

## **LOWERY v WALKER REVISITED: RISKS AND RESPONSIBILITIES; OCCUPIERS AND TRESPASSERS**

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### **Abstract:**

This article reviews the liability of occupiers for injuries suffered by trespassers on their land. The article opens with a review of the a case which went to the House of Lords at the beginning of the twentieth century; a time when negligence was in its infancy and before any statutory intervention covering this area of law was in existence. The article asks the reader to take an objective view of the cases reviewed. Some of these decisions have been criticised as being inconsistent and illogical but it is suggested here that a closer examination reveals that the creator of the particular risk which was the immediate cause of the harm remains liable for the loss suffered.

**Keywords:** Occupiers, trespasser, risks, personal injury, Occupiers' Liability Act 1957, Occupiers' Liability Act 1984

### **Introduction: the case of *Lowery v Walker* and the concept of risk**

One hundred years ago Lowery left the public footpath and climbed over a fence to enter a field occupied by Walker. He followed the well-trodden path to the station at Whitehaven, Cumberland (as it was then). If asked whether he had permission to be in the defendant's field it seems likely that he would have answered in the negative, but tempered his answer by adding that 'everybody does it.'<sup>1</sup> Although there was some uncertainty, it seems that the field had been used as a short-cut for some 30-40 years.<sup>2</sup> While crossing the field Lowery was set upon by Walker's horse which had been put to graze in the field, (the Whitehaven County Court reported the horse as 'savage'<sup>3</sup>), and he suffered physical injuries as a consequence of the attack.

As a rule the discussions of cases arising either in the general law of negligence or the application of statute (Occupiers' Liability Act 1957 and Occupiers' Liability Act 1984) concerning trespassers, have taken as their organising structure the characteristics of the non-visitors and the apodictic circumstances at the time of the injury to confirm or deny the existence, and the subsequent breach of, a duty of

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<sup>1</sup> For a discussion of the establishment of rights of way in a modern context see; Simpson E., "As of right": all in the mind?' (1998) *Conveyancer and Property Lawyer*, 442.

<sup>2</sup> *Lowery v Walker* [1911] AC 10, 10 (HL)

<sup>3</sup> *Lowery v Walker* [1909] 2 KB 433, 433 (HC)

care.<sup>4</sup> Whilst drawing on the same factual issues this focuses on the creation of the particular risk, or combination of risks, which caused the injury, in an attempt to show that legal responsibility for harm suffered has been found to lie with the creator of the risk, or greatest risk, most closely linked to the injury, and this has become increasingly the case in recent times.

When considering the instances before the court it is accepted that any assessment of a risk, or risks, would have been subjective at the outset (the choice made by the young man to dive into the shallow lake or swimming pool, for example<sup>5</sup>), but becomes an objective judicial assessment when the claimant is seeking redress in tort. The creator of the causal risk will, it is argued, generally be liable for the harm. Creation of the risk must, in this discussion, be distinguished from assumption of the risk (the defence of consent, or *volenti non fit injuria*). However, the operation of this defence requires that the claimant has full knowledge of the relevant risks and consequences and has made an informed decision to accept both. If this is the case the creator is relieved of his responsibility which shifts to the injured claimant and no recovery is possible.<sup>6</sup>

Risks are determined by circumstances. There may be dozens of bad-tempered horses being grazed up and down Britain. None will pose a risk (except, perhaps, to the farmer), without additional factors; the knowledge of possible trespass<sup>7</sup> and the cognitive ability of the trespasser (as in the case of children) being factors which may give rise to the risk itself. Returning to the case, the defendant, Walker, had been the occupier of this field for 15 years and the horse had been put there from time to time over a three year period before the claimant was injured. There is judicial agreement that Walker knew the horse had attacked people before but the question remained: was this sufficient to establish a breach of a legally recognised duty? The assertion by Lowery was that Walker owed him a duty of care and that he had breached this

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<sup>4</sup> See, for example, various editions of texts such as, Dugdale, A., ed. *Clerk & Lindsell, on Torts* (2007, Sweet & Maxwell), Kidner, R., *Casebook on Torts* (2008, 10<sup>th</sup> edn., Oxford University Press), Murphy J., *Street on Torts*, (2007, 12<sup>th</sup> edn., Oxford University Press) which organise discussion of the cases generally from the wording of the 1984 Act.

<sup>5</sup> See, for example, *Ratcliffe v McConnell* [1999] 1 WLR 670, *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, [2003] UKHL 47; *Rhind v Astbury Water Park Ltd* [2004] EWCA Civ 756; *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003.

<sup>6</sup> More likely the injured claimant will be deemed to have accepted part of the risk and the Law Reform (Contributory Negligence) Act 1945 will apply to reduce any award to reflect the percentage of the risk accepted by the claimant. See, e.g. *Reeves v Commissioner of Police* [1998] 2 All ER 381 for the application of this (usually) partial defence in a negligence action.

<sup>7</sup> *Maloney v Torfaen County Borough Council* [2005] EWCA Civ 1762.

duty by putting a horse of 'fierce temper'<sup>8</sup> into the field which attacked him causing injury.<sup>9</sup>

The defendant and his son stated in evidence that they had frequently shouted at persons crossing the field, sometimes turning them back. They had complained to the police and the defendant had been advised by the police to allow them to approach persons who were trespassing on his field. There appeared to have been at one time a notice board put up by the defendant warning people not to trespass on the field but it had been ignored.

Therefore, Walker could have supported police action which may have deterred the practice of using his field in this manner. However, Walker was a dairy farmer and part of his income was derived from selling milk at the door and he decided that to follow this route may have a detrimental impact on his sales. Left with this dilemma, and a bad-tempered horse to put out to pasture, Walker decided to use his land to suit his business and put the horse to graze in that field. No notice was put up on the fence to indicate that the horse was in the field and to warn expected trespassers of the risk. The landscape was changed by the placing of the horse in the field. What seems to have been a safe environment was now a danger and, although it is true that the act of trespass continued to be unlawful, the risk of physical harm to these known trespassers was created, apparently without any awareness on their part, by Walker.

## **1 The Development of the Law post-*Lowery v Walker***

Many years after this decision, and in recognition of the confusing state of the common law, Parliament legislated to clarify the legal rules governing the relationship between occupiers and those visitors lawfully on their premises in the Occupiers' Liability Act 1957 (the 1957 Act).<sup>10</sup> It is not the intention here to review the application of the 1957 Act although it remained the only statutory framework for almost 30 years. More significantly (and following the decision of the House of Lords in *British Railways Board v Herrington*<sup>11</sup>) the legislature passed the Occupiers' Liability Act 1984 (the 1984 Act) indicating the limited scope of the duty owed by the occupier to a

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<sup>8</sup> [1910] 1 KB 173 at 180.

<sup>9</sup> Buckley L.J. (dissenting) later described the horse as having an 'evil character' (CA) at 190.

<sup>10</sup> Detailed discussion of the Occupiers' Liability Act 1957 is outside the scope of this article.

<sup>11</sup> [1972] AC 877. See Buckley, R., 'The Occupier's Liability Act 1984 – Has *Herrington* Survived?' (1984) 48 *Conv* 413; Murphy, J., 'Public Rights of Way and Private Law Wrongs' (1997) 61 *Conv* 362.

person not lawfully on her premises but who suffers personal injury as a result of 'any danger due to the state of the premises or to things done or omitted to be done on them.'<sup>12</sup> Determining whether a duty of care arises between the trespasser and the occupier in the 1984 Act will depend on matters listed in section 1(3), with the final policy caveat detailed in section 1(3)(c) that 'the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.' Although it was thought initially that the 1984 Act would be applicable to all cases concerning physical injury to a trespasser whilst on the premises of an occupier recent cases seem to suggest that where the operating cause of the injury is due to an activity risk, rather than a risk linked to the 'state of the premises' common law principles of negligence law may apply.<sup>13</sup> Placed within the analysis presented here, if the risk which caused the injury was created by the occupier (either because of the state of his premises or an activity conducted on those premises) he will probably be responsible for the consequent harm. If the responsibility lies with a risky activity undertaken by the claimant, the occupier is not likely to be responsible.<sup>14</sup> An assessment of the duty owed and whether the duty was breached under statute or at common law involves reviewing all the circumstances of the case to assess, as precisely as possible, the risks taken by both parties to the action and their role in causing the harm suffered.

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<sup>12</sup> Occupiers' Liability Act 1984 s.1(a).

<sup>13</sup> It is a matter of continued debate among academics and judges as to when the 1984 Act applies and when the common law of negligence applies. Does the 1984 Act apply only to the state of the premises defined as the physical state of the property, or does the state of the premises include risks arising from actions taken by the occupier rendering an otherwise innocuous property a danger? In *Lowery* itself the field did not disclose any physical dangers, but was made dangerous by the presence of the horse. A more obvious example is an activity undertaken by an occupier on his land, e.g. if he engages in shooting rabbits but misses and shoots a trespasser instead. Lord Hoffmann in *Tomlinson v Congleton Borough Council* [2003] UKHL 47 at [26]–[27] (echoing comments made by the judge at first instance, and Lord Phillips in the Court of Appeal) confirmed that there was 'nothing about the mere at Brereton Heath which made it any more dangerous than any other ordinary stretch of open water in England' and did not think that the 1984 Act applied to the facts, the applicable law being the common law of negligence. In his commentary on the case of *Reville v Newberry* [1996] 2 WLR 239, Weir argued that the case was outside the scope of the 1984 Act and really concerned the actions of the occupier in using force to expel the burglar and would come within the common law of negligence. See: Weir, T., 'Swag for the Injured Burglar,' 55 *CLJ* (1996) 182 at 183. The state of the premises was accepted as being the cause of the injuries in *Maloney v Torfaen County Borough Council* [2005] EWCA Civ 1762 and engaged the 1984 Act. However, it was found by the trial judge as a question of fact that the council had no knowledge that trespassers would be in the vicinity, so no risk was created which attracted legal responsibility.

<sup>14</sup> See later *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 etc.

With respect to Lowery's injuries, and by using the relevant legal narrative, the House of Lords concluded that Lowery had implied permission to be on the land of Walker. They thus created a relationship between the two parties, which necessitated care by Walker for the welfare of Lowery (or, presumably any other mauled trespasser) concluding that the occupation rights of Walker had to be balanced against the welfare rights of Lowery.<sup>15</sup>

The same arguments presented, particularly in the Court of Appeal, in the case of *Lowery v Walker*, continue to rage on the role of the law in protecting trespassers from harm. These arguments include the 'illegality' defence,<sup>16</sup> the very plausible argument that the law of negligence generally exists to protect those going about their lawful business, together with the historic support for property rights; all these rail against recovery. It is argued that the trespasser has no legitimate expectation that he will be compensated as a result of his trespassing and at first glance the law of tort offers good protection to the occupier (with exclusive possession). Trespass to land is actionable without proof of damage and, in most cases an injunction will be available to support the rights of the occupier to use her land as she wishes and prevent others from encroaching on it.<sup>17</sup> This position upholds Peter Cane's argument that judicial reasoning arises from the default position of exclusivity of use of the land.<sup>18</sup> Lowery offers no strong argument that he has a right to enter except for the fact that others had entered before him and used the path. He does not claim that the path is a public right of way, and there was no evidence brought forward from the county court to suggest that Lowery believed that he had a right to be there (although there was some controversy about whether it was decided that he was a trespasser by the trial judge and this was picked up by the House of Lords.<sup>19</sup>) The evidence put forward says only that Walker did not bring the action recommended by the police for fear of damaging his milk sales. The House of Lords concluded that

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<sup>15</sup> This is, what Cane describes as 'a clash of property ideas and obligation ideas: the law of obligations is basically concerned with compensating for losses inflicted by tortious conduct rather than redressing interferences with property rights as such.' Cane, P., *Tort Law and Economic Interests*, (1996, 2<sup>nd</sup> edn., Oxford, Clarendon,) p.51.

<sup>16</sup> *Ex turpi causa non oritur actio*. For a recent discussion of the availability of the 'illegality defence' see *Moore Stephens v Stone Rolls Ltd* [2009] UKHL 39.

<sup>17</sup> *Patel v W H Smith (Eziot) Ltd* [1987] 1 WLR 853 – the landowner was entitled to an injunction to restrain trespass on his land where title is not in issue even if he suffers no harm, unless the defendant can show an arguable case that he has the right to enter. See also *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 WLR 411 Ch D and *John Trenberth Ltd v National Westminster Bank Ltd* (1980) 39 P & C R 104 Ch D.

<sup>18</sup> Cane, *Tort Law and Economic Interests*, p.51

<sup>19</sup> *Lowery (Pauper) v Walker* [1911] 10 (HL) per Lord Shaw of Dunfermline, at p.14.

because Walker had taken this decision he had given Lowery implied permission to be on his land and that this gave rise to a duty of care in negligence. However, was he seeking compensation as a result of his trespassing, or, was he seeking compensation for an injury caused by the (unnecessary) risk created by Walker? Could it be that the House of Lords concluded that Lowery had been exposed to an unjustifiable risk of harm by Walker and that the general support for of property rights *in this case* was trumped by the right to legal protection from physical harm?

If such a conclusion could be supported it did not mark the beginnings of a judicial trend. The common law traditionally treated trespassers with severity and continued to do so post-Lowery. A four year old child trespasser in *Robert Addie & Sons (Collieries) Ltd v Dumbreck*<sup>20</sup> was owed no duty by the owners even though the machinery on the land was potentially dangerous and the owners knew that the land was used as a playground. Viscount Dunedin said in *Addie* that the duty towards the trespasser will arise only if it is a result of a malicious or reckless act.<sup>21</sup> The boy was killed by being crushed in the terminal wheel of a haulage system. The four year old trespasser was assumed to bear the risk of harm, even though it would have been impossible for him to assess the risks involved. The colliery owners could have argued that the risk was obvious and had always been present.

Similarly, in *Edwards v Railway Executive*<sup>22</sup> children were in the habit of climbing a fence beside a railway line to toboggan down the embankment. In his judgment Lord Porter notes,

There must, I think, be such assent to the user relied upon as amounts to a licence to use the premises. Whether that result can be inferred or not must, of course, be a question of degree, but in my view a court is not justified in lightly inferring it...<sup>23</sup>

So, although the House of Lords concluded that Walker had given implied permission for Lowery to be on his land it refused relief in both *Addie* and *Edwards* confirming that repeated trespass with the knowledge of the owner, upon premises which are known to present significant dangers, does not necessarily infer implied permission and raise the possibility of recovery. This was a harsh outcome when it is remembered that both *Addie* and *Edwards* were child trespassers and Lowery was

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<sup>20</sup> [1929] AC 358

<sup>21</sup> *Ibid* at pp.376-377.

<sup>22</sup> [1952] AC 737 (HL)

<sup>23</sup> *Ibid*,

an adult. The risk lay with the children in the former, but with the occupier in the latter. The difference could be explained by the passiveness of the occupiers in both Addie and Edwards, compared with the (apparently) active measures taken by Walker to deter trespass. Acts and omissions have a history of being viewed differently by the courts in negligence cases.<sup>24</sup>

However, the courts now treat child trespassers with more sensitivity. The 1957 Act recognises a difference in the standard of care that an occupier should show towards known child visitors on his premises overtly in section 2(3)(a). This higher standard is underpinned by the knowledge that children cannot be assumed to appreciate the risks inherent in an activity in a way commensurate with an adult.<sup>25</sup> The 1957 Act applies to children lawfully on the premises of course and it is reasonable to expect an occupier who invites children on to her premises to try to ensure that they will be 'reasonably safe.'

With implied permission granted by the House of Lords Lowery assumed the mantle of protection offered by the common law at the beginning of the twentieth century and would now either enjoy protection under the 1957 Act as a lawful visitor, or come within the ambit of the 1984 Act (if the horse constituted part of the 'state of the premises'), or the common law of negligence, which would necessitate Lowery proving that a duty was owed to him (even though he was just one of many trespassers using the path). Both the 1957 and 1984 Acts recognise that the level of acceptable risk is determinant on the class of visitor/non-visitor and this was particularly important during the period between the two Acts.

## **2 Reconciling Cases Involving Children**

In *Glasgow Corporation v Taylor*,<sup>26</sup> a seven year old died when eating berries in the Botanic Gardens, Glasgow. Entry to the gardens was lawful but this permission did not extend to interfering with the plants. However, the choice of planting was a decision taken by the council without considering the potential for harm to children

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<sup>24</sup> See, for example, *Home Office v Dorset Yacht Co.* [1970] AC 1004; *Reeves v Commissioner of Police* [1998] 2 All ER 381 where a duty of care arose only because the Home Office and the Commissioner of Police had control over the circumstances which led to the harm.

<sup>25</sup> Occupiers' Liability Act 1957 s.2(3)(a) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visit, so that (for example) in proper cases – (a) an occupier must be prepared for children to be less careful than adults;

<sup>26</sup> [1922] 1 AC 44.

whom they knew visited the park. The court found that by planting the bushes with the bright red berries the council enticed the child on to the flower beds and contributed positively to the child's decision to move off the pathway and eat the poisonous berries. The child, it was concluded, deserved the protection of the 1957 Act because of these special circumstances. The Corporation had created a preventable risk of harm and was responsible. In spite of the decisions in *Addie* and *Edwards* judicial willingness to embrace the idea of an allurements to dispel the status of trespasser, as in the case of *Taylor*, acted to mitigate the harshness of the common law in some cases.

This 'device' may have passed into history with the passing of the 1984 Act<sup>27</sup> but there is no doubt that the protection offered to a visitor under the 1957 Act is wider than under the 1984 Act and for children the 1957 Act section 2(3)(a) exists to ensure that any risks are reviewed and minimised. It is likely that it will continue to be important to persuade the court that the child is a visitor so that a circumstance which might present no risk to an adult becomes a risk which carries a responsibility when children, or other vulnerable individuals, are in the vicinity.

In the above cases the creator of the risk was the occupier. Difficulties arise when there are multiple risk factors and it is necessary for the court to determine which of those risks was responsible for the harm suffered, and, consequently, where the loss should lie.

### **3 The Creator of the Risk which Caused the Harm and the Notion of 'forced neighbourhood'**

In *The Calgarth*<sup>28</sup> an agreement offered protection for damage arising from the right to navigate the dredged canal. We can presume, therefore, that risks inherent in the agreement were the responsibility of the contractor, not the owner of the vessel. During its passage the tug grounded and there was consequent damage to the ship's hull. In a claim for recovery against the contractor Scrutton LJ, noted that protection:

[I]s confined to vessels paying dues to enter or leave the canal, and that the right of navigation does not include a right to ground on the bank.

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<sup>27</sup> See Kidner, *Casebook on Torts*, p.274.

<sup>28</sup> *Rea Towing Company, Ltd., and Owners of Steamship "Otarama" v Manchester Ship Canal Company* (1926) 26 *L. L. Rep.* 203.



Famously, Scrutton LJ went on to say:

When you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters; you invite him to use the staircase in the ordinary way in which it is used.<sup>29</sup>

The risks which if they materialized were compensatable were only those within the scope of the normal use of the canal (or staircase). If a person decided to create additional risks which caused harm then they would have to bear the loss.

The harshness of the common law in relation to child trespassers was considered in *British Railways Board v Herrington* in 1972.<sup>30</sup> The plaintiff child was six years old and was playing in an area adjoining the railway line. The railway line was electrified and a fence between the land on which the child was able to play as a lawful visitor and the railway line, on which the child was not allowed, was damaged because of frequent trespass across the line. In contrast to a danger which would be apparent to all, including a small child, the electrified railway line was a 'hidden' danger at a time when electrification was a new technology.<sup>31</sup> The child was injured seriously whilst crossing the line. Although Kidner<sup>32</sup> suggests that the decision is of academic interest only following the passage of the 1984 Act, it is clear from more recent cases that if the occupier's property poses a significant danger, intentionally or recklessly created by the occupier knowing that a trespasser may come into the vicinity then judicial focus will shift to an enquiry into the risks taken by the trespasser herself. If the trespasser is an adult and creates the risky situation it is likely that the responsibility for any injury will lie with her.

In addition, *Herrington* remains important in assessing the standard required by the occupier. Lord Reid in *Herrington* noted that proximity can be implied by law between the parties:

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<sup>29</sup> Per Scrutton LJ p.212

<sup>30</sup> [1972] AC 877

<sup>31</sup> Cf *Dyer v Ilfracombe Urban District Council* [1956] 1 WLR 218 where a child fell from a slide and was injured. Singleton L.J. remarks 'There was no trap. There was no concealed danger. There was nothing which was not obvious to a child 4 ½ years old. My view of this case is that the danger (if that is the correct term) was the ordinary danger which is present to the mind of anyone if he or she climbs to a height.' at p. 228. Similarly, in *Simkiss v Rhondda Borough Council* 81 LGR 460, the Court of Appeal concluded that the danger was an obvious one, and one which 'that an occupier is entitled to assume that prudent parents will act reasonably in warning their children of natural hazards.' per Dunn LJ at p.471.

<sup>32</sup> Kidner. *Casebook on Torts*, p.274.

By trespassing they [the trespassers] force a 'neighbour' relationship on him [the occupier]. When they do so he must act in a *humane* manner.<sup>33</sup>

Lord Pearson distinguished the 'unpredictable' trespasser and the 'known or reasonably to be anticipated' trespasser. The latter he opines becomes a 'neighbour', but one who 'is rightly to be regarded as an underprivileged neighbour'.<sup>34</sup> It is to be presumed that the occupier will not owe to the 'underprivileged neighbour' the same degree of care owed to the lawful visitor, but it is difficult to imagine how this will be assessed differently to the standard of care owed generally. This qualified neighbour status is reflected in the 1984 Act as recovery is for physical harm only arising from the event.

It is suggested here that even if the status of the injured party is not in question the same issues have shifted to embrace the obligation idea expounded by Cane above.<sup>35</sup> The obligation under the 1984 Act will arise if, on the facts of the case, a nexus is established between claimant and defendant, the risk which caused the harm will be assessed within the context of this relationship. The construction of that relationship now is not so different from the constructions put on the law in the past. In our case Walker made a choice of where to graze his horse knowing it to have a propensity to attack people. It was a reflective choice, not one made in haste, and it was this act which created the risk which led to the injury to Lowery. Similar reasoning can be applied to *Glasgow Corporation v Taylor*, although they might have argued that they gave no thought to the possibility that the berries were poisonous, perhaps arguing instead that they were chosen for their aesthetic appeal. However, linked with the fact that the council had recently lifted a restriction on unaccompanied youngsters visiting the park, and the fact that there must be many alternative planting choices which could have been made, the council bore the responsibility of the risk they had created.

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<sup>33</sup> [1972] AC 877 at 899 per Lord Reid. Application of the 'common humanity' test can be found, for example, in *Lowry v Buchanan* [1980] 3 *NJB* when the Court of Appeal upheld the decision of the trial judge to withdraw the case from the jury when the plaintiff was injured when trespassing in a partially-built house when a board laid across joists broke when he stepped on it. The Court of Appeal confirmed that the duty of care owed to a trespasser 'merely requires the occupier to behave with common humanity'.

<sup>34</sup> [1972] AC 877 at 924 per Lord Pearson.

<sup>35</sup> See *Tort Law and Economic Interests*, p.51.

#### 4 The Problem of the Criminal Trespasser

There remains the difficult question of the criminal trespasser. It is unlikely that the public conscience will be disturbed if the law offers no protection to a burglar, terrorist, or rapist whilst on the property of their victim.<sup>36</sup> In fact, the alternative response was generated by the outcome of the case discussed below. It is hoped that to view the case from the perspective of a risk analysis will remove some of its emotive content and the need to resort to public policy arguments.

In *Revill v Newbery*,<sup>37</sup> the claimant was a burglar trespasser who was awarded damages for harm caused while on the defendant's land. Newbery suspected that there might be a trespasser coming on to his land with the intention to steal his property. He lay in wait for the trespasser with a loaded shotgun inside a wooden shed. When the trespasser was heard in the vicinity Newbery fired the shotgun through the shed door injuring Revill's arm and he was able to recover. It seems that the police had failed to offer a solution to prevent the repeated trespass occurring and that as a result the occupier had decided to take action himself to protect his property from intrusion (or, in the case of Newbery intrusion, and burglary). As can be imagined the media and the public found it difficult to be sympathetic towards Revill and derided the court's decision. So what of the risk? Was it a result of his trespass? It is suggested that if the burglar had tripped on even paving stones whilst trespassing no risk would have been created by the occupier and the risk and responsibility would have lain squarely with the trespasser. There is no doubt that the risk of physical harm was created by the occupier (even if the risk of trespass was assumed by the claimant) and it is this risk which caused the injury and attracted legal redress.<sup>38</sup> Fortunately, it remains the case that an occupier with a shotgun is not a risk expected in this country and when the shotgun is hidden, as in this case,

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<sup>36</sup> The defence of illegality, it has been suggested, might apply in those cases which offend the public conscience and the example of the getaway driver involved in a robbery is the classic case; *Ashton v Turner* [1981] QB 137. The public conscience test has been rejected subsequently by the House of Lords in *Tinsley v Milligan* [1993] 3 All ER 65 (a contract law case) and in *Hewison v Meridian Shipping Services* [2003] ICR 766 where Ward LJ said that it was a false guide.

<sup>37</sup> [1996] 1 All ER 291

<sup>38</sup> An occupier can use force to eject an intruder on her property but this force must be assessed by the court as objectively proportionate. In *Revill v Newbery* the burglar trespasser did not threaten Mr Newbery physically. As Murphy notes (*Street on Torts*) 'the law does not generally value interests in property as highly as those in the person.' p.303.

this weighed in favour of the injured claimant.<sup>39</sup> Damages were reduced by two-thirds to reflect the contribution of the claimant, and Newbery was awarded damages for a counterclaim for the anxiety he suffered during the event.

Often the places where the trespassers suffered harm are not inherently dangerous as can be deduced from the examples given: a field, a park, and a garden shed. It was the actions of the occupier that made them so, coupled with the knowledge that a trespasser was likely to come along. An ardent protector of property rights would, of course, argue that an occupier can use her land as she wishes even if this creates a danger, as a trespasser has no right to be on the land. In *Addie, Edwards and Herrington*, and others, the landowner's ordinary use of her land did, in fact, make it inherently dangerous. A heavy engineering business such as a colliery would need machinery with moving parts to exist and a railway line has no purpose without trains to run over it. The occupiers did, however, have the power to control the risk they offered to known trespassers using fencing or other barriers.<sup>40</sup> Surely, however, the claimants would also have been aware to a greater or lesser extent about the dangers of machinery,<sup>41</sup> trains,<sup>42</sup> and railway lines?<sup>43</sup> They are not promoted in any way as being safe places to play, or appropriate shortcuts. From a very young age parents warn their children about dangerous moving machinery, electrical items, trains, cars, buses, and the like.<sup>44</sup> A trespasser in these cases must have an awareness (however slight) that they are engaging in risky behaviour when running across a railway line, or playing in a disused mine or quarry. This is not to say that a child will be able to assess the risk properly and, the younger the child, the less likely this will be the case. If the danger is a novel one this increased risk will be unknown to the trespasser as it is hidden from view, or beyond their understanding. Does this mean that the risk and responsibility of harm should, in these cases, fall on the occupier? *Herrington* would seem to say 'yes' sometimes. In this case the

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<sup>39</sup> Furthermore, this was not just a case of confronting the burglar with the shotgun; the occupier was prepared to injure (or, even kill) the intruder. This was held to be a disproportionate response even though Newbery was more vulnerable physically than Revill.

<sup>40</sup> See also, *Southern Portland Cement v Cooper (Rodney John) (An Infant by his next friend Peter Alphonsus Cooper)* [1974] AC 623. Cf. *Penny v Northampton BC* 72 LGR 733; (1974) 118 SJ 628

<sup>41</sup> *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358; *Latham v R. Johnson & Nephew Ltd* [1913] 1 KB 398.

<sup>42</sup> *Commissioner for Railways v Quinlan* [1964] AC 1054.

<sup>43</sup> *Herrington v British Railways Board* [1972] AC 877.

<sup>44</sup> For the responsibility of parents to warn children see: *Simkiss v Rhondda BC* (1983) 81 LGR 460; and for the responsibility of parents to prevent their children playing in dangerous places see *Phipps v Rochester Corporation* [1965] 1 QB 450.

relationship which is constructed between the trespasser and the occupier is sufficiently proximate, but requires only that the latter 'take[s] such steps as common sense or common humanity would dictate...' <sup>45</sup> or, in the words of Lord Pearson, in a manner consistent with an 'underprivileged neighbour.' <sup>46</sup> The decision in *Herrington* acknowledged the age of the child, the severity of the injuries, and the obligation on occupiers for the risks they create which might not be obvious to others and over which they have control.

## **5 A Review of More Recent Cases**

A series of recent cases have brought this area of law to the forefront again because of their catastrophic impact on the (often young) claimant.

In *Donoghue v Folkestone Properties Ltd* <sup>47</sup> a 31 year old adult struck his head when he dived into a harbour after midnight in late December. While accepting that the occupier was under an obligation to warn of risks it was held that this reasonable expectation did not extend to cover a time and a season when no-one would have imagined someone diving into the water. Applying the 1984 Act to the facts the Court of Appeal concluded that section 1(3)(b) had not been satisfied and no duty arose. The facts of the case established that the risk which caused the harm was one created by the injured claimant, not the harbour owners.

Subsequently, the House of Lords made a forceful statement attaching personal responsibility to risky activities undertaken by adults in *Tomlinson v Congleton Borough Council*. <sup>48</sup>

The 18 year old claimant suffered catastrophic injuries when he dived into the shallow water of a lake in the council's public park. The decision was welcomed by those who support personal responsibility for acts which are known to be risky but

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<sup>45</sup> *Herrington v British Railways Board* [1972] AC 877, per Lord Morris of Borth-y-Gest at p.909.

<sup>46</sup> In *Herrington* Lord Reid describes this responsibility as attaching after consideration of the facts. 'So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it. If he knew before the accident that there was a substantial probability that trespassers would come I think that most people would regard as culpable failure to give any thought to their safety.' At p.899.

<sup>47</sup> [2003] QB 1008

<sup>48</sup> [2004] 1 AC 46. See also *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003 where a holidaymaker was seriously injured diving into the shallow end of a swimming pool in the early hours of the morning. The Court of Appeal applied *Ratcliffe* and *Tomlinson* to find that the tour operators owed no duty to Evans because the risk of possible injury was obvious.

are taken anyhow.<sup>49</sup> More broadly it is an example of liability in tort law being imposed by the court only when the risk has been created by the defendant. In this case it was concluded that the council did not expose Tomlinson to the risk, or encourage him to engage in the activity which resulted in his injury. The fault lay with the claimant and the council was not liable. The park, being a public place, and Tomlinson having been there when it was open to the public, raised the question of whether the 1957 Act applied to the case. Recalling the words of Scrutton LJ in *The Calgarth* it was confirmed that when Tomlinson dived into the lake he was acting outside the scope of the risks attributable to the council and which offered protection to a lawful visitor. Lord Hoffman notes:

I can see no difference between a person who comes upon land without permission and one who, having come with permission, does something which he has not been given permission to do. In both cases, the entrant would be imposing upon the landowner a duty of care which he has not expressly or impliedly accepted.<sup>50</sup>

Lord Hoffman reviewed the condition of the lake and surrounding circumstances and concluded that there was no risk created by the council which would give rise to a duty under either the 1957 Act or the 1984 Act. The claimant accepted that he was unable to establish that the risk was due to the state of the premises<sup>51</sup> and tried, in the alternative, to prove that it was an activity duty, 'things done or omitted to be done' by the council at the park. These, he argued, included the failure to prevent him from taking the decision to dive into the lake; to act as a brake on his free will, and curb his dangerous action. The House of Lords concluded that the scope of the duty placed upon the defendant council did not extend to cover the irresponsible actions of Tomlinson, and, furthermore noted, that such a finding would have a detrimental impact on the enjoyment of the wider public when acting responsibly in the park (or similar facilities). The dangers of the activity undertaken by the claimant were obvious, the risk had been estimated wrongly by the claimant, but this miscalculation could not shift the blame on to the defendant council.<sup>52</sup>

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<sup>49</sup> See, for example, Ferguson, P. 'Making a Splash' *New Law Journal*, 2003, 1406. 'is a necessary reaffirmation of the primacy of personal autonomy in English tort law and the consequential need for individuals to take responsibility for their own actions.'

<sup>50</sup> *Tomlinson*, para 13. As mentioned previously Lord Hoffmann was of the opinion that this case was not concerned with the state of the premises and did not fall within the ambit of the 1984 Act. The common law of negligence applied, although the focus of both is on whether a duty of care is owed by the occupier to the injured claimant.

<sup>51</sup> *Ibid.* para 28.

<sup>52</sup> See also *Rhind v Astbury Water Park Ltd & anor* [2004] EWCA Civ 756 where the 20 year old claimant did a running dive into the shallow water and hit his head on a fibreglass

*Donoghue, Tomlinson*, and other similar cases<sup>53</sup> involved adults. What about children? As has been mentioned before it is presumed that an occupier will be expected to offer greater protection to child visitors and child trespassers and consequently a risk situation can arise for which they might be required to offer protection. In *Keown*<sup>54</sup> an 11 year old boy was climbing on the underside of a fire escape when he fell and was seriously injured. It was admitted that there was nothing inherently dangerous about the fire escape and decided that the boy was aware of the risk of falling when undertaking the voluntary activity. The cause of the injury was the risky activity of the boy and the responsibility for the unhappy outcome lay with him, not the hospital trust. The fire escape did not give way, or fall on him, neither did it have the potential to cause harm if used in the proper manner, by child or adult.

The 12 year old boy in *Baldacchino v West Wittering Estate plc*<sup>55</sup> also failed to pass the responsibility for his terrible injuries when he dove into the sea off a buoy when the tide was receding. There was clearly a risk attached to the activity (perhaps the very reason why the boy was doing it) but the defendants had taken all precautions necessary to deter the sensible visitor to the beach from engaging in reckless behaviour. The court found that the boy exceeded the permission given to him as a lawful visitor when he undertook the dive and that a duty did not arise under the 1984 Act or at common law. No damages were awarded as the cause of the injury was the risk taken by the boy.

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container on the bottom of the disused gravel pit. The container was covered in silt so was not necessarily an obvious danger. It was held that the 1957 Act did not apply, and that the claimant was unable, on the evidence, to establish the threshold requirement for the existence of a duty of care in s.1(3)(a) of the 1984 Act. There was no evidence to support the statement that the defendants had been aware of the existence of the fibreglass container. It was the specific danger which had to be known, not the general danger of the disused gravel pit which had become a watersports venue.

<sup>53</sup> *Siddorn v Patel* [2007] EWHC 1248 (QB) applied *Tomlinson* in an action against a private property owner. Here, the decision to climb out of the window of her rented flat on to the adjacent flat roof to dance during a party led to the claimant crashing through a skylight and sustaining serious injuries. The cause of the injury was the decision by the claimant to engage in a risky activity which was in no way encouraged by the occupier. No responsibility for the injuries sustained lay with the occupier. In *Evans v Kosmar Village Holidays* [2008] 1 WLR 297, the 17 year old failed in his claim against the tour operators who were found to be under no duty to warn of the risk of diving into the shallow end of a swimming pool. The risk was obvious.

<sup>54</sup> *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39.

<sup>55</sup> [2008] EWHC 3386 (QB)

Some clarity has, therefore, been offered to the occupier in respect to those unique occasions where someone takes it upon herself or himself to exceed the welcome offered to all visitors to their premises and act in a reckless and risky manner. This was recently applied in *Poppleton*<sup>56</sup> when a 25 year old adult fell and was seriously injured at an indoor climbing facility it maintained and opened to the public for a fee. He fell when engaging in a dangerous and unsupervised jump, '[T]he risk of possibly severe injury from an awkward fall was obvious and did not sustain a duty to warn Mr Poppleton of it.'<sup>57</sup> Liability lay with the injured adult and not the leisure facility.

## **Conclusion**

How would *Lowery v Walker* fare today following the passing of the 1957 Act, the 1984 Act and the continuing relevance of the common law of negligence in this area? It is suggested here that because the risk which caused the injury was created by the occupier responsibility would still lie with Mr. Walker. Applying the 1984 Act (or the common law of negligence) Walker had created the conditions for the harm which was sustained to the trespasser. Lowery did take the decision to trespass, but this was not risky behaviour in itself bearing in mind the years of repeated trespass (he did not, after all, attempt to ride the horse) and so the courts would be unlikely to apply *Tomlinson*. The biggest difference is the applicable law would probably be the Law Reform (Contributory Negligence) Act 1945, s(1). In 1909 contributory negligence was a complete defence and it was not raised presumably on the basis that Lowery's actions were non-negligent. However, Lowery was engaging in unlawful behaviour and, given the opportunity, a court would surely recognise the right of the landowner to fence and use his land to graze his horse? It is suggested here that the contribution might fall short of the two-thirds reduction seen in *Revill v Newbery* but perhaps a 30-50% reduction in the £100 award might have been made.<sup>58</sup>

In conclusion it would seem that the law offers some clarity in this area if the cases are viewed from the perspective of risk creation and causation. Potential claimants seeking redress for injuries suffered as trespassers will need to show that it was a risk created by the occupier which remained the primary cause of their injury, not a

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<sup>56</sup> *Poppleton v The Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646.

<sup>57</sup> *Ibid*, para.21 per May LJ.

<sup>58</sup> It is estimated that this equates to over £5,000 in today's money. There is no way of knowing if Walker had the financial means to meet this demand.



risky activity undertaken by themselves and outside the boundaries of the activities permitted, encouraged or facilitated by the occupier. In relation to the latter the loss will lie with the injured non-visitor.