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GUERNSEY LAW JOURNAL

TWENTY FIRST ISSUE

Introduction

This edition covers the six month period from 1st January, 1996 to 30th June, 1996.

The original texts of legislation and judgments digested are available at the Greffe.

Whilst care has been taken in recording the material published herein no responsibility is accepted for the contents of this issue or its accuracy.

References to this issue in future issues will be cited using the figure and letters 21.GLJ. followed by the paragraph number.

Editorial Committee

The Deputy Bailiff (de V. G. Carey, Esq.), Advocate J. N. van Leuven, Advocate V. C. Ogier, Advocate C. M. Fooks, H.M. Greffier (K. H. Tough, Esq.).

Compiled from sources including all Orders in Council, Ordinances, Projets de Loi and subordinate legislation and selected cases and other relevant material which became available during the months January to June 1996.

28th February, 1997

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GUERNSEY

ADVOCATES

Duty to client - duty of confidentiality - disclosure order - application by advocate to set aside

1. P obtained an *ex parte* order arresting certain shares in a company and ordering A, the advocate acting for D (the owner of the shares), to disclose the whereabouts of such shares and other information concerning them. A applied for the order to be set aside, claiming legal professional privilege. HELD by the Deputy Bailiff, setting aside the disclosure order, this was a case to be dealt with as a matter of confidentiality rather than privilege. Having considered the effect of the decisions in Bankers Trust Co. v. Shapira [1980] 3 All ER 353 and in Irish Permanent Building Society v. Farrell, Montoire Limited intervening (16.GLJ.43) and Morgan, Stanley International v. Puglesi, Banque Belge (Guernsey) Limited intervening (14.GLJ.43), and as the claim against D was in respect of monies due under a loan note and the papers before the Court did not disclose any breach of trust or wrongdoing on the part of D, there were no grounds to order A to disclose the information requested.

[George Harrison, Harrison's Limited et al v. O'Brien - Plaids de Meubles 20.2.96 (EAGP/IHB)].

Qualifications

2. Ordinance: The Bar (Amendment) Ordinance, 1996. - Amends the qualifications for admission to the Guernsey Bar by:
 - (a) reducing the residential qualification to 3 years' residence in the Bailiwick after having attained the age of 16;
 - (b) extending the British professional qualification so as to include Scottish advocates and solicitors, and Northern Ireland barristers and solicitors;
 - (c) requiring a minimum period of pupillage with a Guernsey advocate to have been undertaken.

In force 27.6.96 (No. XV of 1996).

AGRICULTURE AND ANIMALS

Animal health

3. Ordinance: The Animal Health Ordinance, 1996. - Consolidates and extends with minor amendments the previously existing Ordinances relating to notifiable animal diseases. Establishes a system for the compulsory monitoring of bovine animals in accordance with internationally recognised criteria as respects certain specified diseases.

Part I, together with the first 3 schedules, requires the States Veterinary Officer to be notified of, and to arrange for the testing of animals suspected of being infected with, any of the diseases specified in schedule 1; and the taking of immediate precautions in respect of suspected and other susceptible animals. When a test results in a positive reaction in respect of any of the diseases listed in Part 1 of Schedule 1, the affected animal is to be slaughtered under the supervision of the SVO, and compensation calculated in accordance with Schedule 2 is paid to its owner. The Agriculture and Milk Marketing Board is empowered:

- (a) to declare that premises are "infected premises", whereupon the Board has powers to disinfect and various special provisions concerning the accommodation of animals, entry of persons, and removal of articles and materials become applicable;
- (b) by order published in La Gazette Officielle, to declare an "infected area", which results in the imposition of additional restrictions;
- (c) by order, to require the dipping of sheep.

The sale, transfer and movement of, and the use of milk taken from, infected or suspected animals, is subjected to control; abortions in bovine animals give rise to reporting and other requirements; and the use of vaccine containing brucella is banned.

Part II of the Ordinance establishes the system for checking and recording the healthy status of island bovine herds in respect of tuberculosis, brucellosis, enzootic bovine leukosis, infectious bovine rhinotracheitis and bovine viral diarrhoea. The Board is required to arrange the periodic compulsory testing of all bovine animals in Guernsey for these diseases in accordance with procedures prescribed by European Council Directive or the Organisation International des Epizooties and listed in Schedule 3. When an animal has reacted negatively to all relevant tests the Board is to certify it as disease free, and there are restrictions on the addition of uncertified animals to disease free herds. The Ordinance imposes requirements as to the identification marking of bovine animals, and requires specified information to be noted in record books issued by the Board.

In force 1.5.96. (No. XI of 1996).

Milk

- 4. Ordinance: The Milk (Control) (Amendment) (Guernsey) Ordinance, 1996. - Provides for the classification as Grade 3 of (and in consequence the non-payment for) milk delivered to the dairy which has been produced otherwise than at a holding, from cattle, and by methods, approved as meeting the health conditions of the relevant EC legislation.

In force 1.7.96 (No. XII of 1996).

AVIATION AND AIRPORTS

5. Ordinance: The Air Transport Licensing (Guernsey) Law, 1995 (Commencement) Ordinance, 1996. - Brings the Air Transport Licensing (Guernsey) Law, 1995 (see 20.GLJ.4), other than Part I, into force on 28th February, 1996. Part I is to come into force on 1st June, 1996.

In force 28.2.96. (No. VIII of 1996).

BANKING, INSURANCE AND FINANCE INDUSTRIES

Investment business

6. Projet de Loi: The Protection of Investors (Amendment) (Bailiwick of Guernsey) Law, 1996. - Imposes a duty on auditors to report to the Financial Services Commission any matters which they have reasonable cause to believe significant for determining whether a person is fit and proper, or whether the Commission should exercise its powers, in the context of the investor protection licensing system. Auditors communicating information or opinion on such matters to the Commission are absolved from any duty of confidentiality in that respect. Failure to comply with the duty may be reported to the auditor's professional body with a view to the institution of disciplinary proceedings.

Approved by the States of Guernsey 24.4.96. Awaiting the approval of the States of Alderney and the Chief Pleas of Sark and Royal Sanction.

Royal Bank of Scotland

7. Ordinance: The Royal Bank of Scotland (Bailiwick of Guernsey) Law, 1995. - Brings the Royal Bank of Scotland (Bailiwick of Guernsey) Law, 1995 (see 20.GLJ.5) into force on 1st March, 1996.

In force 31.1.96. (No. IV of 1996).

CHILDREN AND YOUNG PERSONS

Care proceedings - fit person order - application for revocation by natural father - locus standi - meaning of "parent"

8. B, the natural father of an illegitimate child in respect of whom a fit person order had been made, applied to the Juvenile Court, pursuant to section 8(2) of the Children and Young Persons (Guernsey) Law, 1967, as amended, for the order to be revoked. The question arose, as a preliminary point, whether B fell within the meaning of the word "parent" in section 8(2) of the 1967 Law. HELD, by the Magistrate sitting alone as Chairman of the Juvenile Court, the principle stated in Re M (an infant) [1955] 2 All ER 911 and in Re CT (an infant) 1956] 3 WLR 826, that unless a statute clearly indicated otherwise "parent" did not include the putative father of an illegitimate child, was applicable to the interpretation of the word in section 8(2). There was nothing in the 1967 Law to indicate that "parent"

was intended to include a putative father and, accordingly, B had no right in law to apply for the fit person order to be revoked.

[B v States Children Board - Juvenile Court 1.3.96 (GWA/JRF)].

COMPANIES

Auditors

9. Statutory instrument: The Company Auditors Regulations, 1996. - Provide that, for the purposes of section 63 of the Companies (Guernsey) Law, 1994, and subject to specified conditions, a partnership or body corporate may be appointed as, and may act as, the auditor of a company.

In force 14.2.96. (S.I. No. 4 of 1996).

Legislation

10. Projet de Loi: The Companies (Enabling Provisions) (Guernsey) Law, 1996. - Enables the States by Ordinance to make provision for the incorporation in Guernsey of companies limited by guarantee (with or without a share capital); for the incorporation in Guernsey of protected cell companies; in relation to the immigration and emigration of companies; in relation to the completion, delivery and filing of annual returns and the Greffier's functions in respect thereof; for the incorporation in Guernsey of companies with power to issue shares of no par value; in relation to the amalgamation of companies; and in relation to merger relief and relief in respect of group reconstructions.

Approved by the States 28.2.96. Awaiting Royal Sanction.

11. Projet de Loi: The Companies (Amendment) (Guernsey) Law, 1996. - Amends the Companies (Guernsey) Law, 1994. The most important changes are as follows.

The requirement for a company common seal is abolished.

The Court is empowered to make disqualification orders where the Court considers that a person, by reason of his conduct in relation to any body corporate or otherwise, is unfit to be concerned in the management of a company. The Greffier must keep a register of all disqualification orders. In deciding whether or not to make a disqualification order the Court must have regard to the criteria of schedule 3 ("directors to be fit and proper persons").

Provision is made as to fraudulent trading whereby, if in the course of winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors, persons knowingly parties to the carrying on of the business can be ordered to make contributions to the company's assets.

Provision is also made as to wrongful trading whereby, if in the course of winding up of a company it appears that the company has gone into insolvent

liquidation and that a director of the company, before commencement of winding up, knew that there was no reasonable prospect of the company avoiding insolvent liquidation, the Court may order that director to make contribution to the company's assets.

Company articles, and contracts with a company, may not exempt any person from, or indemnify them against, any liability which would otherwise attach to them under the above provisions.

There are minor amendments in relation to voting at company meetings. Written resolutions of companies are now permissible in place of resolutions (including special resolutions) passed at general meetings (subject to contrary provision in the memorandum or articles). Participation in meetings of members and directors is permissible by means of telephone communication, etc. Physical presence is therefore no longer mandatory.

Applications for the compulsory winding up of a company regulated under the Protection of Investors (Bailiwick of Guernsey) Law, 1987, the Insurance Business (Guernsey) Law, 1986 or the Banking Supervision (Bailiwick of Guernsey) Law, 1994 may not be heard unless a copy of the application has been served on the Commission which may make representations to the Court.

An additional ground for the compulsory winding up of a company is provided on the application of the Advisory & Finance Committee or the Commission on its behalf where the Court is of the opinion that it is desirable that the company should be wound up for the protection of the public or of the reputation of the Bailiwick of Guernsey.

Minor amendments are made to sections 3 (rectification of errors in memorandum), 24 (display of company name), 105(1) (dissolution of company in compulsory winding up) and 111 (offences in relation to disqualification orders).

The States are given power by Ordinance to make provision for the purchase by a company of its own shares and the giving by a company of financial assistance for purchase or acquisition of its own shares.

Approved by the States 30.5.96. Awaiting Royal Sanction.

CONSTITUTIONAL LAW

Elections

12. Order in Council: The Reform (Amendment) (Guernsey) Law, 1996. - See 20.GLJ.8.

Royal Sanction 24.4.96. Registered 4.6.96. In force 5.6.96. (No. II of 1996).
13. Ordinance: The Electoral Roll Ordinance, 1996. - Provides for the general revision of the electoral roll during 1996, and for the continued

entitlement of people who become inscribed on that roll (for 1997) to be inscribed on the rolls for the next two electoral years.

In force 27.6.96 (No. XIV of 1996).

States of Deliberation - Conseillers

14. **Projet de Loi: The Reform (Amendment) (Guernsey) Law, 1996.** - Provides that a casual vacancy in the office of Conseiller must be filled by an election when the term of the office vacated has more than 12 months to run, as opposed to the present 5 months.

Approved by the States 27.6.96. Awaiting Royal Sanction.

COURTS

Magistrate's Court - reform

15. **Projet de Loi: The Magistrate's Court and Miscellaneous Reforms (Guernsey) Law, 1996.** - Amends the qualifications for appointment as Magistrate; re-styles the office of Acting Magistrate as Assistant Magistrate; clarifies the Magistrate's Court's sentencing powers and the procedure for electing trial before and committals for trial to the Royal Court; and increases the upper limit for claims in the Petty Debts Court from £1,000 to £2,500 or such other sum as may subsequently be prescribed by Ordinance.

Minor amendments extend to Alderney and Sark the summary procedure for obtaining directions from a court regarding disposal of property held by the police and the procedure of allowing minor amendments to charges before the court; enable the Magistrate or an Assistant Magistrate to be appointed to sit as a Judge in Matrimonial Causes; and increase the penalty for a witness who fails to attend the Petty Debts Court from £1 to £200.

A court is empowered to fine an offender in substitution for or in addition to the punishment it may otherwise lawfully impose even if the enactment in question does not expressly prescribe a fine as being a penalty available to the court.

Approved by the States 24.4.96. Awaiting Royal Sanction.

CRIMINAL LAW AND PROCEDURE

Assault - doctrine of transferred malice - causation

16. A hit his wife violently while she was holding their baby such that she got up to run from the room and dropped the baby, who consequently suffered a fractured skull. A was convicted in the Magistrate's Court of assaulting the baby on the principle of the doctrine of transferred malice. His appeal was dismissed by the Royal Court (see 20.GLJ.9) and he further appealed to the Court of Appeal, on the ground that the necessary causation was lacking, that is to say, the prosecution had not proved that the injury to the baby resulted from the assault on the wife. HELD, if a person -

brings about a state of affairs in which another person could reasonably be expected to suffer injury and that person does suffer injury, even if that injury was caused indirectly or in an unexpected way, then his acts will normally be regarded as the cause of the behaviour. On the evidence the act of A in hitting a woman holding a baby was plainly liable to lead to her trying to escape and dropping and injuring the baby. The appeal would be dismissed.

[Law Officers of the Crown v. Millar - Court of Appeal 10.1.96 (JRF/NLeP)]. For full report of judgment of Court of Appeal, see paragraph 57.

Insider dealing

17. Order in Council: The Company Securities (Insider Dealings) (Bailiwick of Guernsey) Law, 1996. - See 20.GLJ.10.

Royal Sanction 15.5.96. Registered 18.6.96. In force on a day to be appointed. (No. III of 1996).

Interception of communications

18. Projet de Loi: The Interception of Communications (Bailiwick of Guernsey) Law, 1996. - Prohibits intentional interception of a communication in the course of its transmission by post or by means of a public telecommunication system. No offence is committed if the communication is intercepted in obedience to a warrant issued by the Procureur, if the person to whom or by whom the communication is sent has consented to the interception, if the communication is intercepted for purposes connected with the provision of postal or public telecommunication services or if the communication is transmitted by wireless telegraphy and is intercepted, with the authority of the Secretary of State, for purposes connected with the issue of licences under the Wireless Telegraphy Act 1949 or the prevention or detection of interference with wireless telegraphy.

The Procureur can issue a warrant requiring the person to whom it is addressed to intercept communications described in the warrant and to disclose the intercepted material to the persons described in the warrant where the warrant is considered to be necessary in the interests of national security or for the purpose of preventing or detecting serious crime.

A Tribunal is established to which a person who believes that communications sent to or by him have been intercepted may apply for an investigation. The Tribunal must investigate whether there is or has been a warrant in relation to the complainant and, if so, whether there has been any contravention of the procedural safeguards. The Tribunal gives notice to the applicant stating its conclusion and makes a report of its findings to the Bailiff. It has power to quash the relevant warrant, direct the destruction of copies of the intercepted material and direct the States to pay compensation.

The Bailiff is to appoint a judge of the Court of Appeal as Commissioner to keep under review the carrying out by the Procureur of his functions under the Law and the adequacy of the procedural safeguards and to give

assistance to the Tribunal. If at any time it appears to the Commissioner that there has been a contravention of the procedural safeguards which has not been the subject of a report made by the Tribunal, or that the procedural safeguards have proved inadequate, he must make a report to the Bailiff. The Commissioner is also to make an annual report to the Bailiff which the Bailiff must lay before the Royal Court (but matters prejudicial to national security or to the prevention or detection of serious crime may be excluded).

Note. - This projet replaces that approved by the States of Guernsey on 30.9.87 which did not receive Royal Sanction (see 6.GLJ.69).

Approved by the States 27.6.96. Awaiting approval of the States of Alderney and Chief Pleas of Sark and Royal Sanction.

Police - assault on

19. Projet de Loi: The Offences against Police Officers (Bailiwick of Guernsey) (Amendment) Law, 1996. - Provides for offences of assault on the police to be punishable with up to two years' imprisonment and for offences of resisting or obstructing the police to be triable summarily only, attracting a maximum penalty of three months' imprisonment.

Approved by the States 27.3.96. Awaiting Royal Sanction.

Sentence - misuse of drugs - importation of Class A drug

20. A was convicted by the Royal Court, inter alia, of importing 126 Ecstasy tablets at a potential resale value of between £3,150 and £3,780, for which she was sentenced to 4½ years' imprisonment. She appealed to the Court of Appeal against her sentence on the ground that the Royal Court had failed to take sufficient account of the mitigating factors in her case. HELD, BY A MAJORITY, there were three heads of mitigation in A's favour. Firstly, she had given a considerable degree of assistance to the authorities, including making statements implicating an accomplice which might have involved her in giving evidence in court. Secondly, she had undergone surgery for a pre-cancerous condition which could have led to psychological disturbance and resulted in her drug use. She had recently suffered two bereavements and she was the single mother of a young son whose need for his mother's care had to be considered. Thirdly, it appeared that the Deputy Bailiff had regarded A's submission that the proceeds of sale would be used for financing treatment for her addiction as a factor reducing the mitigation in her case. It should have been regarded as irrelevant. Taking into consideration the mitigating factors, and applying the guidelines in Oren (see 18.GLJ.13), the Court would substitute a sentence of thirty months' imprisonment in respect of the importation of Ecstasy.

[Law Officers of the Crown v. Inan - Court of Appeal 10.1.96 (HMC/RJC)].
For full report of judgment of Court of Appeal see paragraph 58.

Sentence - misuse of drugs - importation of Class A drug

21. A, aged 38, pleaded guilty to the importation of 48 Ecstasy capsules, worth approximately £25 to £35 each in Guernsey, from Jersey. When apprehended

at the airport he attempted to hide the capsules. He refused to give the name of his supplier in Jersey or his contact in Guernsey. A, who was unemployed, was to be paid £200. He had two previous convictions for possession of cannabis. He applied for leave to appeal against his sentence of 4 years' imprisonment. Dismissing the application the Court observed that the case of Inan (see paragraph 20) was to be confined to its special facts and that there were no circumstances in A's case which would enable the Court to reduce the sentence.

[Law Officers of the Crown v. Suggett - Court of Appeal 26.3.96 (HMP/SGD)]. For full report of judgment of Court of Appeal, see paragraph 60.

Sentence - misuse of drugs - importation of Class B drug

22. A, who pleaded guilty to importing 166.8 grams of cannabis, worth between £1,000 and £1,334, in 23 packets, some concealed internally, was sentenced to 2 years' imprisonment. A was aged 25 and had a substantial number of criminal convictions for offences not involving drugs but including arson and conspiracy to rob using an imitation firearm. He had a history of mental health problems although there were no symptoms when examined for the purposes of the Court of Appeal hearing. The Court took the view that he had set up and carried through a considered course of events leading to the importation and observed that the fact that a defendant in such a case is suffering from a mental condition would not necessarily be taken as a mitigating factor. On appeal against sentence HELD, in the light of the information before the Court, had the sentence imposed been one of 3 years' imprisonment the Court would not have interfered. The appeal would be dismissed.

[Law Officers of the Crown v. Hennessy - Court of Appeal 26.3.96 (HMP/NJB)]. For full report of judgment of Court of Appeal, see paragraph 59.

EUROPEAN COMMUNITIES

European Economic Area

23. Order in Council: The European Economic Area (Bailiwick of Guernsey) Law, 1996. - See 18.GLJ.19 and 20.GLJ.23.
- Royal Sanction 13.3.96. Registered and in force 15.4.96. (No. I of 1996).

FOOD

Food and drugs legislation

24. Projet de Loi: The Food and Drugs (Amendment) (Guernsey) Law, 1996. - Removes the exclusion of "milk" from the foods for which the Board of Health may make Orders in respect of food hygiene.

Approved by the States 30.5.96. Awaiting Royal Sanction.

25. Ordinance: The Food and Drugs (Amendment) (Guernsey) Law, 1995 (Commencement) Ordinance, 1996. - Brings the Food and Drugs (Amendment) (Guernsey) Law, 1995 (see 20.GLJ.24) into force as to those provisions relating to registration of food premises on 1st March, 1996 and as to the remainder on 1st February, 1996.

In force 1.2.96. (No. I of 1996).

26. Ordinance: The Food and Drugs (Emergency Prohibition Notice) (Maximum Compensation) Ordinance, 1996. - Prescribes £1,000,000 as the maximum compensation payable under section 14B(10) of the Food and Drugs Law for loss sustained by complying with an emergency prohibition notice which is not subsequently confirmed.

In force 1.2.96. (No. II of 1996).

HEALTH AND MEDICINE

Prescription charges

27. Ordinance: The Health Service (Benefit) (Amendment) Ordinance, 1996. - Provides that, from 1st April, 1996, prescription charges in Guernsey and Alderney shall be the same (£1.50).

In force 1.4.96). (No. IX of 1996).

INCOME TAX

Income tax return - requirement to provide further information - production of copy documentation - legal professional privilege - liability to pay penalty - procedure

28. G and S, in separate cases, were each served with notice under section 200 of the Income Tax (Guernsey) Law, 1975, as amended, stating the Administrator's belief that they were liable to a pecuniary penalty in consequence of their failure to furnish all the information sought by the Administrator. They each elected, pursuant to section 200(2) to have the matter dealt with by the Royal Court sitting as an Ordinary Court. HELD by the Deputy Bailiff:-

(1) Once the Court is seized of such penalty proceedings the Administrator can take no further action and the Court must deal with the questions of liability to pay, and quantum of, a penalty.

(2) The obligation to provide information includes an obligation to provide copies of relevant documentation.

(3) While G, a solicitor, as a fiduciary, was protected from furnishing information concerning his clients' affairs (except where there was a statutory obligation for him to do so or an order of the Court ordering him to do so), he was not prevented from disclosing information sought with regard to the income of his practice even if that meant that he would have

to identify the names of persons who had been his clients and fees received therefrom.

(4) Following the decision in States of Guernsey v. Hillcrest Executor and Trustee Company Limited (16.GLJ.35), the proper meaning of the word "require" in section 68 of the 1975 Law (relating to information required by the Administrator) was "think necessary", and not "need" as argued by S, and S was obliged to provide full information concerning certain transactions notwithstanding his allegation that such information related to capital gains rather than income: it was for the Administrator to decide the true nature of such transactions.

[Administrator of Income Tax v. Gold; Administrator of Income Tax v. Scott - Plaids de Meubles 29.2.96 (HER/JNVL; HER/unrep)].

Partnership

29. **Projet de Loi: The Income Tax (Limited Partnership Amendments) (Guernsey) Law, 1996.** - Clarifies that limited partnerships are within the definition of partnerships thus ensuring, as a matter of Guernsey income tax law, that the arrangement is not regarded as a taxable entity in its own right but the partners' shares are taxed in their hands on normal individual taxation principles. The Law exempts from Guernsey income tax any income derived from international operations (as defined), together with interest paid by a limited partnership, in the hands of a non-resident limited partner.

Approved by the States 31.1.96. Awaiting Royal Sanction. Provisionally effective 1.2.96 (States' Resolution on Article 1 of Billet d'État No I of 1996 under the Taxes and Duties (Provisional Effect) (Guernsey) Law, 1992).

30. **Ordinance: The Income Tax (Exempt Bodies: Limited Partnerships) Ordinance, 1996.** - Removes all reference to limited partnerships from the Exempt Bodies Ordinances, given that it has now been made clear that limited partnerships are not taxable entities.

Approved by the States 31.1.96. (No. VI of 1996). In force 1.2.96.

INTELLECTUAL PROPERTY

Trade Marks

- 31.. **Order in Council: The Patents, Designs and Trade Marks (Amendment) (Bailiwick of Guernsey) Law, 1995.** - See 19.GLJ.30.

Royal Sanction 13.12.95. Registered and in force 22.1.96. (No. XVII of 1995).

INTERNATIONAL LAW

Salvage Convention

32. Projet de Loi: The Salvage Convention (Bailiwick of Guernsey) Law, 1996. - Provides that the International Convention on Salvage, 1989 as set out in Schedule 1 to the Law shall have force of law in the Bailiwick of Guernsey. The Convention provides *inter alia* that the master shall have the authority to conclude contracts for salvage operations on behalf of the owner of the vessel; and that salvage operations which have had a "useful result" (which includes preventing or minimising damage to the environment) give a right to reward.

Approved by the States of Guernsey 27.3.96 and by the States of Alderney 5.6.96. Awaiting approval of Chief Pleas and Royal Sanction.

ISLAND DEVELOPMENT

Use classes - change of use - agricultural land - the keeping and exercising of horses for recreational purposes - whether permission required

33. The Island Development Committee refused an application by A for permission to convert land which had been used by a working farmer to land for use by a horse owner for keeping and exercising horses for recreational purposes. A appealed on the grounds that the decision of the Committee was *ultra vires* in that it should have advised A that no permission was required and that such activities would not amount to a material change of use and so would not constitute development. HELD by the Deputy Bailiff, the definition of "development" in section 40 of the Island Development (Guernsey) Law, 1966, as amended, specifically excluded the use of land *inter alia* for agriculture. Applying the principles set out in South Oxfordshire v. Secretary of State for the Environment and Underwood [1981] JPL 285, the use of land principally for the purposes of grazing animals was agricultural whereas the use of land for the exercising of animals was not agricultural and planning permission would be required. Each case should be assessed on its facts. The type and scale of activities for which permission was sought in the present case were similar to that for which permission was required in Underwood and therefore the Committee's decision was not *ultra vires*.

[Gramby Limited v. Island Development Committee - Plaids de Meubles 25.6.96 (PJGA/HER)].

LAND LAW

Conveyancing - legislation

34. Projet de Loi: The Conveyancing (Guernsey) Law, 1996. - Provides that an agreement for the sale or other disposition of real property can be made only in writing and only by incorporating all the terms which the parties have expressly agreed in one or more documents or, where conditions of sale

are exchanged, in each. This provision does not apply in relation to an agreement made in the course of a public auction, an agreement made before the section comes into force or any other agreement specified by order of the Royal Court. "Real property" does not include a lease. Section 2 empowers the Royal Court by order to make rules to facilitate the conveyancing of real property. In particular, such rules may make provision for the establishment of a system of cautions whereby the registration against real property of a document described in the rules, and the arrest by the Sheriff of monies to be applied towards the completion of a conveyancing transaction, would be prohibited on conveyancing days unless a caution had been entered.

Approved by the States 28.2.96. Awaiting Royal Sanction.

Rights of common - cession and relinquishment

35. Order in Council relative to the Petition of the States of Guernsey regarding the common rights of the inhabitants of the Parish of Saint Martin. - See 19.GLJ.32.

Registered 22.8.95.

PAROCHIAL MATTERS

Occupier's rate

36. Ordinance: The Parochial Taxation (Amendment) Ordinance, 1996. - Increases to £10 the penalty payable to a Parish Constables who collects a rate not paid within 30 days of the demand.

In force 27.6.96 (No. XIII of 1996).

PARTNERSHIP

Limited partnership

37. Ordinance: The Limited Partnership (Guernsey) Law, 1995 (Commencement) Ordinance, 1996. - Brings the Limited Partnerships (Guernsey) Law, 1995 (see 20.GLJ.43), other than section 45(4) thereof, into force on 1st February, 1996.

In force 31.1.96. (No. V of 1996).

PRACTICE AND PROCEDURE (CIVIL)

Arrest - disclosure order - application by fiduciary for order to be discharged - duty of confidentiality

38. See George Harrison, Harrison's Limited et al v. O'Brien, paragraph 1.

SOCIAL SECURITY

Social insurance

39. Ordinance: The Social Insurance (Rates of Contributions and Benefits, etc.) (Amendment) Ordinance, 1996. - Fixes, for the purpose of the specialist medical benefit scheme, the rate of Class 3 social insurance contributions for persons who have attained pensionable age at 1%. Provides for a consequential additional allocation to the Guernsey Health Service Fund.

In force 31.1.96. (No. VII of 1996).

TORTS

Occupier's liability - plaintiff injured while visiting premises as licensee - standard of care required

40. In proceedings for damages for personal injury arising from occupier's liability, the question arose as to the nature and extent of the duty owed to P by the landlord of premises which she was visiting, no equivalent of the Occupier's Liability Act, 1957 having been enacted in Guernsey. The Deputy Bailiff held (see 19.GLJ.53) that the common law in England prior to 1957 must be applied and P must be treated as a licensee. P appealed to the Court of Appeal. HELD, although it was held in Singleton v. Le Noury (see 9.GLJ.48) that the fundamental parts of Guernsey customary law cannot be altered by judicial decision, the pre-1957 Law relating to occupier's liability was not such a fundamental set of principles and was capable of development by the courts provided that the "aids to navigation" laid down by Lord Lowry in C v. Director of Public Prosecutions [1996] 1 AC 1 were followed. Development of Guernsey law on the principles laid down in the Australian case of Australian Safeway Stores (Pty) Ltd. v. Zaluzna (1987) 162 CLR 479, which set aside the limited duties previously established in the common law as owed to invitees, licensees and trespassers respectively and replaced them with a general duty of care based upon the principles in Donoghue v. Stevenson, would provide a degree of certainty previously lacking. The duty of care owed by the landlord of the premises to P should be declared to be a duty to have done what a reasonable man would have done in the circumstances by way of response to the risk, in so far as foreseeable, in accordance with the Donoghue v Stevenson principles of the law of negligence. The appeal would be allowed.

[Morton (formerly Champion) v. Paint - Court of Appeal 9.2.96 (RJC/JMW)].
For full report of judgment of Court of Appeal, see paragraph 61.

GUERNSEY STATUTORY INSTRUMENTS

41. The following Statutory Instruments were registered during the period covered by this issue. Except where otherwise indicated they have not been digested in detail. A reference copy of each is held at the Greffe and copies may be obtained from the relevant Committee.

Title	Date Made	Coming into force	No.
The Social Insurance (Contributions) (Amendment) (No. 2) (Guernsey) Regulations, 1995	29.12.95	1.1.96	1
The Social Insurance (Benefits) (Miscellaneous Provisions) (Amendment) (Guernsey) Regulations, 1995	29.12.95	1.1.96	2
The Teachers' Superannuation (Amendment) (Guernsey) Regulations, 1996	22.1.96	1.1.96	3
The Company Auditors Regulations, 1996 (see paragraph 9)	13.2.96	14.2.96	4
The Parking Places (Amendment) Order, 1996	13.2.96	14.2.96	5
The Health Service (Pharmaceutical Benefit) (Amendment) Regulations, 1996	28.2.96	1.3.96	6
The Health Service (Medical Appliances) (Amendment) Regulations, 1996	28.2.96	1.4.96	7
The Food and Drugs (Slaughter and Deboning of Beef) Order, 1996	3.4.96	3.4.96	8
The Food and Drugs (Improvement and Prohibition - Prescribed Forms) Order, 1996	3.4.96	3.4.96	9
The Weights and Measures (Bailiwick Standard, Working Standard and Testing Equipment) (Amendment) Regulations, 1996	24.4.96	25.4.96	10
The Importation of Fertilisers and Feeding Stuffs Order, 1996	16.4.96	22.4.96	11
The Rent Control (Variation) Order, 1996	11.4.96	1.7.96	12
The Import and Export of Goods (Control) (Guernsey) (Amendment) Order, 1996	3.5.96	20.5.96	13
The Merchant Shipping (Registration) Order, 1996	21.5.96	22.5.96	14

The Customs and Excise (Bailiwick of Guernsey) (Personal Reliefs) (Amendment) Order, 1996	21.5.96	22.5.96	15
The Wireless Telegraphy Apparatus (Restriction) Order, 1996	20.5.96	20.5.96	16
Code of Recommendation for the Welfare of Livestock at Slaughter	21.5.96	31.7.96	17
The Slaughterhouse (Revocation) Regulations, 1996	11.6.96	1.8.96	18

UNITED KINGDOM STATUTORY INSTRUMENTS

42. The following is a list of Statutory Instruments made in the United Kingdom which are specifically applicable to Guernsey and which were registered here during the period covered by this issue. Unless otherwise indicated they are not digested in detail elsewhere in the Journal.

	<u>S.I. Number</u>
The Wireless Telegraphy (Television Licence Fees) (Amendment) . Regulations, 1996	379
The British Nationality (Fees) Regulations, 1996	444
The Air Force Act 1955 (Bailiwick of Guernsey) Order, 1996	718
The Army Act 1955 (Bailiwick of Guernsey) Order, 1996	722
The Naval Discipline Act 1957 (Bailiwick of Guernsey) Order, 1996	726

ALDERNEY

AVIATION AND AIRPORTS

43. **Projet de Loi:** The Air Transport Licensing (Alderney) Law, 1996. - Imposes, for flights to which the Law applies, a requirement for the operator or charterer to hold an Alderney air transport licence granted by the States Transport Committee ("the Committee"). The Law applies to any flight beginning or ending in Alderney other than one beginning or ending in a place outside the British Islands. The Committee has power to prevent unlicensed flights.

Applications for licences by operators or charterers of aircraft must be made to the Committee. Applications should normally be presented 6 months before the date on which the licence is to come into operation. In determining licence applications, the Committee must take certain matters into account, including the provisions of the policy statement (which is the published policy of the States of Guernsey Transport Board in relation to the licensing of air transport services as approved by the States of Deliberation) and any public representations. The applicant must also hold a Civil Aviation Authority licence (or its equivalent granted by the Secretary of State for Transport) for the flights in question.

Licences can be revoked (if, for example, the holder acts in a manner inconsistent with the operation in accordance with the conditions of the licence of the air transport service to which the licence relates). Licence applications are to be published in the Alderney Gazette. Use of an aircraft on an unlicensed flight is an offence.

Approved by the States of Alderney 3.4.96. Awaiting Royal Sanction.

CENSUS

44. **Ordinance:** The Census (Alderney) Ordinance, 1995. - makes provision for the holding of a census in Alderney. Census day is 31st March, 1996.

In force 6.3.96. (Ordinance of the States of Alderney of 6.3.96).

COMPANIES

45. **Ordinance:** The Companies (Alderney) Law (Annual Returns) Ordinance, 1996. - Amends section 37 of the Companies (Alderney) Law, 1994 by providing that an annual return need no longer be executed under the company's common seal.

In force 3.1.96. (Ordinance of the States of Alderney of 3.1.96).

46. **Ordinance:** The Companies (Alderney) Law (Auditors) Ordinance, 1996.- Provides that, for the purposes of section 78 of the Companies (Alderney) Law, 1994, and subject to specified conditions, a partnership or body

corporate may be appointed as, and may act as, the auditor of a company.

In force 1.5.96. (Ordinance of the States of Alderney of 1.5.96).

CONSTITUTIONAL LAW

47. **Projet de Loi: The Government of Alderney (Amendment) Law, 1996.** - Amends the Government of Alderney Law, 1987 by providing that, beginning with the election in December, 1996, members of the States shall henceforth serve a term of four years, six of them (out of twelve) being elected every two years; and that the President shall also henceforth serve a term of four years. Transitional provision is made for the election to be held in 1996.

Approved by the States of Alderney 1.5.96. Awaiting Royal Sanction.

DWELLINGS PROFITS TAX

48. **Ordinance: The Dwellings Profits Tax (Suspension) (Alderney) Ordinance, 1996.** - Suspends the operation of the Dwellings Profits Tax (Alderney) Law, 1989 (see 6.GLJ.281) for a further year from the 6th April, 1996.

In force 6.4.96. (Ordinance of the States of Alderney of 3.4.96).

FOOD

49. **Ordinance: The Alderney (Application of Legislation) (Food and Drugs) Ordinance, 1996.** - Applies the Food and Drugs (Amendment) (Guernsey) Law, 1995 (see 19.GLJ.22) to Alderney.

In force 1.2.96. (No. III of 1996).

HEALTH AND MEDICINE

Medical benefit

50. **Ordinance: The Alderney (Application of Legislation) (Health Service) (Benefit) (Amendment) Ordinance, 1996.** - Provides that, from 1st April, 1996, the medical consultation grant in Guernsey and Alderney shall be the same (£8 for a consultation with a medical practitioner and £4 for a consultation with a nurse).

In force 1.4.96. (No. X of 1996).

Prescription charges

51. **Ordinance: The Health Service (Benefit) (Amendment) Ordinance, 1996.** - See paragraph 27.

MILK

Milk hygiene

52. Ordinance: The Raw Milk (Prohibition of Supply) (Alderney) Ordinance, 1996. - Prohibits sale and supply of raw milk or any milk-based product derived or manufactured from raw milk. There are exemptions for the sale or supply of milk to an approved dairy and the supply by an owner of cows of milk to members of his own household or his employees. Raw milk" means milk which is not pasteurised, sterilised or UHT milk prepared in accordance with the UK Dairy Products (Hygiene) Regulations 1995.

In force 1.5.96. (Ordinance of the States of Alderney of 1.5.96).

53. Ordinance: The Milk (Hygiene) (Alderney) Ordinance, 1996. - Lays down general conditions for the handling and marketing of milk, especially heat-treated milk; empowers the States of Guernsey Board of Health to inspect and supervise the operation of dairy premises and, where a risk of injury to health occurs, issue a prohibition notice having similar effect to those issued under the Food and Drugs (Guernsey) Law, 1970.

In force 5.6.96. (Ordinance of the States of Alderney of 5.6.96).

ROAD TRAFFIC

Speed trials

54. Ordinance: The Speed Trials (Alderney) Ordinance, 1996. - Closes the roads at Whitegates and Tourgis Hill on (respectively) 20th and 21st September 1996 for the purposes of speed trials. Disapplies the traffic regulations as to speed limits and noise restrictions in respect of vehicles taking part in those trials.

In force 1.5.96. (Ordinance of the States of Alderney of 1.5.96).

WATER

55. Ordinance: The States Water Supply (Rates of Charge) (Amendment) (Alderney) Ordinance, 1996. - Amends the States Water Supply (Rates of Charge) (Alderney) Ordinance, 1996 by changing the date at which rateable values are to be determined for the purposes of assessing water rates.

In force 1.5.96. (Ordinance of the States of Alderney of 1.5.96).

56. Ordinance: The States Water Supply (Rates of Charge) (Alderney) Ordinance, 1996: Prescribes water rates for the year from 26th March 1996 for water charged by meter or by rate.

In force 26.3.96. (Ordinance of the States of Alderney of 6.3.96).

SARK

There is no material relating to sark for the period covered by this issue.

JUDGMENTS OF THE GUERNSEY COURT OF APPEAL

A

57.

[CRIMINAL DIVISION - APPEAL NO. 205]

1996 JANUARY 10

THE LAW OFFICERS OF THE CROWN

v.

MICHAEL JOSEPH MILLAR

B

Before: BLOM-COOPER, SOUTHWELL and SUMPTION, JJ.A.

See paragraph 16.

N. Le Poidevin, for the Appellant.

J.R. Finch, for the Crown.

C

SUMPTION, J.: The Appellant was convicted by the Magistrate's Court on 10th May 1995, on a charge of assaulting his son, Ethan Millar. He was sentenced on that charge to 5 months' imprisonment which he has now served. On 11th September 1995, his appeal against conviction was heard by the Bailiff and dismissed. He now appeals to the Court of Appeal under section 7 of the Magistrates Court (Criminal Appeals) (Guernsey) Law, 1988. That enactment provides for an accused to renew his appeal to the Court of Appeal. Accordingly, we are concerned on this appeal with the correctness of the original conviction of the Appellant by the Magistrate, not with the decision of the Bailiff: Law Officers of the Crown v. Diment 16.GLJ.15. There is no appeal against sentence.

D

The circumstances are rather unusual. The Appellant is a married man with a baby son, Ethan, born in August 1994. On 20th January, 1995, he had an argument with his wife in the sitting room of their home. She was sitting on the settee, holding their baby in her arms. In the course of the argument the Appellant lost his temper, rose from his own chair, and hit his wife around the head with great violence, several times, drawing blood. She got up from the settee and ran from the room, dropping the baby on the floor, as a result of which the baby's skull was fractured. Fortunately, the baby made a good recovery. Otherwise the Appellant might have faced an altogether more serious charge.

E

Perhaps rather surprisingly, the Appellant was charged with the assault not of his wife, but of their son. This meant that Mrs. Millar was not compellable to give evidence against her husband, and she did not do so. At the trial before the Magistrate the evidence for the prosecution consisted substantially in the statements made by the Appellant to the police in a taped interview shortly after the incident, which was said to include relevant admissions. No objection was taken to the admission of this evidence and it has not been suggested at any stage that it could have been. At the conclusion of the prosecution case, the Appellant's counsel submitted that there was no case to answer. But he told the Magistrate that he did not intend to call the Appellant or lead any other evidence and invited him to proceed straight to his decision on the charge. This the Magistrate did.

F

G

A The Magistrate found that the Appellant had no intention of harming the baby and it is right that we should record that this has been common ground at every stage of the proceedings. He convicted the Appellant on two grounds: first, that in hitting his wife while she was holding the baby he was reckless of the baby's safety, and secondly, that the "doctrine of transferred malice" applied to this case. For reasons which will become apparent, we reached the conclusion at the hearing of the appeal that it could be decided without reference to the question of recklessness, and we therefore heard no argument upon it.

B
C A person is guilty of assault if he does an act intended to cause and actually causing injury, and in certain other cases which we ignore because they are irrelevant to this appeal. The mens rea of the offence consists in the intention to injure. The so called "doctrine of transferred malice" is the rule of law by which an accused who does an act intended to cause injury to A but in fact causing injury to B, may be guilty of assaulting B. It is a means of supplying the mens rea necessary to the offence in a case where the accused intended to cause harm, but not in the precise way nor to the precise person who, in the event, suffered it. The leading modern authority is R. v. Mitchell [1983] QB 741, a decision of the Court of Appeal in England. In that case the accused deliberately hit a man in a post office queue intending to injure him. The intended victim fell against an old lady next to him and injured her. The old lady subsequently died of the injuries and Mitchell was convicted of manslaughter. The conviction was confirmed by the Court of Appeal. Staughton J., delivering the judgment of the Court, said:-

D "We can see no reason of policy for holding that an act calculated to harm A cannot be manslaughter if it in fact kills B. The criminality of the doer of the act is precisely the same whether it is A or B who dies. A person who throws a stone at A is just as guilty if, instead of hitting and killing A, it hits and kills B."

E This principle has, however, very little to do with the appeal in the present case. The reason is that the Appellant does not deny that he intended to hit his wife. Nor does he dispute that, if injury to the baby resulted, that intention is enough to supply the mens rea necessary to the crime of assault. His point is that the prosecution did not prove, at any rate to the necessary criminal standard of proof, that the injury to the baby in fact resulted from the assault on the wife. This is not a point directed at lack of mens rea or of "transferred malice" but a pure question of causation.

F Because of the course which the trial took, the only evidence on the point consisted in the following passages from his interview with the police, at pages 9 and 10 of the record of interview:-

"A. She had the baby on her, the head on the breast.

Q. Not feeding it, just cuddling it?

A. Not feeding it, no. I suppose protecting it.

G Q. Because you were slapping her around the head?

A. Because I'm hitting her around the head, yes. And when I hit her she got up and em- like that. (He indicated that she was leaning forward to get up).

A

Q. Did you actually see the baby fall?

A. No, no I didn't see the baby fall.

Q. Did the baby fall before she got up?

B

A. No, while she was getting up, I think.

Q. You think it was while she was getting up that the baby fell?

A. Yeah, it was 'cos she went "The baby, the baby" like that, as she ran to the door like, as she was getting up the baby landed on the floor.

Q. You didn't actually see the baby land on the floor?

C

A. Yeah, well I saw the baby on the floor, I didn't see it fall, I didn't see it hit the floor."

And after a short gap:-

"Q. So the baby's on the floor, she's got up and walked to the door?

D

A. She never walked, she ran to the door, that's what she was getting up for. When she dropped the baby on the floor she was getting up to run out of the fucking door.

Q. With the baby?

A. I s'pose with the baby or whatever, yeah, and she dropped the baby like, you know, not blaming her you know, it's my fault, I shouldn't be hitting her."

E

In our judgment this evidence is wholly consistent. What it proves, and to our minds inescapably proves, is that Mrs. Millar rose from the settee to escape her husband's blows and that the baby fell from her arms as she rose and began to run from the room. The fact that the Appellant did not see the baby actually fall is irrelevant since it is clear that he saw the baby immediately before and after the fall and was therefore able to tell the police at what precise stage of the incident it happened. The fall and the injury arose directly from Mrs. Millar's attempts to avoid the Appellant's violence. We reject as fanciful the alternative possibilities advanced by Dr. Le Poidevin, who appeared for the Appellant, that Mrs. Millar may have thrown the baby down in a moment of pique or that the baby may have fallen in an accident occurring independently of the Appellant's attack on his wife, albeit simultaneously with it.

F

Causation is a question of fact. The test is the same in the civil and the criminal law although the standard of proof required to satisfy it is higher in the second. If an accused brings about a state of affairs in which another person can reasonably be expected to suffer injury and that person does suffer

G

A injury, then his acts will normally be regarded as the cause of the injury. It does not matter that the injury was caused indirectly or in an unexpected way, provided that it was within the range of consequences which can be expected to follow naturally from the accused's behaviour. If it follows naturally from the accused's behaviour, it does not matter that it was not the only possible thing that might have followed from it. Nor does it matter that one link in the chain of causation may be the voluntary act of someone else, if that voluntary act is the sort of thing that can be expected to happen.

B All this may seem rather abstract, but the facts of this case provide a concrete illustration of the good sense that lies behind it. If a man violently hits a woman holding a tiny helpless baby, that is quite plainly liable to lead to her trying to escape and dropping and injuring the baby in the process. If that happens then the man's acts have injured the baby. On the evidence it is what happened in this case. The Appellant intended to hurt his wife and what he did hurt his son as well. He was therefore rightly convicted of assaulting him.

C The appeal will be dismissed.

Appeal dismissed.

58. [CRIMINAL DIVISION - APPEAL NO. 206]

D 1996 JANUARY 8,10

THE LAW OFFICERS OF THE CROWN

v.

TANYA INAN

Before: BLOM-COOPER, SOUTHWELL and SUMPTION, JJ.A.

E Sentence - misuse of drugs - importation of Class A drug

See paragraph. 20.

R.J. Collas, for the Appellant.

G.R. Rowland, Q.C. (H.M. Comptroller), for the Crown.

F BLOM-COOPER, J.: The Judgment which I am about to deliver in the case of Tanya Inan is the Judgment of the Court by a majority.

G Tanya Inan pleaded guilty on 2nd October 1995, before the Deputy Bailiff and 12 Jurats of the Royal Court to three offences of drug smuggling for which she received a total of 4½ years' imprisonment. She sought leave to appeal against sentence on the single ground that it was excessive. At the end of her Counsel's submission to us, we granted her application and proceeded to treat the application as the full appeal. At the end of the hearing we reserved our decision, to be given this morning. This we now do.

All three offences were committed on Sunday 28th May 1995, when Mrs. Inan entered the Island by air from Gatwick. Although born in Guernsey in 1960, to which she has returned from time to time to live and work, she has for the past six years resided in London. She is now aged 35 years and is a single parent with a son aged ten, who is being looked after by his maternal aunt and uncle living in Gibraltar. The Social Enquiry Report reveals that the son is a well adjusted boy for which much credit is given to Mrs. Inan. The father of Mrs. Inan's child was killed in a swimming accident. Her brother also died shortly after in an accident in the Pyrenees. And following her second bereavement Mrs. Inan apparently became a heroin addict. Three years ago she married again, but separated from her husband a year ago.

A
B

The Indictment disclosed three counts: First, an offence of fraudulent evasion of the prohibition on the importation of a Class A drug, namely 0.774 grams (0.027 ounces) of heroin, for which she was sentenced to 6 months' imprisonment. Second, a like offence in relation to another Class A drug, namely 126 tablets of MDMA (Ecstasy) at a potential resale value of between £3,150 and £3,780, for which she was sentenced to 4½ years' imprisonment, to run concurrently with the sentence on Count 1. Third, a like offence in relation to a Class B drug, namely 45.979 grams (1.62 ounces) of cannabis resin, for which a sentence of 18 months' imprisonment was imposed, likewise to run concurrently with the sentences on the two other counts. She has been in custody since her arrest and has, therefore, by now served 7½ months. The Royal Court held that, pursuant to S.3(1)(a) of the Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988, Mrs. Inan had not benefited from drug trafficking, and therefore made no order of confiscation of property.

C
D

In presenting his succinct argument on behalf of Mrs. Inan, Advocate Collas focuses exclusively on the sentence of 4½ years' imprisonment for the offence of smuggling into Guernsey 126 Ecstasy tablets. He contests neither the propriety of the sentence of 6 months' imprisonment in respect of the small amount of heroin, which was for the Appellant's own use, nor the correctness of a sentence of 18 months' imprisonment for the importation of the cannabis resin.

E

This Court's attention has been drawn once again to the helpful guidelines laid down as part of the sentencing policy of the Royal Court for drug offences, in August 1994 at the conclusion of the trial in Oren 18 GLJ 13. Those guidelines have recently been given the imprimatur of this Court in Law Officers of the Crown v Warmisham 20.GLJ.19, in which case the importation was roughly equivalent, namely 103 Ecstasy tablets, to the amount in this case. We think it worth repeating in part, the approved words of the Royal Court in the Oren guidelines:-

F

"In view of the substantial increase there has been in cases involving the importation and possession with intent to supply of controlled drugs of both Class A and Class B, this Court now considers it appropriate to review and restate its sentencing policy. In so doing the Court has come to the conclusion that in future cases substantially higher sentences must be imposed.

G

A Turning to cases involving larger quantities, where the inference is to be drawn that the offender is engaged in trafficking, the starting point for sentencing will be in the case of Class B drugs, two and a half years, and in the case of Class A drugs, four years."

This Court in Warmisham interposed, in the middle of citing that passage:-

B "The following passage makes it clear that these periods are in each case the sentences stated to be appropriate after the entry of a plea of guilty with its appropriate discount."

And then the Court went on to quote further from the Oren guidelines:-

C "The lower sentences will be reserved for cases where there are guilty pleas and the quantity of drugs found in the possession of the offender is in the lower end of the range both in amount and value. As to the lower end in value the Court would at the present time be regarding this as £1,000 or less on the streets of Guernsey, always bearing in mind that that figure might properly be reduced downwards if the market were to be flooded and prices fell to those found elsewhere. Larger quantities of drugs for the Guernsey market will attract sentences of up to twice those indicated as starting points."

In Warmisham the Court of Appeal reduced a sentence from 6 years' imprisonment to 5 years.

D Whatever was the starting point for fixing the tariff in the case of this Appellant, we do not think that in that respect there is anything strictly wrong about a sentence of 4½ years' imprisonment. Indeed Advocate Collas does not contend that the fixing of the tariff was in any way amiss. What he does submit is that the mitigating factors were so underrated by the Deputy Bailiff, in his Judgment on sentencing, as to render the ultimate sentence of 4½ years' imprisonment excessive. Hence, Advocate Collas submits, the sentence should be reduced. We agree, for reasons which we give at some length. Since we are disagreeing with the Deputy Bailiff's approach to the question of mitigation, and nothing else, we think it is helpful in order to understand our reasons for reducing the sentence of 4½ years' imprisonment, to set out verbatim, the Deputy Bailiff's judgment on sentence, at page 14 E of the transcript:-

F "DEPUTY BAILIFF: Tanya Inan, the Court has considered all that your Advocate has said. It has taken into account your plea, the help that you gave to the Customs, the fact that you have been ill and the fact that you have a ten year old child.

However, cumulatively the Court regrets that it has not found a great deal of mitigation in your case. After starting life with advantages and skills you have come down in the world and the Court suspects that regular drug taking has been a main contributor to this and that you realise that yourself.

G The Court finds it particularly disturbing that your Counsel should come here and suggest that the proceeds of sale of these drugs would be used to finance treatment for your addiction. You clearly did not give thought to the damage your merchandise would do to the young people of this Island,

into whose hands it would land up. And in this regard, recent reports have served to confirm the view of the Court, that every M.D.M.A. tablet that comes to Guernsey is a potential killer." A

That is the end of the quotation in its entirety, from the judgment on sentence of the Deputy Bailiff.

Mitigating circumstances

To the extent that any discount on the tariff was made by the Royal Court it was clearly only a minor factor in the sentence passed. The Deputy Bailiff said that the Royal Court could not find much mitigation. By contrast, we do find that there was substantial mitigation in this case, which we place under three headings: first, the assistance which Mrs. Inan gave to the Customs Officers, combined with her guilty plea; second, her personal circumstances as a single parent who had recently undergone a minor surgical operation of a worrying long-term kind; and third, the question of the purpose to which she would put the proceeds of sale of the Ecstasy tablets. B C

Assistance

During the period of five interviews with Customs Officers over the Sunday and Monday, 28th and 29th May 1995, the Appellant made oral statements implicating an accomplice and a friend, although this was made only after the fifth and final statement. During her detention she had become unwell, such that the duty doctor was called to examine her. During the medical examination she told the doctor that she had a package of drugs internally concealed. It may have been inevitable that the package would have been discovered without her help; nevertheless she may not have anticipated that eventuality. The Comptroller, very fairly (as we would expect) conceded that the Appellant did give some assistance, "drip-by-drip" as he described it, and drew our attention to the fact that there was other assistance given, undisclosed publicly, but revealed privately to us. We have taken account of that. We think that the Royal Court paid insufficient attention to the degree of assistance Mrs. Inan had given to public authorities about the criminal event she engaged in on 28th May. D E

Whatever weight was to be attached to those matters, we think that the phrase used by the Deputy Bailiff - "...the help that you gave to the Customs..." - is minimising the actual assistance. What weighs heavily with us is that the identification of the accomplice involved Mrs. Inan in the unwelcome prospect of having to give evidence in Court. In the event that did not arise, but she was not to know that. F

Personal circumstance

A few weeks prior to the offences on 28th May, Mrs. Inan had undergone surgical treatment for pre-cancerous cells of the cervix. She was due to attend a colposcopy clinic to have a proper follow-up as the vulval lesion is a pre-malignant condition. A medical report stated that

"...in general patients who have been through surgical procedures to the vulval skin do suffer some psychological disturbance and sometimes depression..." Mrs. Inan's mental health was never examined post-operatively, since she failed to keep the appointment but landed up in G

A prison in this Island. The Social Enquiry Report from a Probation Officer notes also that "...she has faced two close bereavements in recent times and I would suggest her feelings of self-esteem are very low. Her drug use may well be a form of escapism to cope with grief and the depression she felt as an isolated single parent in London..."

B But above all else we think that her son, to whom she has devoted much care, is entitled not to be deprived of his mother's care beyond what is absolutely necessary for the purpose of reflecting the appropriate penalty. One must always remember that any immediate custodial sentence bears heavily on an innocent person in the position of the Appellant's son.

Financing addiction

C The Deputy Bailiff commented that the Court found it disturbing that the proceeds of sale of Ecstasy tablets would be used for financing "...treatment for your addiction..." It is not entirely clear what was the "disturbing" feature in that fact. The use of the proceeds of sale for the treatment of her heroin addiction was treated by the Deputy Bailiff almost as an aggravating factor, or at least as a factor that reduced any mitigation that there might otherwise be. Since we regard it as an irrelevant factor, it could neither aggravate her offence nor reduce the effect of the mitigating circumstances.

D For all those reasons, we think that this is a case which falls squarely within the Oren guidelines. The sentencing Court (and this Court) always looks at each case on the merits and has regard to exceptional circumstances in calculating the amount of any discount on the tariff sentence. This case does disclose exceptional circumstances in the shape of mitigating factors. Accordingly, we will substitute for the sentence of four and a half years' imprisonment in respect of the second count, a sentence of thirty months' imprisonment. To that extent only this appeal is allowed.

E Appeal allowed to the extent that the sentence on the second count was reduced from four and a half years' to thirty months' imprisonment.

59.

[CRIMINAL DIVISION - APPEAL NO. 207]

1996 MARCH 26

F THE LAW OFFICERS OF THE CROWN
v.
PHILLIP JOHN HENNESSY

Before: COLLINS, DOREY, P. and HARMAN, JJ.A.

Sentence - importation of Class B drug

G See paragraph 22.

N.J. Barnes, for the Applicant.

A.C.K. Day, Q.C. (H.M. Procureur), for the Crown.

DOREY, P.: Phillip John Hennessy appeared before the Royal Court on 21st

February 1996, and pleaded guilty to having imported a quantity of cannabis resin, a Class B drug, the importation of which is prohibited, the offence having been committed on 15th November 1995.

A

He was sentenced to a term of 2 years' imprisonment and, his application for leave to appeal having been refused by a single judge of this Court, he now applies for leave to appeal against that sentence.

The Applicant was stopped by Customs Officers, he having disembarked from a vessel which had sailed in from Weymouth. He was asked various questions and then was asked to remove his jacket. A sequence of events then occurred which led to his producing in one way or another a total of 23 packets of cannabis resin.

B

Initially, 9 packets were found in the pockets of his jacket. He was asked if he had concealed any drugs internally and he originally denied this, but he said that there was more cannabis in a tent pole bag which he was carrying with him. Indeed, a further 4 packets were found at that location.

C

In relation to the 13 packets so far therefore discovered, he said that he had paid £150 for them and that he intended to use the proceeds for paying off an overdraft of £440 which he had on his account with the National Westminster Bank.

He, having initially denied that he had any drugs concealed internally, later admitted that that was untrue, and first a total of 8 packages were passed in a bowel motion and those packages were balloons containing cannabis. On the next day, a further two packages were passed. In all the cannabis imported by these various means amounted to 166.8 grams in weight and the total of 23 packets was worth between £1,000 and £1,334 and was capable of producing 1,200 cannabis cigarettes.

D

It transpired that in addition to the account with National Westminster Bank he had some months before opened an account with a different bank, namely, the Midland Bank, and it appeared from the evidence that on 6th November £600 was paid into that account in Guernsey and four days later on 10th November, this was withdrawn in England at Burnham-on-Sea, and withdrawn in cash.

E

At the hearing some discussion took place as to whether a Newton Hearing was practicable in the absence of notice of an issue to be raised by the Applicant's advocate. However, this was resolved by the learned Deputy Bailiff who, having heard argument, stated that the Court would deal with it this way, and he said at page 11 F of the transcript:-

F

"I think it is very important in these cases that we accept what the inferences that may be properly drawn are, and we discuss them. And I think in this particular case that one draws the inference, here is a man who uses cannabis, here is a man without a large sum of money but he has got a family in the Island and that some of it might have been used for his own purposes and the rest of it, on his own admission, was going to pay off some debts."

G

The Applicant, who is 25 years of age, has a substantial number of criminal convictions for offences not involving drugs. Some are comparatively minor,

A but his record contains an offence of arson for which he was placed on probation and then in 1989 a sentence of 7 years in a young offenders institute was imposed at the Maidstone Crown Court for his having been concerned in a conspiracy to rob, that conspiracy involving the use of an imitation fire arm for the possession of which he was also convicted and sentenced to a concurrent 3 years detention.

B While in prison in Guernsey after his age had caused his transfer from the young offenders institution, he was diagnosed as suffering from mental health problems. The appropriate order was made and he was transferred to Castel Hospital, and psychiatric reports were before the Royal Court and this Court respectively from Dr. Browne, a consultant psychiatrist at that hospital.

Dr. Browne's first report which was before the Royal Court was dated 5th January 1996, and having given the history of the Applicant's condition and treatment he said this:-

C "While it is the case that the defendant understood the nature of his offence and committed same in a purposeful manner, it is nonetheless an offence which owes a little of its etiology to the defendant's mental illness. It is difficult to ascertain with any degree of certainty his mental state at the time of committing the offence, but it's likely that he was non compliant with medication at that juncture and that his schizophrenic state would add considerably to the likelihood of him committing such an offence by way of lack of insight and impulsivity."

D He had earlier in the report referred to the fact that although in the past the Applicant had shown symptoms consistent with schizophrenia and had been severely "thought disordered" and had displayed paranoid symptomatology, he was not showing any such signs in January of this year. And Dr. Browne said:-

"His current lack of psychotic symptomatology owes much to the fact that he is currently on anti-psychotic medication which he receives [by injection] to ensure compliance."

E However, in his further report which is made to this Court and is dated 25th March 1996, it appears that in fact that medication was discontinued in January, probably a little later than the date of that report, and that at the time of the report submitted to us dated 25th March 1996, he was still not displaying any overt psychotic features. Of course, the medication having been discontinued, the cause for such lack of symptoms could not any longer be the continuance of that medication and so Dr. Browne at that stage, put forward a further and alternative explanation, namely, that the Applicant was currently residing in a relatively stress free environment, where few demands were made upon him.

F However that may be, the view which this Court takes is that the Applicant set up, and carried through, a thought-out and considered course of events, which led to his being apprehended by the Customs and to his conviction in this case. The money was provided to him, he went to England to purchase the drugs, he did so intending to pay off his loan to the National Westminster Bank and it is difficult to see how the offence which he committed could have been properly regarded as an offence committed on an impulse.

G

We would say also that the fact that a defendant in a case involving the importation of drugs is suffering from some mental condition must not of itself be taken as necessarily a mitigating factor; it depends of course upon the circumstances.

A

Advocate Barnes realistically accepted that the sentence in this case was not out of line with sentences passed in similar cases. It is well known that the leading case now in this jurisdiction with regard to the sentencing for drugs cases, is the case of Law Officers of the Crown v. Oren 18.GLJ.13, and the Deputy Bailiff in passing sentence rightly said that, applying the Oren guidelines, and bearing in mind the fact that the importation had involved internal concealment, one might be looking at a sentence in the region of 3 years.

B

We consider that the Royal Court were being merciful indeed when they went on to say at page 17 D of the transcript:-

"However, Dr. Browne's report indicates that there is a psychiatric problem with this particular Accused, and in view of his whole record and what it has said in that report, the Court has taken note of that evidence, it cannot regard it as a proper disposal to suspend any sentence of imprisonment but it takes it into account."

C

When I say that the Royal Court was being merciful, of course, I have to bear in mind also that the Royal Court did not have the evidence which is before us, namely, that there were no psychotic symptoms when the applicant was examined this month despite the fact that medication had been removed, and it may be that if the Royal Court had known of that, had had the pre-vision to know of that (which of course, it clearly could not) it might have taken a different view with regard to the sentence.

D

However that may be, we would make it clear that on the evidence which is now before us, had a sentence of 3 years' imprisonment been imposed by the Royal Court, it must not be thought that that is a sentence with which we would have interfered had the matter then come to us and had we had all the information which we now have before us today. In those circumstances this application for leave to appeal is dismissed.

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Application for leave to appeal dismissed.

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A 60.

[CRIMINAL DIVISION - APPEAL NO. 208]

1996 MARCH 26

THE LAW OFFICERS OF THE CROWN

v.

ROY SUGGETT

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Before: COLLINS, DOREY, P. and HARMAN, JJ.A.

Sentence - misuse of drugs - importation of Class A drug

See paragraph. 21.

S.G. Denziloe, for the Applicant.

A.C.K. Day, Q.C. (H.M. Procureur), for the Crown.

C

DOREY, P.: On 21st February 1996, Roy Suggett appeared before the Royal Court and pleaded guilty to an offence of the importation of a quantity of a type of Ecstasy, a Class A drug, into this Island, the offence having been committed on 29th December 1996. The sentence imposed upon him was one of 4 years' imprisonment and from this sentence he now seeks leave to appeal.

D

The Applicant is a man of 38 years of age, and has some contact with this Island and with Jersey, although he comes originally from Wales. He is a welder and has been in steady work for some years until October of last year. He is unmarried but he has a child arising from a relationship with a woman living here with whom he has still some contact and the child being 2 years old resides with, and is cared for, by its mother.

E

The facts of the offence can be fairly shortly stated: On 29th December the Applicant flew from Jersey to Guernsey, arriving at the Airport in the afternoon. He was stopped by Customs Officers and having admitted that he had been involved in drugs some five years ago, and being unable to give the address to which he was supposedly going to see the lady to whom I have referred and the child, was searched.

F

A total of 48 Ecstasy capsules were found upon him, having been carried by him in a package concealed in his underclothes. He was searched and when asked to remove his underpants 9 capsules of Ecstasy dropped on the floor. He claimed that they were for his own personal use. A further 39 capsules were then found in a transparent bank money bag in a pocket of his jacket, that jacket having already been searched before the strip search. The Applicant said that he had transferred them before the strip search having originally hidden the bag in the underpants in the Airport lavatory at Jersey. He had therefore been able to switch the bag contained in the underpants into his jacket hoping, no doubt, that that having been searched already there would be an end of the matter, but accidentally he had left 9 capsules behind, they having escaped from the bag in his underpants.

G

The capsules were worth some £25/£35 each in this Island, a considerably enhanced price from that obtainable in England or, indeed, in Jersey, doubtless due to a comparative scarcity over here. The value in Jersey would have been

in the region of £5 per tablet; the attraction of importation into Guernsey is, therefore, obvious.

A

The Applicant refused to give the name of his supplier in Jersey or to identify the person to whom he was to make contact or to deliver the drugs in Guernsey. Originally he claimed that he was only to receive £75 for acting as a courier but on being pressed he stated that it was £200 that he was to receive.

His previous convictions contain two previous offences of possession of cannabis, each of which attracted a small fine. The Applicant has never previously been made subject to a sentence of imprisonment.

B

The motive for the offence is clear; the Applicant had been out of work for some two months and had no money. He received, as he eventually confessed, £75 and £25 for his air fare in Jersey and he was to receive a further £100 in Guernsey.

The sentence of 4 years imprisonment to which we have referred was passed in respect of this offence and in our view properly passed in line with the guidelines in Law Officers of the Crown v. Oren 18.GLJ.13. We have been referred to the decision of this Court in Law Officers of the Crown v. Inan 21.GLJ.20. In our view this is a case to be confined very much on its special facts, and to be considered as no more than the application to the facts of that case of the residual power of the Court to show mercy to a particular offender in the circumstances of a particular case as foreshadowed in the final paragraph of the guidelines set out in Oren.

C

The same can be said for the reduction from the sentence of 6 years' imprisonment to 5 years in the case of Law Officers of the Crown v. Warmisham 20. GLJ.19.

D

Comparison between such cases is of little or no assistance in that in such cases the Court is making a deduction from the guideline standard; each has to be considered on its own special facts and having regard to its own special circumstances.

E

It has been urged upon us that there are a number of matters which taken cumulatively would enable this Court to reduce the sentence passed by the Royal Court. We find however that there are no such circumstances in the instant case, and accordingly the application for leave to appeal against sentence is dismissed.

Application for leave to appeal dismissed.

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A 61.

[CIVIL DIVISION - APPEAL NO. 219]

1996 JANUARY 9, 10 and FEBRUARY 9

PENELOPE SUSAN MORTON Plaintiff
(formerly Champion) (Appellant)

v.

MICHAEL ST. JOHN PAINT Defendant
(First Respondent)

GEORGE BRAMALL

and

BRIAN AYLWARD Third Parties and
Second and Third Defendants
(Second and Third Respondents)

Before: BLOM-COOPER, SOUTHWELL and SUMPTION, JJ.A.

Occupier's liability - plaintiff injured while visiting premises as licensee -
standard of care required

See paragraph 40.

R.J. Collas, for the Plaintiff.

J.M. Wessels, for the Defendant.

On 9th February, 1996 the following judgments were delivered by Blom-Cooper, J. and Southwell, J.

BLOM-COOPER, J.: The judgment which is about to be delivered by Southwell J. has been seen by me in draft. I agree with him that this appeal should be allowed, for the summarised reasons which he states in his conclusions on pages 25-27. Since, however, we are differing from the learned Deputy Bailiff in his careful, even appropriately cautious judgment - a judge of first instance may not, in such cases, do what an appellate court may properly do - I wish to add my own observations on why, in my view, the Deputy Bailiff misdirected himself.

Attracted as he was to adopt the statutory reform in England of the Occupiers Liability Act 1957, the Deputy Bailiff felt compelled to conclude that the established distinction between the duty of care owed by an occupier of premises to an invitee and to a licensee, had to be upheld. The Deputy Bailiff held, at page 1 of his judgment, that post-1957 (and to this day) "the consequence has been that English law and Guernsey law part company and even if the change made by statute is sensible and logical this court cannot take upon itself to be legislature and judicature". Later in his judgment, at page 5, the Deputy Bailiff underlined his fundamental approach to the issue, by stating baldly that "law reform is the prerogative of the legislature and not the courts". It is at this point that I conclude that the Deputy Bailiff is mistaken.

The division between legislature and the courts in law-making cannot be so simplistically stated. "Judges do and must legislate, but they can only do so interstitially": that statement made by Mr. Justice Holmes of the US Supreme Court in Southern Pacific Co. v. Jensen 244 US 205, 221 (1917), was described

by Mr. Justice Cardozo in The Nature of the Judicial Process (1921), as one of the well known "flashing epigrams" referred to by Jacob J. in Merck & Co. Inc. v Primecrown Ltd. & others [1995] F.S.R. 909, 915-916. Once it is appreciated that judges do make law, the question is invariably where to draw the boundary line between the evolving nature of the common law and the role of Parliament in its over-arching legislative activity. Where Parliament has intervened, it is the supreme law-maker. But where it is silent on a topic or has intervened only partially there is room for development of the law by the courts in harmony with legislative intentions. As Lord Wilberforce said in Director of Public Prosecutions v. Lynch [1957] AC 653, at 684H:

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"I have no doubt it is open to us, on normal judicial principles, to hold the defence [of duress to a charge of murder] is admissible. We are here in the domain of the common law: our task is to fit what we can see as principle and authority to the facts before us"; that is legislating interstitially.

The legal distinction between invitees and licensees has been entirely the work of judges within the context of the development of the law of negligence, and not (until 1957) the creature of statute. Had Parliament not passed the Occupiers Liability Act 1957 the English courts would have been impelled, if not propelled, by changing social conditions to consider the survival of the outmoded and irrational distinction between invitees and licensees. What the English law relating to the liability of occupiers of premises was, pre-1957, would not, in my judgment, have outlived the succeeding decades of this century. That conclusion does not depend on hindsight, for that is what did happen precisely in another common law jurisdiction. The elimination of the distinction between invitees and licensees was achieved in a series of decisions in the Australian courts, to which the Deputy Bailiff's attention was drawn. While the Australian example sounded to the Deputy Bailiff as "eminently sensible", he felt that he could not (page 3 of his judgment)

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"cast to the wind the special tests relating to occupiers' liability and the consequent categorisation of plaintiffs as invitees and licensees and instead adopt a test developed on the principle of proximity of relationship".

E

An analysis of the Australian case law on the topic is not only illuminating - as is amply displayed in Mr. Southwell's judgment - it is also persuasive of the contention advanced by Mr. Collas in his attractively concise argument. He contended that the Occupiers Liability Act 1957 had merely anticipated what common law judges in England, alert and sensitive to developments in other common law jurisdictions within the older Commonwealth, would have done. They would, he submitted, likewise have delivered the quietus to the outmoded distinction. One has only to study the development of the general law of negligence, from Donoghue v. Stevenson onwards, to discern the emphatic shift in legal policy from the landowner's freedom in the use and control of his or her property, to the priority accorded to the personal safety of all those coming on to the landowner's property, lawfully or unlawfully. The common law in England would have reflected that policy change which had its Antipodean adumbration.

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It would be an act of supererogation on my part to re-canvass the Australian jurisprudence, set out so fully by Mr. Southwell in his judgment. But a

A moment's historical reflection would not go amiss to substantiate the assertion that judges in England would have adopted the Australian approach after 1957, had Parliament in the United Kingdom not comprehensively intervened.

B Even before the statutory intervention in England in 1957 the Australian High Court had, in a number of judgments, treated the liability of an occupier of premises for accidental injury sustained on those premises by another - be he invitee, licensee or trespasser - as governed by the ordinary principles of the law of negligence. That movement was traceable in a series of judgments of distinguished judges from 1953 to the early 1960s. They are compendiously referred to in the judgment of Deane J in Hackshaw v. Shaw (1984) 155 CLR 614 at p.642-3. In 1963 in Voli v. Inglewood Shire Council (1963) 110 LR 74, at p.89 Windeyer J pointedly said:

C "... even without the aid of a statute such as now exists in England, the trend of judicial authority has been to treat the liability of an occupier for mishaps on his premises as governed by a duty of care arising from the general principles of the law of negligence. The special rules concerning invitees, licensees and others are ultimately subservient to those general principles. Instead of first looking at the capacity in which the plaintiff comes upon the premises, and putting them into a category by which his rights are measured, the tendency now is to look at all the circumstances of the case, including the activities of the occupier upon, or in respect of, the premises and to measure his liability against the conduct that would be expected of a reasonably careful man in such circumstances".

D Similar views can be found among the English judiciary of that era. In Wheat v. E Lacon & Co Ltd [1966] AC 552 - Lord Denning (sitting in the House of Lords) said (p.577-578) that:

E "by the year 1956 the distinction between invitees and licensees had been reduced to vanishing point. The duty of the occupier had become simply a duty to take reasonable care to see that the premises were reasonably safe for people coming lawfully on to them: and it made no difference whether they were invitees or licensees. The Act of 1957 confirmed the process".

F The Third Report of the Law Reform Committee (Occupiers' Liability to Invitees, Licensees and Trespassers) (Cmd 9305, November 1954) which was appointed in June 1952, was prompted by the House of Lords' majority decision in London Graving Dock Co Ltd v. Horton [1951] AC 737. In that case Lords McDermott and Reid had dissented, the latter stating (at p.785) that he saw "no reason to depart unnecessarily from the simple method of asking in any case what would a reasonable man in the shoes of the defendant have done". I have no hesitation in concluding that Horton's case would not long have survived unscathed, if only because it would have been an early candidate for the exercise of the House of Lords' new-found power in the Practice Direction of 1966, whereby their Lordships were able to reverse their own previous decisions. Lord Reid's dissent of yesteryear would have become the law, had not Parliament pre-empted judicial law-making.

G Enactment of section 2 of the Occupiers' Liability Act 1957 meant that the "common duty of care" became a duty "to take such care as in all the circumstances of the case is reasonable to see that the visitor will be

reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there": see section 2(2). Parliament was in effect enacting what the judges would have declared the common law to be. In no sense would the courts have been usurping the legislature's function, had they acted prior to 1957 to abolish the distinction between invitees and licensees.

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The most compelling indication that the common law is ambulatory, and can walk alongside any statutory change in the same field of law, comes from a speech of Lord Diplock in Erven Warnink Besloten Vennootschap & another v. J Townend & Sons (Hull) Ltd and another [1979] AC 731. In the context of passing-off cases, where Parliament had progressively intervened in the interests of consumers, by imposing on traders a higher standard of commercial candour than the legal maxim of the common law - caveat emptor - called for, Lord Diplock said (at p.743C):

B

"The increasing recognition by Parliament of the need for more rigorous standards of commercial honesty is a factor which should not be overlooked by a judge confronted by the choice whether or not to extend by analogy to circumstances in which it has not previously been applied a principle which has been applied in previous cases where the circumstances although different had some features in common with those of the case which he has to decide. Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course".

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A single statutory intervention, in the form of section 1(2) of the Occupiers Liability Act 1957 abolishing the distinction between the duty owed to invitees and licensees, suffices to indicate to a judge to apply thereafter the common law in a parallel, rather than in a divergent way, namely to apply a duty of care owed by an occupier to visitors in respect of dangers due to the state of the premises or things done or omitted to be done on them.

E

I cannot refrain from noting that Lord Diplock, as Mr. Kenneth Diplock, Q.C. and a member of the Law Reform Committee, wrote a minority report to the Committee's Third Report of 1954. He counselled against codification of the law, and wrote:

"Over much of that field the law is now reasonably certain and not unsatisfactory. I would therefore limit statutory intervention to specific amendments of the law in those cases where the doctrine of stare decisis has prevented the common law from adapting itself to current social and ethical conceptions. An examination of the reported cases has not satisfied me that any drastic alteration of the existing law is needed. I do not favour the general abolition of the distinction between the duty owed to 'invitees' and 'licensees'. However imperfect in theory, the practical compromise which the common law has evolved of dividing persons who enter on land into these two categories seems to me still to work substantial justice except in the case of two classes of persons, viz-

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- (a) persons lawfully upon land or premises to which the public have access, such as public parks, conveniences etc; and
 - (b) persons using means of access to premises which have been let, where such means of access remain in the occupation of the landlord.

I should recommend the statutory elevation of persons in these two classes into the category of "invitees".

B

Lord Diplock's category (b) precisely encompasses this case.

Accordingly, Guernsey law, in adopting the English law rules in the field of tortious liability, could properly conform to what the UK Parliament had decreed was the "eminently sensible" rule. To bring the law of Guernsey into line with the statutory rule in England, and not to allow a parting of the ways for the two jurisdictions, does not have to await enactment of a similar law by the States of Guernsey. It can be done judicially. The argument, ably advanced by Mr. Wessels for the respondent, would mean the ossifying of the very organism of the common law - namely, its constant adaptability to changing social conditions. It cannot be right that the law of negligence should remain stunted in its growth so long as the States of Guernsey fails to legislate.

C

As Lord Scarman observed in Gillick v. West Norfolk and Wisbech Area Health Authority [1986] AC 112 at p.183D:

D

"It is, of course, a judicial commonplace to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted on. The mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times and to apply principle in such a way as to satisfy the needs of his own time. If judge-made law is to survive as a living and relevant body of law, we must make the effort, however inadequately, to follow the lead of the great masters of the judicial art".

E

SOUTHWELL, J.: In 1987 the defendant Mr Paint was the owner of premises at 17 Mill Street, St Peter Port. These premises consisted of a shop and ancillary premises on the ground floor, and above four residential flats of one of which Mr N A Morton was the tenant. Mrs Morton was then Miss Champion and a friend of Mr Morton whom she has since married.

F

On 6 June 1987 Mrs Morton sustained severe injuries by falling through a window on the common staircase of 17 Mill Street (No.17) into the yard below. As a result of this accident she has been left almost totally paralysed from the waist downwards, with the other severe injuries described in her Cause in this action.

On 31 May 1990 Mrs Morton's Cause in the present action was placed on the Pleading List. In her Cause she claimed damages in excess of £232,000. Her pleaded allegations as to the manner in which her injuries were sustained are set out in her Cause in paras. 1-5 as follows:

G

- "1. The Defendant is and was at all material times the owner of premises (the said premises) situate at and known as 17 Mill Street in the Parish of Saint Peter Port, part of which is and was divided into our residential flats. A

2. At all material times Neil Andrew Morton (Mr Morton), a friend of the Plaintiff, was the tenant of a flat situate on the third floor of the said premises, access to Mr Morton's flat being from Mill Street by way of a common staircase also owned now and at all material times by the Defendant. B

3. The said staircase was at all material times in the possession, occupation and control of the Defendant.

4. Adjoining the said staircase, on the landing below the entrance to Mr Morton's flat, there was at all material times a window the glass within measuring approximately 34 inches by 39 inches, and which said window overlooked a yard outside belonging to the Defendant. The said window, the bottom level of which was approximately 7 inches above the floor level, had neither a bar nor other safety apparatus in front of it and was at all material times in the possession, occupation and control of the Defendant. C

5. On or about the 6th day of June 1987, the Plaintiff (at all material times a lawful visitor of Mr Morton) was lawfully using the said staircase with Mr Morton to his flat when, whilst walking up the staircase, she lost her balance, put her hand out to steady herself but fell through the said window and into the said yard below in consequence whereof she sustained severe injuries and has suffered loss and damage." D

As can be seen from these paragraphs her claim against Mr Paint is founded on his alleged liability, as the occupier landlord who retained possession, occupation and control of the common staircase, for allowing the window on the staircase to be such as to permit a person who lost her balance on the staircase to fall through the window. E

By his Défenses Mr Paint admitted paras. 1 and 2 of the Cause, admitted para. 3 except his occupation of the staircase, did not admit para. 4 except for the existence of the window, and did not admit para. 5 except that Mrs Morton fell through the window on to the yard below on 6 June 1987.

Third Party proceedings were commenced by Mr Paint, and the Third Parties have now been made additional Defendants by Mrs Morton. But the Court is not concerned with the position of these other parties on the present appeal. F

On 27 August 1992 the action was placed on the Witness List.

On 6 October 1994 Mr Paint applied to the Court

- "1. For an order that pursuant to Rule 43 of the Royal Court Civil Rules, 1989, the question as to whether for the purposes of determining the nature and extent of the duty owed by the Defendant to the Plaintiff in the circumstances set out in the Plaintiff's proceedings the G

A Plaintiff was an invitee or a licensee of the Defendant, being a matter in question in these proceedings, shall be decided as a preliminary point in issue before the trial of the Plaintiff's action and that until the determination of the said point in issue the Plaintiff's action be stayed accordingly; and

B 2. For an Order pursuant to Rule 36 that the following sub-paragraphs of para. 7 of the Plaintiff's summons be struck out as disclosing no reasonable cause of action against the Defendant namely sub-paragraphs (a), (c), (d), (e), () and (h)."

On 1 February 1995 the Deputy Bailiff made an order in the terms of paragraph 1 of this application, and also ordered that written submissions be lodged in relation to this preliminary issue. No order was made in relation to para. 2 of the application.

C Mrs Morton did not appeal against this Order.

Trial of the preliminary issue before the Deputy Bailiff took place on 7 March and 25 April 1995. The Deputy Bailiff delivered judgment on 22 May 1995.

It is apparent from his judgment that the issue argued before him was in wider terms than those specified in his Order of 1 February 1995. The issue on which he gave judgment can be summarised in this way:

D Assuming the facts set out in Mrs Morton's Cause to be correctly stated, what was the nature and standard of the duty owed in 1987 by Mr Paint as the landlord occupier of the common staircase of No.17 to Mrs Morton as a lawful visitor to Mr Morton, the tenant of one of Mr Paint's flats?

Advocate Collas for Mrs Morton and Advocate Wessels for Mr Paint have again argued the same issue before this Court, and I am indebted to them for their cogent and succinct submissions.

E In his judgment the Deputy Bailiff held that

1. the common law of Guernsey in 1987 as regards the obligations of landlords to those who use the common parts of premises to visit tenants was the same as the common law of England and Wales in 1956, before the English statute, the Occupiers Liability Act 1957, became law;

F 2. under the common law of England and Wales in 1956 Mrs Morton would have been regarded as being no more than a licensee vis à vis the landlord, Mr Paint, and that was the position under the common law of Guernsey in 1987;

3. the duty owed by a landlord to such a licensee in 1987 under the law of Guernsey was limited to the duty not to expose the licensee to a danger not obvious or not to be expected under the circumstances, such danger being often described as a trap;

G 4. the common law of Guernsey in this regard had not developed further since 1956, and could not be developed further by the Guernsey Courts

(further development being a matter for the States of Guernsey and not for the Courts), despite the statutory changes in England and Wales and in other jurisdictions, and the common law developments in other common law jurisdictions (especially in Australia) since 1956.

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On 19 July 1995 the Deputy Bailiff granted leave to appeal from his decision on the preliminary issue.

By her Amended Notice of Appeal Mrs Morton asked this Court to set aside the decision of the Deputy Bailiff, on the grounds that

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- (1) the decision was wrong in law; and
- (2) the issue decided by the Deputy Bailiff should anyway not have been the subject of a preliminary issue, in advance of the facts being determined.

The second ground of appeal was not pursued before us by Mr Collas. It would have been a difficult ground to argue, since Mrs Morton had not appealed against the Deputy Bailiff's order of 1 February 1995. In any event, since this issue of law, which is central to Mrs Morton's claim, has been decided in the Royal Court, it would be inappropriate for this Court to send the case back to the Royal Court for trial on the facts without any indication of the Court of Appeal's views on this issue.

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It is convenient to begin with the common law as applied in England and Wales before the Occupiers Liability Act 1957 (the 1957 Act) became law. It is common ground between the parties that in tort cases the Guernsey Courts follow the decisions of the English Courts on the common law, except in so far as the Guernsey law of torts is covered by Guernsey customary law or statutes.

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Common Law in England and Wales before 1957

Before 1957 the relationship between an occupier of premises and another person who came onto or into the premises and sustained injuries by reason of the state of the premises (as opposed to activities carried out on or in the premises) depended on the category into which such other person fell. The main categories were (1) those who entered the premises pursuant to contracts between them and the occupier; (2) those whom the occupier invited to enter the premises (invitees); (3) those whom the occupier permitted to enter the premises (licensees); and (4) trespassers. These categories could for certain purposes be sub-divided into further categories, but for the purposes of this judgment it suffices to distinguish these four categories. There was no contract between Mrs Morton and Mr Paint; and Mr Paint as landlord would be regarded as having allowed visitors invited by tenants to visit the flats leased to tenants as lawful visitors (they would not be trespassers). So categories (1) and (4) are of no direct relevance. But I will have later to consider the position of trespassers in view of developments in the English common law relating to trespassers after 1957.

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The division between licensees and invitees applicable before 1957 was of long standing in the common law. The duties owed to them by an occupier were significantly different, and were briefly summarised by the Deputy Bailiff at page 3 of his Judgment by reference to two of the main English authorities:

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A "In the case of an invitee this [the standard of care] is to be found in the judgment of Willes, J in Indermaur v Dames (1866) LR 1 CP 274 as follows:

B "And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his own 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 a matter of fact."

C The best description of the duties owed to licensees is to be found in the judgment of Lord Sumner in Mersey Docks & Harbour Board v Proctor [1923] AC 253 at page 274:

"A licensee takes premises which he is merely permitted to enter just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions."

D As the Deputy Bailiff stated at p.6 of his Judgment, under English common law of 1956 Mrs Morton would undoubtedly have been regarded as only a licensee, to whom Mr Paint as the landlord would owe only the limited duty described by Lord Sumner in the Mersey Docks case. As the Deputy Bailiff there stated,

E "..... the Plaintiff in the case now before me was, applying the pre-1957 law, a licensee. There seems no argument on this. The House of Lords case of Fairman v Perpetual Investment Building Society [1923] AC 74 is directly on the point. The Plaintiff in that case slipped on a stair on a communal staircase serving a block of flats owned by the Defendant. Her position in law was summarised in the speech of Lord Atkinson at page 85 in the following terms:

F "She was undoubtedly, when using the stairs, using them as the invitee of the tenant, though not of the landlord. Quoad the landlord she was, I think, when using them at most merely his licensee. There is nothing in the case to support the suggestion that the tenant was authorised by the landlord to act as the latter's agent to invite her. The landlord gave her no invitation, it would appear to me, either direct or indirect, to use these stairs."

G As the Deputy Bailiff noted at p.3 of his judgment, both counsel agreed that under English common law before 1957 Mrs Morton would have been a licensee, and this was common ground in the appeal.

Development in England and Wales

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The state of English common law as to the liability of occupiers to invitees, licensees and trespassers was the subject of the Law Reform Committee's Third Report of November 1954. The defects in the law arising from the unsound distinction between invitees and licensees were subjected to strong criticism by the Committee.

The Committee recommended that the distinction between these categories should be abolished, and that in future there should be one uniform duty of care ("the common duty of care") owed by an occupier to persons coming on the occupier's premises whether by invitation or by permission, express or implied. The duty owed by the occupier would be (Report, para 78):

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"to take such care as in all the circumstances of the case is reasonable to see that the premises are reasonably safe for use by the visitor for the purpose to which the invitation or permission relates."

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The criticisms of the then state of English law in this respect both in this Report and by many commentators were so strong and so cogent that government and parliament moved swiftly to reform the law by the enactment of the 1957 Act, by which effect was given to the reform recommended by the Committee.

The Committee recommended (Report, para 50) that there should be no change in the law in relation to trespassers, whether adult or children, while recognising that English law might

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"bear harshly upon child trespassers in which (on this view) common humanity demands that they should not be left without a remedy."

The Committee nevertheless recommended no change in the law because of the difficulty, which the Committee members saw, in making an exception in favour of children giving them a substantial degree of protection without imposing too heavy a burden of responsibility on occupiers.

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The change in the law relating to visitors, whether invitees or licensees, was effected by statute. In relation to trespassers, despite the recommendation of the Committee in the 1954 Report and the absence of any relevant statutory change in the 1957 Act, the common law was developed in England and Wales by the decision of the House of Lords in 1972 in British Railways Board v Herrington [1972] AC 877 HL(E). The Court of Appeal had held (Herrington v British Railways Board [1971] 2 QB 107) that it was bound by the previous decision of the House of Lords in a Scottish appeal in Robert Addie & Sons (Collieries) Ltd v Dumbreck [1929] AC 358 HL(Sc), in which it had been held (the case involved a child trespasser) that an occupier was liable to a trespasser only if the occupier had done some act with the deliberate intention of harming the trespasser, or at least with reckless disregard of the presence of the trespasser. Salmon LJ expressed both doubt as to the correct test, and hope that following the House of Lords Practice Statement of 1966 the House of Lords would reconsider Addie and hold that the same duty of care was owed to trespassers as to other non-contractual visitors, a duty to take such care (if any) as, in all the circumstances, was reasonable: [1971] 2 QB at pp.119-121.

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A In Herrington the House of Lords did re-consider Addie. Lord Reid pointed out that there were already at least two exceptions to the Addie test: (1) where an occupier created on his land a dangerous "allurement" to children; and (2) where by acquiescing in continued trespass an occupier was treated as having (fictitiously) given an implied licence to the continuing trespass (at [1972] AC p.894). Lord Reid went on to consider the impact of the 1957 Act, and of the Scottish Act (Occupiers Liability (Scotland) Act 1960 - "the 1960 Act") by which the law relating to trespassers and to lawful visitors was comprehensively altered, so as to impose a duty similar to the common duty of care in the 1957 Act in relation to both trespassers and lawful visitors. Lord Reid concluded that the silence of parliament with regard to trespassers in England in the 1957 Act was to be attributed to indecision as to what test should be put in place of the Addie test (at p.897). Each of their Lordships decided that the correct test was one of "common humanity", based on what a conscientious humane man, with the knowledge, ability and resources of the actual occupier, would do to protect potential trespassers (e.g. per Lord Reid at p.899). But the statements of the new test by the five judges differed in material respects.

C Their Lordships also expressed differing views as to the extent to which their decision represented a departure from Addie. Lord Reid, while resistant to "usurping the functions of Parliament" (pp.897-898), recognised that on the new test Addie would have been decided in favour of the trespasser (p.898). So also did Lord Morris (p.911) who considered that Addie was wrongly decided. Lord Wilberforce declined to overrule Addie, and considered that the new test was no more than a further development from Addie in a particular class of cases, stating (at p.921):

E "As this Act [the 1957 Act] itself shows, what Parliament left alone in the case of trespassers, while displacing them in the case of invitees or licensees, were the rules of the common law. But the common law is a developing entity as the judges develop it, and so long as we follow the well-trying method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do. So long as liability continues to be based upon fault we may, indeed must, adjust it to reason and experience."

Lord Pearson rejected the more limited Addie test as inadequate and obsolete (pp.929-930) in the following terms:

F "It seems to me that the rule in Addie's case has been rendered obsolete by changes in physical and social conditions and has become an incumbrance impeding the proper development of the law. With the increase of the population and the larger proportion living in cities and towns and the extensive substitution of blocks of flats for rows of houses with gardens or back yards and quiet streets, there is less playing space for children and so a greater temptation to trespass. Also with the progress of technology there are more and greater dangers for them to encounter by reason of the increased use of, for instance, electricity, gas, fast-moving vehicles, heavy machinery and poisonous chemicals. There is considerably more need than there used to be for occupiers to take reasonable steps with a view to deterring persons, especially children, from trespassing in places that are dangerous for them.

In my opinion the Addie v Dumbreck formulation of the duty of occupier to trespasser is plainly inadequate for modern conditions, and its rigid and restrictive character has impeded the proper development of the common law in this field. It has become an anomaly and should be discarded. But in my opinion the duty of occupier to trespasser should remain limited in the ways that I have endeavoured to indicate." A

Lord Diplock discarded the fiction of a licence to meritorious trespassers, relying on the 1966 Practice Statement (at pp.934-935). He went on to formulate his statement of the duty owed to a trespasser both in positive terms (at pp.940-941), and also in terms of what was not included within the duty (at pp.941-942). He distinguished the common duty of care under the 1957 Act, and the common law duty of care developed in Donoghue v Stevenson [1932] AC 562 HL(Sc), and said (at p.941D) that this involved B

"rejecting Lord Hailsham LC's formulation of the duty in Addie's case as amounting to an exclusive or comprehensive statement of it as it exists today. It takes account, as this House as the final expositor of the common law should always do, of changes in social attitudes and circumstances and gives effect to the general public sentiment of what is "reckless" conduct as it has expanded over the forty years which have elapsed since the decision in that case." C

Shortly after Herrington was decided in the House of Lords the Law Commission was asked to consider the law relating to liability for damage or injury suffered by trespassers (Report, para.1). In its Report of March 1976 the Commission drew attention to the lack of certainty resulting from the different statements of the test in Herrington and in subsequent cases (Report, paras. 4-11) and recommended statutory change to a new test as summarised in para. 80(2) of the Report and set out in a draft Bill. Thereafter the Occupier Liability Act 1984 (the 1984 Act) was passed giving effect to the recommendations but in terms somewhat different from the draft Bill. D

Development in Other Common Law Jurisdictions

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In several other jurisdictions statutory changes have been made on the lines of the English statutes (the 1957 and 1984 Acts) or the Scottish statute (the 1960 Act) including New Zealand, some of the Australian States and some of the Canadian Provinces. In New Zealand before the relevant statute became law the position of licensees was considered by the New Zealand courts and the Privy Council in Perkowski v Wellington Corporation [1959] AC 53. The accident had occurred in January 1954, before the English Law Reform Committee's Report. The Privy Council applied the existing common law as to the limited duty owed to licensees, and rejected an attempt to argue that a general Donoghue v Stevenson duty of care was owed. No reference was made to the statutory change in the English 1957 Act. F

In Australia, as I have said, statutory change was made in some States. Where the common law continued to apply without any intervening statute, the common law was substantially developed in the four cases to which I now refer.

In Southern Portland Cement Ltd. v Cooper [1974] AC 623 the Privy Council in an appeal from New South Wales adopted the duty of common humanity owed to trespassers, following the House of Lords in Herrington. G

A In Hackshaw v Shaw (1984) 155 CLR 614 the High Court of Australia in an appeal from Victoria considered a claim by a person injured when the occupier fired his rifle at a trespasser's car, in which the injured person was sitting. The claim was argued on the footing of both general Donoghue v Stevenson liability and an occupier-trespasser liability based on Southern Portland and Herrington. The majority in the High Court held that the injured person was entitled to succeed against the occupier on the basis of a general duty of care in relation to which the existence of the occupier-trespasser relationship did not by itself suffice to provide the necessary requirement of proximity. Thus Deane J

B at pp. 662-663 said:

"... it is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both of a special duty qua occupier and an ordinary duty of care was owed. All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a

C duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk. Where the visitor is lawfully upon the land, the mere relationship between occupier on the one hand and invitee or licensee on the other will of itself suffice to give rise to a duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to her or him. When the visitor is on the land as a trespasser, the mere relationship of occupier and trespasser which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may, as a matter of law, supply the requisite degree of proximity or give rise to a

D reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence."

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For present purposes the most important sentence in this statement of principle is the one which I have underlined. This sentence was not necessary for the decision in Hackshaw. But it represented, so far as concerned licensees, a major advance from the previous limited duty imposed under the common law, whether in Australia or in England and Wales, and was the precursor to the

F establishment of a new common law approach to an occupier's liability to lawful visitors in the subsequent Australian cases.

Papatonakis v Australian Telecommunications Commission & anor. (1985) 156 CLR 7 was a decision of the High Court of Australia on appeal from the Northern Territory. The occupier, Northern Research Pty. Ltd., the second defendant, had inserted a length of weak telephone line in the stronger line placed by the

G first defendants. The plaintiff linesman when climbing a ladder up one of the telephone poles was injured due to the weaker line snapping. The majority in the High Court found in favour of the plaintiff, but on three different bases: Wilson J on the basis of the duty of care owed by an occupier to its invitee;

Brennan and Dawson JJ on the basis of a general duty of care arising apart from any occupier's duty; and Deane J on the basis of an occupier's general duty of care. The dissentient, Mason J, though differing on the facts, held that the relevant duty was the duty of care owed to an invitee. Deane J repeated his view as expressed in Hackshaw at p.657 that the duty owed to an invitee is no more than one instance of the duty of care arising under the general law in the circumstances of the relevant category of case (Papatonakis at pp. 32-33), and stated that the liability of the occupier to Papatonakis was not to be determined by a rigid formula applied without more to everyone falling into the category of invitee.

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In Australian Safeway Stores (Pty) Ltd. v Zaluzna (1987) 162 CLR 479, an appeal from Victoria, the majority (Mason, Wilson, Deane and Dawson JJ) held that the view expressed by Deane J in Hackshaw and Papatonakis represented the common law as applied in Australia. In the headnote the ratio of their judgment was clearly summarised:

"It is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or both of a special duty qua occupier and a general duty of care was owed. It is necessary to determine only whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the entrant or to the class of person of which the entrant is a member. The measure of the discharge of the duty is what a reasonable man would do in the circumstances by way of response to the foreseeable risk."

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In so deciding the High Court set aside the specific limited duties previously established in the common law as owed to invitees, licensees and trespassers respectively, held that to each an occupier owes (if he owes any duty) the general duty of care established by Donoghue v Stevenson, and rejected the search for fine distinctions between such a general duty and the previous specific duties owed to different categories of entrant onto or into land or buildings (see Zaluzna at pp. 486-488).

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In so deciding the High Court reached a position not materially different from that established by statute in England and Wales (by the 1957 and 1984 Acts), in Scotland (by the 1960 Act), and in some of the Australian States by their legislation.

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Common Law in Jersey

There have been no relevant statutes in Jersey. We were referred to decisions of the Jersey Courts. In Blackwell v Carter (1958) JJ 105 the Royal Court (Inferior Number) considered the duty of an occupier to an invitee on the basis of the English cases before 1957. In Macrae v Jersey Golf Hotels Ltd (1973) JJ 2313 the same court stated that in the absence of local statutory law the Jersey Royal Court had in the past followed the English common law (citing among other cases Blackwell). The English 1957 Act was referred to and the court said (at pp. 2317-2318) that

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A "Counsel for both parties agreed that that provision [in the 1957 Act], being the creation of the statute which did not apply to Jersey, should not be adopted by the Royal Court, and we concur. We therefore consider the position as it was at English common law.

For the purposes of the tort of negligence, the extent of the duty owed by an occupier of premises to an invitee was stated by Willes J in Indermaur v Dames (1866) L.R. 1 C.P. 274 to be:

B "... that he, 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."

The extent of the duty as defined in that statement was expressly adopted by the Royal Court in Blackwell v Carter (already cited), and both counsel in this case agreed it."

C There is no suggestion in Macrae by Counsel or the Royal Court that the common law had moved on in Jersey from the position reached in England by 1956.

Other Jersey cases were cited by Mr. Wessels in his written skeleton, including Huet v Lewis (1976) JJ 435 Royal Court (Inferior Number), to similar effect.

Guernsey Common Law

D After this rather long introduction I reach the central point in this appeal and consider what duty was owed by a person in Mr. Paint's position to a person in Mrs. Morton's position in 1987 under the common law of Guernsey. No statute relating to occupiers' liability has been passed by the States of Guernsey. So the starting point is in the cases decided by the Courts of Guernsey.

E Only two Guernsey cases were cited to us on this aspect of the case. The first was Harper v Falla and Collas (28 November 1950) in which the Royal Court held that the plaintiff had failed to establish his basic allegation of fact, but went on in this way:

"As respects the duty owed by the defendants to the plaintiff, the Court approved the principles enunciated in Indermaur v Dames (36 Digest 35,208) as being applicable to the present case and in consonance with the general principles of law in this Island concerning the duty owed by occupiers of premises."

F It is apparent, therefore, that in 1950 the Royal Court would have relied on the then principles of English common law in determining what was the duty owed by an occupier to an invitee visiting his premises.

G The second case was Beaty v The Richmond Hotel Ltd (3 April 1981). In that case the plaintiff claimed in respect of personal injury both as an invitee and by virtue of an implied term of the contract between herself as a guest and the hotel. The claim was based on the negligent omissions of the hotel. The summing up and directions of the Deputy Bailiff in so far as based on the duty owed to an invitee were put in terms of pre-1957 English common law. But the issue this Court has to decide was not raised at all.

Further development of Guernsey law

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The main contentions of the parties can be shortly summarised.

Mr. Collas submits that the relevant principles of Guernsey common law can and should be developed to meet changing circumstances, and that the development should be based on the example of the High Court of Australia in the cases culminating in Zaluzna.

Mr. Wessels submits that the relevant principles of Guernsey common law remain as developed in England and Wales down to 1956 in relation to invitees and licensees and down to 1983 in relation to trespassers, and that they cannot and/or should not be developed further, whether on the lines of Zaluzna or otherwise, since any further development is for the States and not for the Courts of Guernsey to determine.

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It is common ground that

- (1) in relation to the law of torts it has been customary for the Guernsey Courts to adopt English common law as it has been developed by the English courts;
- (2) there has been no previous occasion on which a Guernsey Court had occasion directly to consider the question here raised because an English statute has prevented further development of English common law in a particular field (though Mr Wessels submitted that frequently in Guernsey, where English common law has been superseded by an English statute, the courts and the legal profession rely on out-of-date English textbooks in order to find out what English common law was before it was superseded by statute);
- (3) in considering whether or not the Guernsey Courts can and should develop further occupiers' liability at Guernsey common law, the Guernsey Court will have regard not only to previous practice in Guernsey, but also to any guidance which may be derived from English cases, to which I now turn.

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Throughout the history of the common law in England the courts have continually developed the law to meet new circumstances. The whole development of the law of occupiers' liability with the categorisation of invitees, licensees and trespassers was a creation by the English courts. In the field of tort no one who read the majority decision in Donoghue v Stevenson (above) in 1932 could have been in any doubt that the decision amounted to a revolution in the tort of negligence likely to lead to substantial further development, as plaintiffs in different types of case tried to bring their facts within the ambit of the broad Donoghue v Stevenson principle. A similar comment could be made in relation to Hedley Byrne & Co. Ltd. v Heller & Partners [1964] AC 465 HL (E) and the law concerning negligent misstatements. In neither of those cases was it necessary for the House of Lords to depart from its own previous decisions. Before the Practice Statement of 1966 the House of Lords regarded itself as bound by authority not to do so (London Tramways v London County Council [1898] AC 375 HL (E) and Cross & Harris on Precedent in English Law, 4th ed., at pp. 102-104). By the Practice Statement 1966 the House of Lords enabled itself, in rare cases, to depart from its own previous decisions where (*inter alia*) "too

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A rigid adherence to precedent may ... unduly restrict the proper development of the law". However the House of Lords added (*inter alia*) the caveat that

"In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."

B The underlining is mine. I emphasise these words because most of the English authorities cited to us concerned development of the criminal law, and to some extent the readiness of the House of Lords to develop the law of torts was given less attention in argument before us. Herrington is one example of a case in which, overtly or otherwise, members of the House of Lords were prepared to depart from Addie by reason of changed social circumstances, as the quotations I have made above from the speeches of Lord Pearson and Lord Diplock in Herrington show. The duty of common humanity to trespassers was largely new.

C Another example of the House of Lords overruling its own previous decision (and one only 13 years before) on the tort of negligence can be seen in the overruling of Anns v Merton LBC [1978] AC 728 HL (E) in Murphy v Brentwood DC [1991] 1 AC 398 HL(E).

D Quite apart from these particular instances of the operation of the Practice Statement, an examination of the main English textbook, Clerk & Lindsell on Torts, 17th ed., shows a very large number of examples of recent, major developments in the law of torts, including negligence, the economic torts and defamation, by the House of Lords and the English Court of Appeal.

E In the English criminal law the Courts have been less ready to embark on radical developments of the common law, for the good reason stated in the Practice Statement. There is in general no limitation or prescription in English criminal law, and decisions of the Court of Appeal and the House of Lords in criminal cases are retrospective as well as prospective. Nevertheless the House of Lords has been prepared to make use of the Practice Statement and to overrule its previous decisions in at least two cases: in R v Shivpuri [1987] AC 1 it overruled its decision in Anderton v Ryan [1985] AC 560 on the interpretation of the Criminal Attempts Act 1981, and in Reg v Howe [1987] AC 417 it overruled its decision in Lynch v DPP for Northern Ireland [1975] AC 763 as to whether duress can be a defence to a charge of murder.

F Counsel were led to concentrate on statements in criminal cases because they were referred to the separate assenting judgment of Sir Louis Blom-Cooper QC in the Court of Appeal of Jersey in TA Picot (CI) Ltd. v Michel & ors. (17 February 1995, unreported) in which he had at pp. 27 & foll. referred particularly to relevant English criminal cases as to the English courts' power to develop the common law.

G In Reg v Clegg [1995] 1 AC 482 HL (NI) the House of Lords declined to develop the law relating to self-defence in the crime of murder, so as to enable a soldier who used excessive force in self-defence to be convicted of manslaughter and acquitted on a charge of murder. Lord Lloyd at pp. 498 & foll. considered whether the House of Lords should develop the common law without waiting for Parliament to act. He held that such development should be

for Parliament, not the courts. His main reasons for so concluding were that (1) Parliament had dealt directly with this defence in the Criminal Law Act (Northern Ireland) 1967, S.3(1), without creating a qualified defence where excessive force was used; (2) Parliament had acted in closely related fields; (3) the point in issue was part of the wider issue whether the mandatory life sentence for murder should still be maintained. It is, however, appropriate to cite one passage from Lord Lloyd's speech (at [1995] 1 AC p.500 D-G):

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"In his dissenting speech in Director of Public Prosecutions for Northern Ireland v Lynch Lord Simon of Glaisdale said, at pp. 695-696:"

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"I am all for recognising frankly that judges do make law. And I am all for judges exercising this responsibility boldly at the proper time and place - that is, where they can feel confident of having in mind, and correctly weighed, all the implications of their decision, and where matters of social policy are not involved which the collective wisdom of Parliament is better suited to resolve (see Launchbury v Morgans [1972] AC 127, 136F-137A, 137G). I can hardly conceive of circumstances less suitable than the instant for five members of an appellate committee of your Lordships' House to arrogate to ourselves so momentous a law-making initiative."

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"Like Lord Simon, I am not averse to judges developing law, or indeed making new law, when they can see their way clearly, even where questions of social policy are involved. A good recent example would be the affirmation by this House of the decision of the Court of Appeal (Criminal Division) that a man can be guilty of raping his wife (Reg v R [1992] 1 AC 599). But in the present case I am in no doubt that your Lordships should abstain from law-making."

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Another recent case cited to us was C (a minor) v Director of Public Prosecutions [1996] 1 AC 1 HL (E). In C v DPP the question was raised whether the presumption that a child between the ages of 10 and 14 was incapable of criminal wrongdoing could be abrogated by judicial decision, or only by parliament. The House of Lords held that such a development could only be made by parliament, reversing the contrary decision of the Divisional Court of the Queen's Bench Division. The Divisional Court had held (I quote from the headnote at [1996] 1 AC 1) that

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"the presumption that a child was doli incapax did a serious disservice to the law and its abolition would cause no injustice to the defendant, and that since there was no impediment to the court's authority to abolish it, the presumption was no longer part of the law of England."

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In his speech Lord Lowry said this at pp. 27B-28D/E:

"In Reg v Kneller (Publishing, Printing and Promotions) Ltd [1973] AC 435 Lord Simon of Glaisdale made two points which are most relevant to the present appeal. He observed, at p. 489C, that the House was concerned with highly controversial issues on which there was every sign that neither public nor parliamentary opinion was settled. Then, at p. 489E, he said that Parliament had had several opportunities to amend the law but had not taken them. He quoted the words used by Lord Reid in Shaw v

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A Director of Public Prosecutions [1962] AC 220, 275, when he said: Where Parliament fears to tread it is not for the courts to rush in."

Again, Lord Simon in Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653, 696A referred to "matters of social policy ... which the collective wisdom of Parliament is better suited to resolve."

B In my dissenting speech in Reg v Gotts [1992] 2 AC 412, in which by a majority your Lordships held that a plea of duress was of no avail in defence to a charge of attempted murder, I drew attention, at p. 440, to two statements contrasting the functions of Parliament and the judges. In Abbott v The Queen [1977] AC 755 Lord Salmon said, at p. 767:

C "Judges have no power to create new criminal offences; nor in their Lordships' opinion, for the reasons already stated, have they the power to invent a new defence to murder which is entirely contrary to fundamental legal doctrine accepted for hundreds of years without question. If a policy change of such a fundamental nature were to be made it could, in their Lordships' view, be made only by Parliament. Whilst their Lordships strongly uphold the right and indeed the duty of the judges to adapt and develop the principles of the common law in an orderly fashion they are equally opposed to any usurpation by the courts of the functions of Parliament."

D And in Reg v Howe [1987] AC 417 Lord Mackay of Clashfern, speaking of judicial legislation said, at pp. 449-450:

E "In approaching this matter, I look for guidance to Lord Reid's approach to the question of this House making a change in the prevailing view of the law in Myers v Director of Public Prosecutions [1995] AC 1001, 1021-1022, where he said: "I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty." (Emphasis supplied.)

F It is hard, when discussing the propriety of judicial law-making, to reason conclusively from one situation to another, but a further example of reluctance to interfere with a fundamental doctrine, the rule against hearsay, is provided by the difficult case of Reg v Kearley [1992] 2 AC 228 decided in your Lordships' House. I refer to the statements of my noble and learned friends, Lord Bridge of Harwich, at p. 251, and Lord Ackner, at p. 258, and of Lord Oliver of Aylmerton, at pp. 277-278. I believe, however, that one can find in the authorities some aids to navigation across an uncertainly charted sea. (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the

difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty. I consider that all these aids, in varying degrees, point away from the solution proposed in the court below. Since drafting this speech I have enjoyed the privilege of reading the speech delivered by Lord Lloyd of Berwick in Reg v Clegg [1995] 1 AC 482 and I readily adopt all that he has said there on the subject of judicial law making."

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Mr Wessels relied strongly on the five aids to navigation which Lord Lowry there gave, in support of Mr Wessels' submission that the relevant principles of Guernsey law remained and should continue to remain based on English common law as it stood before the 1957 Act.

In contrast to Reg v Clegg and C v DPP, I refer, for example, to Reg v R [1992] 1 AC 599 HL (E) in which the rule of the common law that a husband could not rape his wife was overturned, despite parliament having recently amended the law relating to rape in the Sexual Offences (Amendment) Act 1976, s.1(1). Lord Keith at [1992] 1 AC p. 623-D cited with approval this statement in the Court of Appeal by Lord Lane LCJ:

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"The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

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In my judgment Lord Lowry's five aids to navigation can and should be applied by the courts of Guernsey just as much as by the English Courts, but bearing in mind that development of the civil common law by the Courts is more readily undertaken than that of the criminal common law.

In Guernsey the hierarchy of the courts and the doctrine of precedent requires the Royal Court and the Court of Appeal to follow the decisions of the Privy Council, when hearing appeals from the Courts of Guernsey. Privy Council decisions on appeals from other Commonwealth jurisdictions are not binding, but are persuasive authority on the common law where relevant circumstances in Guernsey do not differ markedly from those in the other jurisdictions. The decisions of the House of Lords are not binding on the Guernsey Courts. But in so far as the Guernsey Courts follow English decisions on the common law, the decisions of the House of Lords carry considerable weight, and it would be only in rare cases that the Guernsey Courts would not follow such a decision of the House of Lords. The decisions of the Guernsey Court of Appeal (and of its precursor, the Cour des Jugements et Records) are binding on the Royal Court but not binding on the Court of Appeal itself: Smith v Harvey 14 May 1981 : No.9 (Civil): Guernsey Court of Appeal. As regards the decisions of the English Court of Appeal, while the Guernsey Courts always treat them with due respect, they are not bound by them, and are free to review them and to depart from them if they are considered to be wrong or not appropriate in the particular circumstances of Guernsey: compare the decision of the Privy Council on appeal from New Zealand in Attorney General for Hong Kong v Reid & ors [1994] 1 AC 324 per Lord Templeman at pp.338D-339A.

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A The coutume and common law of Guernsey has always developed by judicial decision, supplemented by statutes passed by the States of Guernsey and approved by the Privy Council. But there are fundamental parts of Guernsey common law which have been recognised as not being capable of alteration by judicial decision. In Singleton v Le Noury 5 June 1990, 9 GLJ 48, the Court of Appeal of Guernsey considered questions relating to alleged rights of way arising from a Clameur de Haro raised by the Le Noury respondents. In their judgment the Court of Appeal said this (at p.18):

B "..... the Court is of the opinion that under Guernsey Law a servitude cannot be acquired by prescription. The Court accepts that the Coutume does develop over the centuries. The maxim "coutume fait loi et la meilleure loi est la coutume du pays" refers to such development. But such development cannot change the fundamental and substantive common law and the principle of "nul servitude sans titre" and "Droit de servitudes de vues, égouts de maisons, et autres choses semblable par la Coutume générale de Normandie ne peut etre acquise par possession ou jouissance, fut-elle de cents ans, sans titre" as set out in the writings of Laurent Carey, Basnage and Berault are part of our coutume or fundamental common law and cannot be altered by judicial decision."

C That case concerned the property law of Guernsey. Longstanding and fundamental principles of property law could not be overturned by judicial decision today. But that would not prevent judicial development of the Guernsey law of tort which has long been founded to a large extent on English judicial decisions on the common law, and has followed English developments by such judicial decisions: see for example the Guernsey Court of Appeal judgment in International Technology Operations Ltd & ors v Silver Falcon Enterprises Ltd & anor (1994), in which strong reliance was placed on the developments by the English courts in the field of economic torts.

D I turn to Mr Wessels' arguments.

E His first head of argument was on these lines. Norman customary law has little to say on the tort of negligence and other similar torts. Guernsey law has long followed English law on tort generally. It is common for Guernsey statute law to fall far behind English statutory developments (see for example Vidamour v Hood (1993) Royal Court). There are many similar instances in which English common law has been superseded by English statutes, but no Guernsey statute has been passed, and the Guernsey Courts have continued to follow English common law as it stood before the English statutes intervened. That an English statute, the 1957 Act, had intervened did not make the pre-existing English common law any the less persuasive. It would make Guernsey law most uncertain, if, whenever an English statute affecting the common law is passed, the Guernsey Courts were free to trawl the oceans of the other common law jurisdictions to find the common law development which is most appealing. As a small jurisdiction Guernsey needs simple clear laws.

F Though there is force in these arguments, in my judgment they go too far. If the states of Guernsey pass no statute dealing with the position of visitors to premises, Guernsey common law will, according to Mr Wessels, remain ossified in its pre-1957 state, however long after 1957 this state of affairs may continue. Mr Wessels accepted that if the States of Guernsey did not act for 50 or 100 years, the ossification would continue, and Guernsey law relating to visitors

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would remain unaltered and undeveloped. But the English common law of pre-1957 was subject to strong and fully justified criticism in the Report of the Law Reform Committee (to which I have already referred), by the Courts and by distinguished commentators. To ossify Guernsey law in a form so justly criticised would be of no benefit to the residents of and visitors to Guernsey.

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Mr Wessels had also to accept that, if his argument were right, the duty of an occupier to lawful, non-contractual visitors would remain as in English law pre-1957, but the duty of an occupier to trespassers would have been developed further by the decision in Herrington and would therefore remain as in English law immediately before the 1984 Act. In theory at least this could result in a higher duty being owed to some trespassers (especially children) than to licensees. Anyway the development in Herrington of the law relating to trespassers was to a large extent influenced by the statutory development of the law relating to lawful, non-contractual visitors in the 1957 Act.

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If the relevant English common law had in 1956 not been subject to the kind of criticism I have indicated, then the argument against further development by the Guernsey Courts would be more strongly arguable. But in view of the obvious defects in the pre-1957 law, Mr Wessels' arguments are weakened.

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So also is his argument based on the comparison with the Jersey cases of Blackwell and Macrae.

Mr Wessels drew to our attention the Report of the States Accident Law Reform Committee of November 1971. Though that Committee had a wide remit, in its Report it recommended changes in tort law in relation to (inter alia) contributory negligence and joint and independent tortfeasors. The statute which resulted from its Report, The Law Reform (Tort) (Guernsey) Law 1979, dealt with the same matters as were covered in the Report. Mr Wessels argued that silence in both the Report and the statute in relation to the law concerning occupiers' liability showed that such law was regarded as not being in need of change by both the Committee and the States. But in my judgment it is not possible to derive from such silence any conclusion either that the law concerning occupiers' liability was acceptable as it stood or that it was in need of reform. This silence carries the arguments of each side in the present case no further.

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Mr Wessels argued next that Australian law as laid down in Zaluzna was different from the 1957 Act, and that reliance on Australian law would lead to Guernsey law being taken on lines different to those in England. In my view the differences between the common duty of care in the 1957 Act and the Donoghue v Stevenson duty of care in Zaluzna are more semantic than real. Both assimilate the positions of the old classes of invitees and licensees into one category of lawful visitors, and the standard of duty owed to such visitors depends not on arbitrary categorisation but on all the circumstances of the particular case.

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Mr Wessels then cited Stannus v Graham [1994] Australian Tort Reports 81-293 at page 61,561 NSW Court of Appeal concerning the duty of care owed to a contractual entrant, who was also a lawful visitor. Mr Wessels submitted that the decision in Stannus showed that the Zaluzna decision left open uncertainties and potential problems, and was therefore insufficiently certain

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A in its effect. But Stannus was simply one example of the application of well-established principles relating to contractual entrants, and also (in so far as decided by the NSW Court of Appeal) to lawful visitors post-Zaluzna. No new principles were established in Stannus which for that reason was not a decision worth reporting.

Mr Wessels, in summarising his arguments, relied on the following main submissions:

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- (1) In matters of this importance it is usual for major changes in the law to be made by Parliament (in Guernsey by the States) and not by judicial legislation.
 - (2) The States have so far not decided to make any change as regards occupiers' liability, and it is right therefore for the Courts to continue to abstain from making any such change.
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- (3) There is no material before the Court of Appeal to show what are the relevant social circumstances in Guernsey. What these circumstances are is a matter for the judgment of the States, not the Courts.
 - (4) The duty of an occupier to a licensee or invitee is one of the fundamentals of the Guernsey common law which, following Singleton, the Courts cannot or should not alter.
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- (5) To adopt the Zaluzna test would make for greater uncertainty because it is unclear how far the cases decided before 1957 would continue to be relevant.
 - (6) Anyway the Guernsey Court of Appeal ought not to interfere in matters involving social circumstances and public policy without having the benefit of a detailed examination of these factors in the Royal Court. Here the Royal Court had considered these factors and decided against judicial change. So the Court of Appeal should be the more reluctant to make any judicial change. He relied in this connection on the judgment of Sir Godfray le Quesne in the Jersey Court of Appeal in Picot at pp. 11-13.
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I do not set out Mr Collas' arguments at length because to a large extent I accept them and I include them within the reasons set out below for allowing this appeal.

F Having considered all the submissions fully during and after the hearing of this appeal, I am satisfied that it is right for this Court to continue to develop the common law relating to occupiers' liability as applied in Guernsey, in a way which is consonant with the needs of the Guernsey community. I have reached this conclusion for the following main reasons:

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- (1) English common law relating to occupiers' liability pre-1957 was in a state which was not consonant with the needs of a modern community. It was not based on clear principles. The Courts had been driven to rely on fictions and presumptions so as to avoid the harsher and more inappropriate aspects of the law. It was so uncertain as to be of limited use in providing any practical basis for decision-making by the Courts. The measured but strong criticisms of the Law Reform

Committee showed that development in line with the development of the Donoghue v Stevenson duty of care was needed so as to bring the law onto a principled basis. Statutory change in England and Wales was needed to remedy the defects in the law more rapidly and more certainly than might have been achieved by judicial development. This is illustrated by the change in the law concerning trespassers achieved in Herrington, in which the House of Lords, while developing the law so as to remedy the previous harsh treatment of trespassers, especially children, failed to provide a clear and principled foundation for further development and application, resulting in the need for the 1984 Act.

- (2) The pre-1957 common law on occupiers' liability did not amount to a fundamental set of principles of Guernsey law within the Singleton test. Indeed the lack of clear principle in the pre-1957 law is indicative of this. Accordingly Guernsey law is capable of development by the Courts, provided that Lord Lowry's aids to navigation are met.
- (3) The assimilation of occupiers' liability to lawful, non-contractual visitors and trespassers within the scope of the Donoghue v Stevenson duty of care, along the lines set out in Zaluzna, provides a considerable degree of certainty of principle (which was lacking in the pre-1957 law), and will enable the application of that duty of care, when owed, to be on a principled basis (rather than, as before, by relying on outdated fictions and presumptions.)
- (4) Development of Guernsey law on the lines laid down in Zaluzna (which are not materially different from the statutory development in England and Wales) will meet each of the five aids to navigation stated by Lord Lowry in C v DPP. The solution is not a doubtful one, but involves replacing an uncertain law, lacking in straightforward legal principles, by simple principles which can readily be applied in practice, as the Donoghue v Stevenson principles have been applied in many different fields since 1932. The States of Guernsey have not acted. But there is no indication that the States have rejected opportunities of clearing up the law relating to occupiers' liability, or that the States have legislated on other aspects of the law of tort deliberately leaving this field untouched. This is not a disputed area of social policy. The social circumstances concerning occupiers' liability to visitors in Guernsey do not appear to differ in any material respect from the circumstances in the United Kingdom, Australia, New Zealand or Canada, and I note that Mr Wessels did not put before us any suggested material difference. This is not a fundamental legal doctrine in Guernsey, as I have already explained. Finality and certainty can be achieved by putting Guernsey law on the simple, principled basis of a duty of care founded on the neighbour test in Donoghue v Stevenson.
- (5) It would not be appropriate to leave Guernsey law in the state reached by English law nearly 40 years ago, which was justly criticised as something of a blot on English jurisprudence and requiring urgent reform. For the Guernsey Courts to cling to obsolete English common law cases which ceased to be authoritative in

A England and Wales 39 years ago would not be in the interests of those who live in Guernsey or their visitors. It would be the more inappropriate because, as Mr Wessels accepted, it would involve clinging to such out of date cases concerning liability to lawful visitors, while adopting the more recent developments in Herrington concerning liability to trespassers, which in turn had to be superseded by statute in England and Wales because of their uncertainty.

B In my judgment the weight of the argument lies on the side of development of Guernsey law by the Courts, taking the principles evolved in Donoghue and Zaluzna as the basis of this development.

Accordingly in my judgment the appeal should be allowed, and the duty of care owed by Mr Paint to Mrs Morton should be declared to be a duty to have done what a reasonable man would have done in the circumstances by way of response to the risk, in so far as foreseeable, in accordance with the Donoghue v Stevenson principles of the law of negligence.

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SUMPTION, J.: I agree with both judgments which have just been delivered.

(i) Appeal allowed;

(ii) The duty of care owed by the First Respondent to the Appellant declared to be a duty to have done what a reasonable man would have done in the circumstances by way of response to the risk, in so far as foreseeable, in accordance with the Donoghue v Stevenson principles of the law of negligence;

D (iii) First Respondent ordered to pay the costs of the Appellant in the court below and in this court, save that there shall be a disallowance for the costs expended on whether or not there should have been a preliminary point of issue ordered; and

(iv) The Court being satisfied that the proceedings had been of exceptional complexity, certified, pursuant to Rule 3(3) of the Royal Court (Costs and Fees) Rules, 1989, that the relevant recoverable costs shall be multiplied by two.

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