



# Peter Veinot v. Kerr Addison Mines Ltd.

Susan Armatage

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Commentary

---

## Citation Information

Armatage, Susan. "Peter Veinot v. Kerr Addison Mines Ltd.." *Osgoode Hall Law Journal* 13.2 (1975) : 345-353.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol13/iss2/10>

This Commentary is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

## Case Comments

### **Peter Veinot v. Kerr Addison Mines Ltd.**

By SUSAN ARMATAGE\* \*\*

#### OCCUPIER'S LIABILITY

It is sometimes thought that the Supreme Court of Canada has embarked upon a new era. Certainly the signs of revitalization in what had been one of the nation's most stable institutions are unmistakable. Within the past three years the almost unbroken tradition of making the most senior member of the Bench Chief Justice upon the retirement of the incumbent Chief Justice has been shattered by the appointment of Justice Laskin, one of the most junior members of the Court, to succeed Chief Justice Cartwright. Shortly after that event took place the first full length, critical study of the Court and its work was published.<sup>1</sup> Even more recently the Supreme Court Act was amended to give the Court complete control in the selection of civil and criminal cases worthy of further hearing.<sup>2</sup> While these winds of change are blowing, the judgments of the Court can be examined not only for their impact on the law but also for the indications they give of the manner in which the Court's view of its role in the judicial process is evolving. On both of these points the recent case of *Peter Veinot v. Kerr Addison Mines Ltd.*<sup>3</sup> gives much food for thought.

*Veinot v. Kerr Addison* deals with what Professor Weiler has called "the tangled web of occupier's liability".<sup>4</sup> Its facts make it a classic example of the problems that have concerned courts in this area of tort law. The judgements rendered will undoubtedly be the source of Canadian doctrine on the question for the foreseeable future. Indeed, one might infer that the case was recognized by the Court as an opportunity to reconsider this branch of the law. Though the case in its essence is simply a claim for damages flowing from personal injury, all nine members of the Court sat on the appeal. This selection of cases for special treatment having regard to the substantive issues which they raise is apparently one of the policies which Laskin, C. J. has put into force. In a recent speech the Chief Justice commented on the problems which he

---

\* Miss Armatage is a student at Osgoode Hall Law School.

\*\* The author wishes to acknowledge the assistance of Professor Bucknall.

<sup>1</sup> P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974).

<sup>2</sup> S.C. 1974-75, c. 18.

<sup>3</sup> (1975), 51 D.L.R. (3d) 533 (S.C.C.).

<sup>4</sup> Weiler, *supra*, note 1 at 65.

faces in selecting benches and allocating judicial duties in the following terms:

What is the appropriate vehicle for the creative judicial act, what the case that calls for the innovative dissent, what piece of litigation calls for the summation and generalization of theretofore uncoordinated principles, is always a matter of nice judgement, perhaps of timing as well. . . . Each of the nine judges of the Court brings his own sense of the proportions of any case to its decision, and to the kinds of reasons that will express it.<sup>5</sup>

*Veinot v. Kerr Addison Mines* was apparently a case that, in the opinion of some members of the Bench, called for "the creative judicial act". It is undoubtedly the sort of case to which the Court will increasingly try to give its attention in the future as a result of the recent legislation limiting the cases before the Court to those which have been granted leave to appeal.

The facts of *Veinot v. Kerr Addison Mines* can be briefly stated. Peter Veinot, the plaintiff, was a snowmobiler, a careful, considerate driver and three years the President of a local snowmobile club which advocated control of the sport. On the night of March 16, 1970, Mr. Veinot, his wife and another couple were out for an evening of recreation on their snowmobiles, travelling along well packed trails at a moderate rate of speed. The snowmobile Mr. Veinot and his wife were on was equipped with special fog lights as well as ordinary lights. The party's course led them to a hydro right of way, down a logging road, and onto another road. This latter road was hard packed and well plowed. It was apparently suitable for and open to public travel. Indeed, to all appearances it was a public road and the extension of one of the streets of Virginiatown, a small hamlet in northern Ontario. In fact the road was privately owned by Kerr Addison Mines, the defendant. The road was on the defendant's property and was open to public passage only as a matter of courtesy. Stretched across this road and supported by unpainted posts was a rusty pipe. The pipe and its supports were invisible at night. The pipe itself was about at face height for a person seated on a snowmobile. Mr. Veinot, on the lead snowmobile, struck this pipe and sustained serious injuries.

The pipe in question had been in position for over twenty years. It became a danger to travellers only with the advent of snowmobiling in the area. The evidence showed that most snowmobilers veered off on a trail that ran at right angles to the road when they reached the pipe. One of the defendant's security officers had seen a few snowmobile tracks inside the area barred by the pipe but he had not mentioned this fact to his superiors.

The facts outlined founded a legal action which eventually reached the Supreme Court of Canada. Again, it is Professor Weiler whose perceptive analysis helps us to understand the position of the case before that Court. As he pointed out in discussing the general role of the Supreme Court:

There are many archaic doctrines which do not make headlines and do not find their way into the political arena. Cumulatively they can have a serious impact on the quality of our legal justice. Judges are constantly happening upon such doctrines in the course of litigation. They have the opportunity to do something

---

<sup>5</sup> Bora Laskin, *The Supreme Court of Canada* (1974), 8 L.S.U.C. Gazette 248 at 250.

about the injustice quickly and quietly. It is the same sheltered characteristic of our Supreme Court — the unhurried rational atmosphere of adjudication — that makes it a valuable forum for testing specific doctrines in the light of basic principles and smoothing off the rough edges which may be found.<sup>6</sup>

The rough edges in *Veinot v. Kerr Addison Mines* arise from the encrustation of doctrine that has grown up around the 1866 English case of *Indermauer v. Dames*.<sup>7</sup> Weiler uses this case to illustrate how a judge's words, in handling a routine case, can be given more weight in future cases than is justified. In this case, dealing with an invitee situation, the words "unusual danger" were used to indicate a danger a person would not expect to find and thus be unprepared to avoid. This idea was extended to the point where the outcome of the case might hinge on semantics and categorization of the injured party rather than on the responsibilities of the occupier.

If we assessed this problem in terms of the general principles of tort law, we would ask if the occupiers had reason to be aware that the visitor might be endangered by the condition of his premises and whether he could reasonably be expected to take some steps to prevent such an accident materializing.<sup>8</sup>

In the field of the occupier's liability, the first task of the judge came to be the characterization of the injured person as a trespasser, licensee, or invitee. Different standards of care attached to each of the categories. The law was most solicitous of persons who had a right to be in the place where the injury occurred. Invitees, the most favoured group, were to be saved from all harm. Licensees were to be protected from dangers foreseeable by the landowner. Fleming comments on these two categories:

The value of these distinctions between lawful entrants have been subjected to much criticism on the ground that they do not correspond to real differences in the reasonable claims to protection of persons who enter others' property, and introduce needless refinements into the solution of otherwise simple problems.<sup>9</sup>

The injustices flowing from these distinctions are patent. The fact that licensors are not responsible for dangers of which they are not aware means that the sloppier the occupier's habits of inspection, the less likely that an injured licensee will have any redress. "Clearly, the test of the licensor's duty puts a premium on negligence. . . ."<sup>10</sup>

Fleming does note, however, that there is a trend away from focusing attention solely on the characterization of the injured plaintiff and towards a consideration of what might reasonably be expected of the occupier. This trend may be furthered through legislation or judicial intervention.

A case which led to such legislation in England was *London Graving Dock v. Horton*,<sup>11</sup> where a rigid definition of the terms "unusual danger" led to a great injustice to the plaintiff. A welder aboard a ship sustained injuries

---

<sup>6</sup> Weiler, *supra*, note 1 at 46.

<sup>7</sup> (1866), L.R. 1 C.P. 274.

<sup>8</sup> Weiler, *supra*, note 1 at 67.

<sup>9</sup> J. G. Fleming, *The Law of Torts* (4th ed. Sydney: Law Book Co., 1971) at 378.

<sup>10</sup> *Id.* at 397.

<sup>11</sup> [1951] A.C. 737 (H.L.).

directly due to the ship owner's negligence but could get no damages because the words "unusual danger" were interpreted by the House of Lords to mean something of which the welder would have no knowledge. As he had complained that the scaffolding on which he was working was unsafe, this meant that the welder had knowledge of it and that it was no longer unusual. The obvious inequity of this decision focused attention on the problem and led to the passage of the *Occupier's Liability Act, 1957*<sup>12</sup> which emphasizes a "common duty of care" owed by an occupier to his visitors whether they be invitees or licensees.

From the plaintiff's point of view, the third and least preferred category in occupier's liability cases is that of trespasser. In light of the confusion in this branch of the law, the obstacles to recovery by the injured trespasser would seem almost insurmountable.

The trouble starts with the all too embracing definition of a trespasser, which includes any person who happens to enter someone else's land without consent or privilege.<sup>13</sup>

It is understandable that a trespasser who has entered the land with intent to commit an unlawful act or who has deliberately circumvented obstacles keeping him from the danger would find it difficult to collect for injuries not deliberately inflicted by the occupier. However, many trespassers are people who have blundered onto the land by accident or assumed it was all right to be there.

. . . [E]xcusing the occupier on the ground that the victim turned out to be a trespasser rather than a lawful visitor confers on him a windfall, completely unrelated to any functional consideration such as whether imposing a duty would add to his burden of maintenance.<sup>14</sup>

A historical overview of decisions regarding trespassers in occupier's liability cases shows, nonetheless, a trend toward placing responsibility on the occupier for maintaining his premises in a safe manner.

In British decisions the narrow position is clearly shown in *Robert Addie and Sons (Collieries) Ltd. v. Dumbreck*<sup>15</sup> where Viscount Dunedin says ". . . the line that separates each of these three classes is an absolutely rigid line."<sup>16</sup> In this case a father was unable to recover damages when his four year old son, killed when entangled in a machine, was ruled to be a "trespasser" on the company's land.

The harshness of this reasoning came to be circumvented by the doctrine of "implied licence". If an occupier knew that people were using his land and took no steps to prevent such use, it would be inferred that these people had the occupier's permission and were thus licensees. This doctrine allowed

---

<sup>12</sup> 5 & 6 Eliz. 2, c. 31 (U.K.).

<sup>13</sup> Fleming, *supra*, note 9 at 400.

<sup>14</sup> *Id.* at 403.

<sup>15</sup> [1929] A.C. 358 (H.L.).

<sup>16</sup> *Id.* at 371.

the judges to stay within established principles and yet reach the decision they wanted.<sup>17</sup>

Fleming comments on *Lowery v. Walker*,<sup>18</sup> a case which used the implied licence doctrine:

Despite the finding of the trial judge that he was trespasser, the House of Lords allowed him recovery on the ground that the defendant had acquiesced in the public use of the track. This decision illustrates a favourite technique of raising the standard of protection for trespassers, without openly departing from the traditional rules, by calling the plaintiff what he clearly is not, i.e. a licensee. However distasteful, this devious practice will retain its pull until it becomes permissible frankly to admit a duty of care for trespassers in suitable cases.<sup>19</sup>

Thus one sees the weakness of the implied licence doctrine. Although it achieves the desired result, it fails to confront the real problem of providing adequate protection for all people, including trespassers, who sustain injuries through the negligence of others.

More recent decisions have avoided the implied licence doctrine and awarded damages to persons who are clearly trespassers. The test has become one of foreseeability:

In principle a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming in the proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge.<sup>20</sup>

In *British Railways Board v. Herrington*,<sup>21</sup> decided within the context of Britain's *Occupier's Liability Act, 1957*, we see a direct consideration of the trespasser issue with a resulting subjective test:

So the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which could have avoided it.<sup>22</sup>

A similar line of development can be traced in American decisions. The old position regarding trespassers can be found in *American Jurisprudence*:

Whether the entry is made for an illegal or wrongful purpose, or for an innocent purpose, or with no apparent purpose . . . or even by mistake, or mischance, has

---

<sup>17</sup> See *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229 (H.L.), where damages were awarded to a child injured in a railway turnstile: "The duty the owner of the premises owes to the person to whom he gives permission to enter upon them must . . . be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of these persons." (at 228 *per* Lord Atkinson). See also *Excelsior Wire Rope Co. Ltd. v. Callan*, [1930] A.C. 404 (H.L.).

<sup>18</sup> [1911] A.C. 10 (H.L.).

<sup>19</sup> Fleming, *supra*, note 9 at 401.

<sup>20</sup> *Commissioner for Railways (N.S.W.) v. Cardy* (1960), 104 C.L.R. 274 (Aust. H. Ct.). Damages were awarded to a boy burned in an ash dump though he was clearly a trespasser. See also *Videan v. British Transport Commission*, [1963] 2 Q.B. 650 (C.A.).

<sup>21</sup> [1972] A.C. 877 (H.L.).

<sup>22</sup> *Id.* at 899 (*per* Lord Reid).

usually been considered immaterial where the courts adhere to the traditional common law position.<sup>23</sup>

However, in *Edgerton v. H. P. Welch Co.*<sup>24</sup> it was stated that:

. . . the trend of modern authority is that an uninterested intrusion upon the land in possession of another does not constitute a trespass.

This case used the American Law Institute's *Restatement of Torts* rule that an intruder is not a trespasser, for the purposes of liability to the landowner in an action for trespass, if his entry is unintentional and non-negligent.<sup>25</sup> In *Gould v. De Beve*,<sup>26</sup> the court found that calling a person a trespasser did not prevent damages being awarded when a child sustained injuries in a fall.<sup>27</sup>

The trend towards focusing on what could reasonably be expected from the occupier is illustrated by three American cases. In *Imre v. Riegel Paper Corp.*<sup>28</sup> a man fell through the surface of a dumping ground into hot coals. Heher, J. said it was unnecessary to find he was an implied licensee:

However, it may be phrased, this doctrine of liability for hurt to others is basic to common law. Where an act carelessly done would be highly dangerous to the personal safety of others, the common law raises a 'public duty' of care commensurate with the risk of harm.<sup>29</sup>

In *Beaston v. James Julian Inc.*<sup>30</sup> it was stated, "It is a general rule that ordinary care must be exercised to prevent injury to a trespasser whose presence upon the premises is reasonably expected." And finally, in a case showing the interrelationship between English and American doctrine, *Green Springs, Inc. v. Calvera*,<sup>31</sup> the judge quoted from the English case of *Heaven v. Pender*,<sup>32</sup> saying,

Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.<sup>33</sup>

<sup>23</sup> 62 Am. Jur. 2d., Premises Liability, s. 55.

<sup>24</sup> (1947), 321 Mass. 603; 74 N.E. 2d 674. See also *Videan v. British Transport Commission*, [1963] 2 Q.B. 650 (C.A.) at 666: "You must take into account also the character of the intrusion by the trespasser. A wandering child or a straying adult stands in a different position from a poacher or burglar." (*per* Lord Denning, M.R.).

<sup>25</sup> American Law Institute, *Restatement, Second, Torts* s. 158, comment f and s. 166, comment b.

However this position is questioned in 62 Am. Jur. 2d., Premises Liability, s. 56: "The 'modern trend' perceived by the court in the Edgerton case does not seem to have had noticeable effect on the law regarding the status of trespassers whose entry was unintentional, or the duty owed them."

<sup>26</sup> (1964), 117 App. D. C. 360; 330 F. 2d 826.

<sup>27</sup> This decision has been questioned on the ground that it was based largely on a statute unique to that state.

<sup>28</sup> (1957), 24 N.J. 438; 132 A. 2d 505.

<sup>29</sup> *Id.* at 505 (A. 2d).

<sup>30</sup> (1956), 49 Del. 521; 120 A. 2d 317.

<sup>31</sup> (1970), 239 So. 2d 264 (Fla.).

<sup>32</sup> (1883), 11 Q.B.D. 503.

<sup>33</sup> *Id.* at 509 (*per* Brett, M.R.).

Thus we find that at the time *Veinot v. Kerr Addison Mines* came to the courts, the trespasser was gradually being recognized as worthy of aid under the law for any injuries he might suffer and the duty of the occupier was being enlarged to embrace a "duty of common care". In *Veinot* the Supreme Court of Canada was given the opportunity to exercise its uniquely judicial power of both criticizing and building the law.

The virtue of the common law process is that it will permit judicial revision of this area of law without a sudden and total break with the past. . . . As long as a court understands the direction in which the law should be moving, a view which it can discern from reflection on the themes of the law of torts generally, it can begin to rework each of the special doctrines as they are brought up in a particular case and gradually bring them into line with the overall drift of tort liability. After the judicial system has had sufficient experience with this effort, the groundwork will be laid for the adoption of the basic principles of negligence law, without any offence to important legal values.<sup>34</sup>

At the trial level the case was decided for *Veinot* with the jury finding he was an implied licensee. However, on appeal to the Ontario Court of Appeal,<sup>35</sup> the decision was reversed on the ground that there was not enough evidence to show implied license. Arnup, J. A., stated:

Whether the test of the extent of knowledge on the part of the occupier which is required before an inference of implied licence can be drawn is that the presence of trespassers was 'likely', 'extremely likely', 'a substantial probability', or 'as good as knows', the evidence in this case falls short of what is required.<sup>36</sup>

Even though many of the cases cited in the appeal judgement were ones which represented the view that trespassers do not need new labels in order to be compensated for injuries, Their Lordships relied on the doctrine of implied licence in reaching a conclusion on the facts.

At the Supreme Court of Canada a majority of the judges agreed on the validity of the new doctrine which would obviate reliance on the legal function of implied licence, but they disagreed on its application to the case. Indeed, the majority was not unanimous in the adoption of the principle of a duty of care towards trespassers.

The majority decision was given by Dickson, J. with concurrence by Spence, J. and Laskin, C. J. Pigeon and Beetz, JJ. concurred in the result while carefully refraining from comment on the question of a standard duty of care. The dissent was given by Martland, J. with concurrence by Judson, Ritchie and de Grandpré, JJ.

In his judgment Dickson, J. traces the two lines of jurisprudence which have evolved concerning the occupier's liability toward trespassers.

One perpetuated the letter and spirit of [*Robert Addie and Sons (Collieries) Ltd. v. Dumbreck*]. . . . The other gave effect to changing ideas of social responsibility and imposed upon the owner of land duties well beyond those in contemplation in *Addie's* case.<sup>37</sup>

---

<sup>34</sup> Weiler, *supra*, note 1 at 70-71.

<sup>35</sup> [1973] 1 O.R. 411 (Ont. C.A.).

<sup>36</sup> *Id.* at 416.

<sup>37</sup> (1975), 51 D.L.R. (3d) 533 at 549.

Dickson, J. clearly suggests that the doctrine of implied licence is obsolete:

In some of the cases the landowner's consent was implied or imputed . . . , the status of the intruder being elevated from that of a trespasser, which he clearly was, to that of licensee, which he clearly was not.<sup>38</sup>

He then shows he is ready to adopt the more liberal analysis of the occupier's duty toward trespassers and mentions four points from Lord Denning's judgment in *Pannett v. McGuinness & Co. Ltd.*<sup>39</sup> which a judge should consider in this type of case. These are: the gravity and likelihood of probable injury, the character of the intrusion, the nature of the place where the trespass occurs and the defendant's knowledge of the trespasser's presence. The general rule is that an occupier is bound to treat a trespasser according to the dictates of "common humanity".<sup>40</sup>

Thus Dickson, J. has considered the problem of liability towards a trespasser squarely and has refused to be constrained by the legal fiction of implied licence. His judgment leads one to conclude that there has been a change in judicial focus from the status of the injured man to the duty of the occupier to protect everyone from injury on his property. In deciding trespasser cases the judiciary will have to reach decisions on such issues as foreseeability, likelihood of injury and other tests as suggested by Lord Denning.

Martland, J., in a long and carefully reasoned dissent, also reviewed the existing jurisprudence with regard to occupier's liability. Like Dickson, J., he concluded that *Addie's* case is no longer a fundamental definition of the law in the area. His summary of the rule with regard to occupier's liability was that

an occupier who knows of the existence of a danger upon his land which he has created, or for whose continued existence he is responsible, may owe a duty to persons coming on his land, of whose presence he is not aware, if he knows facts which show a substantial chance that they might come there.

The duty, in Martland, J.'s eyes, is somewhat less stringent than that owed to persons lawfully on the land. It is variously referred to as a duty "to act in a humane manner"<sup>41</sup> or as Lord Pearson put it in *British Railways Board v. Herrington*<sup>42</sup> "a duty to treat the trespasser with ordinary humanity."<sup>43</sup> In Martland, J.'s view no duty was established in this case because there was no evidence that the defendant knew that the land was being used in such a way as to raise a danger.

I have already referred to the absence of any evidence to establish any knowledge by the company that anyone had operated a snowmobile as Veinot did, along the private road from the powder magazine area to the gate.<sup>44</sup>

The Supreme Court of Canada as a body has now examined the law of occupier's liability. Both the majority and dissenting opinions are carefully

---

<sup>38</sup> *Id.*

<sup>39</sup> [1972] 3 W.L.R. 386 (C.A.).

<sup>40</sup> (1975), 51 D.L.R. (3d) 533 at 551.

<sup>41</sup> *Id.* at 541.

<sup>42</sup> [1972] A.C. 877.

<sup>43</sup> (1975), 51 D.L.R. (3d) 533 at 540.

<sup>44</sup> *Id.* at 548.

considered and drafted. Both move the law in Canada forward. As Weiler pointed out:

Judges do have an independent influence on the evolution of our law. If their craftsmanship deteriorates, we, the consumers of that law, will suffer. . . . The decisions of the Supreme Court of Canada can have a real impact on the quality of our law and our lives.<sup>45</sup>

The difficulty is that the impact of this decision is diluted. If the five majority judges had agreed upon the validity of the newer doctrine, or if the minority, which accepted the new doctrine, had seen fit to apply it to the facts of this case, the impact would have been greater. While both Martland, J. and Dickson, J. adopt a "common humanity" test of obligation to persons on the land of another, Dickson, J. does not discuss the relationship of this obligation to the obligation owed to invitees and licensees. Martland, J. suggests that the old categories retain some validity but that the rigid definition of the obligation to trespassers must be rethought.

The problem is, of course, that it is hard to find guidance in the judgment about where the law will go. Every year snowmobilers across the country unwittingly drive into old wire fences — many of them sustaining serious injury. Does the test of "common humanity" help them assess the liability of the occupier of the land? If a future court wishes to offer more protection to occupiers should it draw upon the words of Dickson, J. or from the decision of Martland, J.? The bright thread of "common humanity" has been added to the "tangled web of occupier's liability" but the tangle remains.

---

<sup>45</sup> Weiler, *supra*, note 1 at ix.