See also 424. 1963 8 SR. 256
App. 1970 8 SR. 420
Appl (1988) 14 NSWLR 374
Appl 100 ALR 747

[HIGH COURT OF AUSTRALIA.]

WATSON . . . . . APPELLANT;
PLAINTIFF,

AND

GEORGE . . . . . RESPONDENT;
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *May* 18;

SYDNEY, *July* 23.

Williams A.C.J., Fullagar and Kitto JJ.

Negligence—Dangerous premises—Liability of occupier to person entering pursuant to contract—Boarding house—Defective gas bath-heater—Death of paying guest.

A defective gas bath-heater installed in a bathroom at a boarding house caused the death, by carbon-monoxide gas poisoning, of a paying guest at the boarding house. His widow brought an action against the proprietress of the boarding house, claiming damages and *solatium*. After the accident, it was discovered that the outer water jacket of the heater had bulged and that the flue had become partly blocked by a collection of rust. The combination of these defects caused carbon-monoxide gas to escape into the bathroom. The condition of the heater would have been apparent to an expert but not to the ordinary person. The heater had been in use for more than twenty years and, although it was of an out-of-date type, it was safe when in good repair, and a large number of heaters of the type were still in use. The trial judge stated the duty owed by the boarding house proprietress to the paying guest by saying that the former impliedly warrants that reasonable care has been taken to make and keep the premises reasonably fit and safe for the purposes for which they are to be used. Applying this principle, he said that, in accepting the deceased as a paying guest and in inviting him to use the bathroom, the boarding house proprietress impliedly warranted that reasonable care had been taken to maintain the bath-heater in a reasonably fit and safe condition. He held that the boarding house proprietress had not failed in this duty, despite the fact that she had not had the heater examined at regular intervals. He accordingly dismissed the action.

Held, that the trial judge had stated the relevant principle correctly and had correctly applied it to the facts.

Decision of the Supreme Court of South Australia (*Ligertwood* J.) *Watson* v. *George* (1953) S.A.S.R. 219, affirmed.

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APPEAL from the Supreme Court of South Australia.

Faith Dorothea Watson brought an action in the Supreme Court of South Australia under Pt. II of the *Wrongs Act* 1936-1944 (S.A.) for damages and *solatium* in respect of the death of her husband, John Joseph Alexander Watson, on 15th or 16th July 1951.

The plaintiff and the deceased were lodging in a boarding house owned and conducted by the defendant, Daisy Burnice George, at South Terrace, Adelaide. The accommodation provided for them included the use, in common with other lodgers, of a bathroom. On the morning of 16th July 1951, the deceased was found dead in the bathroom, in which the bath-heater was alight. His death had been caused by carbon-monoxide gas from the heater. An expert who subsequently examined the heater found that the flame of the burner was smothering, which indicated that the products of combustion were being forced down over the flame. On dismantling the heater, he found that the outer water jacket of the heater had been bulged in towards the inner water jacket so as to block the free flow of the products of combustion into a primary flue and thence into a secondary flue. As a result, the products of combustion were escaping at the bottom of the heater into the bathroom. This of itself would not have created any danger to an occupant of the bathroom, but about two-thirds of the space in the outside elbow of the secondary flue had become blocked by a collection of rust, so that, when the products of combustion escaped into the bathroom, they did not rise round the bath-heater and enter the secondary flue through a draught diverter, as they should have done, but remained in the bathroom. Owing to incomplete combustion, these products contained an excessive amount of carbon-monoxide gas, which is a deadly poison. The deceased was overcome by this gas and died in the bathroom. The heater was of an out-of-date type, but it was safe and efficient when in good repair, and many heaters of the type were in regular use.

The trial judge (*Ligertwood* J.) (1) held that in accepting the deceased as a paying guest and inviting him to use the bathroom, the boarding house proprietress impliedly warranted that reasonable care had been taken to maintain the bath-heater in a reasonably fit and safe condition, and that, on the facts, the boarding house proprietress had not failed in her duty. He accordingly dismissed the action.

From that decision the plaintiff appealed to the High Court.

(1) (1953) S.A.S.R. 219.

K. L. Ward Q.C. (with him *V. C. Matison*), for the appellant. The defendant, having received some warning that all was not well with the bath-heater, was guilty of negligence in failing to pass this on to the deceased. The defendant also failed to make good her implied warranty that the heater was in a safe condition (*Bell* v. *Travco Hotels Ltd.* (1)). The heater and flue should have been inspected periodically. The greater the potential danger, the greater is the care required (*Beckett* v. *Newalls Insulation Co. Ltd.* (2); *Swinton* v. *China Mutual Steam Navigation Co. Ltd.* (3)). The case is analogous to the cases relating to lifts. [He referred to *Haseldine* v. *C. A. Daw & Son Ltd.* (4).] Once the plaintiff establishes fault on the part of the defendant, it is unnecessary to establish that this particular type of accident was likely to occur.

H. G. Alderman Q.C. (with him *G. C. Harry*), for the respondent. There is no absolute continuing warranty of safety. The defendant is not responsible for latent defects which reasonable care could not discover. The implied warranty by an invitor for reward relates to the condition of the premises at the time of the contract, not to what might happen in the future (*Clerk & Lindsell, Law of Torts*, 10th ed. (1947), p. 644; *Charlesworth, Law of Negligence*, 2nd ed. (1947), p. 170; *Salmond, Law of Torts*, 10th ed. (1945), p. 471; *Winfield, Law of Tort*, 1st ed. (1937), p. 584). There is no evidence to suggest that any reasonable step a householder would take would have discovered the defect. [He referred to *Paris* v. *Stepney Borough Council* (5); *Caminer* v. *Northern & London Investment Trust Ltd.* (6).]

V. C. Matison, in reply. It is for the defendant to satisfy the court that she took reasonable steps to keep the bath-heater safe, because the facts are entirely within her knowledge (*Hyman* v. *Nye* (7); *Barkway* v. *South Wales Transport Co. Ltd.* (8)). The warranty as to the safety of the premises is a continuing warranty (*Carstairs* v. *Taylor* (9)).

Cur. adv. vult.

July 23.

The following written judgments were delivered :—

WILLIAMS A.C.J. This is an appeal by the plaintiff from a judgment of the Supreme Court of South Australia (*Ligertwood* J.) in an action brought by the plaintiff to recover damages and a

(1) (1953) 1 Q.B. 473.
(2) (1953) 1 All E.R. 250, at p. 254.
(3) (1951) 83 C.L.R. 553, at pp. 566-567.
(4) (1941) 2 K.B. 343.
(5) (1951) A.C. 367, at p. 382.
(6) (1951) A.C. 88.
(7) (1881) 6 Q.B.D. 685, at p. 687.
(8) (1950) 1 All E.R. 392, at pp. 398-399.
(9) (1871) L.R. 6 Ex. 217, at pp. 222, 223.

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solatium under Pt. II of the *Wrongs Act* 1936-1944 (S.A.) in respect of the death of her husband in the bathroom of a boarding house kept by the defendant at 101-102 South Terrace, Adelaide, on 15th or 16th July, 1951. The action was brought by the plaintiff as the administratrix of the deceased for her own benefit as his wife and she alleges that his death was caused by the negligence of the defendant. *Ligertwood* J. dismissed the action with costs.

Most of the facts are not in dispute. It is common ground that the defendant was carrying on the business of a lodging house at 101-102 South Terrace, Adelaide, and that the deceased and the plaintiff were lodging there at the time of his death. They were paying for accommodation which included a double bedroom, breakfast, and the use in common with other lodgers of the bathroom in which the deceased died. His death was caused by carbon-monoxide gas which escaped from the gas bath-heater in this bathroom and overcame him. He went to the bathroom at about 10 p.m. on Sunday night, 15th July, and was found lying dead on the bathroom floor about 7 a.m. on Monday morning, 16th July. The bath-heater was alight and the water was discharging from it into the bath which was overflowing. It was obvious that it had been alight for a considerable time. The bathroom window was closed.

The bath-heater was examined by an expert from the gas company on 21st July 1951. He lit the heater and noticed that the flame of the burner was smothering. This indicated that the products of combustion were being forced downwards over the flame preventing the amount of secondary air required for complete combustion reaching the flames. This led him to believe that there must be an obstruction in the heater. He took it to pieces and examined it and also examined the flues within which the products of combustion should have passed through the wall of the building into the outer air. The heater was a "Douglas" bath-heater of an out-of-date type but one which is quite safe and efficient when in good repair and these heaters are still in regular use in a large number of bathrooms in Adelaide. It has two water jackets, outer and inner, both made of copper with a space between them in which the products of combustion circulate and pass into a primary flue also made of copper. In the heater in the lodging house these products passed thence into a galvanized iron secondary flue which had two elbows, one inside the bathroom shaped so that the pipe would be diverted slant-wise towards the ceiling and go through the wall of the building and the other just outside the wall shaped so that the pipe would become vertical and complete its length

parallel to the wall ending with a cowl on the top. The whole length of the flue was about twenty feet. A draught diverter or baffle was fitted at the junction of the primary and secondary flues having openings from the bathroom into the secondary flue and fitted so that any gases which escaped from the heater into the bathroom would circulate around the heater and be drawn into the draught diverter and thence along the secondary flue into the outer air. The fitting of a cowl to the secondary flue is now out-of-date, the modern practice being to fit a " T " shaped elbow instead. But there are still about 2,000 secondary flues in use in Adelaide fitted with cowls.

The expert found that the outer water jacket of the heater had been bulged in towards the inner water jacket so as to block the free flow of the products of combustion into the primary flue and thence into the secondary flue. As a result these products were escaping at the bottom of the heater into the bathroom. This of itself would not have created any danger to an occupant of the bathroom. But unfortunately about two-thirds of the space in the outside elbow of the secondary flue had become blocked by a collection of rust so that when these products escaped into the bathroom they did not, as they should have done, rise round the bath-heater and enter the secondary flue through the draught diverter, but remained in the bathroom. Due to incomplete combustion these products contained an excessive amount of carbon-monoxide gas which is a deadly poison and the deceased was overcome by this gas and died in the bathroom.

The deceased was lodging at South Terrace by the express invitation of the defendant and the plaintiff sought to make her liable for damages on two grounds. In the first place she sought to invoke the principle of law laid down in *Indermaur* v. *Dames* (1) that a visitor " using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact " (2). It was held in *London Graving Dock Co. Ltd.* v. *Horton* (3), that an unusual risk is one which is not usually found in carrying out the task which the invitee had in hand. I have no doubt that the presence of carbon-monoxide gas is an unusual risk

(1) (1866) L.R. 1 C.P. 274.
(2) (1866) L.R. 1 C.P., at p. 288.
(3) (1951) A.C. 737.

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for a lodger to encounter in a bathroom which he has been invited to use. The plaintiff sought to prove that the defendant's manageress, Mrs. Devine, who was in charge of the lodging house knew, or ought to have known, that the bath-heater was dangerous prior to the accident and ought to have locked the bathroom or warned lodgers of the danger. She relied on the evidence of Mr. and Mrs. Dracup, two other lodgers, who used the same bathroom. Mrs. Dracup had become ill whilst using the bathroom on the Sunday morning. But his Honour accepted Mrs. Devine's evidence that she believed that Mrs. Dracup's illness was due to a miscarriage and that she had no reason to believe that it was due to a defective bath-heater.

The other ground on which the plaintiff sought to make the defendant liable was upon an allegation that at all material times the deceased was a lodger for valuable consideration in the lodging house and it was an implied term of the contract between the defendant and the deceased that the defendant would keep and maintain the bathroom and all the fittings and fixtures therein in a proper state of repair and in a safe condition. The implied term as pleaded seeks to place an absolute obligation on a defendant who conducts a boarding house for reward to ensure the safety of all those parts of the house into which her lodgers may be reasonably supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so. In my opinion *Ligertwood* J. was right in holding that the obligation was not absolute. After discussing a number of cases he said that their general effect is that an invitor for reward impliedly warrants that reasonable care has been taken to make and keep the premises reasonably fit and safe for the purposes of the invitation. Applying this principle to the bath-heater his Honour said that in accepting the deceased as a paying guest and in inviting him to use the bathroom the defendant impliedly warranted that reasonable care had been taken to maintain the bath-heater in a reasonably fit and safe condition. In *Key* v. *Commissioner for Railways* (1), *Jordan* C.J. said : " There are, however, two categories of invitees to whom the occupier owes a special duty, which is or may be higher than that owed by him to ordinary invitees. In these cases, the duty is contractual, and arises by virtue of an implied term in a contract between the occupier and the invitee. The invitees in question are persons whom the occupier employs to do work for him on his premises, and persons who pay him for admission to his premises. . . . In these cases the occupier's implied contractual duty to be careful replaces any common law duty to the invitee which might otherwise

(1) (1941) 41 S.R. (N.S.W.) 60; 58 W.N. 72.

exist in the same field; . . . and for any breach of the occupier's implied contractual duty the invitee may sue either in contract or in tort" (1). Later he said: "Similarly, if the occupier of premises agrees for reward to allow a person to enter his premises for some purpose, he impliedly warrants that the premises are as safe for the purpose as the exercise of reasonable care can make them; and an action for negligence will lie for injury caused by a breach of the duty created by the warranty" (2). A glance at some of the leading English cases is sufficient to show that the law was correctly summarized by his Honour in these passages. A case in which many of them are discussed is *Maclenan* v. *Segar* (3). In the leading case of *Francis* v. *Cockrell* (4), where a grandstand collapsed, *Martin* B. said: "I do not at all pretend to say whether the relation of the parties raised a contract or a duty. It seems to me exactly the same thing; but I am of opinion that when a man has erected a stand of this kind for profit, that he contracts impliedly with each individual who enters there, and pays money to him for the entrance to it, that it is reasonably fit and proper for the purpose; or, if you choose to put it in another form, that it is the duty of a person, who so holds out a building of this sort, to have it in a fit and proper state for the safe reception of the persons who are admitted. I apprehend it might have been described, at a time when pleading was more strict than it is now, either as a contract or as a duty, and that it is one of those implied contracts which, in point of fact, is the same as a duty. I do not at all distinguish between them, and, therefore, in my judgment, the duty was personal on the defendant, when he received this money, to provide that the stand was fit and proper—ordinarily fit and proper for the purpose. Not that I consider the defendant in any way an insurer, and responsible for anything beyond what a man would reasonably be responsible for; but I think that he was responsible for that stand being in a fit and proper condition,—in a reasonably fit and proper condition for the purpose for which he took the money and admitted the person" (5). In *Hyman* v. *Nye* (6), a case relating to a defective carriage, *Lindley* J. (as he then was) said: "A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but

(1) (1941) 41 S.R. (N.S.W.), at pp. 65-66; 58 W.N. 72.
(2) (1941) 41 S.R. (N.S.W.), at p. 66; 58 W.N. 72.
(3) (1917) 2 K.B. 325.
(4) (1870) L.R. 5 Q.B. 184; 501.
(5) (1870) L.R. 5 Q.B., at pp. 509-510.
(6) (1881) 6 Q.B.D. 685.

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in my opinion, he is bound to take as much care as they; and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the break down was in the proper sense of the word an accident not preventible by any care or skill" (1). In *Hall* v. *Brooklands Auto Racing Club* (2) *Scrutton* L.J. cited a passage from *Parnaby* v. *Lancaster Canal Co.* (3), approved by Lord *Wensleydale* in *Mersey Docks Trustees* v. *Gibbs* (4), in which it was held that the common law imposed a duty on the proprietors of a canal "not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care so long as they kept it open for the use of all that might navigate it, that they might navigate it without damage to their lives or property" (5). His Lordship then said: "This is not an absolute warranty of safety, but a promise to use reasonable care to ensure safety" (2). In the same case *Greer* L.J. cited the following passage from *Maclenan* v. *Segar* (6): "Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them" (7). His Lordship then said: "It is clear law that there is no absolute warranty that the premises are safe, but only that reasonable skill and care have been used to make them safe" (7). In *Campbell* v. *Shelbourne Hotel Ltd.* (8), where the plaintiff was a guest at the defendant's hotel, *Cassels* J. held that the defendant owed to the plaintiff, as an invitee, a duty to take all reasonable care to see that the premises were safe.

In my opinion *Ligertwood* J. stated the nature of the warranty correctly and the only remaining question is whether he erred in the application of the law to the facts. The bath-heater had probably been in use for over twenty years. It had evidently been properly installed and there is no evidence that it had ever functioned other than satisfactorily. Mrs. Devine said that prior to the death of the deceased it had not given any trouble. Mrs. Devine was in

(1) (1881) 6 Q.B.D., at pp. 687-688.
(2) (1933) 1 K.B. 205, at p. 214.
(3) (1839) 11 A. & E. 223, at p. 230 [113 E.R. 400, at p. 403].
(4) (1866) L.R. 1 H.L. 93.
(5) (1866) L.R. 1 H.L., at p. 124.
(6) (1917) 2 K.B. 325, at p. 332.
(7) (1933) 1 K.B., at p. 223.
(8) (1939) 2 K.B. 534.

the habit of showing new lodgers the way to use it. She had lit it only a week before when the Watsons arrived to show the deceased how to do so. It had then appeared to be in good working order. It was in regular use. Two other lodgers, Mr. and Mrs. Graham, had used it about 11 o'clock on the Sunday morning and suffered no ill effects. In these circumstances, as his Honour said, the issue narrows down to the question whether the defendant in a reasonable course of conduct towards her boarders should have from time to time had the bath-heater examined by an expert to see that it was functioning properly. The expert from the gas company said that there were 30,000 gas bath-heaters in use in Adelaide, including between six hundred and seven hundred "Douglas" heaters, but he did not know of any previous case in South Australia of a person dying as a result of carbon-monoxide gas. He had been a testing officer since 1936 or 1937 and he only knew of one case in which the water jacket had bulged. The bulge in the present case was caused by undue water pressure at some time and this might have happened immediately before the accident or ten years before. An accumulation of rust settling in the elbow of a secondary flue and blocking it was equally unusual. It was the unfortunate coincidence of these two very unusual happenings that caused the accident. As his Honour said: "A bath-heater is a comparatively simple appliance, a defect in which would be expected to show itself to the ordinary user" (1). His Honour drew the inference against the defendant that the bulging and the accumulation of rust was in each case a gradual process, that the defect in the heater would have been apparent some time before the accident and would have disclosed itself in the smothering of the flame if it had been inspected by an expert. Having regard to the evidence of the expert that the bulge might have occurred at any time and that the rust might have been precipitated by a storm early on the Sunday night, this was a very favourable inference for the plaintiff. Be that as it may, the facts are that nothing had occurred which could reasonably cause Mrs. Devine to believe that the bath-heater required attention. There is no evidence that it is usual or necessary to have bath-heaters inspected at regular intervals, or that the gas company or any public authority recommends that this should be done, or that it is risky not to do so. I think that the defendant is entitled to rely on the statement by Lord President *Dunedin* which is cited by Lord *Normand* in his speech in *Paris* v. *Stepney Borough Council* (2) that: "Where the negligence of the employer consists of what I may call a fault of

(1) (1953) S.A.S.R. 219, at p. 223. (2) (1951) A.C. 367.

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omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it" (1). Lord *Normand* said that this rule "contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances" (1).

For these reasons I would dismiss the appeal.

FULLAGAR J. The facts of this case have been very fully stated by *Williams* A.C.J. I agree that the appeal should be dismissed, but I have felt some difficulty over the case, as did the learned trial judge himself. The difficulty has seemed to me to be fundamental and to lie in arriving at a satisfactory formulation of the rule of law involved.

Whatever defects of definition may be found in the different classes of case, English law has laid down special rules with regard to the liability of occupiers of premises for injuries suffered by persons entering thereon through defects or dangers existing in the premises. The place of these special rules in the general law of negligence should not be forgotten or confused, and I therefore quote in full a passage of some length in the judgment of *Dixon* J. in *Lipman* v. *Clendinnen* (2). His Honour said :—"The circumstances in which one man may lawfully come upon premises in the occupation of another are infinitely various and as his lawful presence there must raise some duty of diligence, however slight, for his safety, it might be considered consonant with general principle to measure the standard of care required by determining as matter of fact what amount of care in all the actual circumstances of each particular case the reasonable man would exercise. But English law has adopted a fixed classification of the capacities or characters in which persons enter upon premises occupied by others, and a special standard of duty has been established in reference to each class. Many of the circumstances which might have been considered in reference to the precautions required go now only to the question in what character did the sufferer come upon the premises. Apart from contractual relations (*Maclenan* v. *Segar* (3)), and the execution of an independent authority given, by law (*Great Central Railway Co.* v. *Bates* (4) ; *Low* v. *Grand Trunk*

(1) (1951) A.C., at p. 382.
(2) (1932) 46 C.L.R. 550.
(3) (1917) 2 K.B. 325.
(4) (1921) 3 K.B. 578, at pp. 581-582.

Railway Co. (1)), he who enters upon land occupied by another does so in one or other of three characters. The duty owing to him is measured or defined by reference to the category to which he belongs. He comes as a trespasser, as a licensee, or as an invitee. The separation is absolute between these three classes, which are mutually exclusive. A different duty is incurred by an occupier to each class, and these various duties are not to be confused or assimilated. In determining the liability of an occupier, it is imperative that a decision should first be reached fixing the class to which the person belongs who complains of injury. When that has been done, the case must be governed altogether by the standard of duty prescribed for that class " (2). His Honour then referred to a passage in the speech of Viscount *Dunedin* in *Robert Addie & Sons (Collieries)* v. *Dumbreck* (3). His Lordship there said :— " Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law. When you come to the facts it may well be that there is great difficulty . . . in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category. I cannot help thinking that the use of epithets, ' bare licensees ', ' pure trespassers ' and so on, has much to answer for in obscuring what I think is a vital proposition ; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls " (4). As to the suggestion that there is a fourth category comprising persons who " enter as of right ", see *Salmond* on *Torts*, 10th ed. (1947) (edited by Dr. *Stallybrass*), pp. 485-486.

In the passage quoted above *Dixon* J. put on one side, as constituting a separate and distinct class, cases in which the duty is held to be contractual. In *Key* v. *Commissioner for Railways* (5), *Jordan* C.J., in the course of an otherwise helpful passage, refers to persons to whom a contractual duty is owed as constituting a category or categories of " invitees ". Cf. *Halsbury's Laws of England*, 2nd ed., vol. 23, pp. 602-604. I cannot help thinking, with great respect, that it is a grave mistake, when a technical term has acquired a fairly well settled meaning, to attempt to alter or enlarge that meaning to suit one's individual taste.

(1) (1881) 72 Maine 313 [39 Am. Rep. 331].
(2) (1932) 46 C.L.R., at pp. 554, 555.
(3) (1929) A.C. 358.
(4) (1929) A.C., at pp. 371, 372.
(5) (1941) 41 S.R. (N.S.W.) 60, at p. 65 ; 58 W.N. 72.

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The question of the category into which a particular case falls is a question of law. If there is a jury, it is for the judge and not the jury. Thanks to the classical statement of the law by *Willes* J. in *Indermaur* v. *Dames* (1), the case of the true invitee has generally raised only questions which, on their true analysis, are questions of fact. " It is all-important ", said *Isaacs* J. in *South Australian Co.* v. *Richardson* (2) " to adhere to the carefully-worded formulation of the rule ", and this behest has been widely, if not universally, obeyed. Juries are, I think, invariably directed in the language of *Indermaur* v. *Dames* (1). The case of the licensee, although here too we have had the invaluable guidance of *Willes* J. (*Gautret* v. *Egerton* (3)), has been less happy : the temptation to gloss and " improve " has been irresistible. The self-confessed glossator is not often an improver. The present case, however, is not a case either of invitee or of licensee. It belongs to that class of case in which the person injured is on the premises in pursuance of a contract and for valuable consideration paid or payable to the occupier. On this class of case the important authorities are not numerous, and it is not altogether easy to extract the true rule from them. The most important are the two well known cases of *Francis* v. *Cockrell* (4) and *Maclenan* v. *Segar* (5).

In *Francis* v. *Cockrell* (6) there are three passages in the judgments in the Exchequer Chamber which require consideration. The plaintiff had been injured through the fall of a stand on a racecourse, for admission to which he had paid money. *Kelly* C.B. said :— " I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied. That I hold to be a general proposition of law applicable to all contracts of this nature and character. It is, indeed, subject to a qualification or exception, to which I will hereafter advert, as determined by the case of *Readhead* v. *Midland Rly. Co.* (7) ; but that qualification extends only to the case of some defect which is unseen and unknown and undiscoverable, not only unknown to the contracting party, but undiscoverable by the exercise of any reasonable skill and diligence, or by any

(1) (1866) L.R. 1 C.P. 274.
(2) (1915) 20 C.L.R. 181, at p. 190.
(3) (1867) L.R. 2 C.P. 371.
(4) (1870) L.R. 5 Q.B. 184 ; 501.
(5) (1917) 2 K.B. 325.
(6) (1870) L.R. 5 Q.B. 501.
(7) (1867) L.R. 2 Q.B. 412 ; (1869) L.R. 4 Q.B. 379.

ordinary and reasonable means of inquiry and examination" (1). The learned Chief Baron practically repeats these words (2). *Martin* B. said :—"I am of opinion that when a man has erected a stand of this kind for profit, that he contracts impliedly with each individual who enters there, and pays money to him for the entrance to it, that it is reasonably fit and proper for the purpose; or, if you choose to put it in another form, that it is the duty of a person, who so holds out a building of this sort, to have it in a fit and proper state for the safe reception of the persons who are admitted" (3). The learned Baron adds that the defendant is not an insurer—not "responsible for anything beyond what a man would reasonably be responsible for" (4). But he does not, except in this extremely indefinite way, qualify the terms of the warranty. *Montague Smith* J. said :—"It seems to me that, in cases of this kind which relate to things and not to personal services, the undertaking or promise to use due care may be more correctly stated in an impersonal than a personal form, and the proper mode of stating it is, the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form, that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so. It seems to me that those are obligations which are to be implied from a contract of this kind, and that in this case they have been broken; for, although it is not found that there was any personal negligence on the part of the defendant, yet it is found that there was negligence on the part of those who constructed the stand, and who were employed by the defendant to erect it. For that negligence it seems to me that the defendant is responsible" (5).

It cannot be said that the three passages quoted lay down an identical rule. The language of *Kelly* C.B. suggests that there is a warranty of safety or reasonable fitness, subject to an exclusion of liability if the defect is shown to be not only unseen and unknown but undiscoverable by any ordinary and reasonable means of inquiry and examination. On this view it might well be said that the burden of bringing himself within an exception rests upon the defendant. *Martin* B. may be thought to intend that everything should be left to the jury—including the content of the duty itself. But the exceptions which his words suggest to my mind are such exceptions as act of God or malicious act of a third party, and one would think that, on his view, the warranty was, for

(1) (1870) L.R. 5 Q.B., at p. 503.
(2) (1870) L.R. 5 Q.B., at p. 508.
(3) (1870) L.R. 5 Q.B., at p. 509.
(4) (1870) L.R. 5 Q.B., at p. 510.
(5) (1870) L.R. 5 Q.B., at pp. 513-514.

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practical purposes, absolute in such a case as the present. *Montague Smith* J. would appear to have thought that the obligation, though as a matter of form contractual, in substance imposed a personal liability for negligence and a vicarious liability for the negligence of anybody who had been concerned in the construction repair or maintenance of whatever had caused damage to the plaintiff. This is not the only place in which a hesitation is apparent between a liability for breach of contract as such and an extended vicarious liability for negligence as in tort. Such a hesitation may perhaps be thought to have been unfortunate. It may be that it has led to something in the nature of a compromise.

The case of *Searle* v. *Laverick* (1) was a case in which a bailee for reward placed two carriages for safe keeping in a shed which was blown down in a high wind. Evidence that the shed had been negligently erected for the defendant by an independent contractor was rejected at the trial, and was held by the Court of Queen's Bench to have been rightly rejected. The case was held to belong to a different category from that of *Francis* v. *Cockrell* (2), on which the plaintiff had strongly relied. But *Blackburn* J., who delivered the judgment of the Queen's Bench, referring to *Francis* v. *Cockrell* (2) observed (3) that the judgment delivered by *Hannen* J. for the Court of Queen's Bench in that case (4) had been " carefully prepared and delivered in writing ". He then quotes *Hannen* J. (5) as saying : " It is said in the judgment in *Readhead* v. *Midland Rly. Co.* (6) ' Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given '. Applying this rule to the present case, we think that the contract of the defendant with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work, as well as by himself " (7). *Blackburn* J. then observes (8) that the judgments in the Exchequer Chamber were not written and it is not difficult to infer that, in his view, some of them went too far in favour of an extension of the doctrine of an implied warranty.

The position was considered in a judgment delivered by *a'Beckett* J. for the Full Court of Victoria in *Faux* v. *Williamstown Bathing Co. Ltd.* (9). The plaintiff sued in a county court for injuries

(1) (1874) L.R. 9 Q.B. 122.
(2) (1870) L.R. 5 Q.B. 184 ; 501.
(3) (1874) L.R. 9 Q.B., at p. 127.
(4) (1870) L.R. 5 Q.B. 184.
(5) (1870) L.R. 5 Q.B., at p. 193.
(6) (1869) 4 Q.B. 379, at p. 392.
(7) (1874) L.R. 9 Q.B., at pp. 127-128.
(8) (1874) L.R. 9 Q.B., at p. 128.
(9) (1903) 29 V.L.R. 459.

sustained through a defective flooring board in the defendant's swimming baths. One would gather that he entered for the purpose of bathing, and paid for admission. The county court judge seems to have directed the jury as if it were an ordinary claim for personal negligence. The verdict was for the defendant. On appeal to the Full Court Mr. *Arthur* argued—not, one would have thought, without reason—that the jury should have been directed that the defendant " undertook that, so far as care and skill could make it so, the structure was safe and fit for its purpose ". He also argued that, the defect having been proved, it was for the defendant to show that he could not have discovered it—i.e., presumably by the exercise of reasonable care. These arguments seem to have been within a quite conservative view of the effect of *Francis* v. *Cockrell* (1). The court, however, after referring at some length to *Francis* v. *Cockrell* (1) and *Searle* v. *Laverick* (2), dismissed the appeal, holding the direction sufficient. I will refer again to this case a little later.

After the observations of *Blackburn* J. in *Searle* v. *Laverick* (2) the view that there was in such cases an actual warranty of safety or of reasonable fitness must have been found difficult to maintain. There are two fairly recent cases which, either because of the decision itself or because of what is said in the course of the judgment, may possibly be thought to suggest that the notion of so extensive a warranty has not yet perished. These cases are *Silverman* v. *Imperial London Hotels Ltd.* (3) and *Gillmore* v. *London County Council* (4). In the former case the plaintiff had had a distressing adventure with bugs in a Turkish bath. In the latter the plaintiff was a member of a physical training class and slipped on a polished hardwood floor. Whatever may be thought of the decision in the later case, I do not think that either really represents an application of a doctrine of absolute warranty. If either does, it must, I think, be regarded as unsound in view of the evident approval given by the Court of Appeal in *Hall* v. *Brooklands Auto Racing Club* (5), to the judgment of *McCardie* J. in *Maclenan* v. *Segar* (6). It is true that in *Hall's Case* (5) only *Greer* L.J. expressly mentions *Maclenan* v. *Segar* (6), but the decision and the reasons for the decision appear to be entirely in accord with that case.

In *Maclenan* v. *Segar* (6) the plaintiff had been seriously injured in a fire which broke out in an hotel in which she was staying as a guest for reward. The cause of the fire was proved to lie in a defective

(1) (1870) L.R. 5 Q.B. 184; 501.
(2) (1874) L.R. 9 Q.B. 122.
(3) (1927) 137 L.T. 57.
(4) (1938) 4 All E.R. 331.
(5) (1933) 1 K.B. 205.
(6) (1917) 2 K.B. 325.

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scheme for conveying smoke and burning soot from the kitchen chimney. The construction had been carried out by a competent architect and a competent builder employed by the defendant's landlord, but either the architect or the builder or both had, as *McCardie* J. found, been guilty of grave negligence. The construction was such that there was from the first a grave risk of fire, though the risk did not in fact materialise for some six years. The defendant did not know, and had no reason to suppose, that there was any danger. *McCardie* J., in holding the defendant liable, began by saying that the case was not a case of an invitee. He said :— " In my opinion the existence of a contract between the plaintiff and the defendant in such a case as that now before me is of great importance, for it may lead to the implication of a warranty which carries the duty of a defendant substantially beyond the obligation indicated in *Indermaur* v. *Dames* (1)" (2). The learned judge then considered a number of authorities, and, after concluding with a citation of the passage which in effect repeats the passage set out above from the judgment of *Kelly* C.B. in *Francis* v. *Cockrell* (3), he stated what he conceived to be the relevant rule in the following terms :—" Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises ; and the head-note to *Francis* v. *Cockrell* (4), must to this extent be corrected. But subject to this limitation it matters not whether the lack of care or skill be that of the defendant or his servants, or that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises " (5).

The above statement of the rule must, I think, be accepted as a correct statement : it can hardly be doubted that it represents the general current of authority. It is, however, from some points of view, a curious rule. The obligation is, in legal theory, contractual, but the liability depends on a breach by somebody at

(1) (1866) L.R. 1 C.P. 274.
(2) (1917) 2 K.B., at p. 330.
(3) (1870) L.R. 5 Q.B., at p. 508.
(4) (1870) L.R. 5 Q.B. 501.
(5) (1917) 2 K.B., at pp. 332-333.

some stage of a common-law duty (which may, of course, have been also itself a contractual duty) to use reasonable care. It seems clear that the rule does not impose liability in the absence of negligence on the part of anybody. It is to be observed also that in some cases the whole question will resolve itself practically into a question whether the defendant or a servant of the defendant has been guilty of negligence in connection with the source of danger and damage. So, in the present case, it is established that the bath-heater was in itself a safe and efficient appliance and was safely and properly installed in a safe and suitable situation, and it may be taken that its undoubtedly dangerous condition in July 1951 was due to a gradual process of deterioration. If, therefore, we accept *Maclenan* v. *Segar* (1) as laying down the true rule, the question does, as *Ligertwood* J. observed, really narrow itself down to the question whether the defendant, or her manageress, failed to exercise reasonable care in that they did not cause periodical examinations of the bath-heater to be made by an expert. So it may possibly be that the direction to the jury which was upheld in *Faux* v. *Williamstown Bathing Co. Ltd.* (2) can be justified on the basis that, no other negligence being established, the case resolved itself into a question whether the defendant's manager had been negligent in that he had not observed and remedied the defect in the flooring.

It may be thought that, on the rule as stated in *Maclenan* v. *Segar* (1), a question arises as to burden of proof. The question could be important in at least two kinds of case. The first may be exemplified by supposing that in *Maclenan* v. *Segar* (1) the fire was unexplained by any evidence, and that it might or might not have been due to faulty construction of a chimney. The second is where the evidence for and against the defendant is so evenly balanced that it is desirable to direct a jury as to what it should do if it is unable to say that it is satisfied either that there was or that there was not negligence somewhere. The present case might indeed almost be said to be such a case: I think that the learned trial judge himself regarded it as a "border-line" case. The formulation of the rule in the form of a proposition subject to an exception does suggest that, if the premises are not safe, there is prima facie a breach of contract, which the defendant may excuse by proving that the unsafe condition is not due to negligence and could not have been discovered by the exercise of reasonable care. The argument for such a view is stronger if the rule be stated in

(1) (1917) 2 K.B. 325. (2) (1903) 29 V.L.R. 459.

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the words of *Kelly* C.B. than if it be stated in the words of *McCardie* J. For it is to be noted that, although *McCardie* J. did not appear to think that his statement of the rule differed in effect from that of *Kelly* C.B., he did not actually adopt the words of the Chief Baron. On the contrary, it is very notable that he did what the Chief Baron did not do. That is to say, he referred to "reasonable care and skill" in the initial formulation of the general rule, with the result that what follows looks more like an explanation or elaboration than a qualification or exception. As a matter of general principle, the burden of proving a breach of contract, no less than that of proving a breach of a common law duty, rests on a plaintiff, I think that the cases generally suggest, and that the true rule is, that the burden rests on a plaintiff in this class of case of proving negligence somewhere at some stage. It may be thought that the position should be otherwise: the occupier is the person most likely to be in possession of material facts. But it does not seem to me that the authorities warrant saying that the occupier must satisfy the court or a jury that an unsafe condition of his premises was not due to anybody's negligence. It does not, of course, follow that a plaintiff may not in some circumstances be able to launch a case without specifying an act or omission on the part of any particular person as responsible for the defect or danger.

Having regard to what I have said, and having regard to the evidence, I do not think that any fault can be found with the judgment of the learned trial judge in this case. His Honour, for reasons which are sufficiently plain, was not prepared to rely on the Dracup evidence as showing that a warning of the condition of the bath-heater, suggesting that immediate action was necessary, had been conveyed to Mrs. Devine. That issue being out of the way, the case stood thus. Because of the partial stoppage of the flue by rust, and (probably to a much less extent) because of the "bulging" of the water jacket, a highly dangerous state of affairs existed in the bathroom. But the heater was in itself a safe and efficient appliance, and it had been installed with all due care. No negligent *act* on the part of anybody was proved. It occurs to one that some point might have been made with regard to the material of which the flue was constructed. It might perhaps have been suggested that it ought to have been constructed of galvanized material or of some material immune to rust. No such point, however, was made, and the evidence, as it stands, is altogether insufficient to warrant any finding for the plaintiff on any such point. The practical question in the case then came, as his Honour said, to this, whether there was a breach of the implied warranty

in that reasonable care had not been taken to *maintain* the bath-heater in a reasonably fit and safe condition.

It was said that the manageress, Mrs. Devine, had had the bath-heater under observation for some time. She was in the habit of showing new boarders how to use it, and she had in fact lit it a very short time before the fatal accident, when she was showing the bathroom to the deceased. One would certainly think that at that stage an expert would have known from the way in which the flame burnt that something was wrong, and it was put that Mrs. Devine should have seen that there was something wrong. It was also put that the bath-heater had been installed more than twenty years before, and that the defendant or her manageress was negligent in not having had it examined from time to time by an expert in order that it might be ascertained whether it was working properly and safely. There is, of course, force in the plaintiff's contention. One knows or hears from time to time of accidents, fatal and otherwise, occurring through the escape of carbon monoxide from gas bath-heaters. On the other hand, it is difficult to say that the danger of carbon monoxide from gas bath-heaters is matter of common knowledge, or that it would or should occur to an ordinary person that a bath-heater should be tested from time to time for carbon-monoxide fumes, or that a periodical examination was necessary or desirable. *Ligertwood* J. took the view that the defect in the heater would have been apparent to an expert who lit it, but not to one who was not an expert, and he said that to condemn the defendant or her manageress on the ground that they had not called in an expert to examine the heater would be "to be wise after the event and not to judge the affairs of mankind by the standard of ordinary reasonable human conduct". It is not possible, to my mind, to say that his Honour was wrong in the view which he took.

In my opinion this appeal should be dismissed.

KITTO J. I agree and have nothing to add.

Appeal dismissed with costs.

Solicitors for the appellant, *Playford, Matison & Smith.*
Solicitor for the respondent, *G. C. Harry.*

B. H.