# Judges, child trespassers and occupiers' liability in the built environment

BENNETT, L. <http://orcid.org/0000-0001-6416-3755>


COBRA2010
2nd - 3rd September


RICS
the mark of
property
professionalism
worldwide


DAUPHINE
UNIVERSITÉ PARIS

# COBRA 2010

## The Construction, Building and Real Estate Research Conference of the Royal Institution of Chartered Surveyors

## Held at Dauphine Université, Paris, 2-3 September 2010

ISBN 978-1-84219-619-9



12 Great George Street
London SW1P 3AD
United Kingdom

www.rics.org/cobra

September 2010

The RICS COBRA Conference is held annually. The aim of COBRA is to provide a platform for the dissemination of original research and new developments within the specific disciplines, sub-disciplines or field of study of:

**Management of the construction process**

- Cost and value management
- Building technology
- Legal aspects of construction and procurement
- Public private partnerships
- Health and safety
- Procurement
- Risk management
- Project management

**The built asset**

- Property investment theory and practice
- Indirect property investment
- Property market forecasting
- Property pricing and appraisal
- Law of property, housing and land use planning
- Urban development
- Planning and property markets
- Financial analysis of the property market and property assets
- The dynamics of residential property markets
- Global comparative analysis of property markets
- Building occupation
- Sustainability and real estate
- Sustainability and environmental law
- Building performance

**The property industry**

- Information technology
- Innovation in education and training
- Human and organisational aspects of the industry
- Alternative dispute resolution and conflict management
- Professional education and training

**Peer review process**

All papers submitted to COBRA were subjected to a double-blind (peer review) refereeing process. Referees were drawn from an expert panel, representing respected academics from the construction and building research community. The conference organisers wish to extend their appreciation to the following members of the panel for their work, which is invaluable to the success of COBRA.

| | |
|---|---|
| Rifat Akbiyikli | Sakarya University, Turkey |
| Rafid Al Khaddar | Liverpool John Moores University, UK |
| Ahmed Al Shamma'a | Liverpool John Moores University, UK |
| Tony Auchterlounie | University of Bolton, UK |
| Kwasi Gyau Baffour Awuah | University of Wolverhampton, UK |
| | |
| Kabir Bala | Ahmadu Bello University, Nigeria |
| Juerg Bernet | Danube University Krems, Austria |
| John Boon | UNITEC, New Zealand |
| Douw Boshoff | University of Pretoria, South Africa |
| Richard Burt | Auburn University, USA |
| | |
| Judith Callanan | RMIT University, Australia |
| Kate Carter | Heriot-Watt University, UK |
| Keith Cattell | University of Cape Town, South Africa |
| Antoinette Charles | Glasgow Caledonian University, UK |
| Fiona Cheung | Queensland University of Technology, Australia |
| Sai On Cheung | City University of Hong Kong |
| Samuel Chikafalimani | University of Pretoria, South Africa |
| Ifte Choudhury | Texas A and M University, USA |
| Chris Cloete | University of Pretoria, South Africa |
| Alan Coday | Anglia Ruskin University, UK |
| Michael Coffey | Anglia Ruskin University, UK |
| Nigel Craig | Glasgow Caledonian University, UK |
| | |
| Ayirebi Dansoh | KNUST, Ghana |
| Peter Davis | Curtin University, Australia |
| Peter Defoe | Calford Seaden, UK |
| Grace Ding | University of Technology Sydney, Australia |
| Hemanta Doloi | University of Melbourne, Australia |
| John Dye | TPS Consult, UK |
| | |
| Peter Edwards | RMIT, Australia |
| Charles Egbu | University of Salford, UK |
| | |
| Ola Fagbenle | Covenant University, Nigeria |
| Ben Farrow | Auburn University, USA |
| Peter Fenn | University of Manchester, UK |
| Peter Fewings | University of the West of England, UK |

| | |
|---|---|
| Michael Murray | University of Strathclyde, UK |
| Saka Najimu | Glasgow Caledonian University, UK |
| Stanley Njuangang | University of Central Lancashire, UK |
| Henry Odeyinka | University of Ulster, UK |
| Ayodejo Ojo | Ministry of National Development, Seychelles |
| Michael Oladokun | University of Uyo, Nigeria |
| Alfred Olatunji | Newcastle University, Australia |
| Austin Otegbulu | |
| Beliz Ozorhon | Bogazici University, Turkey |
| Obinna Ozumba | University of the Witwatersrand, South Africa |
| Robert Pearl | University of KwaZulu, Natal, South Africa |
| Srinath Perera | Northumbria University, UK |
| Joanna Poon | Nottingham Trent University, UK |
| Keith Potts | University of Wolverhampton, UK |
| Elena de la Poza Plaza | Universidad Politécnica de Valencia, Spain |
| Matthijs Prins | Delft University of Technology, The Netherlands |
| Hendrik Prinsloo | University of Pretoria, South Africa |
| Richard Reed | Deakin University, Australia |
| Zhaomin Ren | University of Glamorgan, UK |
| Herbert Robinson | London South Bank University, UK |
| Kathryn Robson | RMIT, Australia |
| Simon Robson | University of Northumbria, UK |
| David Root | University of Cape Town, South Africa |
| Kathy Roper | Georgia Institute of Technology, USA |
| Steve Rowlinson | University of Hong Kong, Hong Kong |
| Paul Royston | Nottingham Trent University, UK |
| Paul Ryall | University of Glamorgan, UK |
| Amrit Sagoo | Coventry University, UK |
| Alfredo Serpell | Pontificia Universidad Católica de Chile, Chile |
| Winston Shakantu | Nelson Mandela Metropolitan University, South Africa |
| Yvonne Simpson | University of Greenwich, UK |
| John Smallwood | Nelson Mandela Metropolitan University, South Africa |
| Heather Smeaton-Webb | MUJV Ltd. UK |
| Bruce Smith | Auburn University, USA |
| Melanie Smith | Leeds Metropolitan University, UK |
| Hedley Smyth | University College London, UK |
| John Spillane | Queen's University Belfast, UK |
| Suresh Subashini | University of Wolverhampton, UK |
| Kenneth Sullivan | Arizona State University, USA |
| Joe Tah | Oxford Brookes University, UK |
| Derek Thomson | Heriot-Watt University, UK |
| Matthew Tucker | Liverpool John Moores University, UK |
| Chika Udeaja | Northumbria University, UK |
| Basie Verster | University of the Free State, South Africa |
| Francois Viruly | University of the Witwatersrand, South Africa |
| John Wall | Waterford Institute of Technology, Ireland |
| Sara Wilkinson | Deakin University, Australia |
| Trefor Williams | University of Glamorgan, UK |

| | |
|---|---|
| Bimbo Windapo | University of Cape Town, South Africa |
| Francis Wong | Hong Kong Polytechnic University |
| Ing Liang Wong | Glasgow Caledonian University, UK |
| Andrew Wright | De Montfort University, UK |
| Peter Wyatt | University of Reading, UK |
| | |
| Junli Yang | University of Westminster, UK |
| Wan Zahari Wan Yusoff | Universiti Tun Hussein Onn Malaysia, Malaysia |
| | |
| George Zillante | University of South Australia |
| Benita Zulch | University of the Free State, South Africa |
| Sam Zulu | Leeds Metropolitan University, UK |

**In addition to this, the following specialist panel of peer-review experts assessed papers for the COBRA session arranged by CIB W113**

| | |
|---|---|
| John Adriaanse | London South Bank University, UK |
| Julie Adshead | University of Salford, UK |
| Alison Ahearn | Imperial College London, UK |
| Rachelle Alterman | Technion, Israel |
| Deniz Artan Ilter | Istanbul Technical University, Turkey |
| | |
| Jane Ball | University of Sheffield, UK |
| Luke Bennett | Sheffield Hallam University, UK |
| Michael Brand | University of New South Wales, Australia |
| Penny Brooker | University of Wolverhampton, UK |
| | |
| Alice Christudason | National University of Singapore |
| Paul Chynoweth | University of Salford, UK |
| Sai On Cheung | City University of Hong Kong |
| Julie Cross | University of Salford, UK |
| | |
| Melissa Daigneault | Texas A&M University, USA |
| Steve Donohoe | University of Plymouth, UK |
| | |
| Ari Ekroos | University of Helsinki, Finland |
| | |
| Tilak Ginige | Bournemouth University, UK |
| Martin Green | Leeds Metropolitan University, UK |
| David Greenwood | Northumbria University, UK |
| Asanga Gunawansa | National University of Singapore |
| | |
| Jan-Bertram Hillig | University of Reading, UK |
| Rob Home | Anglia Ruskin University, UK |
| | |
| Peter Kennedy | Glasgow Caledonian University, UK |
| | |
| Anthony Lavers | Keating Chambers, UK |
| Wayne Lord | Loughborough University, UK |
| Sarah Lupton | Cardiff University |
| | |
| Tim McLernon | University of Ulster, UK |
| Frits Meijer | TU Delft, The Netherlands |
| Jim Mason | University of the West of England, UK |
| Brodie McAdam | University of Salford, UK |
| Tinus Maritz | University of Pretoria, South Africa |

# Judges, child trespassers and occupiers' liability in the built environment

**Luke Bennett** [1]

[1] Department of the Built Environment,

Sheffield Hallam University, Sheffield, S1 1WB,

United Kingdom

*Email: l.e.bennett@shu.ac.uk*

**Abstract:**

This paper analyses how the doctrine of occupiers' liability for the safety of child trespassers has been developed in English Law over the last 100 years by applying Pierre Bourdieu's theorising on the operation of the 'juridical field' (Bourdieu 1987). The analysis traces the evolution across the 'no duty' dictum of *Robert Addie & Sons (Collieries) –v- Dumbreck* (1929)[1], the 'duty of humanity' advanced in *British Railways Board –v- Herrington* (1972)[2], the qualified duty of care introduced by the Occupiers Liability Act 1984 following the Law Commission, *Report on Liability for Damage or Injury to Trespassers*, Cmnd 6428 (1976) and the subsequent interpretation of that duty in case law such as *Tomlinson –v- Congleton Borough Council (2002)*[3] and *Mann v Northern Electric Distribution Ltd* (2010)[4]. The paper analyses the ways in which the judiciary's operation as an 'interpretive community' (Fish, 1980; 1989) has steered this evolution and the ways in which external, supra-juridical, factors have also influenced how occupiers' liability law has been interpreted and applied. The analysis is based upon a doctrinal and narrative analysis of the key cases, policy and legislative instalments. This analysis includes assessment of how child trespassers have been

[1] (1929) AC 358, HL.

[2] (1972) AC 877, HL.

[3] (2002) EWCA Civ 309, HL

[4] (2010) EWCA Civ 141, CA.

depicted and their motivations interpreted by English judges; evaluation of the impact of the 1984 Act; the influence of parallel developments in other common law jurisdictions and the interaction of occupiers' liability law with other 'safety' based legislation. The analysis shows how within the broad policy and legal framework set by legislators, the common law and the 1957 and 1984 Occupiers' Liability Acts, the courts have marked out (and pragmatically adjusted) the limits of the 'reasonable' safety provision required of occupiers for lawful visitors and trespassers.

**Keywords**:

*Occupiers' Liability – Trespass – Safety – Estate Management – Interpretive Communities- Pierre Bourdieu – Sociology of Law*

## 1. Introduction

Does an occupier owe any duty to safeguard child trespassers who may come upon his land or structures? This question is easily stated – but has taxed the courts for over 100 years. This paper considers how the appellate courts in the United Kingdom have sought to find an answer to this question.

This study forms part of a wider project seeking to understand how various stakeholders (e.g. occupiers, land agents, trespassers and regulators) each seek stable and workable interpretations on what the law requires of them in this area of law (Bennett & Crowe 2008; Bennett 2009; Bennett & Gibbeson 2010). For, in this arena, each lay 'interpretive community' (Fish 1980; 1989) starts with the same awareness of the broad principles – that an occupier owes a duty of care towards lawful visitors and something similar to foreseeable trespassers in proximity to foreseeable danger – and then must develop and apply its own pragmatic and approximate interpretation of what that means in practical terms for its community.

To support this wider project this paper seeks to achieve two outcomes. First, to provide a concise summary of the doctrinal evolution of the law in this area. And secondly, to consider how the appellate judiciary have themselves operated as one such 'interpretive community' in developing their own interpretation of how these legal principles should properly be applied in cases before them. This second layer of analysis will draw upon, and seek to empirically illustrate, Pierre Bourdieu's theorising of the operation of the 'juridical field' (Bourdieu

1987). In each case the analysis is confined to the 'problem' of child trespass to make the task manageable and because the child trespass has proved a particularly active and emotive part of the wider field of occupier liability for trespassers per se.

This paper's analysis will specifically consider the following questions:

- Has there been a neat linear evolution in the law of occupiers' liability as regards child trespassers over the last 100 years? – and, if so, has this seen unequivocal humanisation of the doctrines, with an ever greater level of duty arising?;
- What has remained *constant* within this judicial discourse? In considering the operation of the appellate judiciary as an interpretive community we need to assess continuities as well as changes; and
- What does this likely mix of change and constancy tell us about the dynamic interplay of law with wider political, social and economic factors such as anxieties about parenting, safety and change within the built environment?

To achieve this 'dual-purpose' analysis this paper sets out a brief summary of the 'trajectory' of this area of law over the last 100 years before then drilling into the specific milestones of this 'story' in greater detail. Following this, the analysis will consider the cross-cutting themes of 'constancy' and 'context' which endure or otherwise interact with this narrative.

Before commencing this journey, a few words on methodology are appropriate. The author is a lawyer by profession, but one with a strong sociological orientation. This paper's primary aim is not to discover what the law is now, or was in the past – but rather to use aspects of legal historical and doctrinal analysis in support of a wider consideration of how the evolution of the doctrine has occurred within the juridical field. For Bourdieu, the juridical field is a "social universe" (816) in which law, lawyers and lawyering achieve an enduring discourse in which individual actors both shape, and are shaped by their community of knowledge and practice. But, importantly, the juridical field is not solely inhabited by law and law principles (that is, the conventional realm of jurisprudence) but instead it is constantly interacting with and existing by means of social, economic, psychological and linguistic practices within and beyond the field.

This paper is based upon a study of appellate court reported judgments, legal journal articles, law reform reports and wider policy and stakeholder debates. Inevitably Court of Appeal and House of Lords decisions play a significant part in this source material, and it should be plainly stated, and following Simpson (1996), that judicial cognition does not only take place within the appellate courts – the law is interpreted by lawyers advising their clients and by judges in unreported first instance decisions. In these other (harder to access) sources lie the day to day application and well trodden path following behaviours that make up the 'day-to-day' lived reality of the law (what Bourdieu would style law's *'habitus'*). But this paper seeks to show that *habitus* can also be detected at work within the appellate courts.

## 2. The story in outline

Text-book accounts of the development of legal principles in English Law concerning occupiers' liability towards child trespassers have it that the last 100 years have seen a "humanising" trend, starting from a "draconian"[5] position "derived from the nineteenth century moral judgment that a trespasser was deserving of his plight" (Markesinis & Deakin 1999: 327), a doctrine rooted in an "an over-zealous preoccupation with the sanctity of real property rights, even over that of human life." (OLRC, 1972: 6-7). The 1929 House of Lords judgement in *Addie*[6] is vilified as symptomatic of this attitude – a decision finding no duty owed by a mine owner to a four year old child trespasser fatally crushed by a spoil conveyor on its site, because the common law was held in that case to offer no duty of care to a trespasser. Their Lordships had thus upheld a view that liability (if any) was dependent upon a "technical question of the capacity of the injured: invitee, licensee, trespasser"[7].

In 1957, at the recommendation of the Law Review Committee, the principles of occupiers' liability for lawful visitors were codified in the Occupiers Liability Act 1957, removing a differentiation of levels of duty as between various types of invitee and licensee and replacing these with declaration of a "common duty of care" to be owned by occupiers to all lawful visitors – but the common law was left uncodified as regards (any) duty to trespassers.

[5] Per Lord Diplock in (1972) *British Railways Board –v- Herrington* A.C. 877, HL at 931.

[6] *Robert Addie and Sons (Collieries) Limited –v- Dumbreck* (1929) A.C. 358, HL.

[7] Per Lord Hailsham in (1972) *British Railways Board –v- Herrington* A.C. 877, HL at 924.

In 1972 the House of Lords, in *British Railways Board –v- Herrington*[8] overruled *Addie* and, in a spirit of modernisation, and self-declared "humanisation" of the common law on this question, held that circumstances could arise in which an occupier would owe a "common duty of humanity" to a trespasser. However, due to concerns about how the five Law Lords had variously defined that possibility, the Law Commission was asked to examine the law and submitted its recommendation for codification of the principles of occupiers' liability to trespassers in 1976. In 1984 a modified version of the Law Commission's proposals was enacted, as the Occupiers' Liability Act 1984 setting the current basis for occupier liability towards trespassers and other uninvited visitors (and whether adult or child).

The aim of this paper is not to fundamentally challenge the accuracy of this "story" – but rather to show the relevance of some of the subtleties, continuities and changes that lie beneath the surface.

## 3. The law at the start of the 20th century

Prior to *Donoghue –v- Stevenson* (1932)[9] there was no notion of a singular, generic, duty of care applicable to all circumstances. Duties of care were identified on a case by case basis. Therefore, unsurprisingly, questions of whether a duty existed as regards various types of injury suffered by persons visiting premises were regarded as self-contained areas of jurisprudence. In the case of visitors to land, these incidents involved real property and the primary question appeared a property law one: whether an owner should have unfettered entitlement to enjoy his property without interference or duty to others. In this context contemplation of liability to trespassers was indeed viewed from a "property rights" perspective.

In 1902 the harshness of the doctrine – that a trespasser must take the land as they find it and cannot complain about it to the owner - was reaffirmed in *Devlin –v- Jeffray's Trustee*[10]. In this case a six year old child fell into an unfenced clay pit 25 yards from a public road and was drowned. The court held there was no liability for the occupier – as presence of a danger

[8] A.C. 877, HL.

[9] AC 562, HL.

[10] (1902) 5 F. 130

was not, in itself, sufficient – there had to be an invitation (or allurement) to come onto the land and suffer that fate.

The doctrine of 'allurement' had developed during the nineteenth century as an attempt to provide some protection for child trespassers, expressing a judicial view of what motivates children to trespass which we will consider further later in this paper. The allurement doctrine held that some features may beguile a child into straying onto someone's land, and that occupiers' must therefore anticipate (in certain circumstances) that the nature of those features may give rise to some form of duty towards a child trespasser (but not to an adult – the allurement doctrine only applied to children).

The first 20 years of the twentieth century saw a plethora of appellate decisions in cases concerning injury or deaths to child trespassers. Many of these cases were Scottish in origin, possibly reflecting the prevalence of jury trials in that jurisdiction in such claims and/or reflecting a perceived need to find opportunity to develop a particularly dour approach to child trespass seen to be characterisitic of Scots law at the time, encapsulated (in many aspects) by Hamilton LJ, who said in *Latham –v- R.Johnston & Nephew Ltd* (1913)[11]:

> "Children's cases are always troublesome. English law has been very ready to find remedies for their injuries. Scotch law has been less indulgent…it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes…**"**:

*Addie* was viewed by the judiciary as an opportunity to address a prior drift away from a clear statement of principle. The House of Lord's decision in the Irish case, *Cooke –v- Midland Great Western Railway of Ireland* (1909)[12] had caused concern by appearing to impose a liability upon occupiers for children known to play upon (or in the vicinity of) industrial machinery (in this case a railway turntable). Liability had been imposed on the railway company on the basis that it had granted an implied licence to the boy injured whilst playing on that equipment because it had failed to effectively exclude the boy and his friends from that location. Subsequent cases (like *Latham*) had sought to distinguish *Cooke* on its facts.

[11] 1 KBD 398, CA at 413

[12] A.C. 229, HL.

The Law Lords needed to be strong in their ruling if the feared effect of *Cooke* was to be resisted. Accordingly, in *Addie* Lord Hailsham declared (at 365):

> "Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger."

*Addie* was not, however, followed in *Excelsior Wire Rope Co Ltd -v- Callan* (1930)[13], in which the House of Lords found the operator of a haulage conveyor liable for fatal injury caused to a five year old child trespasser playing upon that equipment. Subsequent commentators have struggled to see the factual differences that their Lordships claimed justified departure from *Addie.* However, *Excelsior* did not overrule *Addie*, and it was *Addie* that came to be regarded as encapsulating the general rule. Accordingly cases in the inter-war years tended to deny liability – finding the cause of danger to be evident, not an allurement and thereby something that a trespasser should take "at his own risk"[14].

## 4. The move towards 'humanisation'

In 1952 the Law Reform Committee (a precursor to the Law Commission) was asked to examine occupiers' liability law, and to propose codification if it considered that appropriate, which it did. However, as regards liability towards trespassers the Committee declared themselves happy with the existing common law rule, although, as Heuston (1955: 271) noted, a minority of the Committee appear to have favoured a relaxation of the doctrine re: child trespassers but did not hold out for this.

Whilst the resulting (for England & Wales) Occupiers' Liability Act 1957 therefore applied codification only to lawful visitors, the codification undertaken in Scotland (the Occupiers' Liability (Scotland) Act 1960) made no distinction between invited and uninvited visitors, instead imposing a duty towards all persons entering premises, that duty being "such care as in all the circumstances as is reasonable" (Section 2(1)). Whilst the Act[15] appeared to have intended (unlike the 1957 Act) only to have codified the *standard* of care – rather than altered

[13] AC 404, HL.

[14] Per Murphy LJ in *McLaughlin –v- Antrim Electricity Supply Co.* (1941) NI 23, CA; see also *Morley –v- Staffordshire County Council* (1939) 4 All ER 92, CA.

[15] See specifically, Section 1(2).

common law rules for the identification of who had the benefit of these duties, the 1960 Act was subsequently called in aid by judges pressing for reform of the liability situation regarding trespassers in England, as we will see below. It appears that the 1960 Act did not trouble the House of Lords' traditionalist approach to a trespasser injury claim in *McGlone –v- British Railways Board* (1966) [16]in which Lord Reid – despite the wide duty imposed by the 1960 Act – decided that the circumstances of the case showed that the occupier had fulfilled his statutory duty to act reasonably "if he erects an obstacle which a boy must take some trouble to overcome before he can reach the dangerous apparatus."

Elsewhere, attempts were made during the 1960s to revisit the base principles, for example Denning MR's attempts to restate the law around principles of foreseeability in *Videan –v- British Transport Commission* (1963)[17]: such that if the presence of the trespasser was foreseeable then a duty of care would be owed. Attempts had also been made (rather unsuccessfully) to develop a distinction between 'active' and 'static' liability – that a difference in duty or standard of care might lie in examining whether the occupier was 'simply' occupying land or 'actively' carrying out some operation upon it, an early example being *Davis –v- St Mary's Demolition & Excavation Co* (1954)[18].

But it was *Herrington* that finally saw *Addie* assailed. We will discuss in more detail below how the judiciary (in both the Court of Appeal[19] and the House of Lords[20]) mobilised rhetoric and other juristic devices to achieve this effect. Suffice to state here that the appellate judges in *Herrington* declared the *Addie* principles to be inhumane and that occupiers' liability needed to be brought into line with general negligence, to align it with Lord Atkin's axiomatic formulation in *Donoghue –v- Stevenson* (1932)[21] that:

[16] SC (HL) 1, 15

[17] 2 QB 650, CA, 666.

[18] 1 WLR 592, QBD per Ormerod J.

[19] *Herrington –v- British Railways Board* (1971) 2 Q.B. 107, CA.

[20] *British Railways Board –v- Herrington* (1972) A.C. 877, HL.

[21] AC 562, HL at 580

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

and that whilst trespassers should not be owed a full duty of care, a "duty of common humanity" should apply, commensurate with the needs of a civilised society.

## 5. The problems with humanisation

In April 1972 the Law Commission were asked to consider the occupiers' liability to trespassers in the light of the House of Lord's decision in *Herrington* , reflecting concern that that judgement had failed to set down "a clear principle applicable to the generality of cases" (Law Commission 1976: 3). As the Law Commission noted, the five Law Lords had each formulated different tests by which the duty could arise towards trespassers. Whilst each broadly contemplated the need for some actual or constructive awareness of the trespasser and their proximity to danger *Herrington* did not give a clear tool by which the "special circumstances' might be spotted in other future cases. Particular concern was focused upon the operability of the "humanity" test, a test which appeared, at least in Lord Morris of Borth-y-Gest's formulation to equate to taking "such steps as common sense or common humanity would dictate"[22]. The Law Commission noted that Lord Denning MR in the Court of Appeal in *Pannett –v- McGuinness & Co* (1972)[23] had truncated the Lordship's ruminations with characteristic short shrift: *"The long and the short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did"*. Yet in *Herrington*, four of the Law Lords had said (each in their own way) that the duty towards trespassers needed to be calibrated so as to achieve:

> "a compromise between the demands of humanity and the necessity to avoid placing undue burdens on occupiers".

In short, to be readily applicable (perhaps with a lay audience in mind) the Law Commission considered that a codification – a formula – was needed.

[22] *British Railways Board –v- Herrington* (1972) AC 877 at 899.

[23] 2 QB 599 at 606-7

Thus the Law Commission considered that *Herrington* would leave uncertainty – because the variant rationalisations and the early signs of abbreviation and selective invocation failed to enunciate a clear guide to what appeared to have been intended as two separate questions, namely:

> 1) what are the special circumstances in which a duty towards trespassers should be said to arise - and specifically what level of knowledge and/or foreseeability of (i) danger and (ii) trespass is required?; and
>
> 2) how should the degree of care (i.e. "common humanity") be determined? – specifically how should it be distinguished from the "reasonable care" due to lawful visitors?

In 1984 the Occupies' Liability Act was enacted for England & Wales, implementing many (but not all) of the Law Commission's recommendations on occupiers' liability for trespassers. The Act declared that the test to determine when a duty arose comprised (Section 1(3)) a three point test, namely that the occupier:

> (1) is aware of the danger or has reasonable grounds to believe that it exists;
>
> (2) is aware or has reasonable grounds to believe that the trespasser is or may come into the vicinity of the danger; and
>
> (3) the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer the trespasser some protection.

And the standard of care was provided for as (Section 1(4)) a duty to:

> "take such care as is reasonable in all the circumstances of the case to see that [the trespasser] does not suffer injury on the premises by reason of the danger concerned."

However, "the danger concerned" is only that defined by Section 1(1)(b), namely:

> "danger due to the state of the premises or to things done or omitted to be done on them."

and it is this element of the codification that has proved to be the main avenue by which a distinct cooling in the judicial mood regarding recovery for injury suffered by trespassers has

emerged over the last decade, a trend reaching its zenith in the powerful House of Lords decision *Tomlinson –v- Congleton Borough Council*[24]. *Tomlinson* shows the ascendancy of a powerful judicial discourse in which aspects of risk are seen as good (or at least unavoidable), the virtues of 'personal responsibility' are extolled and the view expressed that limits must be set by judges to the (perceived) growth of a compensation culture. Furthermore, that resources are finite, and that just because evidence shows that more could have been spent and/or done to increase trespasser's safety does not mean that there was thus a liability to take those steps. We will consider aspects of this discourse further below, here we will look at how the ambit set by Section 1(1)(b) has been used in order to defeat recent claims.

In *Donoghue –v- Folkestone Properties Ltd* (2003)[25], a case involving severe injuries suffered by an adult diving into a dock, the claim was rejected by the Court of Appeal on the basis that the "danger" on the premises arose from the claimant's actions and misjudgement rather than the state or condition of the premises. Lord Hoffman then adopted this reasoning in *Tomlinson* (another unauthorised diving case).

This line of argument also recurred in *Keown –v- Coventry Healthcare NHS Trust* (2006)[26]. In this case an 11 year old child suffered brain injury when he fell 30 ft whilst climbing the exterior of a fire escape. It was held that the occupier had no liability as there was nothing wrong with the fire escape – it was the claimant's deviant use of it that created the danger – and that danger was foreseeable to an 11 year old.

The same effect was achieved in *Baldaccino –v –West Wittering Estate PLC* (2008)[27] . Here use of navigation beacon by boys as a diving platform was unauthorized – thus the boys were trespassers. The claimant, a 14 year old boy, had been paralysed by diving from a navigation buoy into shallow water after tide had receded. The court held there was nothing inherently dangerous in the buoy or the sandy floor or the seawater, thus nothing dangerous in the premises and even if there had been, a warning notice would have achieved nothing – the danger was obvious.

[24] *Tomlinson –v- Congleton Borough Council* (2002) EWCA Civ 309, HL.

[25] QB 1008, CA.

[26] 1 WLR 953, CA.

[27] EWHC 3386 (Qb).

Likewise in *Simonds –v- Isle of Wight* (2003)[28] a 5 year old was injured jumping off a swing whilst running back across a sports field from his parent to rejoin a school group. The High Court held that the trial judge had erred in finding there was a duty to fence off swings to prevent their unauthorized use during a school sports day: playing fields could not be made hazard free, and the danger of swings was self evident. Indeed, the hazard was the child's use of the swing, not the physical existence of the swing.

Consistent with Section 1(4) the standard of care is limited to that which is reasonable in the circumstances. Ascertaining what that reasonable standard requires is not an easy task – but recent cases show that statutory requirements and the practical limitations of eliminating risk entirely will come into play, and there is no duty upon occupiers to point out the obvious thus:

In *Mann –v- Northern Electric Distribution Ltd* (2010)[29] Wilson LJ gave leading judgement and forensically reviewed the factual evidence about how the claimant, who aged 15, had managed to climb into the substation and reach a place at which he was then electrocuted. The claim was based around breach of statutory duty: a duty to fence substations under the Electricity Supply Regulations 1988. The Court of Appeal found no liability by drawing upon the dictum of Asquith LJ in *Edwards –v- National Coal Board* (1949)[30] that the Regulations' requirement of "reasonable practicability" in its degree of fencing provision involved a balancing of risk against costs and other sacrifice, declared that the claimant's prowess in overcoming the defences that had been provided was not reasonably foreseeable and noting that "no amount of security measures will keep out a sufficiently determined trespasser" (para 18).

These recent cases also promulgate a notion of the 'blameless accident', as in *Bourne Leisure Ltd t/a British Holidays –v- Marsden* (2009)[31]. In this case a 2 year old child wandered away from parents at holiday park and was later found drowned in an on-site lake. The parents claimed against the holiday park operator (under 1957 Act) that it had failed to adequately

[28] EWHC 2303 (Qb)

[29] EWCA Civ 141, CA.

[30] 1 K.B. 704, CA at 712.

[31] EWCA Civ 671, CA.

warn the parents and or prevent a drowning in the lake. Moses LJ (who gave the leading judgment) displayed the modern approach by looking for any guidance identifying the park operators as being at fault (and finding none), noted the obvious nature of the hazard posed by the on-site lakes and likelihood that further warning notices or briefings would have been unlikely to have had any effect.

## 6. Context: interpreting the changes

What can this succession of cases tell us about the influence of physical changes in the built environment and changes in social attitudes upon the evolution of this area of law over the last 100 years?

### 6.1 Changes in the built environment

As noted by Lord Wilberforce in *Herrington*[32] the law in this area tends to develop around issues – often physical things - that emerge and need addressing. Viewed in this light, and for an example, a distinct jurisprudence on railway-line fencing can be identified. The railways industrialised long narrow tracts of the countryside from the mid-nineteenth century onwards, later the hazards (electrical and mechanical) of tram systems had to be adjudicated on and so forth. The occupiers' liability cases of the industrial era (of which *Addie* is a classic example) were wrestling with the spatial consequences of industrialisation. New machines now sat in fields, exposed to the curious. Standard patterns of housing development in mining and other activity-specific location were huddled for obvious convenience adjacent to the mills and railways to which they provided worker accommodation (as was the case in *Addie*). The child trespassers lived locally and played locally.

However from the 1920s onwards, as planning legislation started to promote zoning of development industry started to be separated from residential settlements. The new factories were increasingly located in homogenous 'industrial estates' (Darley 2003; Stratton & Trinder 2000: 5). This did not remove the problems of child trespass to industrial premises – but steadily it reduced its relative importance, as reflected in the nature of the premises trespassed upon in the cases surveyed above. In the post 1945 cases we also see the rise of

[32] *British Railways Board –v- Herrington* (1972) A.C. 877 at 930

bomb sites[33], urban clearance[34] and landfill sites[35]. In the early twenty first century the child trespasser appears to mainly haunt hospitals, schools, beaches and lakes rather than factories and mines. Trespass to transport and power infrastructure can, however, be regarded as a constant across the whole study period.

The point here is that child trespass is now less about machinery and locality, and play patterns have changed. The places where (judges at least) would expect to find children has changed since Lord Atkinson's assertion that:

> "...every person must be taken to know...that public streets, roads and public places may not unlikely be frequented by children of tender years and boys of this character" in *Cooke* (1909)[36].

Clearly it is easy to make sweeping generalisations about such socio-economic changes: but the judges have appeared happy to do so. Take for example Lord Pearson's call to arms in *Herrington* invoking a particular image of change in the built environment to justify the repositioning of the law thus:

> "With the increase of the population and the larger proportion living in cities and towns and the extensive substitution of blocks of flats for rows of houses with gardens or back yards and quiet streets, there is less playing space for children and so a greater temptation to trespass. Also with the progress of technology there are more and greater dangers for them to encounter by reason of the increased use of, for instance, electricity, gas, fast-moving vehicle, heavy machinery and poisonous chemicals. There is considerably more need that there used to be for occupiers to take reasonable steps with a view to deterring persons, especially children from trespassing in places that are dangerous for them."[37]

---

[33] *Davis –v- St. Mary's Demolition & Excavation Co* (1954) 1 W.L.R. 592, QBD

[34] *Harris –v- Birkenhead Corporation* (1975) 1 W.L.R. 1345, CA.

[35] *Penny –v- Northampton Borough Council* (1974) 20 July, The Times, CA..

[36] A.C. 229, HL at 237

[37] Lord Pearson, *British Railways Board –v- Herrington* (1972) A.C. 877, HL at 927.

Lord Pearson's anxieties appear characteristic of the '*population bomb'* (Eurlich 1968) concerns that emerged in the 1960s, a similar anxiety apparently being abroad in relation to the crowding out of the countryside, here the Duke of Edinburgh speaking at the National Playing Fields Association's annual conference in 1963:

> "We are on the threshold of the age of leisure, and the problem is no longer academic. There are stark and immediate problems facing us. The queues for playing fields are getting longer; the pressure on general sports and recreation clubs of all sorts is increasing. Swimming pools and sailing clubs are getting crowded, and recreational users of water are beginning to run into each other." (quoted in Dower 2001: 35)

From the 1960s onwards the focus of lawmaking in creation and control of the built environment also changed its emphasis. The Welfare State and the consumer society (we somehow never quite reached the "age of leisure") brought with them new premises, services and activities – each to be embodied within new structures, and this was reflected in the 1963 Offices, Shops and Railways Premises Act and its imposition of safety standards upon these places, extending the remit of health & safety legislation beyond the realm of the Factories Acts. Then the framework legislation created by the Robens Committee[38] and embodied in the Health & Safety at Work etc Act 1974, imposed both a generic statutory duty of safety managers of all business premises to all visitors (Section 4) but also an array of general and activity specific secondary legislation requiring and controlling the assessment and management of place safety.

## 6.2 Changes in the role of the judiciary

The 1960s also saw a change in the way that the judiciary came to see their role. In 1966 the House of Lords had declared that it could, if changed circumstances warranted it, overrule its prior decisions – and the *Herrington* decision was an early example of the use of that power. The role of the judiciary as active law makers (rather than just law-diviners) was becoming increasingly accepted – both by academic commentators on the '*Politics of the Judiciary'* (Griffiths 1977) but also the senior judges themselves, such as Lord Reid (1972):

[38] *Safety and Heath at Work: Report of the Committee 1970-72*, London: HMSO Cmnd 5034 (Chairman: Lord Robens).

> "Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words 'open sesame'. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore".

In the industrial unrest of the 1970s, the energy crises, political turmoil, and economic uncertainty the judiciary started to become more attuned to the public policy implications of their appellate findings of law. We will consider below how those concerns were reflected in the judicial rhetoric underlying the 'leading cases' summarised above.

## 6.3 Changing attitudes to parental responsibility

The case reports give us insight into how the judges have regarded parental responsibility at various instances across the last 100 years. These insights are available in passing comments, no doubt intended as statements of what seemed obvious at the time. Tracking the evolution of these statements appears to show the retreat from the widespread practice of leaving children (even those of what would now be pre-school age) to wander and play alone in their locality.

For example in *Cummings –v- Darngavil Coal Co Ltd* (1903)[39] Lord Young tells us that parents think the risk low to let their children wander unaccompanied, whilst in the Court of Appeal in *Addie* the Lord President (at 556) tells us that letting four year old child roam alone in poor neighbourhoods is not contributory negligence on their or their parents part, for it is normal in such areas (but in the same case, Lord Blackburn's dissenting judgement asserts that the child's parent should have supervised his child better).

The apparent belief in the prevalence of the 'wandering poor child' appears to have persisted into the early 1950s, for Lewis wrote in 1954 that:

> "the law tacitly takes account of the fact that among the poorer classes even very young children are usually under the charge of nobody of responsible years when they go abroad, and that this, taken by itself, will not deprive them of a remedy" (Lewis: 716)

[39] 5 F. 513.

The judicial mood does appear to have changed soon after though, perhaps in reflection of widespread post-war anxieties about 'maternal deprivation' and so-called 'latch-key children' caused by the parental distraction of the war (Kynaston 2008: 113) and a wave of juvenile delinquency attributed to this in the early 1950's. By the time of *Bates –v- Stone Parish Council* (1954)[40] Birkett LJ could write:

> "I am bound to express my own deep regret that the infant plaintiff should have been allowed to go to the recreation ground at all, accompanied only by another small boy of some six years of age. A boy of six could not be expected to be a proper or a competent guardian, and to a child of three and a half most things in this world take on an aspect of danger if he is not protected against them. To reach the recreation ground from the plaintiffs' home required the two little boys to cross two public highways with all the dangers of modern traffic, and that fact by itself, I should have thought, would have been enough for a careful and thoughtful parent to forbid a small boy to go unless he were in watchful and careful hands. Yet the fact remains that the infant plaintiff was allowed to go in the care of a boy of six, and it was the alleged negligence of the defendants that was alone in question."

Devlin J in *Phipps –v- Rochester Corp* (1955)[41] – in which a boy of five, out blackberry picking with his sister aged seven, fell into a sewer pipeline trench on a site awaiting housing development - conducted a thorough review of the 'parental responsibility' cases. In his judgement he moved away from the fiction of liability not arising because of an implicit condition requiring the child only to be present if supervised and instead shifts to a foreseeability basis and tries to account for the 'older' view of the wandering child, by suggesting that in determining whether he has a duty the occupier "may have to take into account the social habits of the neighbourhood"[42]. However, he expresses general conclusion in favour of parental responsibility being greater than that falling upon occupiers as regards child trespassers:

[40] 1 W.L.R. 1249, CA at 43.

[41] QBD 450, QBD.

[42] QBD 450, QBD, at 472.

> "But the responsibility for the safety of little children must rest primarily upon the parents [either to ensure their children don't wander, or to check out the suitability of where they might be to wander] It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those who happen to have accessible land"[43]

Devlin's rationalization of why it wasn't foreseeable that a child of five would be sent out to play alone at the site, shows us how in considering liability (at this time on the basis that an occupier would owe a duty to a "child of tender years" if there was an allurement or an hidden danger there) each of an occupier, a parent and ultimately a judge must "read" the locality – and make judgements about whether it was overcrowded, the site was the only local green space, whether the child's house had a garden in which it could play and what perils existed in the locality.

In 2009, in *Bourne Leisure*[44], Moses LJ drew on Devlin J's analysis in *Phipps* – reasserting the view duty to public is discharged if dangers are obvious to an adult – because little children can be assumed to be supervised. Moses (who gave the leading judgment) sought to move the debate away from a binary blame game of parent versus occupier, and regretted (at paragraph 16) that child accident cases sometimes become "bedevilled with the quest for attaching blame to either the parent or the occupier". In his opinion the 'innocence' of the occupier is not, dependent upon proving the 'fault' of the parents. Stanley Burnton LJ concurred, with the contemporary juridical view that "Accidents may and do happen to young children without anyone being at fault."(paragraph 25).

# 7. Constancies

## 7.1 Why constancies matter

Bourdieu's work advocates the study of the subtle structural generative processes that underlie fields of practice like the law, scientific and religious interpretive communities. Therefore understanding how their meaning making practices – their discourse – adapt over

[43] QBD 450, QBD, at 472.

[44] *Bourne Leisure Ltd t/a British Holidays –v- Marsden* (2009) EWCA Civ 671, CA

time requires a study of constancy as much as a description of change. Here Braudel's (2001: xiv) dictum that historians should look beyond the "surface disturbances" of events can be applied to our doctrinal analysis – as a need to enquire into what was remaining constant beneath these doctrinal changes.

## 7.2 The balancing act

As Lord Reid noted in *Herrington*, managing child trespassers is a thorny issue, particularly if presented as a straight choice between parents and occupiers. The law is required to achieve a balancing act – and:

> "Legal principles cannot solve the problem. How far occupiers are required by law to take steps to safeguard such children must be a matter of public policy"[45].

As Lord Reid noted, alongside his increasingly pessimistic view on the prospects of parents being able to control their children[46], putting responsibility for protecting them upon premises occupiers –would "in most cases impose on occupiers an impossible financial burden"[47]. This anxiety about costs or other impositions upon occupiers has haunted the cases throughout the study period. That anxiety can be found in concerns about the potential ramifications of the *Cooke* judgement in 1909[48], and in *Edwards-v-Railway Executive* (1952)[49] where Lord Goddard feared:

> "had they to provide watchmen to guard every place on the railways of the Southern Region where children may and do get on to embankments and lines, railway fares would be a great deal higher than they are already."

[45] *British Railways Board –v- Herrington* (1972) A.C. 877, HL at 897.

[46] At 897 Lord Reid had expressed the view that supervision of children was only "practicable at one time for a limited number of well-to-do parents but that number is now small."

[47] *British Railways Board –v- Herrington* (1972) A.C. 877, HL at 897.

[48] E.g. Hamilton LJ in *Latham* (1913) CoA at 421; Bankes LJ in *Hardy –v- Central London Railway Co* (1920) 3 KB 459 at 467.

[49] AC 737 HL at 747.

In response advocates of reform have over the years pointed back to those fearing such consequences – pointing out that the feared consequences have never materialised. Here Edmund Davies LJ in the Court of Appeal ruling in *Herrington*[50]:

> "the reports are scattered with expressions of fear as to the probable outcome of imposing *any* sort of duty of care in relation to trespassers – that to do so would unjustifiably restrict occupiers' enjoyment of their property; that the parents of child trespassers would in consequence be encouraged to neglect performing the duty of control which is properly theirs; that even burglars would be invested with a cause of action if they came to harm in their criminal invasion of another's property: in short, that the occupation of property would be rendered intolerably burdensome. The alarmist has indeed been busy in the law. But he has not deterred the Scots from devising a rule which meets the situation admirable. Ten years have passed since their Act of Parliament reached the statute book, yet there has been no plague of writs on behalf of injured trespassers, nor has there been any reason for suspecting that the activities of railway or other authorities have been gravely disrupted in Scotland"

But a concern to avoid wider consequences or the diversion of resources remains a key motivating factor in judicial caution, for example Longmore LJ in *Keown*[51] (2006) considers the policy implications (expressed as a "tentative (obiter) view"):

> "…it would not be reasonable to expect an NHS Trust to offer protection from such a risk. If it had to offer protection from the risk of falling from a normal fire escape, it would presumably have to offer the same protection from falling down drain pipes, balconies, roofs…windows and even trees in the grounds. This seems to me to be going too far."

In defence of his view Longmore LJ gives two justifications. First, that NHS resources are better used in treating patients, and secondly, that there will be a fortification effect (which Longmore LJ notes had indeed happened already at the hospital in question) and local people will lose the amenity benefit of short cuts and harmless play in the grounds:

---

[50] *Herrington –v- British Railways Board* (1971) 2 Q.B. 107, CA at 127.

[51] *Keown –v- Coventry Healthcare NHS Trust* (2006) 1 W.L.R. 953, CA at 959.

> "It is not reasonable to expect that this should happen to avoid the occasional injury, however sad when injury occurs." [52]

Lewison J (in support of Longmore LJ) picks up this point: "If the trial judge was right, then occupiers of buildings up and down the country will have to 'child proof' their buildings in case children try to climb them."[53]

A specific concern about the effect upon access has also underlain these cases across the study period, thus this concern was raised by Lord Collins in *Cooke* (1909)[54]: that liability risk may deter landowners from admitting the public "to enjoy the amenities of their private domains" and Farwell LJ in *Latham* (1912)[55]:

> "It is impossible to hold the defendants liable unless we are prepared to say that they are bound to employ a groundkeeper to look after the safety of their licensees, and the result of such a finding would be disastrous, for it would drive all landowners to discontinue the kindly treatment so largely extended to children and others all over the country."

Farwell LJ's concern was reiterated in *Bates –v- Stone Parish Council (1954)*[56] (a case involving a playground injury) where Romer LJ adding that provoking the closure of playgrounds would propel children back into playing in the streets, places now considerably more perilous than playground chutes and swings.

Gross J in *Simonds* (2003)[57] – also a playground safety case - provides a contemporary echo of this specific concern, stating that there is:

> "a danger with decisions such as this. The upshot would not be that swings are fenced off, it is far more likely that sports days and other simple pleasurable

[52] *Keown –v- Coventry Healthcare NHS Trust* (2006) 1 W.L.R. 953, CA at 959.

[53] *Keown –v- Coventry Healthcare NHS Trust* (2006) 1 W.L.R. 953, CA at 960.

[54] *Cooke –v- Midland Great Western Railway of Ireland (1909) A.C. 229, HL* at 241.
[55] *Latham –v- R. Johnston & Nephew (1913) 1 K.B. 398 CA a*t 408.
[56] 1 W.L.R. 1249, CA at 49.

[57] EWHC 2303 (QB) at Paragraph 13.

> sporting events would not be held if word got round that a school could be liable in a case such as this. Such events would become uninsurable or only insurable at prohibitive cost."

The language of risk assessment is also not an entirely recent invention in this jurisprudence for, in addition to the implicit cost/benefit reasoning of the access and resource implication concerns of the early twentieth centrury cases mentioned above, reference to risk calculation of sorts is present in Lord Young's description of parental reasoning about allowing their child to wander: *Cummings –v- Darngavil Coal Co Ltd* (1903)[58] 5 F. 513:

> "We know quite well that children get off public roads, and that their parents do not trouble themselves, and simply let the children go, knowing, no doubt, that the risk which the children incur is so slight as to make it hardly worth while to interfere with the children."

However, it is in the recent cases (influenced no-doubt by risk assessment concepts derived from occupational health and safety, the economic analysis of law and human rights discourse) we find, for example Lord Hoffman in *Tomlinson*, talking of: "The balance of risk, gravity of injury, cost and social value" (paras 34 – 37) and human rights (his heading "free will": paras 44 – 50). We see also in Hoffman's judgement an advocacy of personal responsibility and the positive power of a measure of risk in daily life. This accords with a powerful lobby active within the senior judiciary, 'captains of industry', government and pressure groups seeking to advocate a pro-risk, pro-entrepreneur and anti-over regulation and anti-safety obsessed position, as detailed by Bennett & Crowe (2008) and expressed in a number of formative policy papers in recent years.

## 7.3 Images of child trespassers

One might expect the judiciary to have demonised child trespassers. But the depiction of the child trespasser is restrained, and at times quite benign, throughout the study period. On the whole the child trespasser is not presented as a sinister 'other', a threat to social order. This in

[58] 5 F. 513.

part may derive from the fact that these reports concern situations in which such children have suffered injury, but still there is something notable in the judge's apparent keenness to differentiate child trespassers as "meritorious"[59] or "trivial and amiable."[60] Care is often taken by the judges to emphasise that there are many types of trespasser and a child trespasser one of the least blameworthy, thus in *Herrington* Lord Morris:

> "The term "trespasser" is a comprehensive word: it covers the wicked and the innocent: the burglar, the arrogant invader of another's land, the walker blithely unaware that he is stepping where he has no right to walk, or the wandering child – all may be dubbed trespassers."

This differentiation assists those in *Herrington* who wish to argue in favour of a duty of care towards child trespassers without invoking another recurrent fear in these cases: that to soften the line would lead to householders having a duty of care towards burglars[61].

The judicial characterisation of child trespassers is also worthy of study in terms of what it reveals of judges attitudes to the behaviour of children, and the source of the urge to trespass as a child. Without exception those judges who reveal a view on this matter subscribe to what might be called the 'boys will be boys' school of thought. Implicit within this rule of thumb theorising is a belief that something innate drives boys to trespass, it is not something that can be reasoned out of a child. It is a variant of the doctrine of allurement, that children will be drawn, automaton-like, towards certain structures. Whilst the language used to express this theory changes somewhat across the study period, the sentiment remains throughout.

The first traced outing of this view is found in Lord Denman's judgment in *Lynch -v- Nurdin* (1841)[62] where the child "merely indulged the natural instinct of a child amusing himself with the empty cart and deserted horse." In *Latham* (1912) we see the view that "a child can get

[59] Per Diplock in *British Railways Board –v- Herrington* (1972) A.C. 877 HL at 936.

[60] Per Sands in *Dumbreck –v- Robert Addie & Sons (Collieries) Ltd* (1928) S.C. 547, Court of Session at 557.

[61] For example, Salmon LJ in *Herrington –v- British Railways Board* (1971) 2 Q.B. 107 CA at 120.

[62] 1 QB 29.

into mischief and hurt itself with anything if it is young enough"[63] and in *Devlin* the view of Lord M'Laren:

> "…that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach."[64]

Then there are cases in which fencing or other protective measures are pictured as having some magical and irresistible challenge and that:

> "it is perhaps fortunate that there is no rule of law imposing on proprietors the impossible task of fencing their lands so as to keep out schoolboys, for the more difficult the fence was made the greater would be the temptation to overcome the obstacle."[65]

But these are not Edwardian vestiges - such views linger into present day jurisprudence, for in the Court of Appeal hearing of *Herrington* Salmon LJ expressed the view that "an exceptionally agile and resourceful little boy may be able to get over or through almost any fence, if determined to do so"[66] and an equivalent view was expressed by Wilson LJ in *Mann* (2009): "No amount of security measures will keep out a sufficiently determined trespasser" (para 18).

The role of such constructions of the child trespasser and his motives appear to operate to desensitise – to take the (injured or deceased) trespasser out of the blame calculation – that is not to say that blame may not sometimes be attached (as it was, for example in *Young –v- Kent County Council* (2005))[67], but it removes the need for the judges to dwell on motive and the chosen aspect of the trespass.

## 7.4 Rhetorical techniques

[63] Hamilton LJ in *Latham –v- R.Johnston & Nephew Ltd (*1912) 1 KBD 398 at 413.

[64] *Devlin –v- Jeffray's Trustees* (1902) 5 F. 130 at 134.

[65] Lord Atkinson in *Cooke* (1909) HL at 237.

[66] *Herrington –v- British Railways Board* (1971) 2 Q.B. 107, CA at 123.

[67] EWHC 1342 (Qb).

We can now turn to consider the use of recurrent rhetorical devices within child trespasser cases. Once again, the aim is to show how constancy runs across the seemingly divergent cases (and thus reveal the operation of certain fixed points of reference within the judicial intepretive community). Reference here is to rhetoric in the neutral sense used by Aristotle – to identify forms and augmentations of argumentation – rather than in the perjorative sense of the term inherited via Plato (Postner 2009: 331-332).

A time honoured judicial rhetorical technique is to invoke 'common sense' when arguing for a departure from the line given by precedent. Twining & Miers have shown how Lord Atkin's formulation of the duty of care in *Donoghue v Stevenson* (1932)[68] is based only upon two cases (with many in opposition) and rhetorical appeals to 'common sense', reasoning that is "permissible, inconclusive and not very cogent." (1999: 365 note) yet Lord Atkins' formulation (not least because of its simplicity and explicit moral linkage to Judeo-Christian precepts) has provided the foundational conceptual hub around which the tort of negligence has revolved ever since.

Equivalent appeals to common sense are invoked in *Herrington*[69] – for example Lord Wilberforce's assertion that – "no greater than we ought to expect from the common law, which always leaves a residue to be completed by common sense" and Lord Morris' assertion[70] that "any well-disposed but fair-minded member of the public" would think the defendant owed a duty towards the child in *Herrington*. He further supports his emotive line of argumentation by characterising the injured child as "a legal outcast" in the defendant's characterisation of the applicable law[71].

Another rhetorical strategy at work in *Herrington* is what we might call 'summoning a sense of alien-ness' about the existing law. Thus in the Court of Appeal, Salmon LJ[72] speaking of

[68] AC 562.

[69] *British Railways Board –v- Herrington* (1972) A.C. 877 HL at 919.

[70] *British Railways Board –v- Herrington* (1972) A.C. 877 HL at 901.

[71] *British Railways Board –v- Herrington* (1972) A.C. 877 HL at 902.

[72] *Herrington –v- British Railways Board* (1971) 2 Q.B. 107, CA at 118.

*Addie* – "a case which I confess I am unable to read, 40 years on, *without a sense of shock."* (emphasis added). Salmon LJ then follows through with the following damning assertion that the doctrine of trespassers taking all risk of their entry:

> "…may have been all very well when rights of property, particularly in land, were regarded as perhaps more sacrosanct than any other human right. This view was widely held in the nineteenth century and, perhaps, even at the beginning of the present century, *influenced by the minds of those who were then no longer young*" (emphasis added)[73]

Finally Salmon LJ[74] heaps further invective upon the status quo:

> "It is difficult to see why today this doctrine should not be *buried* with the *artificial doctrine* based on *fictitious* permission springing from a *supposed* allurement which was *invented* by the courts in an *attempt* to mitigate the harshness and injustice caused by the *ancient legal dogma* relating to infant trespassers" (emphasis added)

But the modernisers in *Herrington* were also happy to draw support from long standing authority where that suited their purpose, thus Lord Morris in the House of Lords judgement[75] deftly resurrects the early nineteenth century spring-gun cases to show there has 'always' been a duty of common humanity underlying occupiers' responsibilities towards trespassers.

In *Tomlinson,* Lord Hutton's judgement in the House of Lords is keen to show parallels back to the early 20th century cases. To achieve this he has to perform opposite of the 'alien-ness' effect. Thus he refers to these old cases cherishingly, making light of their aged appearance, for even though:

---

[73] *Herrington –v- British Railways Board* (1971) 2 Q.B. 107, CA at 120. There is reasonable ground to speculate that Salmon LJ was actually no younger than the nineteenth century judges he was criticising: according to http://thepeerage.com/p23173.htm (accessed 1 July 2010) he was born in December 1903, making him 66 years of age when the Court of Appeal heard *Herrington* in 1970.

[74] *Herrington –v- British Railways Board* (1971) 2 Q.B. 107, CA at 120.

[75] *British Railways Board –v- Herrington* (1972) A.C. 877, HL at 904.

> "couched in old fashioned language…they still express a principle that is still valid today, namely that it is contrary to common sense, and therefore not sound law, to expect an occupier to provide protection against an obvious danger on his land arising from a natural feature…"[76]

Furthermore, in stating[77] that "that there are certain risks which the law, in accordance with the dictates of common sense, does not give protection – such risks are *'just one of the results of the world as we find it'*[78]", Hutton specifically resurrects and incorporates Lord Dunedin's fatalistic view, in *Hastie –v Edinburgh Magistrates* (1907)[79].

Personal biography is deployed by Lord Diplock in his *Herrington* judgement to add to the 'alien-ness' of *Addie*. Diplock claims in his judgement that *Addie's* case was decided in the year he started reading for the bar and that "even at that time it offended against what Lord Atkin, only three years later, was to call "a general public sentiment of moral wrongdoing for which the offender must pay"[80], he then goes on to align himself personally with a that sense of disppointment:

> "I well recall the disappointment with which it was received by those who thought that previous cases in this house had shown the common law as moving towards a less draconian treatment of those who trespassed innocently upon other people's land" [81]

But this reminiscence appears to be hollow rhetoric, for Diplock had prior opportunity to express such enduring disagreement with the *Addie* decision and, in particular, revealed none of this apparent dissatisfaction with the common law position in 1954 when he provided a minority report dissenting from the Law Reform Committee's Third Report[82]

[76] *Tomlinson –v- Congleton Borough Council* (2002) 1 A.C. 46, HL at 88.

[77] *Tomlinson –v- Congleton Borough Council* (2002) 1 A.C. 46, HL at 88. (emphasis added to show Lord Dunedin's quote.

[78] Lord Dunedin *Hastie –v Edinburgh Magistrates (1907) SC 1102* at 1106

[79] SC 1102.

[80] *Donoghue –v- Stevenson* (1932) A.C. 562 HL at 580.

[81] *British Railways Board –v- Herrington* (1972) A.C. 877, HL at 931.

[82] 1953-54 [Cmd. 9305] *Law Reform Committee. Third Report (occupiers' liability to invitees, licensees and trespassers).*

recommendation in favour of statutory consolidation of occupiers' liability principles towards lawful visitors. In his minority report Diplock stated that he feared that codification would lack the subtlety and predictability of a case by case approach. Furthermore he said nothing to challenge the Committee's conclusion that the common law position on occupiers' liability towards trespassers did not need statutory reform (and at the time the only way in which *Addie* could have been circumvented).

In considering judicial discourse we need also to consider how metaphor and other figurative devices may give us insight into the operation of the interpretive community here. The extent to which meaning can be imputed to selection of figures of speech is perhaps open to debate – however the incongruous eruption of rural and/or classical imagery within judicial reasoning about child trespassers appear to be something other than random occurrence. In the study cases we find instances of elaborate deduction involving variously whether or not firing a gun in a field might hit a tramp[83], imaginary children teasing a peaceful donkey or cow into kicking[84], "apple trees, streams, and other infantile joy"[85] and a hypothetical farmer afflicted by trespassers:

> "...tearing up his primroses and bluebells, or picking his mushrooms or stealing his turkeys, or for the purpose of taking country walks in the course of which they will tread down his grass and leave gates open and watch their dogs chasing the farmer's cattle and sheep."[86]

And, once again, use of these tropes follows through to the present day jurisprudence, for in *Tomlinson* Lord Hoffman appears momentarily to fall into reverie when describing the Bereton Heath Country Park's:

> "paths now [running] through woods of silver birch and in summer bright yellow brimstone butterflies flutter in grassy meadows"[87].

[83] Cross LJ in *Herrington –v- British Railways Board* (1971) 2 Q.B. 107, at 138.

[84] Farwell LJ in *Latham –v- R.Johnston & Nephew Ltd* (1912) 1 KBD 398, CA at 407.

[85] Scrutton LJ in *Hardy –v- Central London Railway Co.* (1920) 3 KB 459, CA.

[86] Lord Pearson in *British Railways Board –v- Herrington* (1972) A.C. 877 HL at 925.

[87] *Tomlinson –v- Congleton Borough Council* (2002) 1 A.C. 46, HL at 72.

Interestingly this resort to the poetic does not appear to be intended as an aid to ruling in favour of the claimant (i.e. by painting a picture of the site of the accident as an allurement), for Hoffman then goes on to *deny* liability.

Hoffman then appears to be slip into an Arcadian moment as a display of wordsmithery, for he then summons a Dionysian image describing the persistence of more ad hoc recreational uses at this now restored quarry site, thus: "But the traditions established in the previous anarchic state of nature were hard to eradicate."[88] He then completes the descent into a wanton display of classical learning by[89] attacking Ward LJ's use of metaphor in the Court of Appeal's adverse ruling, a metaphor likening the Mere's water as "a Siren's call strong enough to turn men's minds". Hoffman regards this as 'gross hyperbole' but can't himself resist the temptation to show his (greater) familiarity with Greek mythology by seeking to demonstrate in some detail why the Siren analogy is unworkable. Hoffman's metaphoric reverie eventually redeems his digressions by revealing his wider point – that the danger lies in how the claimant came to use the water rather than that the Mere was in itself in a dangerous condition (and thus a "danger due to state of the premises" in the meaning of the 1984 Act).

All that can perhaps be said of this digression and imagery is that it was display behaviour, aimed at showcasing Lord Hoffman's erudition and classical education (and thus for Bourdieu 1987: 812) an example of the creation of "symbolic capital" – through the display of a traditional symbol of erudition.

## 7.5 The spiral towards rigid rationalism

Finally, we can consider what the trajectory of the law in this area over the study period reveals about the operation of the 'juridical field'.

In 1955 Heuston described occupiers' liability as:

> "…a field of 'lawyers'' law", which although untouched by statute, has acquired a bad reputation. The broad and simple principles established by our great Victorian

[88] *Tomlinson –v- Congleton Borough Council* (2002) 1 A.C. 46, HL at 77

[89] *Tomlinson –v- Congleton Borough Council* (2002) 1 A.C. 46, HL at 80

> judges have been obscured by over-refinement and subtlety…when English law makes a mistake it is usually due to an excess rather than to a lack of rationality" (1955: 271).

Two points can be extracted here. First, that Heuston appears to be taking some apparent pride in the fact that that this area of the common law had avoided statutory intervention, for he carries on to describes the prospect of statutory codification as both drastic and "likely to make many people cringe" (271). This suggests a purism amongst the judiciary in their decision taking (and law making) abilities – something echoed in the tone and content of Lord Diplock's minority report appended to the Law Reform Committee's 1953 report.

The second point is that Heuston is suggesting that the very processes that make the common law successful can, if left to run too long or too deep, make the law *too* rational. This may sound a strange assertion, but it finds echo in diverse places, for Law Commission's Working Paper No. 52 (1973)[90] recommended statutory consolidation because the common law principles had via *Herrington* become "over-refined", whilst the Law Commission's rebuff to the judicial assertion that they are the best people to resolve the post *Herrington* doctrinal confusion was that statements of the law to give a "reasonably certain guide to the law *before* cases are actually decided"[91] (emphasis added). Here the Law Commission was focussing on the need for the law to be 'available', in a practical sense, for easy interpretation and application by those whose behaviour it may seek to influence – in short, occupiers.

Bourdieu is very relevant here, for he observes that the rationalising tendencies of academic and appellate level jurisprudence may at times become too rarefied, and that then the survival of the authority of the juridical field requires that judges (or other law makers) adapt law and keep it (in a sense) unperfected: In Bourdieu's words, what has to happen is "adaptation to reality of a system which would risk closing itself into rigid rationalism if it were left to the theorists alone" (824). This adjustment is necessary because law *has* to remain workable at the pragmatic level – it needs to be seen as 'useful' to the "requirements and the *urgency* of

[90] *"Liability for damage or injury to trespassers and related questions of occupiers' liability"* – at page 26.

[91] The Law Commission (LAW COM. No. 75) (Cmnd. 6428) (1976) *Report on liability for damage or injury to trespassers and related questions of occupiers' liability*, page 6.

practice" (824) (emphasis in the original) – otherwise the field may collapse (or at least be weakened). Thus such changes, such adaptation, along with the apparent signs of conflict between various groupings within the legal professions when such adjustment takes place, should not be seen as a sign of weakness or pathology within the law. Instead such processes ultimately preserve the power and practical efficacy of the law.

## 8. Conclusions

The aim of this paper has been to examine the operation of meaning making, change and constancy processes within the appellate judiciary in relation to the sensitive issue of the occupiers' liability towards child trespassers in the United Kingdom over the last 100 years.

A process of doctrinal change has been mapped out – but undercurrents of constancy have also been identified. Recurrent tropes and rhetorical devices have been illustrated embodied within the succession of 'leading cases'. An attempt has also been made to situate this understanding of change and constancy within the "shaping influence of the social, economic, psychological and linguistic practices which, while never being explicitly recorded or acknowledged, underlie the law's explicit functioning" (Terdiman in his introduction to Bourdieu 1987: 2).

Bourdieu's conceptualisation of the 'juridical field' is complex (because that 'thing' itself is complex). In applying Bourdieu's theories the author's aim has not been to unmask an ideological conspiracy at the heart of the doctrinal evolution of the law in this area – but rather to *illustrate* Bourdieu's abstract theoretical ideas by showing how a mix of historical, spatial, psychological and linguistic interactions underlie what might, at conventional glance, appear a fairly clear cut linear jurisprudential progression between different and distinct doctrinal paradigms and cultural epochs. In lingering tropes and forms of argumentation, a sense of what is and is not legally *pertinent*, tendencies towards formalisation and codification and the ability of the field to moderate its' own tendencies where this becomes necessary, we glimpse the deep structures of this field. For, as Terdiman (Bourdieu 1987: 807) notes, it is these deep and enduring structures within the juridical field that determine *what* and *how* the law will decide in any specific instance.

But, that's not necessarily to suggest that the law, in this or any other area, thereby becomes any easier for lay users to interpret and apply.

## References

Bennett, L. & Crowe, L. (2008), *Landowners' Liability? Is perception of the risk of liability for visitor accidents a barrier to countryside access?*, Countryside Recreation Network: Sheffield. Available at: http://shura.shu.ac.uk/678/ (last accessed 6 July 2009).

Bennett, L. (2009), "Why, What, And How? a case study on law, risk, and decision making as necessary themes in built environment teaching" *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Vol. 1, No. 2, May 2009, 105-113 . Available at: http://shura.shu.ac.uk/694/ (last accessed 2 February 2010).

Bennett, L. & Gibbeson, C. (2010), "Perceptions of occupiers' liability risk by estate managers: a case study of memorial safety in English cemeteries", *The International Journal of Law in the Built Environment, Vol.2, No.1.* Available at: http://shura.shu.ac.uk/1737/ (last accessed 2 July 2010).

Bourdieu, P. (1987) "The force of law: toward a sociology of the juridical field " 38 *Hastings Law Journal* pp. 805 – 853 (translated and introduced by Richard Terdiman)

Braudel, F. (2001) *The Mediterranean in the ancient world*, Allen Lane, London (translated by Sian Reynolds).

Darley, G. (2003) *Factory* Reaktion, London.

Dower, M. (2001) "New pressures on the land: recreation" in Smout, T.C. (ed.) *Nature, landscape and people since the second world war*, Tuckwell Press, Edinburgh

Eurlich, P. R. (1968) *The Population Bomb,* Ballantine, New York.

Fish, S. (1980), *Is There a Text in this Class? The Authority of interpretive communities,* Harvard University Press, London.

Fish, S. (1989) *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Clarendon, Oxford.

Griffiths, J.A.G. (1977), *The Politics of the Judiciary*, Fontana, London.

Heuston, R.F.V. (1955) "Occupier's Liability" in 18 *Modern Law Review* 3, pp 271 – 274.

Kynaston, D. (2008) *Austerity Britain 1945-48: A world to build, Bloomsbury, London.*

Law Commission (1976) *Report on Liability for Damage or Injury to Trespassers*, Cmnd 6428.

Law Review Committee (1954) *Law Reform Committee. Third Report (occupiers' liability to invitees, licensees and trespassers).* 1953-54, Cmd. 9305.

Lewis, T.E. (1954), *Winfield on Tort* (6th ed) Sweet & Maxwell, London

Markesinis, B.S. and Deakin, S.F. (1999) *Tort Law* (4th ed.) Oxford University Press, Oxford.

Ontario Law Reform Commission (OLRC), (1972), *Report on Occupiers' Liability*, Toronto.

Posner, R.A. (2009) *Law & Literature* (3rd ed.) Harvard University Press, London.

Reid, Lord (1972) "The Judge as law maker" (1972) 12 *Journal of the Society of Public Teachers of Law*, 22.

Simpson, A.W.B. (1996), *Leading cases in the common law*, Oxford University Press, Oxford.

Stratton, M. and Trinder, B. (1999) *Twentieth century industrial archaeology*, E & FN Spon, London.

Twining, W. and Miers, D. (1999) *How to do things with rules*, Butterworths, London.