This paper reflects tentative views with respect to the reform of occupiers' liability law. It has been prepared as a basis for discussion with interested groups and individuals prior to the formulation of any legislative change.

Anyone who wishes to make submissions to or to engage in discussions with the Office of the Attorney General on this subject is invited to write or telephone the Law Reform Division, Office of the Attorney General, P. O. Box 6000, Fredericton, New Brunswick E3B 5H1. Telephone: 453-2569.

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BACKGROUND

A great deal of concern and dissatisfaction have been expressed by occupiers of land, particularly in relation to agricultural holdings, arising out of the existing law governing an occupier's liability to those who come onto his land and the law dealing with trespass to land. Unquestionably, the law has become difficult of interpretation, sometimes confusing and uncertain, thereby putting in question its public purpose. The view has also been expressed that the existing law is deficient in adequately protecting those occupiers permitting entry by the public onto their holdings without charge for recreational purposes.

The law evolved from the traditional concept of the unchallenged right in an owner or occupier of land to use and enjoy the property as he pleased with little, if any, regard or consideration for the interests of others. It was the primary characteristic of ownership and occupation. The judges over the years, pleading the public interest, have endeavoured to modify what they perceived to be unsatisfactory aspects of the law by developing over the years distinct and rigid categories into which persons entering land were placed depending upon the purpose of their visit; together with the imposition of defined standards of care owed to each of those persons by the occupier. The effect was that the obligations of the occupier varied according to the category of the entrant, and the essential question in every dispute became the

ascertainment of which particular category an entrant onto premises fell, and having so found, the obligations of the occupier became apparent. Consequently, a complex and detailed body of law came into being to establish and distinguish between the various categories. Inevitably, problems arose in which some factual situations could not easily be accommodated within a specific category which over the years had become fixed, no doubt to lend certainty to the law's development. To resolve this difficulty, the judges were obliged to distort legal principles dealing with occupiers' liability with unsatisfactory results. No attempt was made to discard the categories. The consequence has been confusion, uncertainty and a great deal of complexity in the law. The law is still evolving; and recent developments, especially in relation to trespassers, have heightened the concern of occupiers and enlarged, to a great extent, these uncertainties.

THE PRESENT LAW IN NEW BRUNSWICK

Today, an occupier of land, whether owner or tenant, has a duty to take care that persons entering his land are not injured; and the law lays down the extent; that is, the standard, of that duty of care. In so doing, four categories of entrants onto land are identified by the courts. They are:

(1) Persons entering under terms of a contract

(2) Invitees

(3) Licensees

(4) Trespassers

(1) CONTRACTUAL

The occupier's duty to an entrant under a contract is determined by the terms of such contract. If the contract is silent in this particular, consideration must be given as to whether the main purpose of the contract is the use of the premises or such use is merely ancillary thereto. If the former, the court will imply a warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them; while, if the latter, the court will apply ordinary negligence principles, i.e., the occupier must take reasonable care to see that the structure is reasonably safe.

This discussion, however, is primarily concerned with non-contractual entrants onto premises and the duty of an occupier in that regard.

(2) INVITEE

An "invitee" has been defined as a person who enters the premises in circumstances where the occupier has a material interest in the purpose of that person's visit. For example, a customer in a shop, or a clergyman visiting patients in a hospital.

Duty Owed Invitee:

The law requires that an occupier must use reasonable care to prevent damage to an invitee from unusual dangers of which he knows, or ought to know. In consequence, the occupier is obliged to make reasonable inspection of the premises to ascertain existing dangers and to eliminate same. A question that flows from this formulation is what amounts to unusual danger? The term has been broadly interpreted by the Courts. It has been stated thus:

> ....the word "unusual" is used objectively and means such danger as is not usually found in the circumstances; it is not to be construed subjectively as meaning unexpected by the particular invitee concerned.

Examples held to be unusual dangers by the Courts are a clear glass panel; a water patch on the floor during winter; wet wax on a hospital floor.

It is a high standard of care which is demanded of the occupier and the modern trend has left this aspect of the law unchanged.

(3) LICENSEE

A "licensee" is a person who enters premises with the occupier's permission. There is, however, no common economic interest between them. For example, a gratuitous grant of permission to walk across the occupier's land.

The permission of the occupier may be implied or expressed. The permission may be implied where the public

uses premises with the acquiescence of the occupier, as where persons take a short cut across the occupier's field, unless their presence is expressly excluded by a well displayed notice. Mere knowledge of presence of the person on the land by the occupier does not amount to a licence, there must be acquiescence by the occupier.

Duty Owed Licensee:

The law requires an occupier to warn a licensee of concealed dangers or traps of which the occupier is aware, i.e., has actual knowledge.

Two questions arise: firstly, what constitutes actual knowledge and secondly, what amounts to a concealed danger or trap?

Actual knowledge of danger exists where the occupier has knowledge of facts from which a reasonable man would either infer the existence of the fact in question, or would regard its existence as so highly probable that his conduct would be predicated on the assumption that the fact did exist. The courts, therefore, may impute knowledge in situations where certain facts are known to the occupier, so an occupier was held to have actual knowledge of loose tiles even though he clearly did not know that the particular tiles were loose. The Ontario High Court imputed actual knowledge to him on the basis of knowledge that he had of a similar occurrence in the past.

A concealed trap has been said to mean a peril which was not apparent to the licensee. It does not necessarily connote a danger which is totally outside the licensee's view. Although there is a duty on a licensee to take reasonable precautions for his own safety, that duty cannot be extended to the point where it is incumbent upon him to make a microscopic inspection of the premises before entering. If the danger is sufficiently obscure, having regard to the circumstances, so that it would not be apparent to the licensee, then there exists a peril in the nature of concealed danger.

If a person acting prudently would not have expected its presence, then the dangerous condition may be termed a concealed trap.

It was generally held that the law imposed no duty upon an occupier to warn a licensee in respect of obvious dangers and that knowledge by the invitee or licensee of the danger would preclude him from recovery. This no longer holds true. The ambit of the duty of care seems to have been widened. Laskin J. held in Mitchell v C.N.R. (1974), 46 D.L.R. (3d) 363 that mere knowledge of the danger on the part of the invitee (or licensee) was not enough to absolve an invitor (or licensor) of liability where such knowledge fell short of voluntary assumption of risk.

4. TRESPASSER

(a) Who is a Trespasser:

A trespasser is an entrant upon land without the permission of the occupier.

This category includes both the wilful entrant and the comparatively innocent person on another's land without lawful justification. The person whose presence is contrary to the wishes of the occupier will be considered a trespasser even if he does not realize he is a trespasser. A person considered as a licensee can become a trespasser if he exceeds the scope of his permission. For example, restrictions as to time or space may be placed upon the rights of the lawful visitor. Also a visitor making improper use of the premises may become a trespasser.

(b) Duty owed Trespassers:

Historically the law obliged the occupier not to injure the trespasser wilfully, that is, not to create a danger with the deliberate intent of doing harm or damage to the trespasser, or to do any act in reckless disregard for the presence of the trespasser; but the occupier had no duty to take reasonable care for his protection or even to protect him from concealed dangers. The trespasser came onto the property at his own risk. In England, this attitude of the courts was upheld and followed in a long line of cases especially dealing with disputes between the railways and members of the

public as a result of accidents on the railway lines. This view of the law was confirmed and followed in Canada.

It will be seen that a very low standard of care was imposed on an occupier in relation to a trespasser. The law, as it stood, merely reflected the traditional concept of the land holder's right to the untrammeled use and enjoyment of his domain with least subordination to the interests of others. A trespasser, a person entering land without the permission of the owner or occupier, was seen as a violation of this concept particularly if his motives were dishonest. A wilful trespass was an act to be suppressed as it represented a challenge to the peaceful enjoyment of property and so deserved harsh treatment as a deterrent to others. But what of the innocent trespasser? The comparatively innocent and respectable person such as a walker in the countryside who unhindered strolls across an open field, and children whose sense of boundaries and proprietary rights are so much different from that of adults. The judges made a distinction between the wilful and innocent trespasser and even distinguished between an adult and a child trespasser. They sometimes imported fictions into the law by elevating the innocent trespasser to the category of a licensee by implication in order to provide him with a remedy.

The Supreme Court of Canada in the case of Veinot v Kerr-Addison Mines Ltd. (1975) 51 D.L.R. (3d) 533 in 1974 created a new duty of care to trespassers, whether a

child or adult. The new duty may be called a "duty of common humanity" towards a trespasser. The duty was stated by Mr. Justice Martland as follows:

> .....an occupier who knows of the existence of a danger upon his lands which he has created, or for whose continued existence he is responsible, may owe a duty to persons coming on his land, of whose presence he is not aware, if he knows facts which show a substantial chance that they might come there .....such a duty, when it exists, is limited, in the case of adults, to a duty to warn. In the case of children, something more may be required. The existence of a duty will depend on the special circumstances of each case.

The problem that arises is how certain is this new approach. Does it lessen the confusion and complexities of the law or only add to them. In Videan v British Transport Comm. (1963), 2 All E.R. 866, Lord Denning, M.R. speaking of the common humanity doctrine stated that he did not quite know what it meant. One must endorse that view as the test suffers from the defect of vagueness. The result may well be a real probability that the resolution of legal disputes will remain unpredictable. The rigid category system at one time provided for some degree of certainty in the possible outcome of litigation. This resulted in less litigation as the law could be readily ascertained, and legal advice accordingly given; however, the distinctions between the categories have all but disappeared as a result of recent judicial interpretations with the consequence that there is now uncertainty and difficulty in ascertaining the true state of the law. One may well have no other recourse but to

go to court to ascertain what is the law and embrace all the perils of needless litigation.

OCCUPIERS OF LAND AND USE OF LAND FOR RECREATIONAL PURPOSES

The province enjoys an extensive rural area. Each year large numbers of city dwellers invade the countryside for recreational purposes. Farmers and other occupiers have complained that many of these persons come onto the lands without permission, damage livestock and crops for which no compensation is forthcoming, yet may have an action for damages for any injury sustained on the land. The decision of the Supreme Court of Canada in Veinot v Kerr-Addison, in which the operator of a snowmobile, although a trespasser, was awarded damages for injuries sustained while on private property, heightened these fears. The Legislature, as a consequence, amended the Motorized Snow Vehicles Act by providing that occupiers of land owe no duty of care toward a person who is a trespasser driving or riding on a motorized snow vehicle or being towed by a motorized snow vehicle upon the land, except the duty not to create a danger with the deliberate intention of causing harm or injury to the trespasser or causing damage to the motorized snow vehicle and not to do a wilful act with reckless disregard to the presence of the trespasser. The amendment has greatly reduced the fear of liability for injury to such persons but remains in respect to other recreational activities.

The use of land for recreational activities is usually at the permission of the occupier. Consequently, all entrants to the land as a result of the permission under the existing law are "licensees" and the duty owed by the occupier to a licensee is to warn of concealed dangers or traps. It will be seen, therefore, that the occupier owes a greater duty to persons to whom he grants permission to use his lands for purposes of recreation than he does to a trespasser. The practical effect of this is to discourage an occupier to grant permission for the use of his land for such purpose. He may well ask himself, why should I grant permission which will oblige me to inspect my lands to ensure there are no concealed dangers or traps thereon, at possible great expense, for which I receive no compensation?

It seems desirable that if occupiers of lands are to be encouraged to permit the use of their land for recreational purposes without charge then such land owners should be protected by limiting their liability towards persons entering the land who may be injured.

APPROACHES

Outlined below is a possible solution:-

(1) An OCCUPIERS' LIABILITY ACT might be enacted in which

(a) one duty of care imposed on all occupiers of land would be substituted for the many duties of care that an occupier now owes to persons

coming onto the land; this duty would be to take such care as in all the circumstances is reasonable to see that any person or his property on the premises is reasonably safe while on the premises.

(b) The duty of care would apply in relation to the condition of the premises; activities on the premises; or the conduct of third parties on the premises.

(c) The occupier would be relieved of any duty of care to a person in respect of risks willingly assumed by that person as his own risks.

This approach may be a start in reforming the existing law and follows the one taken by the Uniform Law Conference of Canada in the Uniform Occupiers' Liability Act 1973. The proposal seeks, in determining the occupier's liability for injury to entrants on his land, an approach that is the same as that applied to injuries caused elsewhere and governed by the principles of law regarding liability for negligent actions; i.e., a person must take reasonable care to avoid acts which he can reasonably foresee would be likely to injure other persons directly affected by his actions.

The result would be the abolition of the rigid category system that now exists and its attendant confusion; also, the common humanitarian doctrine with its inherent vagueness. All that would be required under such a law is that the occupier do what is reasonable in all the circumstances of the case. The effect would be to simplify the law in relation to duty of care; and in considering whether the duty of care has been breached all the circumstances of the case would be taken into account. These would include the likelihood of the entrant's presence on the land, foreseeability of possible injury, the purpose of the entry, the nature and character of the entry, and the protection of the entrant from the particular danger. The results of such an inquiry would correspond more closely to the true situation of the individual occupier than the present law in which a court must distill from the evidence factual situations which must be accommodated or made to accommodate within a recognized category, and only then will the duty of care be ascertained.

The common duty of care dispenses with the artificiality and the fictions imported into the existing law to make it function. The law becomes less confused, less complex, more certain and ascertainable.

These proposals would be applicable to trespassers except where provided otherwise. Many trespassers are persons who never intended going onto another person's land, or they are children wholly unconscious of the concept of trespassing. Depending on the circumstances it may be unjust to deny such persons compensation for injuries suffered on the land.

(2) THE MOTORIZED SNOW VEHICLES ACT

The Act provides that the occupier of land owes no duty of care to a trespasser snowmobiler other than not to create dangers with a deliberate intent of doing harm and to refrain from acting with reckless disregard for the snowmobiler's presence.

This provision was enacted to allay the fears of landowners as a result of the decision of the Supreme Court of Canada in the Veinot v Kerr-Addison case. Although the case involved an innocent trespasser, the Legislature must have formed the view that, as a matter of policy, it was to the greater public good to give wider protection to the occupier of lands than to the trespasser even if an innocent trespasser.

The Motorized Snow Vehicle Act could, therefore, continue to apply to all lands.

Alternatively, the position in relation to trespassing snowmobilers could be dealt with as suggested and the Act amended if necessary to reflect whichever view is adopted.

(3) LAND USED FOR RECREATIONAL PURPOSES AND TRESPASSERS

It is in the interest of the public that lands be available without charge for recreational purposes. This purpose can be achieved only if occupiers of land grant permission for such use. Everything should be done to encourage this attitude. The problem, however, is that under existing law a person granted permission to use the land is a licensee and the occupier is under a duty to warn of concealed dangers. The owner of land may well decline as the possible reward for such a generous gesture could be the burden and cost of inspecting the land to see that it is free from concealed dangers and, in any case, a possible suit for damages in the event of injury sustained by a licensee. The practical effect of such an obligation is to discourage an owner of land from granting permission for its use for recreational purposes. Again, as a result of the Veinot case, trespassers, innocent or otherwise, are owed a duty to be treated with common humanity. Land owners, particularly in the agricultural community, feel outraged that they may be liable for injury to a trespasser who has not only invaded their privacy, but may well have caused serious damage to crops for which they will receive no compensation. Farmers feel wronged and without proper protection under the existing laws.

It is essential that some balance be established between the interests of occupiers of land, on the one hand, to ensure that they receive adequate protection from trespassers when they grant permission for the use of their land for recreational purposes without charge; and, on the other hand, the interests of all entrants onto the lands, including trespassers. It is only by so doing that we can protect the interests of the agricultural community, and, at the same time, encourage occupiers to make lands available for recreational purposes without charge. With this in view the following approach may be considered:

(1) To prohibit entry on certain classes of land without permission;

(2) To limit the liability of an occupier who permits entry for recreational purposes without charge on certain classes of land;

(3) To provide a system under which permission to enter may be given by notice.

CLASSES OF LAND

Lands that might be classified include:

(a) land used for agricultural purposes or land under cultivation;

(b) orchards, pastures, woodlots, cleared lands on which cultivated crops are growing;

(c) Gardens, lawns;

(d) occupied land (Fish and Wildlife Act) with an extended definition to include lands constructively occupied by virtue of agricultural or harvesting activities that need not be fenced and need not include any actual adjoining residence;

(e) lands on which wild or natural crops are growing and are harvested (This list is not exhaustive).

NOTICE

Notice permitting entry could be given:

(a) orally;

(b) in writing; or

(c) by means of signs posted in designated places.

OCCUPIER'S LIABILITY

Where entry was prohibited to certain classes of land, or permitted to certain classes of land for recreational activities without charge, the occupier's liability would be limited to dangers created with the deliberate intent of

causing harm or acts done with reckless disregard for the entrants' presence. The entrants would be deemed to have willingly assumed all other risks.

TRESPASSERS

The purpose of the above provisions would be to provide a reasonable limit on the possible liability of the occupier in circumstances where entry was made notwithstanding an absolute prohibition to do so. The provision would affect an intentional trespasser, whose situation would be the same as the trespasser before the Veinot case; i.e., the occupier would be under a duty to avoid acting with reckless disregard for the entrant's presence. The innocent trespasser would be similarly affected.

It must be remembered, however, that the primary purpose of the proposal is to give the occupier some protection by limiting his liability. Its application would be limited to a class of land which would include such places as enclosed premises, gardens, lawns, orchards and cultivated fields. To distinguish between an intentional and an innocent trespasser would entail the recognition of two duties in relation to trespass on lands on which entry was prohibited:

(i) that outlined for the intentional trespasser; i.e., limited to dangers created with deliberate intent to cause harm or acts done with reckless disregard

for the entrant's presence,

and

(ii) in relation to the innocent trespasser the duty to take such care as in all the circumstances is reasonable to see that any person on the premises is reasonably safe.

The existence of two distinct duties would not be desirable. It would create the distinct possibility of repeating problems similar to those experienced under the present category system whose abolition is advocated in order to simplify the law and make it more ascertainable.

If such a distinction was accepted the court would have to decide in every dispute the status of the claimant; i.e., was he a wilful or innocent trespasser, and only after this issue was settled would the court be in a position to identify the duty of care, if any, owed to the claimant by the occupier, and then to inquire whether the ascertained duty was discharged or not. All the disadvantages of the category system would be repeated no doubt with similar results. In almost every case, one would have to seek in litigation answers to such questions. The law as a consequence would remain uncertain and become as complex as before the attempted reform.

However, if it is proposed that notwithstanding the possible problems this distinction should be recognized, the alternative approach would be to hold that the duty owed the innocent trespasser would be the common duty of care outlined above.

Under this proposition regard would be had to circumstances common to all cases involving trespassers, which would include the fact that the claimant is a trespasser, the age and character of the trespasser (whether a child, or adult or a person suffering any infirmity by reason of age or otherwise), the nature and purpose of the entry upon the property, and on the basis of these criteria the court would have to make findings of fact as to whether (i) the claimant was an innocent trespasser, (ii) the occupier in the particular circumstances of the case owed some protection to the innocent trespasser, and (iii) the occupier had discharged that duty by taking such care as was reasonable in all the circumstances of the case to see that the trespasser did not suffer injury by reason of the danger upon the premises.

In this connection an important qualification to be considered is the practical result which would put a trespasser, although an innocent one, in a far more favourable position vis à vis the occupier for any injury sustained than a person who entered the land with permission for recreational purposes and who sustained an injury, in that the

duty owed such a trespasser would be to take reasonable care, while in relation to the person granted permission to enter the land for recreational purposes the occupier's duty would be limited to dangers created deliberately or recklessly.

There is no doubt that a person who seeks and obtains permission to enter land for recreational purposes and who pays nothing for the privilege does not expect to place responsibility for any mishap on the person who gives him such permission. One would expect he would accept any risk attendant on his enjoyment of the privilege. Were it to be otherwise, few, if any, occupier would grant permission for persons to enter land for recreational purposes without charge.

The occupier's common duty of care would not be excluded in relation to permitted entry on the premises for other than recreational purposes (i.e., mutual business, visitors, etc.).

The approaches outlined above are intended to assure protection of the occupier from liability and so encourage landowners to permit the use of their lands for recreational purposes without charge.

TRESPASS TO PROPERTY

Occupiers of land, depending upon the pursuits in which they are engaged, encounter diverse problems caused by trespassers. Different considerations arise in respect to an

urban or rural environment. The occupiers of premises in both situations, however, would wish to exercise some control over the unauthorized entry and/or presence of persons on their property. In the urban area this is relatively easy, because police and other authorized persons could be made readily available to ensure quick enforcement. The rural areas present a more difficult problem. Large scale cultivation represents substantial investments of capital and trespass on cultivated lands; e.g., on pastures and orchards, can result in severe physical and financial loss. Although the occupier of land, by common law, has the right to a civil suit for damages against a trespasser, this remedy is inadequate, particularly in the rural areas, due to delays, expense and the difficulties of identification of the trespasser. The absence of any meaningful deterrent aggravates the problem. Needed is a procedure that is relatively swift and inexpensive; that will provide for the award of compensation by the trespasser for any damage cause; that will provide for the recovery of reasonable costs against the trespasser for any successful prosecution; and in addition that will be punitive by the imposition of substantial fines. These together should amount to a meaningful deterrent to potential trespassers. At present, legislation pertaining to trespass is the Petty Trespass Act. The Act deals with trespass as a crime in relation to shops, shopping malls and educational institutions. Its impact is primarily urban.

Possible approaches could be:

(a) to extend the provisions of the Petty Trespass Act to cover lands and structures, or either of them, wherever situated;

(b) to make it an offence for any person, without the permission of the occupier, to enter certain designated premises when such entry is prohibited;
(Proof of such permission would rest on the person so asserting)

(c) to make it an offence for any person, without the permission of the occupier, to engage in certain activities on the premises when those activities are prohibited.
(Proof of such permission would rest on the person so asserting)

(d) to make it an offence for a person to refuse to leave premises after he is ordered by the occupier or his agent so to do.

These offences would arise in situations where, as in (a) above, entry to certain land was prohibited and a trespass was committed. Prohibition of entry would be without notice, and the burden of proving permission would be on the entrant as it would be a matter peculiarly within his knowledge as to whether he did receive permission or not. Lands so

designated would include gardens, lawns, enclosed lands, fields under cultivation, orchards. Specific notice prohibiting entry seems unnecessary as the public is presumed to know that they cannot enter a garden, lawn, enclosed premises or a field under cultivation without permission. Trespass to such lands should be an offence. Posted notice would be required in all other cases.

Where a person had received permission to enter land to engage in prescribed activities, but departed from those prescribed activities and engaged in activities that were prohibited, the situation would be covered under (c) above. The activities permitted would be indicated by the posting of signs. If, for example, the postings indicated that skiing was permitted but hunting was prohibited, a person who entered as a skier and then proceeded to hunt would be in breach. Again the burden of proving permission would be on the entrant. The activity permitted or prohibited would be indicated by (notice) posting of signs. Land so designated would include forested land, uncultivated and unoccupied lands.

Where the permission granted by the occupier or his agent is withdrawn and the entrant refused to leave when ordered to do so by the occupier or his agent, the situation would be covered under (d) above.

For purposes of the above proposals notice could be given:

(a) orally,

(b) in writing, or

(c) by means of signs posted in designated areas as to be visible from entry points to the land.

SIGN POSTINGS

Interpretative signs may be designed based on a distinctive colour scheme, and/or with distinctive markings, symbols or words which would indicate that entry was prohibited, or permitted, and where entry is permitted the sign would also spell out exhaustively all the activities prohibited or permitted on the land.

The proposals outlined in the Discussion Paper on Occupiers' Liability and Trespass to Property, Ministry of the Attorney General, Ontario, May, 1979, seem a simple, sensible and suitable scheme and is recommended. It states at page 18:

> One of the main problems faced by occupiers of land who are willing to allow some recreational activities on their land is how to prevent other undesired activities. It is a critical problem for trail associations who are given permission to establish a trail on land. Failure to control unwanted activities may result in the occupier's withdrawal of permission to use his land.
>
> Part of the problem is the non-existence of a code to specify the legal meaning of signs in current use. For example, what does a "no fishing" sign mean? Does it merely indicate that the occupier could not find a

"No trespassing" sign at the store? It appears desirable to provide a code to specify the meaning of signs prohibiting or limiting access to premises.

The Code:

(a) The code would provide that entry is prohibited where signs are posted to that effect. Thus, it would be an offence to enter where a sign, for example, stated "No trespassing", "No entry", "Entry prohibited" or "Keep out."

(b) The code would create the positive entry system recommended by the Ontario Trails Council. The positive entry concept would allow an occupier to place signs indicating those recreational uses that are permitted. The code would provide that a sign indicating that a particular activity is permitted means that all other activities are prohibited. The code would also provide that a sign stating the name of an activity, or containing a graphic representation of an activity, is a sign indicating that the activity is permitted.

Thus, if an occupier granted permission to use his land for horseback riding but no other activity, a sign "Horseback riding", or a graphic illustration of the activity, could be posted. All other activities would be prohibited and persons engaged in other activities could be prosecuted.

(c) With respect to trails such a positive entry concept is practical. Certain activities are incompatible with others and the permitted uses can be signified. However, where there is a desire to open large tracts of land to general recreational use with a few exceptions, it would be far less expensive and more convenient to list the prohibited rather than the permitted uses. For example, if a thousand acres

> are to be opened to all uses except fishing, it would be more practical to signify the prohibited uses.
>
> To facilitate the negative entry concept, the code would provide that a sign indicating that a particular activity is prohibited means that all other activities are permitted. The code would also provide that a sign stating the name of an activity, or containing a graphic representation of an activity with an oblique line drawn through the name or through the representation, would mean that the activity is prohibited.

The creation of the code in the legislation would facilitate the prosecution of those who do not respect the rights and privileges of others. ....

The posting and maintaining of signs whether containing writing or graphic representations can be difficult and expensive. Signs are vulnerable to the elements and to vandals. There is a need for a method of giving notice that entry is prohibited which is inexpensive to establish and maintain.

It is proposed that legal meaning be given markings in two colours, red and yellow. Markings could be made with paint, or other low cost materials, and could be placed on existing features of the land such as trees, remaining sections of fencing or the tops of posts. Under the proposal, it would be sufficient if each marking was 10 centimetres (approximately 4 inches) in diameter and a marking was clearly visible in daylight under normal conditions from the approach to every ordinary point of access to the land. It would not be necessary as a condition to prosecution that unusual places of entry be marked. Where entry is prohibited to open areas, it would be sufficient if markings were placed so that one marking could clearly be seen from another.

Red and yellow have been selected because they have international meanings similar to those they have in the proposed system. Red is used as notice that entry is prohibited. Yellow is used to indicate that caution is required. A yellow marking would mean that entry is prohibited except for certain activities, but the entrant would be deemed to have notice of which activities were permitted. Thus, where premises

were posted with yellow markings, it would be the responsibility of the person wishing to enter to discover which activities were permitted. He would do this by looking for explanatory signs or, if there were no signs, by contacting the occupier directly. If an entrant engaged in an activity that was not permitted, he could be prosecuted.

Children are taught at an early age the primary social meaning of red and yellow. The additional meaning to yellow markings could also be taught in schools. Coloured markings should have a more powerful impact on children than written signs.

The occupier of land who wishes to prohibit entry on his land would find that marking his land with red markers is an easier method of giving notice of his intention to exclude entrants than the existing system of posting signs. As stated earlier, the existing system would also be retained.

The marking system and sign code should be of great assistance to recreational associations where an occupier agrees to permit a limited number of recreational activities on his land. An example will illustrate how the sign code and marking system might be used by a trail association which is granted permission by an occupier to establish a hiking trail on his land:

At major access points to the trail, signs could be erected either with a graphic representation of a hiker or with the word "Hiking" on them. All ordinary access points to the trail could be marked with yellow markings to indicate that the land could be used for a limited number of recreational activities. Places along the trail where hikers might stray onto farms, or other premises on which they were unwelcome, could be marked with red markings.

The effects of this signage and marking scheme would be as follows. The signs indicating that hiking was permitted would, because of the code, be notice that only hiking was permitted and entrants engaged in other activities could be prosecuted. Destruction of the sign would not benefit persons who wished to engage in unauthorized activities, since the yellow markings, by themselves,

> would require entrants to be responsible for discovering which activities were permitted. A person entering to engage in an activity other than hiking would be liable to prosecution for wrongful entry. The red markings would warn hikers that they were straying off the trail and make them liable to prosecution if the hikers ignored the markings.

The maximum fine for trespassing, now $1,000 under the Petty Trespass Act, should be maintained. A substantial fine would act as a deterrent to potential trespassers.

A court should be empowered to provide for the payment of compensation to the occupier for any damage caused by a trespasser. Compensation should not exceed $1,000. This is only just and equitable as any fine imposed on a trespasser goes to the Provincial Treasury and not the occupier.

Where a trespasser is successfully prosecuted the court should be empowered to order that the trespasser pay the reasonable costs of the prosecution if the prosecution was privately done by the occupier.

One of the obvious problems of combatting damage by trespassers is the identification of the person who caused the damage. Without identification the occupier would be unable to prosecute the trespasser. An approach worth considering is that the occupier should be compensated from a public liability fund derived from licence fees charged hunters and snowmobile operators. An upper limit would be established for such compensation and for the number of awards. Payments would be required to be reimbursed or would be reduced if the occupier received any sum under a contract of insurance against loss by reason of damage to property in respect of which he made a claim against the fund.

SUMMARY

OCCUPIERS' LIABILITY

(1) Duty of Care

The concept of invitee, licensee and trespasser would be discarded and the numerous duties of care that an occupier now owes to persons entering his land would be replaced by a simple duty of care owed by all occupiers.

The duty would be to take such care as in all the circumstances is reasonable to see that persons entering on the premises are reasonably safe while on the premises.

(2) Agricultural Lands for Recreational Purposes and Trespass

Agricultural lands would be designated into classes by their use.

Entry to land of a designated class would be wholly prohibited. Included in this class would be:

(i) gardens,

(ii) lawns,

(iii) enclosed lands,

(iv) fields under cultivation,

(v) orchards.

(c) Entry to land of a designated class would be permitted for recreational activities. Included in this class would be:

(i) forested land,

(ii) uncultivated land,

(iii) unoccupied land.

(d) Permissible recreational activities would be spelled out by Notices.

(e) Duty of Care

(i) Where entry was prohibited the occupier's liability would be limited to dangers created with the deliberate intent of causing harm or acts done with reckless disregard for the entrant's presence. The entrant would be deemed to have willingly assumed all other risks.

(ii) Alternatively. Where entry is prohibited but the breach is by an innocent trespasser, proof of which shall be on the person so asserting, then the duty of the occupier is to take such care as in all the circumstances is reasonable to see that persons entering on the land are reasonably safe while on the premises.

(iii) Where entry is permitted for recreational activities without charge,

the occupier's liability be limited to dangers created with the deliberate intent of causing harm or acts done with reckless disregard for the entrant's presence, the entrant be deemed to have willingly assumed all other risks.

TRESPASS TO PROPERTY

(1) To make it an offence to enter premises without permission where entry is prohibited. Proof of the grant of permission rests on the person so asserting.

(2) To make it an offence, where permission is granted to enter premises for recreational purposes without charge, to do an activity on the premises which is prohibited.

(3) Where notice is required to inform persons that entry is prohibited, or to specify recreational activities that are permitted notice may be given orally, in writing or by interpretational signs.

(4) To make it an offence to refuse to leave premises after being directed to do so.

(5) The imposition of a maximum fine for any breach up to $1,000.

(6) Provision for the payment of compensation up to a maximum of $1,000 by a trespasser to the occupier for damage caused by the trespasser.

(7) Provision for the payment by the trespasser to the occupier the reasonable costs of any successful private prosecution.

(8) Where damage suffered but the trespasser responsible cannot be identified, hence no prosecution possible, the occupier to be compensated from a public liability fund with limits as to amount of compensation and number of such awards. Such compensation paid to be reduced or refunded if any sum received by the claimant under a contract of insurance for loss or damage to property in respect of which he made a claim against the fund.