Crim. A. 35/52

SHALOM ROTENSTREICH

v.

ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal.
[February 12, 1953]
Before: Cheshin J., Assaf J., and Silberg J.

Criminal Law - Causing death by *negligence - Children playing near dangerous pool - Duty of care towards trespasser- Criminal Code Ordinance,* 1936, *s.* G18 - *Criminal and civil responsibility - Israel and English Law - Jewish Law.*

The appellant was convicted under s. 218 of the Criminal Code Ordinance, 1936 [1)] of causing the death of two small children. The children, though warned not to do so, had been in the habit of bathing in a pool on the appellant's land. The two children had in fact on a previous occasion been driven off and warned not to go near the pool. Nevertheless they disregarded the warning, went into the pool, and were drowned.

Held: Allowing the appeal, per Cheshin J. and Assaf J., that the elements necessary for criminal liability under s. 218 of the (criminal Code Ordinance, 1936, are the same as those for civil liability under the English law of torts.

Since in the present case the children were trespassers and there had been no breach by the appellant of this duty he had been wrongly convicted.

Held further by Assaf J. that the principles of Jewish law led to the same result.

Per Silberg J. (dissenting) that the elements of criminal liability under section 218 of the Ordinance are not the same as those of civil liability under the English law of torts. In the present case it had been positively determined that the death of the children was caused by the

1) For text of s. 218 see infra, p. 216.

negligence of the appellant within the meaning of s. 218 and the fact that they, the children, were trespassers, did not exempt him from criminal liability under that section.

Israel case referred to:

(1) *Cr. A.* 158/51- *B-Z. Shvili v. Attorney-General of Israel,* (1952) 6 P.D. 470.

English cases referred to:

(2) *Excelsior Wire Rope Company Ltd. v. Callan and Others,* (1930) *A.C.* 404.

(3) *Grand Trunk Railway Company* of *Canada v. Walter C. Barnett,* (1911) *A.C.* 861.

(4) *Lowery v. Walker,* (1910) 1 *K.B.* 173; (1911) *A.C.* 10.

(5) *Cooke v. Midland Great Western Railway of Ireland,* (1909) *A.C.* 229.

(6) *Latham v. R. Johnson and Nephew, Limited, (1913) 1 K.B.* 398.

(7) *Jenkins v. Great Western Railway,* (1912) 1 *K.B.* 525.

(8) *Hardy v. Central London Railway Company, (1920) S K.B.* 459.

(9) *Robert Addie* and *Sons (Collieries) v. Dumbreck, (1929) A.C.* 358.

(10) *Morton v. Poulter,* (1930) 2 *K.B.* 183.

(11) *Buckland v. Guildford Gas, Light and Coke Co.,* (1948) 2 *All. E.R.*1086.

(12) *Edwards and Another v. Railway Executive,* (1952) 2 *All E.R.* 430.

(13) *R. v. Percy Bateman,* (1925) 19 *Cr. App. RC.* 8.

(14) *R. v. Nicholls,* (1874) 13 *Cox C.C. 75.*

(15) *R. v. Doherty,* (1887) 16 *Cox C.C.* 306.

(16) *Andrews v. Director of Public Prosecutions,* (1937) 26 *Cr. App. R. 34.*

(17) *Younghusband v. Luftig*, (1949) 2 *K.B.* 354.

(18) *E. Gautret. Administratrix of Leon Gautret*, *deceased v. Egerton and Others; L. Jones, Administratrix of John Jones, deceased v. Egertorn and Others,* (1867) L.R. 2 C.P. 371.

American case referred to:

(19) *United Zinc and Chemical Co., v. Britt et ux*., (1921) 42 *Sup. Court Rep.* 299.

Bar-Shira and *Eliad* for the appellant.

Ben-Shabtai, Deputy State Attorney, for the respondent.

SILBERG J. On August 23, 1950, between 3 and 3.15 p.m., the bodies of two children aged eight and nine were taken from the pool which is in the grounds of the industrial plant, "Even Ve-Sid", at Ramla. They had come to bathe in the pool, where they were drowned. The manager of the plant, Shalom Rotenstreich, was charged in the District Court of Tel Aviv with "causing death by want of precaution", under section 218 of the Criminal Code Ordinance, 1936. He was convicted, and sentenced to three months' imprisonment. His appeal before us is against both the conviction and sentence, and his main contention is that the act - or, more precisely, the omission - imputed to him, does not amount to an offence under the said section.

2. The main facts are not in dispute, and are as follows: -

The pool measured eight to eight metres, the depth of the water was about a metre-and-a-half, and it served as a water-reservoir for the industrial plant. The grounds of the plant as a whole were unfenced and open, but the pool itself was surrounded by a low wall (in the court below described as "a railing"), and its height was 60 centimetres. The pool was built on the top of a small rise, and steps on each side led from the foot of the rise to the railing, and from the railing to the water and the bed of the pool. On one side the pool adjoined the open grounds of the plant, and on the other side it was bounded by the road. The children of the neighbourhood were in the habit of coming to bathe in the pool, from the grounds of the plant or from the road, but the persons in charge of the plant were not happy about these visits, and whenever they came upon the children, they would scold them and drive them away from the vicinity of the pool. These same children, the victims of the accident, had also been driven away once before by the plant watchman. However, like their other friends, they did not heed the watchman's warnings, but as often as they were turned away, they came back. There was no special watch on the pool, and the watchman whose duty it was to keep watch over the whole area of the plant used to come to work at 5 p.m., and stay there until 7 in the morning. The accident occurred at approximately 3 p.m., at which time there was no watchman, either in the grounds of the plant or at the pool. It follows from the findings of the learned judge that it would have been possible to prevent the accident if there had been an efficient and proper watch at the approach to the pool, or if the wire-netting that was spread out over the pool after the accident, had been placed there earlier.

The court below held that the children who were drowned were trespassers, but it nevertheless convicted the appellant of an offence under the said section. The learned judge drew an analogy between the rules of civil and criminal law: he reviewed the well-known English judgments given in actions in tort, brought by a trespasser (or his successor) in respect of an accident in which he had been injured or killed while entering upon private property. The court found that the accepted view until 1930 had been that the owner was not liable for injury to a trespasser unless the injury was intentional, or had been caused by something similar, but in that year, in the case of *Excelsior Wire Rope Co. v Callan* (2), it was held that the owner is liable for injury to a trespasser, even where the injury is caused not by an act but by an omission involving an element of reckless disregard as to the fate of the trespasser. In the present case, the learned judge concludes, "the accused is guilty of such disregard. He was well aware of the danger to children using the pool. He knew that the means he had employed were not sufficient, even though it was possible for him to employ adequate means", and so forth.

3. It seems to me, with all due respect, that this view is erroneous for two reasons: -

(a) The English rule was not changed in the *Excelsior* case (2), but remained as it had been before that judgment was given;

(b) More important, a civil claim for the payment of damages is not the same as a criminal prosecution - I would add, in particular, the criminal prosecution for an offence under section 218 - and, as we shall see, the one cannot be understood by reference to the other, whether by way of analogy or by way of inference a fortiori, neither as favouring liability nor as exempting from liability.

4. Let me start by dealing with the first question, that of the liability in the English law of torts of the owner of property towards a trespasser, and in particular towards a trespasser who is a child. I refer to the English law of torts, and not the Palestine Civil Wrongs Ordinance, 1944, since if there is found to be any difference between them, we must prefer the English law for the simple reason that the Criminal Code Ordinance, 1936, preceded the Civil Wrongs Ordinance, 1944, and in any event the 1944 Ordinance cannot serve as a source of interpretation of the terms and concepts of the Criminal Code Ordinance.

5. The following are the leading judgments in which the above-mentioned question of liability was dealt with at some length. They are not all of equal value and importance, but taken all together, and noting the differences between them, we get a clear and comprehensive picture of the English doctrine on this interesting and very important question. The judgments are : -

(a) The judgment given by the Privy Council in the case of the *Grand Trunk Railway Co. of Canada v.. Burnett* (3). That was a claim for damages against a Canadian railway company for bodily injuries to a person whose hands had been amputated in a train collision, caused by the negligence of the company's employees. It was held that the plaintiff was a trespasser - in contravention of the by-laws, and without a ticket, he had climbed on to the platform of a coach which was altogether unconnected with any passenger train - and the Privy Council held that the company was not liable to pay damages. The Canadian court had thought otherwise, and there is some ground for its view. It stated :

> "The personal safety of a human being (though he be a trespasser) must not be endangered by the negligent act of another. Given the circumstances of this case, it does not seem. . . . . that the defendants are exempt from liability though the plaintiff was nothing else than a mere trespasser." (ibid., p. 369).

But the Privy Council was not content with that view; it reversed that judgment and, as was said shortly and simply by Lord Robson:

> "The general rule..... is that a man trespasses at his own risk." (ibid., p. 370).

However - and at this point there is a certain withdrawal from the wide pronouncement quoted above - the learned judge said : -

> "Again, even if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land

> involving something worse than the absence of reasonable care. An instance of this occurred where an owner placed a horse he knew to be savage in a field which he knew to be used by persons as a short cut on their way to a railway Station : *Lowery v. Walker (4).* In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care." (ibid.)-

(b) The well known judgment of the House of Lords in the case of *Cooke v. Midland Great Western Railway of Ireland* (5). That judgment is of particular interest, for prima facie it is possible to infer from it (and indeed judges in later cases did so erroneously infer), that the liability of the owner towards the trespasser, particularly if he is a child, is not necessarily limited to a wilful or reckless act on the part of owners - and, as is well known, the "binding force" of decisions of the House of Lords as precedents is greater than that of opinions of the Privy Council (see Halsbury, Hailsham Ed. Vol. 19, p. 258, and the cases there cited). But the position is not so : there is, as appears below, no inconsistency between the two. The facts in that case were that a child of tender years (about four years old) was seriously injured while playing on a railway turntable belonging to the railway company. The accompanying circumstances were these : the turntable was situated on a triangular plot of ground belonging to the defendant company; it was closed off by a broken thicket hedge, and the children were in the habit of going through this gap on to the plot of ground in order to amuse themselves on the turntable.

Lord MacNaghten said (at pp. 585, 286) :-

> "It is proved that in spite of a notice board idly forbidding trespass it was a place of habitual resort for children and that children were frequently playing with the timber, and afterwards with the turntable." Now the company knew, or most be deemed to have known, all the circumstances of the case and what was going on. Yet no precaution was taken to prevent an accident of a sort that might well have been foreseen and very easily prevented. They did not close up the gap until after the accident... They did not have their turntable locked automatically in the way in which it is usual to lock such machines... 1

> think the jury were entitled, in view of all the circumstances, on the evidence before these, uncontradicted as it was, to find that the company were guilty of negligence."

It is not possible to know from that somewhat vague language how the noble lord regarded these children - as licensees or trespassers. His remark about the "idle" prohibition of the notice board does not teach us very much, and it may be read either way. That judgment is, however, if one may so put it, "poor in parts and rich in others", and the answer can be gleaned from the words of the other judges. For example, Lord Atkinson said (at p. 239):

> "...I think that there was evidence proper to be submitted to the jury that the children living in the neighbourhood of this triangular piece of ground, of which the plaintiff was one, not only entered upon it, but also played upon the turntable - a most important addition - with the leave and licence of the defendant company."

From the considerable importance that Lord Atkinson attached to the element of "leave and licence" it may be inferred that he sees in it the principal basis of his decision. Lord Loreburn L.C. also notes that the defendants "took no steps either to prevent the children's presence or to prevent their playing on the machine" (see p. 242), and in that he concurs, so he says, with Lord MacNaghten in his opinion. Lord Collins goes further in this direction than all of his colleagues. He stresses the fact that the turntable was situated "in such a conspicuous place, and frequented so largely by young people without remontrance by the defendants", and he also notes the gap in the fence that "called" to these youngsters; and he is prepared to conclude therefrom that the children were not only licensees, but were even within the category of invitees (see p. 241).

It follows that while interesting things were said in it here and there about the mischievous and recalcitrant nature of the children, and of the danger of allurement concealed in the dangerous machines that attracted them, the fundamental basis and the main ground of the judgment was that, taking into account all the circumstances of the case, including the mischievousness and the recalcitrance and the allurement, the injured child was

regarded, if not a real "invitee", at least a "licensee" of the company in question, and for that reason the company was held liable in damages. For, but for this fact, there was no ground for holding the company liable, since it had not done an act, willful or reckless, to endanger the child's life. Indeed, that was how that judgment was interpreted in the judgment given some years later by the Court of Appeal. I refer to *Latham v. Johnson (6),* where Hamilton L.J. says (at p. 417) :

> "The Court of Appeal in Ireland ...declined to regard it (the reference is to *Cooke's* case (5), above) as a case on the duty of an owner or occupier of property towards a trespasser... In *Jenkins* v. *Great Western Railway* (7), in this Court, all the members of the Court... stated that in their opinion *Cooke's* case (5) was decided on the assumption that Cooke was licensed by the railway company not merely to come upon the land, but to play with the turntable."

(c) The judgment of the Court of Appeal in the case of *Hardy v. Central London Railway Co.* (8). This case was also about a railway accident, this time on an underground railway, and the victim was a five year old boy, whose hand was mutilated while playing with the belt that operates the escalators up and down from the booking hall to the passengers' platform. The remaining details closely resemble those of the present case. The children of the neighbourhood were in the habit of running up and down the escalators and the company knew that; station officials would drive the children off whenever they saw them, and the children would return when they were not seen. This particular child, Hardy, was driven away from there by a policeman shortly before the accident took place. The legal question was whether, in the light of these facts, the children were to be regarded as licensees or as trespassers, and the Court of Appeal's reply, in contradistinction to that of the Judge of first instance, was that they were trespassers. Thus, Bankes L.J. said (at p. 466):

> "I can conceive of warnings to children so ineffective, either from their nature or from the absence of any attempt to enforce them, as to convey to the mind of a child the impression that no real objection was taken to what was being done. In such a case it might be possible to draw the

> inference that the child was allowed to be and remain under the impression that it had permission to do what it was doing... (some examples are then cited) ...The present case is not one in which, in my opinion, any inference of licence can be drawn. I come to the conclusion upon the evidence that the children were all of them fully aware of the fact that they had no right to be, and no business to be, where they were. In other words, that they were trespassers. "

The learned judge quotes the words of Hamilton L.J., in the case of *Latham v. Johnso*n (6) :

> "It is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so."

Then Scrutton L.J., in the same case, after completely rejecting the argument of how alluring and attractive these moving stairs are to little children, holds - if one may put it this way - that an allurement does not give rise to a licence and that, in view of the company's unrelenting objection to their visits, those children were trespassers and not licensees, and accordingly said (at pp. 473, 474) :

> "...The landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on is land in the course of his business. Against those he was under no obligation to guard trespassers."

(d) The judgment of the House of Lords in the case of *Addie and Sons v. Dumbreck* (9). In this case the House of Lords followed the theory of the judgment in *Hardy's* case (8), and dwelt on the principles to be applied to the question of the owner's liability towards the trespasser. The facts were these:

A four-year-old child was injured and died of its injuries while playing with a wheel connected by a moving cable to the hauling apparatus of a coalmine. This was worked electrically from the grounds of the mine, and was not visible from the place where it was being worked. The wheel was in a field surrounded by a fence, the gaps in which were more numerous than the parts in good repair, and strangers, youngsters and adults, would go in and out of it, whether to take a short cut or to play games. The company objected to strangers coming upon the premises, and their officials would remonstrate with the adults and warn the youngsters not to go there. From these facts the House of Lords, unlike the Court of Appeal, concluded that the children were trespassers, and relieved the company from paying damages. The finding of fact in the case is not relevant for our purposes. Nor us the importance lies in the legal ruling laid down concerning liability for the trespasser's injuries. Lord Hailsham L.C. said (at pp. 864, 365) :-

"The first and in my opinion only question which arises for determination is the capacity in which the deceased child was in the field and at the wheel on the occasion of the accident. There are three categories in which persons visiting premises belonging to another person may fall; they may go

1) by the invitation, express or implied, of the occupier ;
2) with the leave and licence of the occupier; and
3) as trespassers.

"The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.

"In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent - the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known - or ought to be known - to the occupier.

"Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some willful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

Such is the rule of liability - or more precisely, the rule of absence of liability - of the owner or occupier towards the trespasser in the English law of torts. It has not since altered, as we shall see, and English case-law has not moved from that position to this day.

(e) And now we come to the judgment of the House of Lords in the case of *Excelsior Wire Rope Co.* (2), the case in which the learned judge of the court below thought that there was an important doctrinal development and revision in relation to the principle expressed a year previously, with unsurpassed clarity, in the *Addie-Dumbreck case* (9), referred to above. But, as I have already indicated, the position is not so, as will appear from a careful scrutiny of the details of the case. The headnote to the case published in the Law, Reports is not accurate and is liable to mislead, as happened with the headnote in *Cooke's* case (5), which led many worthy judges astray, and nearly lead to the reversal of the clear ruling there laid down (see the remarks of Bankes L.J. in *Hardy's* case (8), at p. 467).

The facts in that case were as follows:-

> A company engaged in the manufacture of wire rope established its plant near the railway. It connected the plant to the railway lines by a siding, and moved its wagons over the rails by means of a long wire rope which passed around a pulley, set up on someone else's plot of land under licence from the owner (the Marquess of Bute). A dynamo in the factory worked the pulley for a few minutes three times a week. The fence round the plot of land had "disappeared" and the children of the neighbourhood had their eye on that plot of land as a playground for themselves, and would go and "handle" the pulley-wheel. The company's employees did not disturb the children in their games on the plot of land or prevent them from getting to the wheel, and would turn them away from there only when the wheel was working and the wagons were in motion. On the day of the accident, when they were about to move a wagon, one of the workers, as was his custom, went to the wheel and drove the children away from there. But on that occasion the man was in no hurry to work the dynamo and delayed some twenty minutes before doing so (see the account of the facts as reported in 142 L.T.R. at p. 532). Meanwhile the children had time to get near the wheel again and one four-year-old girl began to swing on the rope. The worker did not notice what she was doing because he did not look in her direction and, when the dynamo was started and the wheel began to turn, the girls hands were caught in the wheel or the rope and she was severely injured, together with her brother who rushed to her aid.

A claim for damages against the company was made by the children's father. The judge of first instance held in favour of the plaintiff by deciding that the children were licensees; the judges of the Court of Appeal, including Scrutton L.J., confirmed the judgment, but not on the same ground as the judge below. They held that the children were trespassers and not licensees, yet nevertheless the company was liable to pay for the injury since it had been caused "by an act done by the appellant's servants with reckless disregard of the presence of children" (see pp. 405, 406). The House of Lords confirmed the judgment of the Court of Appeal, but it is not clear whether on the ground given by the latter, or on the ground given by the judge of first instance, or on a ground combining and fusing the two together, and I

incline in fact to the last version. The judges of England, especially those of superior courts, are wont to ride several horses at once because of their strenuous - in my opinion somewhat exaggerated - efforts to limit the scope of their decisions to the facts of the particular case before them. The real reason for the decision was, if we want to be absolutely accurate, that there was no prohibition imposed on the children to be near the wheel when it was not working; their presence there was, therefore, permitted, and the company's servants were accordingly bound to see that they were sent away from there the moment they started working their dynamo, and not to rely on the check made by them twenty minutes earlier. That was the ground of the decision in *Excelsior Wire Rope Co. Ltd. v. Callan* (2), and that is what, in my opinion, distinguishes it from the facts in *Addie's* case (9). This is how Lord Buckmaster summed up the matter (at p. 410) :-

> "To the knowledge of the Excelsior Wire Rope Company these children played uninterruptedly round this post (the reference is to the post to which the pulley-wheel was affixed); there was nothing to prevent them doing it, and I cannot find that there is any evidence to show that, except at the moment when this machine was going to be set in action, they were ever driven away. It was therefore well known to the appellants that when this machine was going to start it was extremely likely that children would be there and, with the wire in motion, would be exposed to grave danger."

In the judgment of Lord Warrington of Clyffe we read (at pp. 411, 419):-

> "There is ample evidence that, to the knowledge of the servants of the appellants, children were in the habit, not only of playing around this sheave and using it for purposes connected with their games, but were actually in the habit of playing with the machine, and the ropes and so forth attached to it, so that it was found necessary, when they were about to use the machine, to see that it had not been put out of gear by the children. Under those circumstances, it seems to me quite plain that there was a duty upon the present appellants, by their servants, when they were about to put this machine in motion, so that it would become

> a danger to any children who might be in the neighbourhood, to see whether or not at that moment there were children in such a position as to be exposed to danger".

And a passage from the speech of Lord Thankerton (at p. 414) :-

> "...the children not only had constant and free access to the machine itself, but clearly to the knowledge of the appellants they were in the habit of interfering and playing with both the post and the wire rope, and it was only when the occasion of putting the machine into operation arose that there was any question of keeping the children away from that spot".

That was the ratio decidendi in the judgment given in that case by the majority of the judges in the House of Lords, and only Lord Atkin, in his short judgment, sees the matter apparently in a different light, and determines the responsibility on the basis of the fact that the company was not itself the owner, and not even the occupier, of the plot of land; it was only licensed by the Marquess of Bute to put up the post with the wheel there, and so its liability towards the injured person was greater than that of the owner or of the occupier (see pp. 413, 413).

In analysing the common ratio of the majority judges as aforesaid, and in trying to endow it with a more fundamental character, we find - so it seems to me - that there is a certain combination and fusion of both the notion of "licence" and the notion of "the reckless act". The children were allowed to be by the wheel; therefore it was a reckless act on the part of the company's servants to start the dynamo and the wheel without first ascertaining whether or not there were in fact children there at that very moment. But for that fact, that is to say. if the children had been forbidden to be on the spot at all, as happened in *Addie's* case (9) , it would have been neither a wilful act nor a reckless act on their part to set the said wheel in motion.

And that very problem, namely, In what way *Addie* and *Sons v. Dumbreck* (9) differs from *Excelsior Wire Rope Co. Ltd. v Callan* (2), was dealt with by Scrutton L.J. in his

judgment in *Mourton v. Poulter* (10), at p. 190. In the opinion of Scrutton L.J., the difference between these two cases is that in the first case a small hillock separated the wheel from its operators, and from where they stood they could not see the wheel and the children, whereas in the second case the starting signal was given at a distance of twenty yards from the wheel, and the man could have seen the children had he bothered to turn his head. However, it seems from what the learned Lord Justice immediately went on to say that he was not so certain of the correctness of this distinction - and rightly so - since there is no real basis for the factual distinction in the points that were emphasized in the latter judgment. Nevertheless, even if one assumes that that is indeed the correct distinction, that is still no authority for the view that, with the giving of the judgment in *Excelsior v. Callan* (9), the owner's liability towards the trespasser was broadened in principle, and that it henceforth extends (as the learned judge in the court below thought) also to an omission involving reckless disregard of the presence of the latter. For even in *Excelsior v. Callan* (2) there was no omission but a positive act, since the child was injured by the setting of the wheel in motion.

Putting the matter shortly, there is nothing in the judgment given in the case of *Excelsior v. Callan* (9), which constitutes a development or revision of the ruling laid dozen in *Addie's* case (9), and the owner's (or occupier's) liability towards the trespasser still remains as it was. Its limits have not been overstepped and they are as they always were, namely, either a wilful act on the part of the owner, or an act involving reckless disregard of the presence of the trespasser. He is not liable for damage caused to the trespasser through "passive" negligence, that is to say, if he is injured by something - and the something is not dangerous - situated for some time past on the owner's land, and no new act has been done to injure the trespasser or endanger him. "As the land remains in the same state, a trespasser must take it as he finds it, and the owner is not bound to worn him." Those were the words of Scrutton L.J. himself (at p. 191) in setting out the reasons for the decision given by him in *Mourton v. Poulter* (10) and they also correspond to what was said by him in *Hardy's* case (8) (at pp. 473, 474).

(f) In later judgments too we do not find any departure from that clear rule; on the contrary, we find it affirmed again and again. I shall not set out all the judgments given on this point since 1930. I shall only call attention to the remarks of Lord Morris in the case of

Buckland v. Guildford Gas Light and Coke Co. (11), on p. 1092 (between the letters D and E), and to the judgment of the House of Lords in 1952 in *Edwards v. Railways Executives* (19), the two recent decisions to which counsel for the appellant drew our attention. It will be noted here that the rule which has been discussed above corresponds to the position in American law, as expressed in the majority judgment in the well-known case of *United Zinc and Chemicals Co. v. Britt* (19).

6. It follows from what has been said that since in the present case there was no injurious act on the part of the owners (the pool had for some time been situated on their land, and they were not "working" it when the accident happened), and since, as the learned judge held, the children were trespassers, the negligence of the present appellant - the "passive" negligence as we have called it - does not make them liable for the payment of damages. And the conclusion that follows is that, if the view is sound that the criminal negligence required for a conviction under section 218 must be of a degree greater, or at the very least no less, than the civil negligence required for making a person liable to pay damages, the learned judge ought to have acquitted the appellant.

7. I said if the view was sound, and with that we have reached the second, perhaps most important, question in this appeal. From what is said in paragraph 9 of the judgment of the court below, it seems that the learned judge was not entirely at case about the analogy between the rules of criminal and civil law - notwithstanding the fact that he made it the basis of his judgment. The problem is by no means an easy one, and we still lack precedents to guide us on to the correct path. In Shvili v. *Attorney-General* (1), Cheshin J. commented obiter, "that these factors (he is referring to the terms of the offence under section 218) are to a certain extent identical with the elements required to prove civil liability in an action arising from manslaughter by negligence in English law," but since there was no need for deciding the matter in that case, he did not go deeply into the problem, and did not explain to what extent they are identical with those factors. At all events, the very expression "to a certain extent" points - so it seems to me - to the lack of a complete resemblance between the two matters mentioned.

8. Let us take a look at the wording of the section, exactly as it is written in the original English : -

> "218. Any person who by want of precaution or by any rash or careless act, not amounting to culpable negligence, unintentionally causes the death of another person, is guilty of a misdemeanour and is liable to imprisonment for two years or to a fine of one hundred pounds."
>
> .....

It is quite plain that not every want of precaution and not every rash and careless act which causes death, is sufficient to convict a person of an offence under section 218. They must be of a certain "degree", and not too great; the act must involve negligence, and must not involve culpable negligence. I shall not enquire here where the borderline is to be drawn between the two, for I know that one cannot accurately fix its exact position. It is a question of degree, and the matter is left to the judge who hears the case. But one may certainly ask - and that is the question which interests us in this appeal : what is the relation between civil liability and criminal liability, and can the matter be put by saying that negligence which, for whatever reason, does not involve civil liability to pay damages, entails criminal liability for an offence under the section?

9. Now the question has apparently - and I stress the word apparently - been considered countless times in the English courts, and has been completely solved there, although the solution is not clear. Thus we read in the well-known judgment of Lord Hewart in *R. v. Bateman* (13), (at p. 16) :-

> ". . . . . the explanation of criminal negligence to a jury should not be a mere question of epithets. It is, in a sense, a question of degree..... but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime".

And what is the difference? As to that, it is stated in an earlier passage (at p. 11) :-

> ". . . . . in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such

> disregard for the life and safety of others as to amount to a crime against the State. . . . ."

So the "felonious intent" or mens rea, in the classical, and not the modern, meaning of the term, is the criterion of criminal responsibility, as distinct from civil liability, and that is the substantial difference arising from the distinction between the two categories of negligence.

A similar idea had been expressed fifty years earlier by Brett J. in the case of *R. v. Nicholls* (14). A small child, the illegitimate son of a young spinster, died from lack of adequate nourishment, and his grandmother, who had voluntarily taken upon herself to maintain him, was put on trial on a charge of manslaughter by negligence, and acquitted. The instructions of Brett J. to the jury were (at p. 76) as follows :

> "..... Mere negligence will not do, there must be wicked negligence, that is, negligence so great, that you must be of opinion that the prisoner had a wicked mind, in the sense that she was reckless and careless whether the creature died or not."

Similarly, in the charge of Stephen J. to the jury in the case of *R. v. Doherty* (15), we come across a concept, also dealing with the state of mind of an accused person, although it is not so clearly expressed.

> ". . . . . Manslaughter by negligence occurs when a person is doing anything dangerous in itself.....and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished. . . . . But if there was only the kind of forgetfulness which is common to everybody, or if there was a slight want of skill, any injury which resulted might furnish a ground for claiming civil damages, but it would be wrong to Proceed against a man criminally in respect of such injury." (See p. 309.)

Finally, one last reference, where stress was put, without pointing to the qualitative distinction which is involved, as was done in *Bateman's* case (13), on the "quantitative" difference - the difference of degree - between civil negligence and criminal negligence. I refer to the words of Lord Atkin in the well-known case of *Andrews v. Director of Public Information* (16), (at p. 47) : -

> "Simple lack of care such as will constitute civil liability is not enough. Nor purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."

10. It follows from all these authorities that civil liability is not the same as criminal liability, and that the latter (in cases of manslaughter by negligence) requires, as a sine qua non, a degree of negligence far higher, or more tainted with guilt, than the negligence that suffices to impose liability to pay damages.

11. What then is the conclusion to be drawn from these citations as regards the question raised by me at the end of paragraph 8? Can we maintain that standard when we come to "measure" the degree of negligence required to convict a person of an offence under section 218?

My answer to that is in the negative. For the problem with which we are dealing does not correspond with the example quoted, and I therefore inserted the word "apparently" at the beginning of the ninth paragraph. All the English authorities cited dealt with a charge of manslaughter by negligence - that is, the felony, falling in our country, under certain conditions, within the scope of the offence set out in section 212; [1)] whereas our concern is with the special offence set out in section 218. The drawback is that the offence in section 218 is a novelty conceived in the library of the Palestine legislator; it has no counterpart in

1) Criminal Code Ordinance, 1936, section 212:
Manslaughter: 212. Subject to the provisions of section 214 of this Code, any person who by an unlawful act or omission causes the death of another person is guilty of a felony. Such felony is termed manslaughter

English criminal law, and so the distinction made in the English judgments quoted above has no application.

Let me explain what I mean. The offence laid down in section 218 is an exceptional offence, and its provisions and exceptions are of the most special kind. It contains two almost opposites under one heading : negligence entailing punishment, yet for all that not culpable. Whatever the exact meaning of that adjective, one thing is certain : that here the legislator did not introduce the "felonious intent", the mens rea in the classical meaning of the term. This is not one of the usual phenomena in criminal legislation; it is by its very nature exceptional, even in the criminal legislation by regulation of our generation. See the stimulating words of Lord Goddard, C.J. in the judgment given in 1949 : -

> "Of late years the courts have been so accustomed to dealing with a host of offences created by regulations and orders independent of guilty intention that it is desirable to emphasize that such cases should be regarded as exceptions to the rule that a person cannot be convicted of a crime unless he has not only committed a forbidden act or default but also that a wrongful intention or blameworthy condition of mind can be imputed to him." *(Younghusband v. Luftig* (17), at p. 370.)

In other words, "mens rea" - the classical "mens rea" - is still one of the fundamental properties of criminal legislation, apart from those special cases where the legislator deliberately dispenses with it. Section 218 is one of the cases where the legislator has waived this important condition; he had his reasons, though he did not disclose them to us. The citizen is thereby given a special warning to take particular care with regard to other people's lives and not to do anything, even unknowingly, which endangers the life of a fellow-being. If a person is not careful, and a man loses his life, he gets his punishment as a warning to others not to make the same mistake again. The meting out of punishment here is, if one may say so, a precautionary measure employed by the legislator to safeguard the citizen's life against want of precaution on the part of his fellow-citizens. If such is the case, if that indeed was the intention and aim of section 218, there is no logic in the special criminal liability under this section being dependent upon and adjudged according to the terms and exceptions of civil liability.

But then it may be asked, how is that possible? Can an act which does not suffice to make a person liable in damages, result in the same person being sent to prison for two years? My answer is, that there is nothing surprising in that; it is not the first time such a thing has happened, as is shown by the doctrine of "contributory negligence" : this serves (in certain circumstances) as a defence to a defendant in an action in tort, but is no defence to an accused in a criminal prosecution. Take another example which springs to mind in this very connection : the situation that existed here in Palestine between the publishing of the Criminal Code Ordinance, 1936, and the coming into force of the Civil Wrongs Ordinance, 1944. During that period it was certainly possible for a person to be held liable and punished for an offence under section 218, and yet not to be held liable and not to pay damages for precisely the same act, in the case of a civil Claim. The difference between the civil action and the criminal prosecution under section 218 is simple and clear : in the civil action the parties are citizen and citizen, and the matter under consideration is the payment of money for a monetary loss; in a criminal prosecution the parties are the citizen and the State, and the matter under consideration is the penalty of imprisonment (or fine) in order to prevent the loss of life; there will therefore be absolutely nothing illogical in acting with greater severity, and imposing liability for less negligence, particularly in the second case. Anyone who does not admit this distinction, and considers that the negligence necessary for a conviction under section 218 must be no less, and perhaps even greater, than the negligence required for liability in an action in tort, will be at pains to excuse and explain the palpable fact that the criminal liability under section 218 was limited only to cases of causing death, and the legislator did not extend it, either in the same section or elsewhere, to cover cases of wounding and bodily injury as well; for the general "criminal negligence" dealt with in Chapter 26 of the Criminal Code Ordinance, 1936 (sections 243-247, is not identical with the "non-culpable negligence" in section 218, but is of a higher degree, as its name implies.

12. The idea propounded here is fraught with very important consequences, but there is no necessity to draw all the possible conclusions from it within the framework of the present appeal. It is sufficient for as to restrict the principle herein to the specific, concrete problem before us, namely, whether the fact that the children, the victims of the accident, were trespassers (a fact which, in the circumstances of the case was, as we have seen, likely to serve us a bar to any civil claim for the payment of damages) is enough to result in the

appellant's acquittal in respect of the criminal offence with which he has been charged under section 218. We must constantly bear in mind the fact that the children's visits in order to bathe in the pool were known and anticipated by the men working on the undertaking, but that they did not approve of them, so that the appellant's argument is not: "It did not occur to me that someone would dare to trespass on my property", but: "It did occur to me, but nevertheless I am exempt from liability." The question is whether to accept that argument in the criminal case before us.

It seems to me that within these restricted limits, at all events, there is no room for query or doubt. Why is the trespasser not entitled to the payment of damages for the accident that occurred to him as a result of the passive negligence of the owner? Because the trespasser, as has been stated, "entered the place on his own responsibility"; because he agreed, as it were ("agreed" in the broad and not in the technical meaning of the term), to be responsible for the damage that would be caused to him as a consequence of his endangering himself. That being so, when does this concept - the concept of agreement and waiver - apply? When one is concerned with a civil, private action of an injured person seeking to replace an out-of-pocket loss, and not when the prosecution is a criminal, public one, brought by the State, with the purpose of preventing danger to life. For the life of the individual is not his private property, and he cannot give up or waive his right to it. Apart from that, the concern here is not for his own life alone.

13. Finally, when the only possible defence available to the negligent defendant in an action in tort is that the injured plaintiff is a trespasser, then that defence will not avail him when he stands trial on a criminal charge under section 218.

But there is one important exception to that rule, and it would be proper to state and stress it, for the avoidance of misunderstanding and error. Sometimes the fact that the deceased was a trespasser will serve the accused as a defence under section 218, not directly but indirectly, namely, when the fact is to be considered as reducing or canceling out the very negligence of the defendant. Putting it concretely: when, in the circumstances of the case, the accused is not bound to anticipate that the stranger who was killed would enter and be injured upon property that was not his. In such a case the judge will acquit the accused, not because of the deceased's act of trespass, but because of the accused's lack of

negligence - a subtle distinction, but one that is fairly clear. In the present case there was no ground for such an argument, nor was it argued, as I have already indicated. The forbidden visits to the grounds of the pool were in this case offences regarded by children as of no consequence; the plant manager foresaw them, and could not fail to foresee them, so that such trespass, as a fact, was not calculated to reduce the appellant's negligence to the extent required in section 218. The sole question here, therefore, is whether it was capable of being a legal defence, in spite of the fact of negligence, and to that, too, the answer must be in the negative, on the ground explained at the end of the foregoing paragraph.

14. The conclusion that I have reached, therefore, is that since in the present case it was positively determined that the death of the children was caused by the negligence of the appellant within the meaning of section 218, the fact that the children were trespassers does not exempt him from criminal liability according to that section. There is equally no basis, in my opinion, for the appeal against the sentence.

In my opinion, therefore, the appeal should be dismissed.

CHESHIN J. This is an appeal from a judgment of the District Court of Tel Aviv in which the appellant was convicted of causing death by want of precaution not amounting to culpable negligence, under section 218 of the Criminal Code Ordinance, 1936. and was sentenced to three months' imprisonment. The appeal is against both the conviction itself and the severity of the sentence.

2. The facts which brought the appellant before the court are not in dispute, and accordingly I have only to repeat with the utmost brevity the findings of the court below:-

> A. The appellant is the manager of the "Even Ve-Sid" plant in Ramla. The grounds of the plant were unfenced, and on a moderately high rise is a square- shaped water-pool which covers an area of sixty-four square metres and serves the needs of the plant. The walls of the pool are slightly higher than the top of the rise, but the approach to the waters of the pool does not involve particular difficulty since a few stone steps lead from the ground to the edge of the walls. On the other hand, exit

from the pool is difficult because the interior steps, situated under the level of the water, are slippery and serve as an insecure stepping-place. No satisfactory watch was placed over the pool, nor were any special precautions taken against strangers coming to bathe in it. Children of the neighbourhood, therefore, were in the habit of entering the grounds of the plant and of enjoying a dip in the pool when no one was looking on. The appellant, however, not only did not permit them to do so, but instructed his subordinates who worked at the place to drive away any child found wandering about on the premises of the plant close to the pool. The employees carried out these instructions, and occasionally, when they saw children bathing in the pool, would also remove the clothes left on the banks of the pool. This led several times to complaints and clashes between the employees and the children's parents. The appellant himself, too, would drive children away when they came to bathe in the pool.

B. On August 53, 1950, about midday, two children about nine years old named Valerie Dolman and Moshe Alters, entered the grounds of the plant, and scent down to bathe in the pool. These children had been warned once before not to come and bathe in the pool, but they paid no attention to that warning, and from the manner in which they surreptitiously crept into the grounds of the plant it was plain that they had the prohibition in mind. Close to half-past-three in the afternoon the dead bodies of these two children were taken out of the water, one holding the other's hand. The cause of death, as determined by the doctor who examined the bodies, was drowning.

C. Against this background the appellant was prosecuted. convicted and sentenced, as I have said.

3. The learned District Court judge held that the children were trespassers when they came to bathe in the pool, but considered that this fact did not exempt the appellant from criminal liability towards them. After reviewing the development of the case-law concerning

negligence in the law of torts, he came to the conclusion that according to English law as it stands at present (that is to say, after the judgment in the *Excelsior* case (2), which will be referred to later) a person is under a civil liability even towards a trespasser, as long as he, whether by an act or by an omission, acts negligently to the extent of lack of consideration (in the words of the learned judge, "a mood of 'I don't care' "), and that that test must also be applied ashen we are enquiring whether the elements of the offence set out in section 218 are present. In the present case, therefore, the appellant, knowing of the danger awaiting children who bathe in the pool, took no sufficient steps to keep them away from the place and to prevent them going down to the pool. He thus acted negligently indicating "a mood of 'I don't care' ". The criminal liability stated in section 218, therefore, applies to him.

4.. Section 218 provides that : -

> "Any person who by want of precaution or by any rash or careless act, not amounting to culpable negligence, unintentionally causes the death of another person, is guilty of a misdemeanour and is liable to imprisonment for two years or to a fine of one hundred pounds."

From this section it is clear that the principal elements of the offence are twofold, namely: (a) causing death unintentionally, by (b) a want of precaution not amounting to culpable negligence.

It does not say just "want of precaution", but "want of precaution not amounting to culpable negligence." It follows that the prosecution does not have to prove a high degree of negligence, felonious negligence, but that it is sufficient to prove want of precaution amounting to a slight degree of negligence. But the problem here is not the degree of negligence required to create the offence, but rather the question, in relation to whom is a person obliged to act with caution not amounting to negligence, and for the death of what class of persons will he be accountable under section 218 if he has not so acted cautiously towards them. Putting it another way, does section 218 set out in full all the elements of the offence stated in it, or is there one additional element, which is not expressly mentioned in it, because it is taken for granted and is in the very, nature of things.

5. Section 218 has no counterpart in English criminal law, and we cannot, therefore, avail ourselves of the essential principles laid down in that law. But there are many precedents in English law concerning the civil liability involved in a person's negligence. It will not be entirely superfluous therefore to compare the substance of that same civil liability with the substance of the criminal liability stated in section 218, so as thereby to clarify and ascertain whether they differ from one another, and if they do, what is the difference between them insofar as the principle to be derived from them is concerned. .

6. One fundamental principle runs like a golden thread through the long line of English judgments dealing with the civil liability of a person for his neighbour's injuries. That principle is that liability depends on the duty that a person owes to his neighbour to take care, and that the duty imposed on a person in relation to a trespasser is not as heavy as that in relation to a licensee or invitee. In the case of *Grand Trunk Railway Co. of Canada v. Barnett* (3), before the Privy Council, which dealt with the rights of a trespasser who had been injured while travelling on a railway, Lord Robson said (at p. 369) :

> "The railway company was undoubtedly under a duty to the plaintiff not wilfully, to injure him; they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him (the trespasser) of the some character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances."

In the case of *Latham v. Johnson* (6), the question was this: what is the liability to the public of a landowner who allows the public, young and old, to pass over his land and to play on it. Farwell L.J., dealing with this question, cited with approval (at p. 405) the following words of Willes J., in the case of *Gautret v. Egerton* (18):-

> "To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty;

> otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence."

And if the extent of a person's liability towards a licensee is restricted within those bounds, how much more so towards a trespasser. It should be noted that at the end of his remarks (at p. 407), Farwell L.J. comes to the conclusion that the extent of a landowner's liability towards a child is no greater than his liability towards an adult.

7. In his judgment in the case of *Latham v. Johnson* (6), Hamilton L.J. divides the persons who come on to a man's premises into three categories, from the point of view of the latter's liability towards them. They are : invitees, licensees and trespassers. "The lowest", adds Hamilton L.J., "is the duty towards a trespasser. More care, though not much, is owed to a licensee - more again to an invitee."

8. The case of *Hardy* v. *Central London Railways Co.* (8) also dealt with the question of a landowner's liability towards a child trespasser who had been injured, and the following are short quotations from the remarks of the judges who sat in that case : -

> Bankes L.J. : "If the plaintiff was a trespasser then he has no right of action, as there is no evidence of any allurement (placed there) with malicious intent to injure."

> Warrington L.J. : "Once the conclusion is arrived at that the plaintiff was a trespasser, the judgment of the Court ought to be in the defendant's favour."

Scrutton L.J. in unequivocal language makes clear what had only been hinted at in other places. The learned Lord Justice said : -

> "If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but (the landowner) was under no liability if, in

> trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers."

9. In the case of *Robert Addie v. Dumbreck* (9), Lord Hailsham divides the persons that come to a man's premises into three classes, just as Hamilton L.J. did in *Latham v. Johnson.* (6), namely, invitees, licensees and trespassers; and after dealing with the onerous nature of the duty imposed upon the landowner towards the first two classes and the extent of the care that he is bound to take towards them, he comes to the third class and says (at p. 865) : -

> "Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least same act done with reckless disregard of the presence of the trespasser."

10. Viscount Dunedin, too, spoke in the same spirit in his speech in the same case (at pp. 370, 371). In answer to the argument put forward there, that a person is obliged to fence his land, he lays down (at pp. 879, 878) that : -

> "There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees..... But when n proprietor protests and goes on protesting; turning away people when he meets them. . . . . and giving no countenance in anything that he does to their presence there, then I think no Court has a right to say that permission must be implied."

The same learned judge as well does not see any difference between a child trespasser and an adult. The following are his words on this point (at p. 376) :-

> "The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser."

11. I do not think (as the learned judge in the court below thought) that the judgment in the case of *Excelsior Wire Rope Co. v. Callan* (2) reversed the principle expressed distinctly and in such clear language in the precedents cited. In the *Excelsior* case (2), it appears that two children, brother and sister, were injured on a plot of ground occupied by the defendant company, while playing with a pulley-wire which was used for moving goods wagons and was operated by a dynamo machine situated at a distance from the spot. The children of the neighbourhood were in the habit of playing on that plot of land, and the company's servants did not drive them away from the land except when they were about to work the dynamo machine and set the wire in motion. On the day of the accident also the company's servants so acted, but because of the great distance *between* the place where the machine stood and the place where the wire was stretched, the servants did not notice that the children had returned and come to play with the wire after they had been driven away from there. On the basis of those facts, Lord Buckmaster stated that : -

> "It was therefore well known to the appellants that when this machine was going to start it was extremely likely that children would be there and, with the wire in motion, would be exposed to grave danger.
>
> "In such circumstances the duty owned by the appellants, when they set the machinery in motion, was to see that no child was there, and this duty they failed to discharge."

Viscount Dunedin in the same case repeats the essence of what he had previously said in *Addie's* case (9), and although he assumes that the children were trespassers, he comes to the conclusion that nevertheless the company must pay damages because it acted - in the language of Lord Hailsham in *Addie's* case (9) - "with reckless disregard of the presence of the trespasser", or, in the language of Viscount Dunedin himself in the same case - "an act so reckless as to be tantamount to malicious acting. "

From these dicta it is clear that in the *Excelsior* case (2) the House of Lords did not intend to decide in opposition to the principles laid down by it and by other courts in previous cases as the learned judge thought in the present case, but on the contrary, the *Excelsior* case (2) serves as one more link in the long chain of judgments determining the liability, or absence of liability, of a landowner towards the various classes of people entering on his land, and the feature common to them all, namely, that towards trespasser there is no duty on the owner of land, apart from the duty not to do a positive act, with malicious intention or out of reckless lack of consideration of the fact of the trespasser being on the land.

12. The case of *Mourton v. Poulter* (10), was also decided according to the principles laid down in the precedents cited, and does not depart from them to the right or to the left. Scrutton L.J. says in the same case (at p. 191) : -

> "The liability of an owner of land to trespassers does not arise where there is on the land a continuing trap. . . . . There, as the land remains in the same state, a trespasser must take it as he finds it, and the owner is not bound to warn him. That, however, is a different case from the case in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near. In each of these cases he owes a duty to these people even though they are trespassers to take care to give them warning."

13. From this group of cases, therefore, one rule, brief and clear, can be deduced: a landowner is not obliged to guard his trespasser or to warn him against any form of danger, apparent or concealed, found on his land. But the moment he proposes to do some act which involves a change in the state of the land and an increase of the danger, the duty is imposed on him, towards trespassers as well, to take reasonable care and to inform them of the change about to take place on the land. In every other case, to use the language of Lord Robson in *Grand Trunk Railway Co. v. Barnett* (3), "a man trespasses at his own risk".

14. That is the English rule in the law of torts, now as always, and it has remained so without any alteration until this day (see the two recent judgments on this point: *Buckland v. Guildford Gas, Light & Coke Co.* (11), and *Edwards v. Railway Executive* (12)).

15. Before passing to the question to what extent these English principles can serve as guides to the solution of the problem before as, let us linger for one moment only over the question in what way the rules of civil negligence are distinguishable from the rules of criminal negligence in English common law. The Court of Criminal Appeal considered this question thoroughly in the case of *R. v. Bateman* (13) in which Lord Hewart L.C.J. defines the distinction thus (at p. 10) : -

> "If A. has caused the death of B. by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A. owed a duty to B. to take care, that the duty was not discharged, and that the default caused the death of B. To convict A. of manslaughter, 'the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, that A.'s negligence amounted to a crime."

Further on in the same judgment he said (at p. 11) : -

> "In the civil action, if it is proved that A. fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In a criminal Court, on the contrary, the amount and degree of negligence are the determining question. "

16. From this language we gather that negligence in English law is a matter of degree : if the negligence reaches a high degree, and goes beyond the restricted framework of making good the damage and of fixing compensation between citizen and citizen, it is regarded as a criminal offence; if it does not reach this high degree, it does not posses the element of criminality, and the injured person's remedy is in damages only.

17. This principle was aptly expressed in the case of *Andrews v. Director of Public Prosecutions* (16). In that case, Lord Atkin said (at p. 47) : -

> "Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."

18. These words spoken by the English judges on the question of the civil and criminal responsibility involved in acts of negligence can, in my opinion, show us the way to the solution of the question that I posed at the opening of my judgment. In support of a charge of manslaughter by negligence in English law, you have to prove that the accused acted with negligence of the highest order, with culpable negligence, with criminal negligence which holds a man's life as of no account, and does not value the lives of members of the public, and is akin to felony. Such felony is included in the law of this country within the scope of the offence stated in section 212 of the Criminal Code Ordinance. But there is a negligence lighter than that : that is negligence that does not reach the status of felony, being of a lower degree. English law does not count this negligence an offence at all, and it provides that civil law alone shall cover it, through the payment of damages. The legislator of the Criminal Code Ordinance, 1986, on the other hand, considered even this lower degree of negligence a criminal offence - to use his language : "want of precaution . . . . . not amounting to culpable negligence" - and in transferring the basis of the negligence from English civil law to the confines of the criminal law in this country, he found a place for it in section 218.

19. Thus we gather that negligence of the higher degree necessary to create a felony in English law is the basis of the offence stated in section 212; whereas the misdemeanour stated in section 218 is created by a lesser degree of negligence, which suffices to support a civil claim for the payment of damages. But it is necessary to state that whether we are concerned with criminal negligence in English law, corresponding to the felony stated in section 212, or with criminal negligence regarded as a misdemeanour under section 218, corresponding to civil negligence in English law and under our own Civil Wrongs

Ordinance, we should always bear in mind the words of Lord Hewart L.C.J. in *Bateman's* case (18) on the common elements necessary for both criminal liability and civil liability in English law. One of those elements is the duty towards the victim to take care. In the absence of such duty, you cannot pin any guilty act on the person who caused the damage.

20. That was what this court stated in *Shvili v. Attorney- General* (1), where it was laid down (at pp. 474, 475) :-

> ". . . . For the purposes of the misdemeanour in section 218, it is essential to prove three elements:
> (a) that there was a duty imposed on the defendant towards his victim to take precautionary measures;
> (b) that the defendant did not take those measures;
> (c) and that as a result thereof the death of the victim was caused."

Later in the same passage, the court added this observation of great import:

> "It is permissible perhaps to comment by the way, that these factors are to a certain extent identical with the elements required to prove civil liability in an action arising from manslaughter by negligence in English law."

These last remarks were made obiter, for they were not in fact necessary for a decision in the case. That explains the reservation contained in the expression, "to a certain extent." In the present case, on the other hand, the question of the duty of a person accused of an offence under section 218 towards his victim is the very spirit and breath of the matter under consideration here, and in my opinion there is no escape from the conclusion to which I have arrived, namely, that no offence under section 218 is committed unless a person is under a duty to his neighbour to take care towards him and that person has not fulfilled that duty in the circumstances stated in the section.

21. I shall mention one more factor of greater practical importance. Generally speaking, there is no such thing as bare negligence, negligence which has not caused real damage, and

a person is not punished for an act (and the same applies to an omission), although there be in it a measure of negligence, unless the law expressly provides that the same act shall be regarded as a criminal offence. Examples of offences of bare negligence are to be found in section 243 of the Criminal Code Ordinance. A person is punished for such negligence, even though it does not result in actual damage. But where the act of negligence by itself does not amount to an offence, and the law does not provide an accompanying punishment, unless it causes damage, such as causing a person's death, would it be lawful or equitable to punish the doer of the act even though no duty was imposed on him to act cautiously in relation to the victim? Let me illustrate my remarks with some examples from everyday life :

A. The owner of a citrus-grove had neglected to attend to his grove situated in the heart of the village. The fence is broken down, and the children are in the habit of getting into the grove in order to pick the leftovers of the fruit and to look for birds' nests amongst the foliage of the trees. Whenever he sees the children wandering about in the grounds of the grove, the owner drives them away from there, but does not close the gap in the fence. A child crept uninvited into the grove, and while climbing one of the trees, fell down and was killed.

B. Reuven has built a house but has not put a railing round his roof. The approach to the roof from the staircase does not entail particular difficulty, and from the roof it is easy to get into the living-rooms. Reuven has caught Shimon a number of times wandering about on the roof of the house, and has reproachfully driven him away; hut even afterwards has not put up a railing and has not sealed the entrance to the roof. One night Shimon went on to the roof with the intention of stealing and in the darkness fell down on the pavement of the street below, and his body was shattered.

C. Levi has dug a lime-pit inside his grounds next to the house he is building, and has not covered it. He knows that at night-time people go on to his land with the intention of stealing building materials, but in his opinion the damage he is likely to suffer does not cost as much as the

> wages of a night watchman, and accordingly does not put a watch on the place or even place a warning lamp there. One night, two thieves got into the building which was in the course of erection, one fell off a rotten plank that was used as a ladder to go from floor to floor and broke his neck and the other one drowned in the lime-pit.

Does law or justice require that the owner of the grove or Reuven or Levi be convicted of causing death under section 218? Towards invitees or licensees coming to a person's house, he is in duty bound to act cautiously, but what is his duty in relation to a trespasser committing an offence? Why should we assume that the legislator intended to fasten a criminal offence on to the shoulders of a man, not for an act which he deliberately did to someone who came to his house to commit a crime, but for an act which was done in good faith, or for an omission, that is to say, for not taking care for the welfare and safety of the offender, and for not seeing to it that the latter could carry out his nefarious purpose in complete safety?

22. There is, in my opinion, only one conclusion to be drawn, namely, where the legislator makes the creation of the offence dependant, not on the act of negligence itself, but on its effects in relation to a person (and it makes no difference whether those effects are death, according to section 212, or any other injury, according to section 244), there can be no conviction unless it is proved, inter alia, that the defendant owed a duty to the victim to take care, and that he did not carry out that duty. This conclusion, for the purpose of the offence stated in section 218, is linked and bound to the rule considered above, namely, that the landowner owes no duty towards an offender trespassing on his land apart from the duty not to injure him by a wilful act. For if that be not so, what then is the difference between a trespasser and an invitee or licensee as regards the criminal liability of the landowner? And what is the difference between a person who digs a pit on public property and one who digs on private property for the purposes of that liability?

23. Passing from these general principles to the concrete case before as :

The two children, victims in the "Even Ve-Sid" plant, were trespassers. This was held by the learned judge, and the finding is not open to question. The fact that they were

attracted by a child's fancy to the pool in the grounds of the plant, that is to say, that there existed an allurement on the appellant's property - that fact may constitute a factor, among other factors, for the purpose of settling the question whether they came to the place as invitees, licensees or trespassers. But once the fact has been determined (as it was determined in the present case) that they came as trespassers, they must be regarded as trespassers, and there is no longer any importance attaching to the question whether the pool served or did not serve as an allurement to them. Moreover, these children were not just trespassers, that is to say, persons who caused damage from the civil point of view (like the trespasser in English law and in the law of torts of this country), but also committed a criminal offence under section 286 of the Criminal Code Ordinance, 1936. For they had been driven away once or twice from the appellant's property, and nevertheless came back and bothered and annoyed him. Had they been of punishable age they could have been criminally prosecuted. The appellant's one duty towards them was not to do an act wilfully to injure them while they were on his property. He was not obliged to fence in the grounds of the plant so that they would not get into them or even to raise the height of the walls of the pool so that they would not bathe in the waters of the pool. That being so, the blame cannot be put on to his shoulders for the accident that occurred to them.

24. Putting it generally, the elements required to prove the offence stated in section 218 are in my opinion not to be found here, and accordingly I think that the appeal should be allowed, and the appellant acquitted.

ASSAF J. I concur in the opinion of my learned colleague, Cheshin J., and in a few words would add that in my opinion the same result would be arrived at in Jewish law.:

The Mishna in Baba Kama, page 33a reads as follows : -

> "If employees come to the private residence of their employer to demand their wages from him and their employer's ox gores them or their employer's dog bites them, with fatal results, the employer is not liable for damage. [1)] Others, however, say that employees have the right

1) Lit. "for ransom money"

> to come and demand their wages from their employer, and that the employer is liable."

In the Gemara the explanation is given that if the employer lives in the same city and the employees could have claimed their wages waiting outside his house, then they must be deemed to have entered his premises without permission, and in that case all are agreed that the employer is not liable. And if he is in the habit of staying always at home, then they must be deemed to have entered his house with permission to claim their wages, and in that case all are agreed that he is liable. When an employer was concerned of whom it was not known whether he was to be found in town or not, and his employees called him from the entrance of his premises, and he said "yes" to them - does his answer constitute the granting of permission to enter or not ?

At all events, we can see from that discussion, that as regards trespassers entering the landlord's property without permission, there is no duty imposed on him.

Basing himself on that discussion, Maimonides lays down in Chapter 10 of Hilchot Nizkei Mamon, Halachot 11-12 :

> "If one enters privately-owned premises without the owner's permission - even if he enters to collect wages or a debt from the owner - and the owner's ox gores him and he dies, the ox must be stoned, but the owner is exempt from paying damages, since the victim had no right to enter another's premises without the owner's consent. When he stood at the entrance and called to the owner, and the owner answered "yes", and then he entered and was gored by the owner's ox and dies, the owner is not liable, for "yes" means no more than 'stay where you are until I speak to you'."

And in Tur Hoshen Mishpat, Article 389, the rule is laid down :

> "When employees have entered the employer's property to ask for their wages and the employer's ox has gored them there or his dog has

> bitten them, if the employer is not accustomed to go out to the market, since he cannot always be found in the market, the employer is liable for injury done to them, for they enter his property with permission; but if he is a person usually to be found in the market, he is not liable, for then they enter without permission.
>
> "And my late father, the Rosh, of blessed memory, wrote: In these days it is the usual custom for employees to enter the employer's house to claim their wages, and even if he be a man who usually goes to the market, he does not carry money about with him in his pocket, to pay the employees, therefore according to the custom he is liable."

Thus Rambam and the Rosh and the Tur all lay down the principle that a man is not bound to act with care, except towards those who enter his premises with permission. That permission does not indeed have to be express, and it depends on custom, provided it is a "usual custom" which is generally practised. On the basis of the words of the Rosh, Maharshal wrote in "Yam shel Shlomo" on Baba Kama, Chapter 8, Article 28 :

> "Therefore the law varies according to the custom prevailing at the time, and the employer is liable even if he is a man one can usually find in the market. We see that even among various employers, although all of them live at the same time and in the same place, the law will be different, according to the usage of each particular one of them to be found or not to be found in the market place; a fortiori the law will be different according to the different customs prevailing at different times and at different places."

And it is worthwhile mentioning another passage from Maharshal in the same work that is pertinent to our case:

> "I wonder whether there ever was a time in which the custom prevailed - a custom of Sodom - that a man would not enter the house of his neighbour without permission - even if he had some business to

> transact there. I think the true position is that he is called a trespasser only for the reason, and in case, that the landlord protested against his entering, and refused to accept responsibility for him - unless it was the house of a craftsman which is open for everybody to enter and where everybody is regarded as entering with permission."

A fortiori that is the position in the present case, where the appellant and the employees in the place, who were under his control, continuously objected to the children bathing in the pool, and the matter was also Known to the children's parents living near the place; and he certainly did not undertake to exercise care towards them. But persons entering a craftman's house or a shopkeeper's store are considered as entering with permission and he is bound to exercise care towards them.

This distinction between a person who enters with permission and one who enters without permission is the determining factor not only for the purpose of determining liability in damages, but also for the purpose of determining responsibility before God, i.e. the obligation to take refuge in one of the cities of refuge for having killed another person by inadvertence. The Rambam holds, in reliance on the words of the Gamara in Makot and Baba Kama, in Chapter 6 Hilchot Rotzeah :

> "If one enters another's premises without permission and the owner kills him inadvertently, he is exempt from going to a City of Refuge, for Scripture says : 'Or who chances upon his neighbour in a wood'. As a wood is an area which everybody is entitled to enter, including the victim, so the Scripture is to be applied to any such place accessible to the public; hence the law imposing that penalty applies only to a place of this kind. Consequently, if one enters a carpenter's shop without permission, and a block of wood strikes him in the face and kills him, the carpenter is exempt from taking refuge. But if he enters with permission, the carpenter must take refuge."

And in Talmud Yerushalmi, Baba Kama, chapter 8, article 8, we read :

> "Rabbi Yossi ben Hanina said: Where a man is standing and felling trees in his yard and an employee enters to claim his wages, and a block of wood falls on him and injures him, he is liable, and if the employee dies, he is not bound to take refuge."

This statement is queried there in view of a contrary opinion held by Rabbi Hiya, and the query is answered in this way. Rabbi Hiya speaks of the case where he did not see him enter, whereas rabbi Yossi speaks of the case where he did see him enter. From this, the Tosaphot rightly conclude (Baba Kama, page 32b, Hayav Be'arba'a), that even when he had seen him enter, he is exempt from taking refuge, because he entered without permission; only when he entered with permission must the owner take refuge.

We see once more that towards a person who enters with permission (even if not invited), there is a duty to act with particular care, even when the owner is engaged in his usual occupation, which does not prima facie involve danger. That is not so, however, in the case of a trespasser.

There is a case reported that was brought before Maharam of Lublin. On account of the attacks of the Tartars on the border districts of Poland, the inhabitants of the District of Wolyn were obliged "to keep their dangerous weapons always ready for use against them", and to receive training from time to time in firing a gun. A certain Jew was training in his courtyard, firing at a marked target on the wall of his house, when a man came into the courtyard from the market, although the non-Jewish squad commander in charge of the Jew who was training, stood outside to warn passers-by not to enter the premises. He did so here, and warned the man not to enter his premises, but the man entered, a bullet hit him and he was killed. The man who fired the shot did not know that anyone had entered; and it was clear that he had no intention of injuring him. The man who had fired the shot came before Maharam to seek a legal ruling; in such cases the person who had caused the harm was usually ordered to go into exile, to fast and to perform additional penances. Taking into account the circumstances of the case, Maharam found it proper not to send him into exile, and one of the reasons given was that the deceased had himself contributed to the result because he had been warned not to enter the place (Responsa Maharam of Lublin, 43). Although there is no complete parallel between that case and the present case, because there

the owner of the premises performed an act endangering life, yet there is support, and partial authority for, the rule that a person who enters without permission, and particularly if he is warned not to enter, takes his life into his own hands and releases the other from his duty of care, and from the duty to see whether anyone is on the Premises.

It is true that according to Jewish law every person is obliged to fence every place that constitutes a danger to a man's life, even of a person who enters without permission, and Rambam lays down this rule, based on sources in the Torah and in the commentaries of the sages, in Chapter 11 of Hilchot Rotseah Ushmirat Nefesh :

> "Making a parapet on one's roof is a positive commandment, for Scripture says: 'Thou shalt make a parapet for thy roof'. . . . . whether it be one's roof or anything else that is dangerous and might possibly be a stumbling block to someone and cause his death - for example, if one has a well or a pit, with or without water, in his yard - the owner is obliged to build an enclosing wall ten handbreadths high, or else to put a cover over it lest someone fall into it and be killed. Similarly regarding any obstacle which is dangerous to life, there is a positive commandment to remove it and to beware of it, and to be particularly careful in this matter, for Scripture says: 'Take heed unto thyself and take care of thy life'. If he does not remove dangerous obstacles and allows them to remain, he disregards n positive commandment and transgresses the prohibition: Bring no blood."

However, while he "disregards a positive commandment and transgresses the prohibition: Bring no blood", he is not civilly liable for the injuries or the death of a person who entered his premises without permission, and he is also under no criminal liability, that being the great distinction between one who digs a pit on public property and one who digs on private property. A person is obviously forbidden to rear a dangerous dog within his house, unless it is held by chains of iron and tied to the permission and that dog bites him and even kills him, the owner of the dog is exempt from liability towards him (Shulhan Aruh, Hoshen Mishpat, 409). Save for a person who enters a craftman's house, it being customary to enter his house for his craft, for he enters with permission (see the observation

of Riva, quoted in the early commentaries and in Tur Hoshen Mishpat, Article 421), "even though he enters for nothing (with no intention of buying ?) the shopkeeper is liable, for he had to guard the life" of the person who entered (Haprisha, ibid). 1

Appeal allowed. Conviction and sentence set aside.

Judgment given on February 12, 1953.