BASIC DEFINITIONS IN THE LAW OF OCCUPIERS' LIABILITY

INTRODUCTORY

"The case books are full of authorities as to the circumstances in which permission to enter or use premises given by an 'occupier' constituted the complainant as 'invitee' as distinct from a 'licensee'. There are numerous cases as to the circumstances in which an 'occupier' of premises is to be treated as having given permission to the complainant to enter or use premises, so as to constitute him a 'licensee' as distinct from a 'trespasser'. There is a plethora of semantic analyses of particular phrases in precedent authorities descriptive of the nature of the contrasted duties owed by 'occupiers' of premises to 'invitees' and 'licensees' respectively. But there is a dearth of relevant authority about what connection with the premises is required at common law to constitute a person an 'occupier' of premises, so as to give rise to a duty of care to persons using them." [1]

In the law of occupiers' liability there has been a strange indifference to basic definitions. As Diplock L.J. points out, the definition of an "occupier" has been neglected, and so, too, has the definition of a "trespasser." These two terms seem to have been taken for granted, possibly due to a circularity in definition: the impression is often given that an occupier is a person entitled to keep trespassers out, and that a trespasser is a person on premises without the permission of the occupier. This impression is a result of over-liberal use of the terms in such varying contexts as trespass, nuisance, occupiers' liability, and even *Rylands* v. *Fletcher* without clear indication that the terms do not have a constant meaning.[2]

In view of the decision of the House of Lords in *Wheat* v. *E. Lacon & Co. Ltd*,[3] it is necessary to undertake a fundamental re-appraisal of our comprehension of the term "occupier", and, attendant upon that, to reconsider what we mean by "invitee", "licensee", and, particularly, "trespasser". Some surprise may be expressed at the latter half of this proposition. *Wheat* v. *Lacons* is obviously a major case on the meaning of "occupier", but how does it affect the various categories of visitors? The answer is that invitees, licensees and trespassers are

1. Diplock L.J. in *Wheat* v. *E. Lacon & Co. Ltd.* [1966] 1 Q.B. 335 at pp. 366-7.
2. See, e.g. *Winfield on Tort* (7th ed.), pp.415 and 419, where the term "occupier" is used both to refer to the person entitled to sue for a private nuisance and the person who can be so sued. As will be shown later, the term has to be understood in two different senses; an "occupier" of land liable to his neighbour for nuisance may not be able to sue for a similar interference with his enjoyment of land, as he may only be, say, a licensee (as defined in the law of property).
3. [1966] A.C. 552. The respondent company is conveniently referred to as "Lacons" in the judgments.

commonly defined in terms of their relationship with the "occupier" of premises, and if the meaning of this pivotal term should change, then perforce the various categories of entrants may have to be re-defined.

THE DEFINITION OF "OCCUPIER"

It is clear, (in view of the ample authority, judicial and academic, on the subject) that possession and occupation are two different things, at least in the law of occupiers' liability. They may, and do often, overlap; but they are, nonetheless, distinct concepts. Possession implies exclusive occupation; whereas the essence of occupation is a measure of control over the land that may well be short of exclusive.[4]

The standard textbooks acknowledge this dichotomy, yet a refusal to distinguish clearly between the possessor and the occupier of land has undoubtedly resulted in some confusion and unconscious identification of the two concepts. Thus *Clerk and Lindsell on Torts*,[5] following the definition of Lord Warrington in *Humphreys* v. *Dreamland (Margate) Ltd.*,[6] states that an occupier is one who "has the right to possession of the premises and the right to exclude therefrom all except those who come by his invitation or permission." The use of the term "possession" implies that an occupier is the person who is entitled to sue for a trespass or nuisance to the land. This, however, does not seem to be *Clerk and Lindsell's* intention, for the learned editors go on to discuss occupation in a factual and flexible sense alien to the law of trespass and nuisance, adopting Ashworth J.'s observation in *Creed* v. *McGeoch & Sons*[7] that finding the "occupier" in each case "depends on the particular facts of the case and especially on the nature and extent of the occupation or control in fact enjoyed or exercised by the defendants over the premises."

Trespass and nuisance (and, to a lesser degree, *Rylands* v. *Fletcher)* are proprietary torts; they protect the exclusive possession of land so that normally only the owner or tenant can sue. But this has no bearing on the law of occupiers' liability, which is concerned with imposing a duty of care on the person responsible for the safety of visitors on land, and the language of negligence is not the language of proprietory rights, but rather of the ability to prevent the injury. There is ample authority for the proposition that exclusive possession of land is not necessary to constitute an occupier.[8] But even in these cases the courts have been reluctant completely to abandon an old and familiar terminology; the decisions on the various fact-situations reveal that ownership or tenancy is not a *sine qua non* of occupation, yet the judgments constantly refer to the defendants' "possession and control", or their "right to invite, permit or exclude" visitors. We have already considered Lord Warrington's remarks in *Humphrey's* case, where a sideshow concessionaire, with no estate in the land, was held by the House of Lords to be the occupier of

4. *Cf.* the position in American law, where occupation seems to be equated with with possession. See *Restatement on Torts,* Chapter 13, which imposes liability on the "possessor" of land. "Possessor", however, is defined as "the person in occupation of land with intent to control it" (section 157), which may fall short of the English understanding of the concept of possession, which is based on the element of *exclusive* occupation or control.
5. (12th ed.) at p. 843.
6. (1930) 144 L.T. 529 at p. 531.
7. [1955] 1 W.L.R. 1005 at p. 1009.

the premises. In *Hartwell* v. *Grayson, Rollo and Clover Docks*[8] the Court of Appeal found that repairers on a ship could be occupiers; clearly they had no right to sue for trespass or nuisance,[9] yet both Bucknill L J. and Rexburgh L.J. emphasized possession as a criterion of occupation (as contrasted with Oaksey L.J., who adopted Lord Wright's definition of an occupier in *Glasgow Corporation* v. *Muir:* [10] "whosoever has control so far as material".)

Thus the courts, while allowing that an "occupier" is not necessarily the same person in the law of occupiers' liability as in the law of trespass and nuisance, have failed to make clear the dichotomy between the two branches of the law of torts. Instead, they have used the concept of possession as a crutch, evading, or perhaps not perceiving the need for a thorough analysis of the concept of occupation in its own right. So in *Murdoch* v. *Scott*[11] the Scottish Court of Session held contractors to be occupiers of a building site, on the grounds that the law of invitee, licensee and trespasser applied not only to the owner or tenant of heritable property, but to every occupier who exercised such a degree of possession and control as to be able to invite or license or forbid the entry of other persons. The significance of this approach is the emphasis on the power to invite, permit or exclude visitors;[12] for is it not well established that the only person entitled physically to eject a visitor is the possessor of the land ?[13] A possessor of land who is neither owner nor tenant could only be an adverse possessor, or that controversial figure in the law of property, the possessory licensee,[14] but it would be absurd to apply either description to the various creatures who have been held to be occupiers — side-show concessionaires, repairers and building contractors. For in truth, possession is an all-or-nothing concept; the defendants in the various cases cited earlier clearly did not have possession; and the notion of "degrees of possession" found in some cases is legally meaningless.

So until 1966 there seemed to be an inherent contradiction between the courts' decisions on the one hand and their reasoning on the other. Then came the climacteric case of *Wheat* v. *Lacons*.[15] In this case a public-house was owned by a brewery and run by a manager and his wife, who lived on the premises rent free and were allowed to take in paying guests in the private part of the premises. The terms of the manager's service agreement included a specific disclaimer of tenancy.

8. [1947] 1 K.B. 901; see also *Humphreys* v. *Dreamland (Margate) Ltd.* (1930) 144 L.T. 529; *Creed* v. *McGtoch & Sons* (1955) 1 W.L.R. 1005; *Murdoch* v. *Scott* (1956) S.C. 309.
9. "They may not have been entitled to exclude either the shipowners or even other contractors who might have had lawful business there." *(per* Oaksey L.J., [1947] K.B. 901 at pp. 913-4).
10. [1943] A.C. 448 at p. 462.
11. *Supra,* n. 8.
12. Even Oaksey L.J. in *Hartwell's* case, *ante,* who emphasized the factor of control as the criterion for occupation, agreed that the basis of occupiers' liability was the invitation or permission given to the visitor.
13. *Harrison* v. *Duke of Rutland* [1893] 1 Q.B. 142; *Dean* v. *Hogg* (1834) 10 Bing. 345.
14. See *Isaac* v. *Hotel De Paris* [1960] 1 W.L.R. 239; *Errington* v. *Errington* [1952] 1 K.B. 290.
15. [1966] 1 Q.B. 335 (C.A.); noted by R.C. Gardner in (1965) 28 M.L.R. 721; [1966] A.C. 552 (H.L.); noted by F.J. Odgers in (1966) 82 L.Q.R. 465.

The agreement also included a right on the part of the owner-brewers to enter the premises for the purpose of testing the beer, inspection and repair of the premises, though they did not in fact exercise any control over the way in which the manager used the private part of the premises. A paying guest of the manager fell down the staircase in the private part of the premises, and was killed. In an action brought under the Fatal Accidents Act[16] by his widow, the question arose, *(inter alia),* as to who was the occupier. Since the manager and his wife were not parties to the appeals, their status was not directly in issue, but all the judges felt that they were occupiers, except Lord Dilhorne, who reserved his opinion on this point.

In the Court of Appeal, a majority of the court held that the brewery was not in occupation, at least of the private part of the premises. But the actual decision is less significant than the language used by the court. The emphasis in all three judgments is on the notion of "control"; no more is it regarded merely as a modified form of possession, a poor cousin whose survival depends on its connexion with a better-known relation. "Possession" in relation to the law of occupiers' liability was put into its proper context by Diplock L.J.: [17]

> Thus the common law liability as 'occupier' is not based on proprietary interests in land nor on any technical doctrine of possession. It is based on the actual control of premises of which the ability to grant effective permission to another person to enter on and use the premises is itself a manifestation. The proprietory interest or the right to 'possession' of the person sought to be made liable as 'occupier' may well be collaterally relevant in determining whether he was in actual control if the permission to enter on and use the land on which reliance is placed was an implied permission or was granted by someone other than the person sued. For *prima fade* an interest in land in possession carries with it the right to actual control. Actual control may be exercised actively or passively; it is not parted with by merely doing nothing.

In the House of Lords this part of the decision was reversed, the law lords unanimously holding that the brewers were in occupation of the entire premises.[18] The Court of Appeal had done a service by clearly distinguishing "occupation" from "possession", but the majority had not been wide enough or flexible enough in its definition of an "occupier". In this perhaps the oft-quoted definition given by Salmond [19] — "(the occupier) is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons" — is partly

16. The action was brought under the English Occupiers' Liability Act, 1957, but the case is good authority even in those jurisdictions that still retain the common law rules of occupiers' liability, since s. 1(2) of the 1957 Act expressly enacts that the Act "shall not alter the common law as to the persons on whom a duty is so imposed or to whom it is owed: and accordingly .... 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."

17. [1966] 1 Q.B. 355 at p. 368.

18. The appeal was, however, dismissed, since the House of Lords considered that there had been no evidence of any breach of the brewers' duty as occupiers.

19. *Salmond on Torts* (14th ed.) p. 372. This passage, as the learned editor likes to remind us, was cited with approval in the following cases: *Hartwell* v. *Grayson, Rollo and Clover Docks* [1947] K.B. 901 at p. 917; *Napier* v. *Ryan* [1954] N.Z.L.R. 1234 at p. 1242; and *Nicholls* v. *Lyon* [1955] N.Z.L.R. 1097 at p. 1106.

to blame. Diplock L.J. expressly relied on it in this case,[20] but Lord Denning said:[21]

> There is no doubt that a person who fulfils this test) is an 'occupier'. He is the person who says 'come in'. But I think that that test is too narrow by far. There are other people who are 'occupiers', even though they do not say 'come in'. If a person has any degree of control over the state of the premises it is enough.

Lord Denning's own definition of an occupier was this: [22]

> Wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier'.

The other learned law lords did not discuss the definition of an occupier at such length, nor did any other law lord venture a rival or complementary definition, except possibly Lord Pearson, who described an occupier in terms of "occupational control".[23] Lord Dilhorne, Lord Morris of Borth-y-Gest, and Lord Pearce were more concerned with exploring a novel but more limited approach to the question — the concept of vicarious occupation: the servant manager may have been in occupation of the premises, but his occupation was on behalf of his master, the brewery, who was therefore also an "occupier".[24] But it is clear that these law lords were (for once) in substantial agreement with Lord Denning: "occupation" is to be defined in terms of control, not possession.[25]

In most cases, of course, the "occupier" will also be the "possessor" of the premises. The possessor will probably always have "occupation", since possession pre-supposes a certain amount of control, and, as Lord Denning puts it:[26] "If a person has any degree of control over premises it is enough." But we now know that an "occupier" need not have possession, and where he does not, it may be convenient to have a distinctive term for him to emphasize his lack of possession; and for the rest of this article he will be referred to as an *"ad hoc* occupier".

THE RATIONALE OF THE DEFINITION

Wheat v. *Lacons* is surely good sense as well as good law. The learned law lords have very firmly taken the subject of occupiers' liability out of the field of proprietory rights and put it where it belongs — under the aegis of the law of negligence. The reason for invoking the various categories of lawful and unlawful visitors is to impose a particular duty of care on the person in fact responsible for the condition of the premises. Proprietory rights have no logical connexion with the duty of care, for why should a property relationship determine a personal relationship?

20. [1966] 1 Q.B. 335 at p. 368.
21. [1966] A.C. 552 at pp. 578-9.
22. *Ibid*., at p. 578.
23. *Ibid*., at p. 589. See *post,* p. 73.
24. This line of argument is discussed by R.C. Gardner in (1965) 28 M.L.R. 721.
25. [1966] A.C. 552 at pp. 574, 583, 587, 589-90.
26. *Wheat* v. *Lacons* itself is a good example of this proposition.
27. [1966] A.C. 552 at p. 579.

The point seems elementary, yet only now has it been clearly recognised. It is sometimes said that differences over the juridical basis of the doctrine of frustration have not affected the actual decisions in the law of frustration. In the law of occupiers' liability, an erroneous juridical basis has led to self-contradiction in definition, and possibly to mistaken decisions.[28] The red herring in this saga seems to have been the concept of the right to invite, permit or exclude visitors; it has already been pointed out[29] that such a right inevitably invokes notions of proprietory rights. Such notions were completely dispelled by *Wheat* v. *Lacons.* In the Court of Appeal, Diplock L.J. shifted the emphasis from the *right* to permit to the *fact* of permission:[30]

> What creates the relationship between an 'occupier' and his invitee or licensee is a permission granted by the former to the latter to enter or use the premises .... A person using premises who seeks to establish that another person owes him the common duty of care[31] as 'occupier' must start by showing that such other person has given him permission to enter or use them .... I make a man who in fact enters or uses premises my neighbour by saying to him 'come in'. 'Come in', not merely 'go in', for it must, I think, also be shown that the person sought to be made liable as 'occupier' is he who opened the door — who was able to grant an effective permission either because he was entitled in law to control the use of the premises or because he did in fact control their use.

Clearly, Diplock L.J. was perfectly aware that occupiers' liability is part of the general law of negligence, not of the law of property. But he placed undue emphasis on the importance of permission, for, as he himself acknowledged:[32]

> .... the common law liability as 'occupier' is not based on proprietory interests in land nor on any technical doctrine of permission. It is based on the actual control of premises of which the ability to grant effective permission to another person to enter on and use the premises is itself a manifestation.

The matter was finally put on a completely logical basis in the House of Lords. We now know that the key to occupation is control. The rationale for this criterion is found in the speech of Lord Pearson:[33]

> The foundation of occupiers' liability is occupational control, i.e. control associated with and arising from presence in and use of or activity in the premises. In *Duncan* v. *Cammell Laird & Co. Ltd.,* Wrottesley J. said:[34] "it seems to me that the importance of establishing that the defendant who invites is the occupier of the premises lies in the fact that with occupation goes control. And the importance of control is that it affords the opportunity to know that the plaintiff is coming on to the premises, to know the premises, and to become aware of dangers whether concealed or not, and to remedy them, or at least to warn those that are invited on to the premises."

28. In view of *Wheat* v. *Lacons* some of the cases where the defendant has been held to be a non-occupier of premises may have to be re-considered, e.g. *Davis* v. *St Mary's Demolition Co.* [1954] 1 W.L.R. 502, and the other contractor cases.
29. *Ante,* p. 70.
30. [1966] 1 Q.B. 335 at p. 367.
31. In Malaysia and Singapore, of course, the "common duty of care" does not apply as such, though it is arguable tha it is not very different from the common law duties owed to invites and licensees, which are gradually being merged into one general duty of care.
32. [1966] 1 Q.B. 335 at p. 368.
33. [1966] A.C. 552 at p. 589.
34. [1943] 2 All E.R. 621 at p. 627.

This approach was confirmed by the Judicial Committee of the Privy Council in *Commissioner for Railways* v. *McDermott*:[35]

> The basic principle is that occupation of premises is a ground of liability and not a ground of exemption from liability. It is a ground of liability because it gives some control over and knowledge of the state of the premises.[36]

THE "OCCUPIER" IN NUISANCE AND RYLANDS v. FLETCHER

It may be noted, in passing, that an "occupier" may be liable, not only for negligence, but also for nuisance. Liability for nuisance by misfeasance is, of course, imposed on the creator of the nuisance, regardless of his status, but liability for nuisance is generally only directed at the occupier of premises. Although the textbooks use the term "occupier" to denote both the person entitled to sue for a private nuisance and the person liable for it under the rule in *Sedleigh-Denfield* v. *O'Callaghan,*[37] it is clear that the two terms cannot be equated. Nuisance is a proprietory tort; thus it is only available as a remedy to the person in actual possession of the premises;[38] but liability in nuisance, particularly for non-feasance is increasingly becoming based on negligence,[39] where it is factual control that alone is relevant.

The rationale of an "occupier's" liability in nuisance was stated as long ago as 1826: "I have the control and management of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another." [40] Is not this the language of negligence? Thus, "some degree of personal responsibility is required" [41] for liability; and an occupier who has no power over the nuisance which he has not created is not liable for it.[42] The "occupier" for the purposes of liability in nuisance is clearly also the person who will be sued if someone is injured *on* the premises.[43]

It follows that the same must be true of the rule in *Rylands* v. *Fletcher.* The better view is that only the person in possession of land is entitled to sue,[44] but anyone may be liable so long as he introduced the dangerous substance and had control of it at the time of the escape; liability is dependent on control.[45]

35. [1967] 1 A.C. 169 at p. 186. *(per* Lord Gardiner, L.C.).
36. *Cf.* the American view that "the basis of (an invitor's) duty is not any economic benefit to the occupier, but a representation to be implied when he encourages others to enter to further a purpose of his own, that reasonable care has been exercised to make the place safe for those who come for that purpose." *(Prosser on Torts,* (3rd ed.), p. 398).
37. *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880. A landlord out of possession may also in certain circumstances be liable.
38. *Malone* v. *Laskey* [1907] 2 K.B. 141.
39. See, e.g., *The Wagon Mound No. 2* [1967] 1 A.C. 617, and *Goldman* v. *Hargrave* [1967] 1 A.C. 645.
40. *Per* Abbott C.J. in *Laugher* v. *Pointer* (1826) 5 B & C 547 at p. 576.
41. *Per* Lord Atkin in *Sedleigh-Denfield's Case, supra,* at p. 897.
42. *Hall* v. *Beckenham Corporation* [1949] 1 K.B. 716.
43. In Wright's *Cases on the Law of Torts* (4th ed.), the chapter on occupiers' liability covers both negligence and nuisance.
44. See, however, *Shiffman* v. *Order of St. John* [1936] 1 All E.R. 579, and *Charing Cross Electric Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K.B. 772.
45. *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* [1921] 2 A.C. 465 at p. 479 (per Lord Sumner).

THE EFFECT OF WHEAT v. LACONS ON THE CATEGORIES OF VISITORS

It may not be realized that *Wheat* v. *Lacons* has an immediate implication for the law of occupiers and trespassers. The more flexible definition of "occupier" is bad news for trespassers, since it will be now more difficult to establish in cases similar to *Buckland* v. *Guildford Gas Light & Coke* Co.[46] and *Davis* v. *St. Mary's Demolition* Co.[47] that the defendants were non-occupiers, and as such owed the "trespassers" a proper duty of care. Thus one means of escape from the decision in *Commissioner for Railways* v. *Quinlan*[48] has been made more difficult.

Wheat v. *Lacons* has also raised some new and serious problems about the definition of the various categories of visitors to premises. The traditional method of defining invitees, licensees and trespassers has been to examine their relationship with the "occupier". These creatures are people who are on the premises with or without the consent of the "occupier", and the particular duty (or lack of it) owing to them depends on the desirability of their presence *vis-a-vis* the "occupier". This was never considered a problem in the days when the conceptions of occupation were hazy;[49] although there was an ostensible recognition of the difference between "possessor" and "occupier", there was nonetheless an instinctive feeling that the man in possession determined the category in which his visitors fell. This has been particularly true of the concept of "trespasser": possibly, in a society traditionally oriented in favour of landowners, the term "trespasser" arouses such strong implications of violation of property rights that it has been difficult to think of a "trespasser" other than in terms of the law of trespass.[50]

But now that the distinction between "possession" and "occupation" has been made crystal-clear, how are invitees, licensees and trespassers to be defined? Is the invitation, permission or exclusion to come from the possessor or the occupier? The problem only arises when there is one person in possession and another in occupation, i.e. an *ad hoc* occupier. The proposition has earlier been advanced that the possessor will always be an occupier, so that where there is also an *ad hoc* occupier, there will be dual occupation of the premises. However, the possessor in such a case may well be a "passive" occupier, with little or no factual connexion with the premises, leaving the *ad hoc* occupier in substantial control. It is clear from the speeches in *Wheat* v. *Lacons* that, where there is dual occupation, the duties of the occupiers will not necessarily be the same; the extent of the duty will vary according to the degree of control exer-

46. [1948] 2 All E.R. 1086.

47. [1954] 1 All E.R. 578.

48. [1964] A.C. 1054.

49. See, e.g. MacKinnon L.J. in *Ellis* v. *Fulham B.C.* [1938] 1 K.B. 212 at p. 231; "We all know what trespassers are, and that category is clear."

50. Thus, Lord Dunedin in *Addie* v. *Dumbreck* [1929] A.C. 358 — the seminal case on the occupier's duty to a trespasser — defined a trespasser for the purposes of occupiers' liability as "one who goes on the land without invitation of any sort and whose presence is either unknown to the *proprietor,* or, if known is practically objected to." (at p. 371, italics added). *Cf. Charlesworth on Negligence* (4th ed.), p. 215, which defines a trespasser in the chapter on occupiers' liability as "one who wrongfully enters on land in the *possession* of another, and has neither right nor permission to be on the land." (italics added).

cised.[51] This means that there will be cases where a visitor injured on premises may recover damages against one occupier but not against the other. In such a case, are we to say that the possessor — the "passive" occupier — is to remain the pivotal figure in the categorization of visitors? If so, the situation could arise whereby an *ad hoc* occupier owed:

(a) a duty of care to a visitor in whose visit he had no material interest;

(b) a duty of warning against concealed dangers to a visitor who has not obtained his permission to enter;

(c) no duty of care to a visitor whom he has no right to exclude, and whom he may actually have invited onto the premises.

The position is much more simple in cases of vicarious occupation, i.e. where the *ad hoc* occupier is in occupation of premises on behalf of his master. The law of occupiers' liability in such cases merges with the law of master and servant, in particular the rule that a master is bound by any act of his servant within the scope of the latter's authority, actual, implied or ostensible. Thus, an *ad hoc* servant-occupier will be able to decide into which category visitors fall, provided such decisions are within the scope of his authority. This proposition is illustrated by two cases. In *Hillen* v. *I.C.I, (Alkali) Ltd.*,[52] the crew of a barge invited stevedores to unload cargo in a dangerous and prohibited way, as a result of which the hatches collapsed, injuring the plaintiff stevedores. The House of Lords held that the plaintiffs had no cause of action against the crew's employers, the occupiers of the barge, because the crew had no authority to invite the plaintiffs to use the hatch covers in an unusual manner; the plaintiffs were therefore, in using the hatch covers in the manner they did, trespassers, and, as such, were owed no duty of care. In the well-known case of *Conway* v. *Wimpey (George) Ltd.*,[53] this principle was applied to the case of a servant driver who was in the habit of giving lifts to workmen employed by other contractors on the premises; there it was held by the Court of Appeal that such workmen were trespassers on the vehicles for the purposes of a suit in negligence, because the servant's action went beyond the scope of his ostensible authority.[54] It follows that, had the permission given by the servants been within the scope of their authority, their masters would have been disentitled from contradicting or overriding this permission in a subsequent action for breach of occupiers' duty.

51. Apportionment of responsibility between two occupiers is possible because the occupier's "common duty of care" is defined as "such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe . . . ." It remains to be seen whether such apportionment will be possible in common law jurisdictions that have not adopted the 1957 Act.

52. [1936] A.C. 65.

53. [1951] 2 K.B. 266; *cf. Mountney* v. *Smith* (1904) C.L.R. 149.

54. In both these cases, of course, the occupational status of the servants was not in issue, but it is submitted that the decisions would have been the same even if they had been found to be occupiers. At any rate, the importance of these cases is that they show that the principle of a servant's scope of authority is applicable in an occupier-visitor situation.

However, there can be dual occupation without vicarious occupation. Such is the case where the possessor of land grants another party a licence to use the premises not amounting to a lease; there are then two independent occupiers.[55] In this situation, how are invitees, licensees and trespassers to be defined? Is the relationship with either occupier or with both? What if a visitor were conferring a material benefit on one occupier but not on the other? Is he an invitee *vis-a-vis* one occupier and licensee *vis-a-vis* the other? Or what if the permission of one occupier directly contradicts the prohibition of the other? Or if one occupier enters the premises against the will of the other?

Where there is conflict between the occupiers as to the status of a particular visitor, the issue may be resolved by a rule of estoppel. It could be argued that, as far as the third party is concerned, an *ad hoc* occupier must be the person to determine the visitor's categorization, for, by vesting such control in him so as to make him an *ad hoc* occupier, the possessor-occupier has impliedly delegated (or at least shared) his right to admit or exclude, and is estopped from contradicting the *ad hoc* occupier's categorization:[56] But it could equally be argued that the possessor-occupier has the ultimate right of deciding who is a trespasser, for the *ad hoc* occupier derives his control of the premises from the possessor-occupier.

This latter argument comes dangerously close to re-asserting the importance of proprietory rights in the law of negligence, but it would not involve a re-definition of invitees, licensees and trespassers, and for this reason it may be the line that the courts will ultimately adopt.

But a logical solution should be preferred to the expedient, and logic demands that categorization of visitors should be made by reference to the person to whom responsibility for the safe condition of the premises will ultimately attach — and in most cases this person will be the *ad hoc* occupier. The estoppel theory, even if accepted judicially, will not cover all fact-situations: perhaps the categorization of individual visitors will, in the final analysis, depend on a consideration of all the circumstances of the case — which occupier is being sued? What is the extent of his occupation and responsibility in relation to the particular injury suffered? What was his connexion with the visit? If this line of reasoning is pursued, it seems that *Wheat* v. *Lacons* has introduced us not only to an *ad hoc* occupier, but to his siblings, the *ad hoc* invitee, *ad hoc* licensee and *ad hoc* trespasser, as well.

CONCLUSION

It may be thought, after all this, that *Wheat* v. *Lacons* has been something of a Pandora's Box, opening up a host of complexities where none existed (or at least remained hidden) before. The old law, albeit confused, was at least uncomplicated. Possibly, then, it will not be practicable to adopt a completely factual approach to the law of occupiers' liability.

55. See *Fisher* v. *C.H.T. Ltd.* (No. 2) [1966] 2 Q.B. 475.

56. *Cf.* the doctrine of ostensible authority, which is also based on estoppel.

It is submitted that the present difficulties are due to the fact that the categories of visitors themselves are tied to concepts of proprietorship, and cannot really be reconciled with the new definition of "occupier". It is impossible to define proprietory concepts in the language of negligence, and any attempt to do so must result in confusion and contradiction. The law of occupiers' liability has now fallen dismally between two stools; once the term "occupier" had severed its connexions with possession, the categories of invitee, licensee and trespasser ceased to be meaningful or useful concepts.

The only way out of the muddle, it is submitted, is for the legislature to adopt the "common duty of care", not as it exists in England, but the Scottish version. Under the Scottish Occupiers' Liability Act, 1960, a single duty of care is owed to all visitors to the premises, be they invitees, licensees or trespassers at common law. This does not mean (as is sometimes assumed) that there is a uniform *standard* of care owed to all visitors; for the "common duty of care" is defined as "such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage"; and "all the circumstances" must include the nature and purpose of the visit.[57] The Scottish Act has virtually assimilated the law of occupiers' liability into the general law of negligence; and only when a similar Act is enacted in Singapore and Malaysia[58] will clarity, logic and common sense [59] return to the law of occupiers' liability.

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57. An important case on the application of this Act to trespassers is *McGlone* v. *British Railways Board,* "The Times"' 28th October, 1965 (H.L.).

58. The law of occupiers' liability prevailing in both jurisdictions is that of the common law.

59. "There is no room today for mystique in the law of negligence. It is the application of common morality and common sense to the activities of the common man." *(per* Diplock L.J. in *Doughty* v. *Turner Manufacturing Co.* [1964] 1 Q.B. 518 at p. 531).

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