SCHILLER v. THE COUNCIL OF THE SHIRE OF MULGRAVE[1]

Negligence — Liability of Public Authority as occupier for injury to entrant as of right — Existence of separate category for such entrants — Meaning of 'unusual' in context of duty owed by invitor to invitee.

Mr Schiller was walking along a track in a North Queensland scenic reserve when a dead tree fell, gravely injuring him. The park was a nineteen acre area of bushland entrusted to the Mulgrave Shire Council by Order in Council made pursuant to the Lands Act 1910 to 1962 (Queensland), for their care, control and management. The reserve was much visited by tourists, of which Mr Schiller was one. The tree fell without warning nor was there any wind or other disturbance to precipitate its fall. Evidence was given that rain forest trees, once dead, are susceptible to a process of decay which gradually eats away their roots and leaves them poised to topple at any time from their own top-heaviness alone. Douglas J. of the Queensland Supreme Court found as a matter of fact that this was what had occurred.

At first instance, *Schiller's* case[2] never really got off the ground, for Douglas J. applied *Burrum Corporation* v. *Richardson*[3] and held that the Mulgrave Shire Council was not the occupier of the path on which Schiller was injured because it had performed no act of maintenance or improvement on it. In allowing the appeal against this application of the *Burrum Corporation* case[4] the distinction which the High Court unanimously and, with respect, correctly drew was that in the *Burrum* case the relevant Order in Council merely empowered the Corporation to take control of part or the whole of the specified area at will. It was therefore held, in that case, that because the Corporation had done no act indicating that it had taken control of the area where the injury occurred, it could not be said to be in occupation of that place. The relevant Order in Council in *Schiller's* case, however, vested care and control of the entire nineteen acres in the Council, and the court found no difficulty in holding that this immediately created a duty of care towards entrants to the reserve, and placed them (the Council) in the position of occupier vis-à-vis such entrants.[5]

The High Court then held that, as far as was relevant to this case, the duty owed by a public authority to an entrant as of right was at least as high as that owed to an invitee,[6] that is, a duty to protect the entrant from unusual dangers of which the occupier was or ought to have been aware. They further held that the danger was unusual, that the council ought to have known through their employees that there was a dead tree near the track, and that in failing to have their employees look for and remove dead trees in dangerous proximity to a track which they knew their visitors frequented they had not taken reasonable care in the circumstances.

[1] (1972) 46 A.L.J.R. 650. High Court of Australia; Barwick C.J., Walsh and Gibbs JJ.

[2] [1972] Qd. R. 140.

[3] (1939) 62 C.L.R. 214.

[4] *Ibid.*

[5] (1972) 46 A.L.J.R. 650, 651 *per* Barwick C.J., 652-4 *per* Walsh J., 656 *per* Gibbs J.

[6] Barwick C.J. stated that it was higher; Gibbs J. left open the possibility of a higher duty being imposed; Walsh J. alone stated that it was no higher. Page references as for n. 5, *supra*.

It is in the course of establishing the classification of the entrant and the duty owed to him that the decision becomes of real interest, for in it is examined an area of law which has been anything but free from difficulty in the past and which, with the greatest of respect, may still provide grounds for uncertainty in the future. The issue is twofold: is there, first of all, a separate category of entrants who might be termed 'entrants as of right'? And if there is, what duty of care is owed to them? The court answered the first question in the affirmative, and there is no doubt that the authorities cited by Walsh J.[7] in so doing support this view. It is here that the rift between the Australian and English authorities in point becomes apparent.

The English courts, applying the tripartite categorization of entrants as trespassers, licensees and invitees laid down in *Robert Addie & Sons (Collieries) Ltd* v. *Dumbreck*[8] had refused to acknowledge the existence of a fourth class of entrants as of right. Such entrants were therefore classified according to the purpose for which they entered the premises in question: if for 'business' purposes, they were held to be invitees;[9] if for recreation only, they were considered to be licensees.[10] The possibility of there being a higher duty owed to an entrant as of right than to an invitee was emphatically denied:

> There is no fourth category conferring rights superior to those of an invitee for the accommodation of persons who, as members of the public, resort to premises as of right, e.g. intending passengers entering a railway station.[11]

The rationale behind this approach was, arguably, that it was unreasonable to impose a higher duty on the railway authority than on, say, a shopkeeper merely because the railway authority could not refuse entrance at their whim while the shopkeeper could. But it was not this aspect of the English approach which the Australian courts found unacceptable. It was the attitude that all entrants as of right who resorted to premises for mere recreation were to be classed as bare licensees[12] which caused the breakaway.

Although decided many years after the High Court first acknowledged entrants as of right as a class on their own, the decision in *James* v. *Kogarah Municipal Council*[13] possibly gives as clear an indication as can be found of the thinking behind the Australian approach. Owen J. stated:

> A swimming pool provided and managed by a local governing body is a place to which members of the public have a right to go . . . As a matter of common sense I would have thought it clear enough that those who go to such a place as of right are at least invited to use its facilities, be they dressing sheds, spring boards, or diving towers, and are at least entitled to be protected against unusual dangers of which the body which maintains and manages the place knows or should know.[14]

[7] (1972) 46 A.L.J.R. 650, 653.

[8] [1929] A.C. 358.

[9] *E.g.* railway passengers: *Letang* v. *Ottawa Railway* [1926] A.C. 725; *Schlarb* v. *L.N.E.R.* [1936] 1 All E.R. 71.

[10] *E.g.* users of parks: *Sutton* v. *Bootle Corporation* [1947] K.B. 359.

[11] *London Graving Dock (Ld)* v. *Horton* [1951] A.C. 737, 764, *per* Lord McDermott. There are, of course, other classes of entrant to which Lord McDermott does not refer. England and Australia have both acknowledged contractual entrants as a separate class (*Maclenan* v. *Segar* [1917] 2 K.B. 325 and *Watson* v. *George* (1953) 89 C.L.R. 409 respectively) and the duty owed by master to servant is discussed in *Jury* v. *Commissioner for Railways (N.S.W.)* (1935) 53 C.L.R. 273.

[12] This view was confirmed as recently as 1950 by the Court of Appeal in *Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353.

[13] (1960) 61 S.R. (N.S.W.) 129.

[14] *Ibid.* 130.

This decision affirmed the status of an entrant as of right for mere recreation as at least equal to that of an invitee. But in the seminal case of this doctrine, *Aiken* v. *Kingborough Corporation*,[15] Dixon J., as he then was, did not confine his holding to an equation of entrants as of right to invitees. He instead treated the matter as one on which there was no authority binding on him and held:[16]

> [t]he member of the public, entering as of common right is entitled to expect care for his safety measured *according to the nature of the premises* and of the right of access vested, not in one individual, but in the public at large.

Dixon J. later expanded on the standard of care to be expected:[17]

> [w]hat then is the reasonable measure of precaution for the safety of the users of premises, *such as a wharf*, who come there as of common right? I think the public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such a person through dangers arising from the state or condition of the premises *which are not apparent* and are not to be avoided by the exercise of ordinary care.

It is here that two troublesome points arise, neither of which is satisfactorily answered by the decision in *Schiller's* case. The issues can be stated thus: How central was the reference to 'premises such as a wharf' to Dixon J.'s above-quoted formulation? Was he intending it to apply to artificial structures and the standard that is owed in respect of those alone? Secondly, what is the duty he was attempting to demarcate? Was it the same as that owed to an invitee or is the absence of any reference to knowledge of the danger on the part of the occupier to be taken as setting a higher standard in one respect than that applicable to invitees? Clearly his limitation of the duty to dangers which are not apparent places the duty lower in one respect than that owed to an invitee, for an invitee may still recover if the danger was apparent, as long as it was unusual.

Both these issues were discussed by the New South Wales Court of Appeal in the case of *Barr* v. *Manly Municipal Council*.[18] In that case, the Council demurred to a declaration relating to injury sustained in a park by a child (but not from an artificial structure). In the declaration there was no allegation that the Council knew or ought to have known of the existence of the danger. The demurrer was opposed on the basis that Dixon J.'s formulation did not require actual or constructive knowledge on the part of the occupier towards entrants as of right. In upholding the demurrer a majority of the court found that the Dixon formula was not to be taken as imposing a duty higher than that owed to an invitee where the entrant as of right was injured by something other than an artificial structure. Wallace P. stated:[19]

> [i]t may well be that a higher duty exists in a case where the 'premises' are artificially constructed premises such as a public jetty on a wharf or a swimming pool but where the property occupied and into which members of the public may enter as of right is, for example, a reserve or park, different considerations seem applicable.

In his dissenting judgment, Jacobs J.A. took the opposite view:[20]

[15] (1939) 62 C.L.R. 179.
[16] *Ibid.* 209 (Emphasis added.)
[17] *Ibid.* 210 (Emphasis added.)
[18] [1968] 1 N.S.W.R. 378.
[19] *Ibid.* 379.
[20] *Ibid.* 390.

> [t]he principle stated by Dixon J. is not limited in its terms to structures or areas which have been changed from their natural condition and have been in some way prepared for use by the public, but such a limitation is a possible view and it may be that Dixon J. was envisaging a duty in the public body to take reasonable care that any artificial structure or any place changed from its natural condition so that in its changed condition it should be used by the public, would not be dangerous to public users from the state or condition thereof . . . However, such a limitation does not explicitly appear, and I would discard it as a possible limitation.

In holding that the demurrer should be overruled, Jacobs J.A. found that knowledge actual or imputed was not an element of the Dixon formula.

The third member of the court in *Barr's* case[21] was Walsh J.A., as he then was, and his judgment contains a scholarly rejection of the contention that Dixon J.'s rule does not require knowledge of the danger. He did not, however, advert to the artificial structure issue until, while a member of the High Court, the issue was raised in the context of *Schiller's* case. There he stated:[22]

> [a]lthough his Honour there referred to premises 'such as a wharf' and although it is possible that the rights of users of public jetties and wharves are not identical with those of users of recreation reserves . . . it seems clear from a consideration of the reasons of Dixon J. that his quoted statement was meant to apply generally to the users [of parks and playgrounds] to which they come as members of the public.

It is here that we see the proper application of Dixon J.'s formula: by holding that entrants as of right are owed a common duty of care no matter what their purpose for entering the premises (*i.e.* whether business or mere recreation) the court has cleared the way for later decisions to turn on whether the public authority has attained the necessary standard of care. Gibbs J. adverts to some of the factors which will be relevant in determining this issue:[23]

> [t]he nature of the area, the extent to which the public resort to it and the practicability of eliminating the risk, having regard to the expense, the funds available and the difficulty of the operation, have all to be considered.

Difficulties still remain, however, as to just what the common duty of care owed to all entrants as of right is. We are left incapable of saying anything more certain than that the entrant as of right is owed a duty at least as high as that owed to an invitee as far as non-apparent dangers are concerned. But the fact remains that the Chief Justice in *Schiller's* case states his belief that the duty is higher; Gibbs J. in the same case and Wallace P. in *Barr's* case leave open the possibility that a higher duty applies. Walsh J., while holding in *Schiller's* case that the duty is probably the same as that owed to an invitee points to the exception seemingly raised by Dixon's use of the words 'not apparent'. His statement of the exception, however, is infelicitously worded, for he holds:[24]

> [i]f the rule stated by Dixon J. makes the obligation of a public authority in control of premises used for public purposes less onerous in one respect than that of an occupier to an invitee, in that the former cannot be, but the latter may be, liable for injury arising from a danger which is "not apparent", . . . this difference is not in my opinion of any importance in this case.

[21] *Supra*, n. 18.
[22] (1972) 46 A.L.J.R. 650, 654.
[23] (1972) 46 A.L.J.R. 650, 658.
[24] (1972) 46 A.L.J.R. 650, 654.

With respect, it is submitted that what the learned judge intended to say was that invitors may be liable for apparent dangers as long as they are unusual, but on Dixon J.'s formulation, public authorities are liable for non-apparent dangers only. If this is correct, the words 'not apparent' in the above quotation should be reduced to 'apparent'.

It was held, however, that this distinction was unimportant as the danger was not apparent to Schiller or 'to the class of tourists to which he belonged'.[25] This class was mentioned again when the court turned to the question of whether the danger was unusual or not (having decided that the duty owed by the council to Schiller was at least that owed by an invitor to an invitee). Walsh J., with whom Barwick C.J. concurred on this point, held:[26] '[f]or the class of persons of whom the appellant was one, that is, tourists from places beyond the northern rain forest areas of very high rainfall . . . I think that the presence of a dead tree in the vicinity of the track constituted an unusual danger.' And Gibbs J.:[27]

> [i]t would be right to describe the danger as an unusual danger. Many of the persons who would be likely to visit the reserve would, like the appellant, be tourists from other parts of Australia and to such persons the danger of a tree falling suddenly on a windless day and without the influence of any external agency might, I think, properly be described as unusual.

Is it not taking an undesirable step in the direction of making the duty hinge on subjective elements to categorise the danger as unusual towards a part only of the body of tourists who would visit the park? It is a danger against which the House of Lords pronounced a clear warning in *London Graving Dock (Ld)* v. *Horton*.[28] Taking a statement of Lynskey J. in the hearing at first instance[29] 'In my view "unusual danger" means a danger unusual from the point of view of the particular invitee.' Lord Reid commented:[30] '[I]t would be contrary to ordinary principles that the question whether one person owes a duty to another should depend not on objective considerations or on facts which he can ascertain, but on the state of mind of that other person, which may well be unknown to him.'

Clearly the unusual nature of the danger in *Schiller's* case was that there was a dead tree, capable of falling without warning on someone using a well-worn and much frequented track, and whether the person was local or foreign made no whit of difference. This is made clear in another part of the decision where Gibbs J. refers to the fact that warning visitors of the danger would be of no avail:[31]

> It would, in my opinion, have served no good purpose merely to warn persons using the track; if the tree fell it might, as the evidence showed, come down so suddenly that a person on the track could not escape it, and the fact that he was warned of the possibility of danger would not help him.

It can therefore be seen that the remarks of Walsh and Gibbs JJ. at present under discussion were unfortunately chosen in that they introduce a subjective element into the occupier-entrant relationship which Lord Reid and indeed the House of Lords unanimously discarded when they held that an unusual

[25] (1972) 46 A.L.J.R. 650, 655-6 (*per* Walsh J.).
[26] *Ibid.* 655.
[27] *Ibid.* 658.
[28] [1951] A.C. 737.
[29] [1949] 2 K.B. 584, 588.
[30] [1951] A.C. 737, 776-7.
[31] (1972) 46 A.L.J.R. 650, 657.

risk is one which is not usually found in carrying out the task which the invitee has in hand: a simple application of that test would have met the situation and given the same result.

It is submitted that these difficulties of interpretation as to what is an 'apparent' danger and what dangers are 'unusual' and to whom they must be both 'unusual' and 'apparent' are to a large extent rods which the courts have created for their own backs. In this area of the law there is a tendency for the courts to treat dicta on which they rely for authority as if they were pieces of legislation. Examples in point are portions of the judgments in *Indermaur* v. *Dames*,[32] *Addie* v. *Dumbreck*,[33] and *Aiken* v. *Kingborough Corporation*.[34] Surely the crux of any issue of occupier's liability is whether the occupier took reasonable care in the circumstances and if the danger was apparent and usual it would be reasonable to ask less of the occupier than if it was not. But to attribute a definitive quality to these factors, making their presence or absence points on which the case appears to turn is to treat remarks made in the course of deciding one particular dispute as though they were the words of a statute.

In conclusion it remains only to observe that there must be a better solution to this particular problem of loss distribution than requiring the courts and indeed the legal profession as a whole to grapple with complexities of the order of those discernible in *Schiller's* case. It should be noted that *James's* case arose from an incident which took place at a municipal swimming pool to which entrance was, at that time, free of charge. How many free municipal swimming pools now remain, and how many entrance fees carry with them a contractually valid disclaimer of liability for damage or injury?

Given the great variety of areas in Australia to which the public may resort as of right, ranging from railway stations and swimming pools to vast national parks, it seems that to attempt an all-embracing doctrine of tort law which will provide a satisfactory system of loss distribution and at the same time provide a reasonable and uniform formulation of the duty of care in which each 'occupier' may discern what is required of him is too much for the common law. With the advantage of having the English statutory innovations in this field to be guided (and in some cases warned) by it should not be beyond our legislatures to come up with a workable formula for the protection of entrants as of right. The same enactment would also have to spread and grade the burden of providing this protection reasonably amongst the numerous bodies to whose premises entrants as of right resort without sacrificing the element of deterrence against indifference to safety provided by the imposition of a duty of care. But it does not seem too much to ask.

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[32] (1867) L.R. 2 C.P. 311.
[33] [1929] A.C. 358.
[34] (1939) 62 C.L.R. 179.