21, 1958

IN THE PRIVY COUNCIL

No. 9 of 1958

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

52121

BETWEEN

EWA PERKOWSKI of Wellington
Widow of Antoni Witold Perkowski (Plaintiff) Appellant

and

THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF WELLINGTON, a body corporate duly constituted under the Municipal Corporations Act 1933 ... ... (Defendants) Respondents

CASE FOR THE RESPONDENTS ON THE APPELLANT'S APPEAL

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1. This is an Appeal (brought by Special leave of Her Majesty the Queen in Council by Order dated 31st July 1957) from a Judgment of the Court of Appeal of New Zealand (Barrowclough C.J., Stanton and Adams JJ) dated the 12th October 1956, dismissing an appeal from a judgment of the Supreme Court of New Zealand (Hutchinson J.) dated the 17th November 1955 dismissing an action in which the Appellant claimed damages under the Deaths by Accident Compensation Act, 1952, in respect of the death of her husband (hereinafter called 'the deceased'). N.Z.L.R. 1957. Pt.1 p.47 l.45; N.Z.L.R. 1957 Pt.1 p.42 l.5

2. The deceased on the 9th January 1954 suffered fatal injuries when he dived at low tide from a diving board into shallow water at Worser Bay, Wellington. p.2 l.25

3. The land immediately above the high water mark in the part of Worser Bay with which this action is concerned is vested in the Respondent Corporation as a pleasure ground and includes five off-shore rocks, so far as they are above high water. Off-shore there was a structure, which taken from the shore end consisted of a concrete duck-walk to one of the rocks referred to in the action as Rock No.5, then from Rock No.5 a wooden duck-walk leading to a concrete platform supported on four p.74 l.25 - p.75 l.13

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concrete piers resting on the bed of the harbour (which was vested in the Marine Department). At the seaward end of the platform there was at the time of the accident a diving board from which the deceased dived. The whole structure was erected by the Worser Bay Amateur Swimming & Life Saving Club, save for the springboard and the concrete block on which it rested. The springboard was provided some years before the accident (probably in 1941) at the request of the club by the Wellington Corporation in replacement of a broken board, but it is not known who placed on the platform the concrete block on which the diving board rested.

4. The Appellant commenced proceedings in respect of the death of her husband both against Her Majesty's Attorney-General (sued in respect of the Marine Department) and against the Respondents. The proceedings against Her Majesty's Attorney-General
p.9 l.19 were discontinued on the 1st July 1955.

5. The action came on for trial before Hutchinson J. and a jury on the 17th August 1955. At the trial the case for the Appellant was put primarily on the basis that, having regard to the facts (inter alia) that the Respondents owned the land above high-water mark and the five rocks, one of which supported the landward end of the seaward duck walk, and that the Respondents erected the diving-board, the Respondents were the occupier of the "premises", and that the diving-board, which it was dangerous to use at low tide on account of the shallowness of the water, was a concealed danger known to the Respondents; and that the Respondents should, by the erection of a warning board or a tide-gauge, have given notice to persons proposing to use the diving-board of the concealed danger. Alternatively, when the matter went to the jury, the case for the Appellant was put on the basis that, if the Respondents were not an occupier of the premises including the diving-board, they were, simply because they erected the diving-board under a duty of care to persons who might use it, and that they were negligent in not erecting and maintaining a warning board or a tide-gauge.

p.58 l.27 6. Issues for the jury were settled between Counsel and the learned Judge as follows:-

1. (a) Was the defendant Corporation occupier of the premises comprising

the spring-board?

(b) If yes, did the spring-board constitute a concealed danger at low tide?

(c) If yes, ought the defendant to have maintained a warning notice board or tide-gauge?

2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide gauge?

3. Was the deceased negligent in a manner causing or contributing to the fatality?

4. Damages (total) Special

General

5. If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality?

7. It was agreed between Counsel for the parties when the issues were being settled:-

(1) that if the Respondents were occupiers of the diving-board at the time of the accident, the deceased was on it as a licensee.

(2) that Issue No.2 should be put as to negligence on the part of the Respondents apart from occupancy, but on the basis that if there was a finding of negligence on that issue it would be left to the Learned Judge to rule whether there was, apart from occupancy, any duty of care upon the Respondents relevant to the fatality that occurred.

No issue was put as to the knowledge of the Respondents of the concealed danger alleged since it was conceded by Counsel for the Respondents that the Respondents had physical knowledge of the position, and that if the jury should hold that there was a concealed danger the Respondents could not say that they had no knowledge of such concealed danger, and accordingly that no issue as to the Respondents' knowledge of such concealed danger need be put.

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8. In his summing up to the jury Hutchinson J. said:-

p.58 l.30 p.59 l.12 "Those parts of Question 1(a),(b) and (c) are all directed to the primary allegation relating to the occupancy, as alleged, by the City Council of the Spring-board; but the second question is put to you on the basis that there was no occupancy, and on this basis, Mr. Foreman and gentlemen, counsel are in agreement that there is an underlying and difficult question of law as to whether or not, if it were not an occupier, it owed any duty at all to the deceased, and accordingly that second question is put to obtain your verdict as to whether or not there was negligence on the part of the Corporation, apart from any question of its being occupier of the spring-board, but your answer to that question is not necessarily conclusive, as it would be left to me to decide that difficult question, which counsel would argue before me, about the Council's duty if it were not an occupier. Of course this question will only arise if you find that the Council was not an occupier of the spring-board. I have stated that so that you will understand how the first and second questions stand in relation to one another.

x x x x x x x

p.61 l.27 - p.62 l.3 "Now question No.2, as I have explained, and I will tell you again, Mr. Foreman and gentlemen, that is on the basis that the Corporation are not an occupier, and if you answer no to the first question and answer yes to the second question, it does not necessarily mean that the plaintiffs wins the action, because it would just mean that your finding is that there was negligence, but it would not necessarily mean that that would give the plaintiff the verdict, as I would still have to answer the legal question as to whether there was any duty to take care under those circumstances. I have tried to make it clear to you, and I hope that you understand the relationship between the first and second questions.

x x x x x x

p.66 ll.3-6 "Now I am going to deal with the second question, and that is the one that you remember I told you about, to get your opinion on that on the basis that the City Council was not an occupier."

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9. The answer of the Jury were as follows:- p.71

Issues and Answers:

1(a) Was the defendant Corporation occupier of the premises comprising the spring-board. ANSWER: Yes

1(b) If yes, did the spring-board constitute a concealed danger at low tide? ANSWER: No

1(c) If yes, ought the defendant to have maintained a warning notice board or tide-gauge? ANSWER:

2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide-gauge? ANSWER: Yes

3. Was the deceased negligent in a manner causing or contributing to the fatality? ANSWER: Yes

4. Damages (total) Special £41.5.0
General £5,250 TOTAL: £5,291.5.0

5. If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality? ANSWER: 80%

10. Upon these findings both sides on 15th September 1955 moved for judgment. In a reserved judgment delivered on the 17th November 1955 Hutchinson J. gave judgment in favour of the Respondents. In the course of his judgment he said: p.73 p.74 p.78 l.11

"It is to be seen that by virtue of the answer to question 1(b), the deceased having been a licensee only, the Plaintiff fails on the primary presentation of her case as based on occupancy of the premises by the Corporation: see Salmond on Torts, 11th Ed.,570,571. p.79 l.1

The Plaintiff can succeed in her action only on the

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basis that there was, apart from any question of occupancy, a duty of care on the Corporation to erect and maintain a warning board or tide-gauge. I explained to the jury in my summing-up, mentioning this several times, that Issue No.2 was put to them on the basis that the Corporation was not the occupier; though I did not expressly tell them that they need not answer Issue No.2 if they found in answer to Issue No.1 that the Corporation was the occupier, and it would probably have been better, in the way that the case was presented to them, if I had expressly told them that. However that may be, it was conceded on behalf of the plaintiff on the hearing of the motions, that the principle that I for convenience refer to as "the Donoghue v. Stevenson principle" does not apply in the realm of the duty of an occupier of premises. The verdict on Issue No. 1(a) finds that the Corporation was the occupier of the premises, and that therefore presents a major difficulty in the way of the plaintiff's counsel in their submission that she is entitled to judgment on the answer to Issue No.2. They endeavoured to meet this difficulty by a number of submissions, all of which are inconsistent with the way in which the case was presented at the hearing.

x x x x x x x

p.82 ll. 7-24 "As I see the case, the jury found, in accordance with the submission made to it for the plaintiff, that the defendant Corporation was an occupier of some part, at any rate, of the structure of which the spring-board was, for the purposes of this case, the important part. It found, contrary to the submission for the plaintiff, that the spring-board did not constitute a concealed danger. The deceased having been a licensee only, that finding concludes the case against the plaintiff, in so far as the case is based on the duty of the Corporation as an occupier. The second issue related only to the position as it would be if the Corporation was not an occupier, and was not intended by the parties to have any application if the defendant Corporation were an occupier. Even if, contrary to that view, it could be held to relate to the position of the Corporation as an occupier, the concession made by counsel for the plaintiff that the principle laid down in Donoghue v. Stevenson does not prevail in the realm of an occupier's duty would conclude the case against the plaintiff"

N.Z.L.R. 1957 Pt.1 p.47 l.45 11. From this decision the Appellant appealed to the Court of Appeal. The appeal came on for hearing before Barrowclough C.J. Stanton and F.B. Adams JJ. on the 23rd and 24th April 1956. After the conclusion of the

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arguments for the Appellant the hearing of the appeal was adjourned sine die. On 28th August 1956 a memorandum was submitted on behalf of the Appellant. Without calling on Counsel for the Respondents the Court of Appeal by judgments delivered on the 12th October 1956 unanimously dismissed the appeal. N.Z.L.R. 1957 Pt.1 p.48 l.42 N.Z.L.R 1957 Pt.1 p.58 l.17

12. Barrowclough C.J. said that neither side had applied to set aside the jury's verdict, and that the finding that the Respondents were the occupiers of the spring-board could not now be questioned. He also said that it was not open to the Appellant to assert that the deceased was other than a licensee thereon. He continued: p.59 l.1

"I do not think that, simply because the Corporation was the occupier of the spring-board, the only duty it might have owed to the deceased was the occupier's duty. In this particular case, however, I am of opinion that there was no relevant duty, other than the occupier's duty, which was owed by the Corporation and therefore, the jury having found the Corporation to be the occupier, the second issue ought not to have been dealt with by the jury." p.59 l.4 - 10

13. Barrowclough C.J. went on to hold:-

(1) that the spring-board was not a chattel, but was (as was admitted by the Appellant) a structure, and that the duty of the Respondents was that of the occupier of premises. p.59 l.44

(2) that such duty arises in respect of the condition of the premises or structure in question p.59 l.48

(3) that, though an occupier may owe to visitors on his premises duties which are in addition to the occupier's duty, and though in particular he may owe the duty which is defined in Donoghue v. Stevenson (1932) A.C. 562, that latter duty has no relation to injuries which result only from the dangerous condition of the premises, that is to say (inter alia) from danger inherent in a structure and arising out of its situation, design or position. N.Z.L.R. 1957 Pt.1 p.60 l.54

(4) that accordingly the Respondents' duty towards the deceased was that of an occupier towards a licensee, and that liability for breach of such duty was negatived by the finding of the jury on Issue 1(b). p.61 l.11

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p.62 l.36 (5) that, even if it were open to the Appellant to allege that her husband was not a licensee, but a person in a separate class (namely a person going as of right on to a public pleasure-ground) to whom a higher duty was owed, there was binding authority against erecting such people into a separate class. For this reason Barrowclough C.J. declined to follow the Australian Cases of Aiken v Kingborough Corporation 62 C.L.R. 179, Burrum Corporation v. Richardson 62 C.L.R. 214 and Vale v. Whiddon 50 N.S.W.S.R. 90, in so far as they are authority for any such proposition.

p.63 l.39 (6) that Slater v. Clay Cross Co. [1956] 2 Q.B. 264 was distinguishable on the ground that the defendants in that case were held liable because its 'current operations' were negligently carried out and that in the present case no current operations relating to the accident were being carried out by the Respondents; and that the observations of Denning L.J. as to the duty of an occupier towards invitees and licensees were obiter.

N.Z.L.R. 1957 Pt.1 W.A.L.R. 14. With regard to Mayor of Perth v. Watson 18 8 Barrowclough C.J. said:-

p.62 l.51 p.63 l.10 "It was an action in which the plaintiff was injured through diving from a platform into shallow water, and the defendant was the owner and occupier of the platform from which he dived. The facts, therefore, bore a strong resemblance to the facts of the present case and no doubt for that reason the case was cited to us. The issues put to the jury by the learned Chief Justice of Western Australia were (1) was there negligence on the part of the defendant (2) was there contributory negligence on the part of the plaintiff? and (3) an issue dealing with the plea of volenti non fit injuria. No question was put in relation to an occupier's duty; and the Full Court was concerned only with the question whether the evidence justified the answers given by the jury to the issues submitted to them. The judgments delivered have no bearing on the questions before us in the present case, and Mr.Cooke very properly did little more than draw our attention to the Western Australia Case."

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15. F. B. Adams J. held:

(1) that the duty of an occupier towards a licensee was that of warning him of concealed dangers (or traps) known to the occupier. p.64 l.43

(2) that the present case was tried throughout on the footing that the deceased was a licensee, and that this was undoubtedly correct. Moreover the case was not taken out of the rule applicable to occupiers and licensees by the fact that the physical injury was suffered by the deceased after he had left the premises, or by the fact that the danger did not consist in a structural defect.

(3) that the finding of the jury on Issue 1(b) negatived any liability under the rule applicable to occupiers and licensees. p.65 l.13

(4) that the contention that the finding of the jury on Issue 1(a) could not stand in law (either on the ground that the spring-board could not in law constitute "premises", or on the ground that it projected beyond the limits of the land owned by the Respondents) was incorrect. Moreover this finding was one sought by the Appellant and she could not be permitted thereafter to place her case on a different footing. p.65 l.18

(5) that it is well established that members of the public using the premises of a public authority by its permission are licensees, unless there are special circumstances which make them invitees; and that in any case the Appellant could not be permitted to place her case on a different footing, since it was pleaded, fought and put to the jury on the basis that the deceased was a licensee. With regard to the Australian cases relied on by the Appellant F.B. Adams J. said p.65 l.54

"We were referred to the Australian decisions in Aiken v. Kingborough Corporation (1939) 62 C.L.R. 179, 190, Burrum Corporation v Richardson (1939) 62 C.L.R. 214, and Vale v. Whiddon (1949) 50 N.S.W.S.R. 90, and, in particular, to the opinion expressed by Dixon J. in the first mentioned case (ibid 210), an opinion which was, however, criticised by Latham C.J. in the second case (p.229). In my p.66 ll.33 - 44

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opinion, the view expressed by Dixon J., and the decision of Herron J. in Valé v. Whiddon go beyond, and conflict with, the English authorities referred to above, and do not deal satisfactorily or sufficiently with the essential element of knowledge of the danger on the part of the occupier; and I respectfully think that their adoption would only add a new confusion to this branch of the law."

N.Z.L.R. 1957 Pt.1 p.66 l.52

(6) that it was conceded by Counsel for the Appellant, and rightly conceded, that if the case fell within the ambit of the rule applicable to occupiers and licensees, there can be no liability on any wider ground. Though a different liability may arise where injury is caused by some act or omission on the part of the occupier over and above those acts or omissions which have no other effect than to render the premises as such unsafe for the use of the licensee, this is not so where the liability (as in the present case) rests solely on the dangerous nature of the premises.

p.68 l.26

(7) that Mayor of Perth v. Watson 18 W.A.L.R. 8 was properly to be explained on the footing that there was a concealed danger or trap.

16. In regard to the Jury's answer to Question 2, F.B. Adams J. said:

p.67 l.42 - p.68 l.21

"If one were concerned merely with the construction of the written verdict, I am inclined to think that the answer to Question 2 would have to be disregarded as being inconsistent with the earlier findings of specific facts which negatived the existence of a duty to warn. But the matter does not rest there. Question 2 was introduced on the initiative of the learned trial Judge, though with the concurrence of counsel, and solely for the purpose of enabling the question of liability on other grounds to be determined after verdict if the jury should hold that the respondent was not the occupier of the premises. In his summing-up, Question 2 was put to the jury, in the plainest possible terms, as one that would be relevant only if the jury found that the respondent was not the occupier of the premises; and, indeed,

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at an early stage in his summing-up, the learned Judge said specifically that, "This question would only arise if you find that the Council was not an occupier of the spring-board". According to the written judgment of the learned Judge on the motions now before us, it had been agreed between him and counsel that this issue should be put "on the basis that, if there was a finding of negligence on that issue, it would be left to him to rule whether there was, apart from occupancy, any duty of care upon the Corporation relevant to the fatality that occurred". It was also agreed that in this connection the Court should have the right to draw any inferences of fact. The learned Judge has held, and in my opinion rightly so, that no such duty arose; and accordingly the answer to Question 2 must be disregarded. In my opinion, the parties are bound by the course of the trial in regard to this issue, and the appellant cannot be allowed to make use of the jury's answer in a manner that would be directly contrary to the intentions of Judge and counsel at the trial, and presumably also contrary to any intention that can properly be imputed to the jury in view of the summing-up. The answer must at the very least be accepted subject to the agreement made with counsel to the effect that, if negligence were found on this issue, it would remain for the Court to decide whether, apart from occupancy, any duty of care arose; and I respectfully agree with the learned Judge that in the circumstances there was no such duty apart from occupancy."

17. With regard to Slater v. Clay Cross Co. Ltd. [1956] 2 Q.B. 264, F.B. Adams J. said: p.68 l.41 p.69 l.16

"Our judgments in this case were ready for delivery some time ago, but delivery was postponed because the learned counsel for the appellant handed in a written submission based on a passage in the judgment of Denning L.J. in Slater v. Clay Cross Co. Ltd. (1956) 2 A.E.R. 625,627; (1956) 3 W.L.R. 232,235 - a judgment with which Birkett and Parker L.JJ. purported to be in entire agreement. It is to the effect that the distinction between invitees and licensees has been virtually abolished by the decisions of the Courts, and reduced to vanishing point; and that the duty of an occupier is "to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them". The passage is confessedly an obiter dictum, because, as the learned Lord Justice said, the distinction had no relevance to cases such as the one then before the Court. The

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actual decision seems to be beyond criticism; but, with all respect, I am unable to accept the dictum, which, in my opinion, is in conflict with established principles, as may be readily seen by an examination of any text-book on the subject, or by a perusal of the Third Report of the Law Reform Committee (Comd. 9305) presented by the Lord Chancellor to Parliament in November 1954 - a report to which Parker L.J. was himself a party. As to the propriety of the new rule of law suggested in the dictum, it might perhaps be desirable in a jurisdiction where, as in England, such cases are tried by Judges. But, where trial by jury is still maintained, as in New Zealand, it would almost be tantamount to surrendering the whole field of the law on this topic to the untramelled decisions of juries. The present law may be open to criticism in matters of detail, but at least provides some measure of certainty over a wide field; whereas, under the rule suggested, occupiers of premises - whether public or private, and whether consisting of modest buildings; or comprising large tracts of untamed country - would be left in complete uncertainty as to the measure of the duties in respect of invitees and licensees which might be attributed to them by verdicts of juries."

p.64 l.35 18. In a short judgment Stanton J. agreed that the appeal should be dismissed.

19. The Respondents will contend:-

(1) That by reason of the manner in which the case was pleaded, argued and put to the jury; of concessions made by counsel for the Appellant; and of the findings of the jury in answer to Question 1, it is not now open to the Appellant to dispute:-

(a) that the spring-board was a structure or premises, or was comprised in premises, to which the rules of law relating to the liability of occupiers towards persons permitted or invited to come thereon apply.

(b) that the Respondents were at the material time the occupiers of such structure or premises

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(c) that at the material time the deceased was a licensee thereon.

(2) that, Issue No.1 having been framed and settled so as to obtain the jury's verdict on the question whether the Respondents had failed in a duty owed by them to the deceased as a licensee on premises of which they were in occupation, the case is concluded against the Appellant by the jury's answer to Question 1(b) and it is not now open to her to allege a different duty.

(3) that, Issue No.2 having been settled and put to the jury on the footing that it arose only if the Respondents were found not to have been occupiers, the answer of the Jury to Question No.2 should (in the light of the answer to Question No.1(a)) be ignored.

(4) that the answer to Question No.2 should be ignored on the further grounds:

(a) that it is inconsistent with the findings in answer to Question No.1, in particular with the finding of specific facts which negative the existence of a duty to warn.

(b) that it was given without any direction as to the duty (if any) owed by the Respondents, the breach of which was alleged to constitute the negligence referred to in the Question.

20. If it should be or become material, the Respondents will contend:

(1) that (whether or not the first submission above be correct) the spring-board was a structure or premises, or was comprised in premises, to which the rules of law relating to the liability of occupiers towards persons permitted to come thereon apply; that the Respondents were at the material time occupiers thereof; and that there was ample evidence on which the jury could so find.

(2) that the deceased was at the material time a licensee thereon.

21. The Respondents will contend further:-

(1) that it has long been settled law that the duty

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of an occupier of premises towards a licensee in respect of dangers in the premises is to give warning of the existence of concealed dangers or traps of which he actually knows, and that there is no liability for damage caused by such dangers if the danger is not a concealed danger or trap.

(2) that a different and wider liability may arise when a person is injured on the premises by "current operations", i.e. by the acts or omissions of any person (whether the occupier or another) carried out on the premises, that is to say by acts and omissions other than those which have rendered the premises as such dangerous.

(3) that the cases of Riden v. A.C. Billings and Sons Ltd. [1957] 3 W.L.R. 496, and Slater v. Clay Cross Co. Ltd. [1956] 2 Q.B. 264, are both distinguishable from the present case, in that they both related to "current operations". In Riden v. A.C. Billings and Sons Ltd. Lord Reid said at p.500: "..... in addition to the appellants and the respondent sued the occupiers and against them, of course, her rights were limited to the rights of a licensee".

(4) that the accident to the deceased was not caused by "current operations" or by any such act or omission as aforesaid, but by a danger inherent in the premises. The several conditions of liability in respect of such dangers towards different categories of persons have not been superseded by any general principle (whether that in Donoghue v. Stevenson [1932] A.C. 562 or any other), and cannot be so superseded without legislation.

(5) that the observation of Denning L.J. in Slater v. Clay Cross Co. Ltd. that the duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them, was unnecessary for the decision of the case then before the Court and is contrary to authority. If this were a correct statement of the duty, the Respondents would

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contend that a duty of reasonable care towards the deceased did not require them to warn him of a danger which (as the jury have found) was not concealed.

(6) that the distinction between invitees and licensees, which Denning L.J. said has "now been reduced to vanishing point", is not in question on this appeal. If it is or becomes material, the Respondents will contend that the well-settled distinction between the duty towards invitees or licensees has not been altered; if the distinction has been narrowed at all, this is so only in relation to the question of the knowledge of the occupier and there has been no alteration in the rule that an occupier is liable to licensees only for concealed dangers. In the present case no question arises in relation to the knowledge of the occupier since it was conceded that the Respondents had actual knowledge of the concealed danger (if there was one).

(7) that in the case of Riden v. A.C. Billings and Sons Ltd. [1957] 3 W.L.R. 496, it was conceded that the duty of the appellants (who were not occupiers, but contractors doing work on the premises) was to use reasonable care to prevent damage to persons whom they might reasonably expect to be affected by their work, and the question at issue was whether or not that duty was adequately discharged by giving warning of the danger. In the present case it has never been contended by the Appellant that if there was a duty, it would not have been adequately discharged by giving warning: in Questions 1(c) and (2) the alleged duty is to maintain a warning notice board or tide-gauge. The question is whether or not there was a duty to warn: the Respondents will submit that the duty to warn a licensee arises only when the danger is concealed, and the jury have found that it was not. In the submission of the Respondents Riden v. A.C. Billings and Sons Ltd. is of no assistance to the Appellant.

(8) that apart from the occupier's duty towards a licensee in respect of the condition of the premises (which is negatived by the finding of the Jury in answer to Question No.1(b)), the Respondents were on the facts of the case under no duty towards the deceased.

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22. The Respondents will contend that for the reasons given by the Court of Appeal (see paragraphs 14 and 15(7) above) the case of Mayor of Perth v. Watson 18 W.A.L.R. 8 is of no assistance to the Appellant. The questions arising in the present case do not appear to have been considered in that case, nor the contentions made by the Respondents in the present case as to the extent of their duty to have been made in that case. The only material reference is at page 12 where Burnside J. having discussed the finding that the defendants were negligent said:-

> "Then, again, assuming - as I think the jury might assume - that the provision of the platform amounted to an invitation or a trap, as counsel expressed it; to induce people to jump off into the water, and that the plaintiff was induced by this trap to jump into the water, the next question arises, was he, under the peculiar circumstances, negligent in doing what he did, and contributed by his own act to the injury he sustained."

In the submission of the Respondents this passage supports the comment of F.B. Adams J. referred to at paragraph 15(7) above. Apart from this the judgments were directed solely to the questions whether the evidence justified the answers given by the jury to the questions submitted to them. That case throws no light on the present case, where both the questions put to and the answers given by the jury were entirely different.

23. The Respondents will contend that it is not now open to the Appellant to allege that the deceased, as a person coming as of right on to a public place, is not to be equated with either a licensee or an invitee. If however, it is open to the Appellant to make this contention, the Respondents will contend that such persons are licensees, and that the suggestion that persons entering on publicly or municipally owned parks or recreation-grounds enjoy a special privileged status superior to that of licensees is ill-founded. The cases of Aiken v. Kingborough Corporation 62 C.L.R. 179, Shire of Burrum v Richardson 62 C.L.R. 214 and Vale v Whiddon 50 N.S.W.S.R. 90, in so far as the decisions in those cases depend on any such proposition, are contrary to authority. Aiken v. Kingborough Corporation is distinguishable on the facts. In Shire of Burrum v Richardson at page 233

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Latham C.J. expressed himself as opposed to elevating such persons into a separate category unless it was necessary to do so for the purpose of deciding an actual case (which was not so in the case before him), and criticized the statement by Dixon J. in Aiken v. Kingborough Corporation. of the duty owed to such persons; Starke J. at page 238 expressed the view that the duty towards persons using a municipal bathing enclosure was similar in principle to that owed by an occupier of property to licensees. If it became material the Respondents would contend that a duty of reasonable care towards the deceased did not require them to warn him of a danger which (as the jury have found) was not concealed. If the Respondents' duty towards the deceased was as stated by Dixon J. in Aiken's case at page 210 the Respondents were not in breach of it. Similarly, if the Respondents duty approximated to that owed to an invitee (as stated by Herron J. in Vale v. Whiddon at page 112) the Respondents were not in breach of it.

24. In regard to all the matters discussed in paragraphs 19-23 above, the Respondents will contend that the Court of Appeal in New Zealand were right.

25. The summary of evidence given in paragraph 8 of the Appellant's Petition for Special Leave to Appeal is partial and in some respects may be misleading:-

(1) The custodian of the pavilion on the beach was called on behalf of the Appellant. The passage from his evidence (from which a sentence only was quoted in the Petition) was as follows:- P.35 ll 18-29.

> "Your house overlooks the bay? Yes. How long have you been there? 25 years. I've lived in my house 25 years, but I've known the bay for 30 years. Have you ever heard of any previous diving accidents? None whatever, not the whole time I lived at the bay or worked there as a custodian. I've never seen any accidents and when there's a low tide, people definitely do not dive from that board. Have you ever seen anybody attempt to dive at low tide? Never. I think they do, but I've never seen them. Have you seen people go down to the edge of the board, look and come back again? Oh yes they do that from curiosity, they look down into the water, and they can see the actual depth. Would you say that at low tide from the platform, you could see that the water is very shallow? Yes."

x x x x

RECORD
P.36 ll 6-9

"Have you ever heard any suggestion or a complaint made to you about not having a notice? No, people have never mentioned it to me, and if they had, I would have been surprised, because it's not wanted."

(2) The witness who said that the board had been erected by the Respondents a good deal higher than the old diving board which had been in use previously went on to say that "someone put on a block of concrete and made it 18 inches or 2 feet higher." There was no evidence who placed the concrete block there.

(3) A quotation is given from an answer to a question whether one could from the diving board see the bottom at high tide. The accident took place at low tide. The evidence of all the witnesses (including those called for the Appellant) who dealt with the matter was that at low tide one could see from the diving board that the water was very shallow: one of the Appellant's witnesses said "you couldn't help but notice that the water was shallow".

The Respondents will contend that the references made in the Petition to the evidence (or indeed any reference thereto) are immaterial upon this Appeal. If it is or becomes material the Respondents will rely on the uncontradicted evidence that there had been no previous accident in over 30 years, that at low tide one could not help but notice that the water was shallow and to the views expressed by witnesses called on behalf of the Appellant that a tide-gauge or warning notice was not necessary.

26. The Respondents humbly submit that the Judgments of the Supreme Court of New Zealand and of the Court of Appeal of New Zealand are correct and should be affirmed for the following among other

R E A S O N S

(1) Because the Respondents were not in breach of any duty which they owed to the deceased.

(2) For the reasons given by the Supreme Court of New Zealand and the Court of Appeal of New Zealand.

(3) For the reasons given in paragraphs 19-23 above.

RECORD

(4) Because the decisions of the Supreme Court of New Zealand and the Court of Appeal of New Zealand were right.

H. A. P. FISHER
Counsel for the Respondents.

No. 9 of 1958

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N

EWA PERKOWSKI of Wellington Widow of Antoni Witold Perkowski

- and -

WELLINGTON CITY CORPORATION

C A S E FOR THE RESPONDENTS ON APPELLANT'S APPEAL

WRAY SMITH & CO.,
3/4, Adelaide Street,
Strand, W.C.2.

Solicitors for the Respondents.