty of care would exist only if it could be established that the running of

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[19] (1960-1961) 104 C.L.R. at 285.
[20] (1965) 38 A.L.J.R. at 17.
[21] (1960-1961) 104 C.L.R. at 286.
[22] See W. L. Morison, "Streamlining Liability to Trespass" (1960-1961) 34 *A.L.J.* 204.

a train along a track adjacent to a highway, guarded only by unlocked gates, was a dangerous operation.

It is not suggested that this is the approach adopted by the Privy Council in *Quinlan's Case*, but it is submitted that it is one compatible with that decision. The duty of care suggested is not equivalent to that owed to members of the public lawfully on a crossing, nor is it equivalent to that owed by an occupier to a licensee or trespasser. The former arises because of the general law of negligence, the latter arises because of occupation of land, but the suggested duty arises because of dangerous operations being carried on upon the land, and the likelihood of injury arising therefrom.

Whilst the Privy Council rejected the principle that a general duty of care is owed to a trespasser equivalent to that enunciated in *Donoghue* v. *Stevenson*,[23] and whilst it affirmed the traditional statement of the liability of an occupier to a trespasser, it conceded that the categorisation of the parties as occupier and trespasser would not necessarily be a relevant description of the relationship in every case. Even though their Lordships do not state when such categorisation would not be relevant, it is submitted that it follows from the affirmation of the High Court decisions in *Cardy's Case* and *Thompson's Case* that whenever a dangerous undertaking is conducted upon land and there is a likelihood of injury to some person, then a duty of care arises, the nature and extent of which will vary with the circumstances of the case.

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[23] (1932) A.C. 562.