LIABILITY OF NON OCCUPIER Vis-A-Vis TRESPASSER

Federation of Malaysia v. *Fong Ee Kim*[1]

This Federal Court decision is welcome as the first judicial pronouncement in Malaysia on the nature and extent of the duty owed to trespassers on land by non-occupiers.

The facts were briefly thus: the respondent was depasturing her chickens behind

38. *R.* v. *Abingdon Justices, ex p. Cousins, "The Times",* Oct. 14, 1964; Sol. Jo., Oct. 23, 1964, p. 840.
39. [1924] 1 K.B. 256.
40. *Ibid*., at p. 259.
41. *Cottle,* v. *Cottle* [1939] 2 All E.R. 535 at p. 541.
42. *R.* v. *Camborne Justices, ex p. Pearce* [1955] 1 Q.B. 41 at p. 51.

1. [1965] 31 M.L.J. 81.

a bush on a village road when a caterpillar grader, which was being used to clear land near the road, was partly driven off the land on to the road and injured the respondent in her leg. At the material time the grader was driven by *P*, an employee of the appellant government, and he was assisted by *N*, who was supposed to warn people who might be in the grader's path. It was admitted on the pleadings that the land and the road belonged to the State and that the Federal Government had neither title nor interest on the property, nor was it the occupier thereof. The trial judge held that *P* was negligent and, though the respondent was a trespasser, *P* was liable. He also found the respondent liable in contributory negligence.

From this decision the Government of Malaysia appealed on the ground that the trial judge had erred in applying the test laid down in *Videan* v. *British Transport Commission*[2] instead of that in *Commissioner for Railways* v. *Quinlan.*[3] The test approved of and applied in the latter case can be called "the extreme likelihood or great probability" test, while that which was adopted in *Videan's* case was the test of reasonable forseeability.

Thomson L.P., delivering the judgment of the Federal Court, held that *Quinlan's* case was inapplicable as it concerned the duty which an occupier owed to a trespasser, whilst the issue before the Court was the liability of a non-occupier. Having so distinguished this Privy Council decision the Lord President proceeded to apply the forseeability test on the particular circumstances of the case. He held that although the respondent was a trespasser by virtue of the nature of her activity on the highway, yet, *P* should have foreseen "the physical presence of a person behind the bush" as on a highway "the possibility of the physical presence of pedestrians and other persons must always be assumed."[4] Therefore as neither *P* nor his assistant took any precautions to see if anyone was present before he brought the grader on the road, *P* was negligent and thus liable to the respondent.

This decision, it is submitted, is well founded both on authority and on principle. Prior to the decision in *Videan* v. *British Transport Commission (supra),* the distinction between an occupier and a non-occupier or independent contractor had been important when considering the liability *vis-a-vis* a trespasser. The duty of care, owed by an occupier is based on his possession of the premises and varies according to the status of the entrant, that is, whether he is an invitee, licensee or a trespasser. As regards the latter the occupier is liable only in a very limited way. He is responsible only if the injury was due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser.[5]

However the relationship of the entrant *vis-a-vis* the occupier is not conclusive of any issue which may arise between a third party engaged in an activity on the premises and the entrant. The non-occupier owes a general duty to take reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his act or omission.[6] "The duty arises quite independently of the occupation of the premises."[7] It is based on the broader principle of liability as manifested in *Donoghue* v. *Stevenson*.[8]

So in the Singapore case of *A. V. Tucker* v. *Ong Oon Hue*[9] the defendants, who were non-occupiers, were held responsible when the infant plaintiff was injured by some lime the property of the defendants which was kept in a portion of an unmade road. It was found that children were in the habit of playing in the vicinity. The Court held that in view of the surrounding circumstances, the defendants ought reasonably to have foreseen the probability that children would play with the lime, but

2. [1963] 2 Q.B. 650.

3. [1964] 2 W.L.R. 817.

4. (1965) M.L.J. at p. 84.

5. *Per* Hailsham L.C. in *Robert Addic* v. *Dumbreck* [1929] A.C. 358 at p.

6. *Billings* v. *Riden* [1958] A.C. 240 applied in *Johnson* v. *Rea* [1962] 1 Q.B. 373.

7. *Per* Bankes L.J. in *Kimber* v. *Gas Light and Coke Co.* [1918] 1 K.B. 439 at p. 445.

8. [1932] A.C. 562.

9. (1959) 25 M.L.J. 115.

no reference was made to the relationship of the infant plaintiff *vis-a-vis* the occupier of the unmade road. The case was decided on the general principles of negligence.

In the earlier English case of *Farrugia* v. *Great Western Railway*,[10] where again the defendant was a non-occupier, the Court of Appeal held that the question of whether or not the plaintiff was a trespasser was irrelevant. Lord Greene M.R. said:

> Even if the fact — and I am not saying it is — that when the plaintiff was running along the road he was doing something in respect of which the owner of the highway could have maintained an action for trespass against him, it appears to me that it is a long way from discharging the defendants the liability to take care towards him.[11]

The law went one step further in *Buckland* v. *Guildford Gas Light and Coke Company* [12] where it was held that even a trespasser may have a successful claim. In that case, a girl, aged thirteen years who climbed a tree was electrocuted when she came into contact with the defendants' high voltage wires hidden in the foliage. The defendants were held liable as the girl belonged to that class of persons whom the defendant ought reasonably to have had on contemplation as being likely to be affected by their act. She was a "neighbour" in the sense in which Lord Atkin used the word in *Donoghue* v. *Stevenson.* In *Buckland's* case Morris J. said: [13]

> The group of those who must be regarded as neighbours from the point of view of the defendants is however, not of rigid necessity the same as the group of those who must be regarded as invitees or licensees from the point of view of the occupier of the land ... as a general rule a trespasser on land would not be within the group of neighbours, but whether one particular person is a neighbour depends upon the circumstances of a particular case.

This view, that towards trespassers non-occupiers owe a duty of the type illustrated in *Donoghue* v. *Stevenson*[14] and in *Buckland* v. *Guilford Gas Light and Coke*,[15] which is a lighter duty of care than the one owed by an occupier was followed in two other English cases: *Davis* v. St. *Mary's Demolition and Excavation Company* [16] and *Creed* v. *McGeoch*.[17] Finally in *Videan* v. *British Transport Commission* [18] the Court of Appeal held that, if the presence of trespassers on land is known or reasonably forseeable, some duty of care is owed by the independent contractor and even the occupier. This decision has incurred the disapproval of the Judicial Committee of the Privy Council,[19] but the criticism only relates to the Court of Appeal's pronouncement on the liability of the occupier. So that as the law now stands, a non-occupier owes some duty of care towards a person regardless of the fact that this person may be a trespasser *vis-a-vis* the occupier of the premises. The duty arises when he knows of or ought reasonably to foresee the presence of the trespasser on the premises; and to determine when such presence may be reasonably foreseeable the particular circumstances of the case must be taken into consideration.

So far this principle has been accepted as good law without much criticism. It must however be noted that in an unreported English Court of Appeal case[20] Hodson L.J., referring to *Buckland* v. *Gas Light and Coke Company*,[21] *Davis* v.

10. [1947] 2 All E.R. 565.

11. *Ibid*., at p. 567.

12. [1949] 1 K.B, 410.

13. *Ibid*., at p. 420.

14. [1932] A.C. 562.

15. [1949] 1 K.B. 410.

16. [1954] 1 All E.R. 578.

17. [1955] 3 All E.R. 123.

18. [1963] 2 Q.B. 650.

19. *Commissioner for Railways* v. *Quinlan* [1964] 2 W.L.R. 817.

20. *Aldrich* v. *H. Boyer* (1960) C.A. 14 digested in R. Bingham, *All the Modern Cases on Negligence,* (2nd ed., 1964), at p. 90.

21. [1949] 1 K.B. 410.

St. Mary's Demolition Company[22] and *Creed* v. *McGeoch*[23] said, *obiter:*

> It may well be that these three decisions — all of which proceed on the footing that the relationship between the occupier and the trespasser is irrelevant in considering the case of a defendant who is not the occupier — may require further consideration by a superior Court.

Put succintly, the main criticism seems to be this — why should the contractor whom the occupier hires to do a piece of work be liable when the occupier himself is not. This question assumes that the contractor's duty is dependent on that of the occupier. The privileges and immunities of the occupier arise out of possession of the premises. In the past the Common Law has always leant in favour of the owner or occupier. The reason seems to be that, in a society where private ownership prevails, the public policy is to allow a man to use his own land in his own way without the burden of watching for and protecting those who come there without permission or right. In the course of this century there has been a growing awareness of another interest, the interest in human safety. The consistency of the Courts in upholding the trespasser's claim against the non-occupier is but another manifestation of this emergent interest.

S. Y. TAN.

22. [1954] 1 All E.R. 578.
23. [1955] 3 All E.R. 123.