OCCUPIERS' LIABILITY REFORM IN WESTERN AUSTRALIA – AND ELSEWHERE

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All Australian lawyers will be familiar with the difficulties of the common law of occupiers' liability, under which the nature of the duty owed by the occupier to persons injured on premises as a result of the defective state of the premises depended on whether the injured person was to be categorized as an invitee, a licensee, a person entering as of right, a person entering under a contract or a trespasser. This produced many tenuous distinctions, as the courts struggled to achieve just results within the limitations of the traditional categories. The law in Western Australia remained in this unsatisfactory state until 25 November 1985, when the *Occupiers' Liability Act, 1985* came into effect.[1] Western Australia thus became the second Australian jurisdiction to enact reforming legislation based on the model first adopted in England in 1957,[2] joining Victoria which had enacted legislation in 1983.[3] Since then, South Australia has also enacted an Occupiers' Liability Act,[4] and reform is under consideration in several other Australian jurisdictions.[5]

Meanwhile, however, the common law has not stood still. Since the 1950s the High Court has attempted to overcome the limita-

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1. The Act received the Royal Assent on 28 October 1985. As a result of the *Interpretation Act, 1984* (W.A.) s. 20(2), the Act came into effect on the 28th day after assent.
2. *Occupiers' Liability Act, 1957* (Eng.).
3. *Occupiers' Liability Act, 1983* (Vic.), inserting Part IIA in the *Wrongs Act, 1958* (Vic.).
4. *Wrongs Act Amendment Act, 1987* (S.A.), inserting Part IB in the *Wrongs Act, 1936* (S.A.).
5. For details see note 25 below.

tions of the common law by finding ways in which an ordinary duty of care based on the *Donoghue v. Stevenson*[6] neighbour principle can be attached to the occupier. Important steps forward were taken in 1984 and 1985 in the decisions in *Hackshaw v. Shaw*[7] and *Papatonakis v. Australian Telecommunications Commission.*[8] Deane, J., was a step in front of the other members of the court: in his judgments in both cases he ventured to suggest that the special duties owed by the occupier were in all cases simply the ordinary duty of care.[9] In *Australian Safeway Stores Pty Ltd v. Zaluzna*[10] the High Court has now adopted his view. *Donoghue v. Stevenson* has thus flowed into the area of occupiers' liability, and has, it appears, submerged the special common law.

While those jurisdictions considering legislative reform may well now pause for thought, the effect of the *Australian Safeway* case in jurisdictions such as Western Australia, where the *Occupiers' Liability Act* is already on the statute book, will be rather different. This article therefore seeks to do two things: first, to examine the Western Australian *Occupiers' Liability Act* and compare it with the legislation in other jurisdictions; and second, to assess the effect of the common law developments on the current Western Australian law.

The Occupiers' Liability Act

1. Introduction

> *[The Occupiers' Liability Act] has been very beneficial. It has rid us of those two unpleasant characters, the invitee and the licensee, who haunted the courts for years, and it has replaced them by the attractive figure of a visitor, who has so far given no trouble at all.*[11]

Before 1957, the common law of occupiers' liability in England, as in all the common law jurisdictions, was dominated by the special categories described above. For some years, however, there had been a general feeling that the law was in need of reform, particularly as a result of several House of Lords decisions in the 1940s and

6. [1932] A.C. 562.
7. (1984), 155 C.L.R. 614.
8. (1985), 156 C.L.R. 7.
9. See especially (1984), 155 C.L.R. 614, at 655-57; (1985), 156 C.L.R. 7, at 32-33.
10. (1987), 69 A.L.R. 615.
11. Lord Denning, M.R., in *Roles v. Nathan*, [1963] 2 All E.R. 908, at 912, speaking of the *Occupiers' Liability Act, 1957* (Eng.).

1950s,[12] and in 1952 the matter was referred to the Law Reform Committee. The Committee reported in 1954,[13] and recommended, "that the law can and should be simplified by the abolition of the existing categories of invitees and licensees, and the substitution of one uniform duty of care owed by the occupier of premises to all persons coming upon them at his invitation or by his permission, express or implied".[14] The Committee's recommendations were implemented by the *Occupiers' Liability Act, 1957.* The Act has now been in operation for 30 years, and has proved a complete success.[15] The comments of Lord Diplock, who, as a member of the Committee, submitted a dissenting report, should be noted:

> [M]y dissenting report — thank goodness — did not play any weight at all and they passed the Occupiers' Liability Act ..., and it has been going now for twelve years and it has worked like a charm — none of the difficulties that I expected ... have arisen.[16]

Three years after the passing of the English Act, the *Occupiers' Liability (Scotland) Act, 1960* went even further. The English Act had applied the common duty of care only to lawful visitors, leaving trespassers to be dealt with by the common law — which at the time provided that an occupier owed only the duty not to cause intentional or reckless harm to trespassers known to be present.[17] The Scottish Act, while generally based on the English Act, extended the common duty of care to all visitors, lawful or otherwise.[18]

12. Particularly *London Graving Dock Co v Horton*, [1951] A.C. 737; and *Thomson v Cremin* (1941), 71 Ll. L. Rep. 1, [1953] 2 All E.R. 1185
13. Law Reform Committee, *Third Report Occupiers' Liability to Invitees, Licensees and Trespassers*, Cmd. 9305 (1954)
14. Ibid., para. 78.
15. For textbook treatments of the English Act see Clerk and Lindsell, *Torts,* 15th ed. (1982), ch. 12; Winfield and Jolowicz, *Tort,* 12th ed. (1984), ch. 9; Salmond and Heuston, *Law of Torts*, 18th ed. (1981), ch 11; Street, *Law of Torts*, 7th ed. (1983), 173-195; Charlesworth, *Negligence*, 7th ed. (1983), ch. 7; North, *Occupiers' Liability* (1971); and Holyoak and Allen, *Civil Liability for Defective Premises* (1982), ch. 2. Periodical literature on the Act includes D.J. Payne, "The Occupiers' Liability Act" (1958), 21 Mod. L. Rev. 359; D. Macintyre, "The Occupiers' Liability Act 1957," [1958] J. Pub. L. 10, and 93; F.J. Odgers, "Occupiers' Liability: A Further Comment," [1957] Camb. L.J. 39; P.M. North, "Damage to Property and the Occupiers' Liability Act 1957" (1966), 30 Conv. 264; C.R. Symmons, "How Free is the Freedom of the Occupier to Restrict or Exclude His Liability in Tort?" (1974), 38 Conv. 253; R.W Hodgin, "Exclusions and Warnings Under the Occupiers' Liability Act" (1974), 25 N.I.L.Q. 105.
16 At the Sixteenth Australian Legal Convention, Melbourne, 1971: (1971), 45 A.L.J. 569.
17 *Robert Addie & Sons (Collieries) v Dumbreck*, [1929] A.C. 358.
18. Law Reform Committee for Scotland, *1st Report Occupiers' Liability* (Cmnd 88, 1957); on the Scottish Act, see Walker, *Delict*, 2nd ed., (1981), 578-99; B.M.E. McMahon, "Occupiers' Liability in Scotland" (1972), 7 Ir. Jur. 264.

The English and Scottish Acts have been the model for Occupiers' Liability Acts in various other common law jurisdictions.[19] Some follow the English Act in extending the duty of care only to lawful visitors, but the majority follow the Scottish Act in setting out a comprehensive duty applying to all visitors including trespassers. Even in England, trespassers have now been brought within the ambit of the legislation: the common duty of care of the 1957 Act was extended to trespassers by the *Occupiers' Liability Act, 1984*.[20] In the meantime, the common law had moved forward by raising the occupier's duty to a trespasser to a duty to act with common humanity.[21] The substitution of the common duty of care in fact made little difference.[22]

In contrast to the general acceptance of the Occupiers' Liability Act reform in the United Kingdom, New Zealand and Canada, until recently the cause of occupiers' liability reform had made very little headway in Australia.[23] In 1983, however, Victoria enacted its *Occupiers' Liability Act*, which was based on a report of the Victorian Chief Justice's Law Reform Committee.[24] This was follow-

19. Northern Ireland: *Occupiers' Liability Act (Northern Ireland), 1957,* Eire· *Occupiers' Liability Act, 1972*; New Zealand: *Occupiers' Liability Act, 1962*; Alberta: *Occupiers' Liability Act, 1973*; British Columbia: *Occupiers' Liability Act, 1974*; Ontario: *Occupiers' Laibility Act, 1980*; Manitoba: *Occupiers' Liability Act, 1983.* The British Columbia and Manitoba Acts are based on the Canadian Uniform Occupiers' Liability Act 1973. On the Northern Ireland Act, see F.H. Newark, "The Occupiers' Liability (Northern Ireland) Act 1957" (1958), 12 N.I.L.Q. 203; on the Canadian Acts, see Linden, *Canadian Tort Law*, 3rd ed. (1982), ch. 18; and B.M.E. McMahon, "Occupiers' Liability in Canada" (1973), 22 I C.L.Q. 515. In this article the various Occupiers' Liability Acts will be referred to simply by the name of the jurisdiction concerned. In the case of England, "England" denotes the *Occupiers' Liability Act, 1957*

20. The method of amendment is rather unsatisfactory. Instead of amending the 1957 Act, which applied to "visitors" and defines "visitors" to be invitees and licensees (section 1(2)), contractual entrants (section 5(1)), and entrants as of right (section 2(6)), the 1984 Act provides that it regulates the occupier's duty to "persons other than ... visitors", i.e. trespassers and certain other cases (section 1(1)(a)): see text to nn. 46-52 below.

21. *British Railways Board v Herrington*, [1972] A.C. 877; *Southern Portland Cement v Cooper*, [1974] A.C. 623.

22. On the English 1984 Act, see R.A. Buckley, "The Occupiers' Liability Act 1984 — Has Herrington Survived?" [1984] Conv. 413; M.A. Jones, "The Occupiers' Liability Act 1984" (1984), 47 Mod. L. Rev. 713; M.A. Haley, "The Uninvited Entrant and the Occupiers' Liability Act 1984" (1984), 81 L. Soc'y Gaz. 1594; A. Samuels, "The Occupiers' Liability Act 1984" (1984), 128 Sol J. 308.

23. Despite recommendations made by two Law Reform Commissions: New South Wales Law Reform Commission, *Working Paper on Occupiers' Liability* (WP 3 1969); South Australian Law Reform Committee, *Report Relating to the Reform of the Law of Occupiers' Liability* (24th Report, 1973).

24. *Report on Occupiers' Liability* (1982). On the Victorian Act, see R. Johnstone, "The Occupiers' Liability Act 1983 (Vic): Sanity Restored?" (1984), 14 Melb. U. L. Rev. 512.

ed in 1985 by the Western Australian Act, the subject of this article. There has now been something of an explosion of law reform, as other Australian jurisdictions attempt to make up for their inactivity in this area over the past 30 years. In 1987, South Australia enacted an Occupiers' Liability Act and reform was under consideration in the Australian Capital Territory, New South Wales and Tasmania.[25]

In Western Australia, in contrast to the position in most other jurisdictions which have enacted occupiers' liability legislation, the Occupiers' Liability Act was drafted without a formal reference to a law reform commission. Following an incident in which a lady slipped and injured herself in a shopping arcade,[26] the then Attorney General asked the Law Reform Commission of Western Australia whether the matter was one which should be referred to it. The Commission suggested that, in view of the fact that many other common law jurisdictions had Occupiers' Liability Acts which conformed to a common model, and the number of reports on the subject by other law reform commissions, it should be possible to draft a suitable Occupiers' Liability Act without a formal reference. The *Occupiers' Liability Act, 1985* was accordingly drafted by Parliamentary Counsel in consultation with the Crown Law Department. Officers of the Law Reform Commission provided assistance on an informal basis.[27] Throughout, the objective was to produce an Act generally consistent with existing legislation elsewhere.

2. Application of the Act

The key provisions in the Western Australian Act are sections 4 and 5. Section 5 imposes a duty on the occupier of premises and section 4 states the ambit of that duty.

25. See Australian Law Reform Commission, *Occupiers' Liability* (Discussion Paper No. 28, 1987); Tasmanian Law Reform Commission, *Research Paper on Occupiers' Liability Law* (by M. Atkinson) (1984). In New South Wales the enquiry is being carried out by the Attorney General's Department with the assistance of the New South Wales Law Reform Commission.

26. The occupiers claimed only to owe her the duty owed to a licensee: *Fairman v Perpetual Investment Building Society*, [1923] A.C. 74; *Jacobs v London County Council*, [1950] A.C. 361.

27. The author of this article, as Executive Officer and Director of Research of the Law Reform Commission of Western Australia, was one of those who assisted in this way. He wishes to make it clear that the views expressed in this article are personal views, and are in no way intended to represent the views of the Law Reform Commission of Western Australia, Parliamentary Counsel or the Crown Law Department.

Section 4 (which was generally based on the equivalent provision in the Scottish Act[28]) provides as follows:

(1) Sections 5 to 7 shall have effect, in place of the rules of the common law, for the purpose of determining the care which an occupier of premises is required, by reason of the occupation or control of the premises, to show towards a person entering on the premises in respect of dangers —
  (a) to that person; or
  (b) to any property brought on to the premises by, and remaining on the premises in the possession and control of, that person, whether it is owned by that person or by any other person,

  which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier of premises is by law responsible.

(2) Nothing in sections 5 to 7 shall be taken to alter the rules of the common law which determine the person on whom, in relation to any premises, a duty to show the care referred to in subsection (1) towards a person entering those premises is incumbent.

(a) *An occupier of premises*

The person on whom section 4 imposes the duty of care set out in section 5 is an "occupier of premises". This expression is more fully defined in section 2, which provides that an occupier of premises means a person occupying or having control of land or other premises,[29] but the most important guide to the meaning of this expression is section 4(2), which provides that nothing shall be taken to alter the rules of the common law which determine the person on whom, in relation to any premises, a duty to show care towards a person entering those premises is incumbent.

The persons who are occupiers of premises for the purpose of the Act are, therefore, the persons who were occupiers of premises at common law. Thus under the Act an occupier can be an owner in occupation, a tenant,[30] a licensee[31] or any person who has the right to possession of the premises and the right to invite or per-

28. S. 1.

29. This is the standard definition found in the equivalent of section 4 in most Occupiers' Liability Acts: see, e.g., Scotland s. 1(1), Ontario s. 1(a), South Australia s. 17b; and cf. England s. 1(2). Cf. Victoria s. 14A(a), which does not contain a comprehensive definition of "occupier of premises".

30. Where there is a landlord-tenant relationship, the occupier of the tenanted premises is the tenant and not the landlord. The landlord does not retain sufficient occupation or control, whether or not he or she has an obligation to repair. The landlord's liability is dealt with by s. 9, as to which see text accompanying nn. 128-142 below.

31. *Wheat v. E Lacon and Co.*, [1966] A.C. 552.

mit any other person to come on to them.[32] Occupation may be temporary, as in the case of a contractor on the land for a limited period.[33] Occupation may be vested in a public body such as a local authority.[34] Occupation is not necessarily exclusive: the same parts, or different parts, of the same premises may be occupied by different occupiers.[35]

(b) *Premises*

"Premises" includes any fixed or movable structure, including any vessel, vehicle or aircraft.[36] The expression is not further defined but it is clear that it has the same meaning as at common law. Thus it includes land, as well as buildings on land.[37] Movable structures would include such things as builders' ladders, staging and scaffolding.[38] Movable structures are to be distinguished from moving structures, such as lifts, which would normally be regarded as part of a fixed structure.[39] As for "vessels, vehicles and aircraft", there was liability at common law

32. Such as the concessionaire of space at a fairground: *Humphreys v Dreamland (Margate)* (1930), 100 L.J.K.B. 137.

33. *Hartwell v. Grayson Rollo and Clover Docks*, [1947] K.B. 901; *Duncan v Cammell Laird and Co.*, [1943] 2 All E.R. 621 (reversed on other grounds, [1946] A.C. 401) (common law); *Bunker v. Charles Brand and Son*, [1969] 2 Q.B. 480 (on the English *Occupiers' Liability Act*).

34. E.g. *Harris v. Birkenhead Corp.*, [1976] 1 All E.R. 341 (the local authority was the occupier of a house that had been compulsory acquired); *Schiller v. Mulgrave Shire Council* (1972), 129 C.L.R. 116 (the authority was occupier of a bushland nature reserve vested in it as trustee for the public). However, a highway authority is not regarded as the occupier of a public road or footpath: *Whiting v. Hillingdon London Borough Council* (1970), 68 L.G.R. 437, and highway authorities are still, under the present law, immune from liability for injuries caused by failure to maintain or repair the highway: see Western Australian Law Reform Commission, *Report on the Liability of Highway Authorities for Non-Feasance* (Project No. 62, 1981), recommending the removal of this immunity.

35. *Wheat v. E. Lacon and Co*, [1966] A.C. 552, in which it was held that a firm of brewers, the owner of an inn, were occupiers of the whole of the premises, through their servants, the licensees, and that the licensees in their personal capacity were occupiers of the residential part of the premises; and *Fisher v. C.H T* , [1966] 2 Q.B. 475, in which it was held that the proprietors of a club and the managers of a restaurant on the club premises were both occupiers of the restaurant. Both were decisions under the English *Occupiers' Liability Act.*

36. S. 2. This is the standard definition found in equivalent sections in most Occupiers' Liability Acts – see, e.g., England s. 1(3)(a); Scotland s. 1(3)(a); Ontario s. 1(b); Victoria s. 14A(b); South Australia s. 17b.

37. North, *Occupiers' Liability* (1971), 44.

38. Ibid., 46-48.

39. E.g., *Haseldine v C.A. Daw and Son*, [1941] 2 K.B. 343.

for the defective condition of ships,[40] planes,[41] trains[42] and motor vehicles.[43] There is no doubt that the position would be the same under the Acts.

(c) *Persons entering on the premises*

The duty imposed on the occupier of premises by section 5 is owed to "persons entering on the premises". All such persons are now owed the same duty. It is here that the impact of the occupiers' liability legislation is greatest. Under the old law, each category of entrant was owed a different duty, and it was necessary to determine the category into which the particular entrant fell. Much case law accumulated on the distinctions between the categories, and the nature of the duty owed to each type of entrant.[44] This can now be consigned to the legal history books. The duty now owed to all entrants is probably not much different from that formerly owed to contractual entrants and invitees (except for the limitation, in the case of the invitee, that the damage had to arise from an unusual danger). Licensees and trespassers are a good deal better off — though, in the case of trespassers, subject to the limitations of section 5(3).[45]

The Western Australian Act has adopted the approach of the Scottish Act and most other Occupiers' Liability Acts in including within its scope all entrants, and not merely lawful visitors.[46] In this respect, section 4 of the Western Australian Act should be carefully compared with its equivalent in the English Act, section 1. Though similar to section 4 in other respects, section 1 of the English Act deals only with the occupier's duty to the persons who at common law would be the occupier's invitees or licensees. Persons entering as of right are to be treated as persons permitted to be there, that is as lawful visitors.[47] A separate part of the Act,

40. E.g., *Duncan v Cammell Laird and Co.*, [1943] 2 All E.R. 621, reversed on other grounds [1946] A.C. 401.
41. E.g., *Fosbroke-Hobbes v Airwork*, [1937] 1 All E.R. 108.
42. E.g., *Foulkes v Metropolitan District Railway Co.* (1880), 5 C.P.D. 157.
43. E.g., *Lomas v M. Jones and Son*, [1944] K.B. 4.
44. See, e.g., Fleming, *Law of Torts*, 6th ed. (1983), ch. 21; Trindade and Cane, *Law of Torts in Australia* (1985), ch. 14.
45. See text accompanying nn. 103-107 below.
46. See Scotland s. 2(1); Ontario s. 3(1); Victoria s. 14B(3); South Australia s. 17c(1).
47. S 2(6).

dealing with contractual visitors, provides that, in the absence of an express duty set out in the contract, they are owed the common duty of care.[48] Some persons are deemed not to be visitors.[49] Persons exercising public rights of way are not visitors,[50] but the occupier still owes a common law duty to such a person[51] and, of course, trespassers are not visitors.

The complexities of the English approach are shown by *Holden v. White*,[52] in which a milkman was injured on a path running through X's land when delivering milk to the house of Y. Y's house could only be reached via this path, and Y had a right of way over it. It was held that X was not liable for the milkman's injuries. Though he was injured on X's premises, he was not X's visitor.

The 1984 Act has now attempted to patch up the deficiencies of the 1957 Act. The common duty of care of the 1957 Act is now owed also to "persons other than visitors" — who include persons exercising rights of way, such as the plaintiff in *Holden v. White*, and trespassers. Thus, in providing that the same duty is owed to all entrants, rather than trying to distinguish a category of "lawful visitors", the Western Australian Act is simpler than, and preferable to, the English legislation.

(d) *Dangers*

The duty imposed on the occupier of premises by the Act is in respect of dangers to persons entering on the premises or, in the circumstances set out in section 4(1)(b), dangers to property, whether of the entrant or a third party. In other words, the Act encompasses liability for personal injury or damage to property. The position under the other Occupiers' Liability Acts is similar.[53] There would be liability for damage to property even where there

48. S. 5(1).

49. Such as persons entering premises in exercise of rights conferred by the *National Parks and Access to the Countryside Act, 1949* (Eng.): see England s. 1(4).

50. *Greenhalgh v British Railways Board*, [1969] 2 Q.B. 286; *Holden v White*, [1982] Q.B. 679.

51. *Thomas v British Railways Board*, [1976] Q.B. 912.

52. [1982] Q.B. 679.

53. See England s. 1(3)(b); Scotland s. 1(3)(b); Ontario s. 3(1); South Australia s. 17c(1). Contrast Victoria, which appears to be limited to personal injury: s. 14B(3).

is no personal injury.[54] Economic loss flowing from damage to property will be recoverable in appropriate circumstances.[55] It is hard to see how economic loss not consequential on damage to property can arise out of breach of the statutory duty of care imposed by the Occupiers' Liability Act.

As for damage to property, the Act makes it clear that the occupier will be liable to a person entering on the premises for damage to property, whether that property is owned by the entrant or a third party. It is easy to see how the entrant could suffer loss when a third party's property is damaged: the entrant may, for example, be a bailee of the property and as such under a duty to take reasonable care of it. A more difficult question is whether the owner of the property has a cause of action against the occupier. On principle, since the owner of the property is not an entrant, any duty the occupier owes to the owner is not a duty *qua* occupier but a duty imposed by the ordinary principles of negligence liability. The wording of section 4(1)(b) makes the distinction quite clear, because it only imposes a duty in favour of the entrant.

The question arose at common law in *Drive-Yourself Lessey's Pty Ltd v. Burnside*,[56] in which a car owned by the plaintiffs and rented out to H was damaged by falling rocks after H had parked it in a car-park owned by the defendants. Street, C.J., and Owen, J., held the defendants liable to the plaintiffs on the ground that, whether the defendants were regarded as invitors or licensors, the invitation or licence extended to the plaintiffs as owners of the car even though they were not entrants. Herron, J., however held that the defendants owed a duty of care under the principles of *Donoghue v. Stevenson*. Street, C.J., and Owen, J., thus applied the rules of occupiers' liability, whereas Herron, J., applied the general principles of negligence. The Act adopts the view that Herron, J.'s approach is the correct one. If the duty owed in each case is a duty to take reasonable care, the end result will not be much different.

54. The common law was somewhat uncertain on this point. Evershed, M.R., in *Tinsley v. Dudley*, [1951] 2 K.B. 18, at 25, thought that there was no liability for damage to property in the absence of personal injury; but Jenkins, L.J., (at 31) thought that the occupier would be liable. The Supreme Court of New South Wales in *Drive-Yourself Lessey's Pty Ltd v Burnside*, [1959] S.R. (N.S.W.) 390 agreed with the view of Jenkins, L.J.

55. For an example in an occupiers' liability context see *A.M.F International v. Magnet Bowling*, [1968] 2 All E.R. 789.

56. [1959] S.R. (N.S.W.) 390.

The same problem arose recently in England in *Tutton v. A.D. Walter.*[57] The plaintiffs kept bees in a hive near a field in which the defendants grew oilseed rape, a plant very attractive to bees when in flower. The bees died after the defendants sprayed their field with pesticide known to be harmful to bees. It was accepted that the bees constituted property belonging to the plaintiff, who of course did not enter on the defendant's land. Counsel for the defendants however argued that the bees were trespassers rather than invitees or licensees, and that therefore the owner owed them not the common duty of care but, at most, the duty to act with common humanity. This seems to assume that the duty was owed to the bees rather than their owner. The court rejected this approach and held that the defendants owed the plaintiff a duty of care under the ordinary principles of *Donoghue v. Stevenson*. The position would be the same in Western Australia.

The wording of section 4(1)(b) of the Western Australian Act is narrower than its equivalents in most other Occupiers' Liability Acts. There will be liability only where the property was not only brought onto the premises by the entrant but remains on the premises in the possession or control of that person. This ensures that the occupier's liability is kept within reasonable bounds. The entrant will have no right of action under the Act if he or she brings goods onto the premises and leaves them in the possession of the occupier, and they are damaged while in the occupier's possession. This will be a matter for the law of contract or bailment. Under other Occupiers' Liability Acts, an action under the Act would remain available in such a situation.

3. Duty of care of occupier

Section 5 provides that –

(1) Subject to subsections (2) and (3) the care which an occupier of premises is required by reason of the occupation or control of the premises to show towards a person entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier is by law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement or otherwise, his obligation towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

57. [1986] Q.B. 61.

(2) The duty of care referred to in subsection (1) does not apply in respect of risks willingly assumed by the person entering on the premises but in that case the occupier of premises owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or his property and not to act with reckless disregard of the presence of the person or his property.
(3) A person who is on premises with the intention of committing, or in the commission of, an offence punishable by imprisonment is owed only the duty of care referred to in subsection (2).
(4) Without restricting the generality of subsection (1), in determining whether an occupier of premises has discharged his duty of care, consideration shall be given to —
  (a) the gravity and likelihood of the probable injury;
  (b) the circumstances of the entry onto the premises;
  (c) the nature of the premises;
  (d) the knowledge which the occupier of premises has or ought to have of the likelihood of persons or property being on the premises;
  (e) the age of the person entering the premises;
  (f) the ability of the person entering the premises to appreciate the danger; and
  (g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person.

(a) *General: Section 5(1)*

Section 5(1) sets out the duty of care which the occupier of premises owes to a person entering on the premises in the circumstances specified in section 4. It provides that the occupier owes a duty to take such care as in all the circumstances of the case is reasonable to see that the person entering the premises will not suffer injury or damage by reason of any danger falling within the ambit of the duty. The provision is based on the Scottish section 2(1), but section 2(1) of the English Act and all other Occupiers' Liability Acts contain similar provisions.[58] The refinements of the distinctions between unusual dangers and concealed dangers or traps have thus now disappeared; the question for the court will be whether the occupier has taken reasonable care in all the circumstances of the case. The question is in effect the same as the question whether the defendant has taken reasonable care in ordinary negligence

58. See, e.g., Ontario s. 3(1); Victoria s. 14B(3). Compare South Australia s. 17c: "the liability of the occupier of premises for injury, damage or loss attributable to the dangerous state or condition of the premises shall be determined in accordance with the principles of the law of negligence."

cases.[59] It is thus, basically, a question of fact.[60]

(b) *Factors: Section 5(4)*

In principle, there is no need for a statute imposing a duty of reasonable care to particularize factors which must be taken into account in assessing whether the duty was complied with. The ordinary common law will ensure that the likelihood and seriousness of harm will be balanced against the cost of taking precautions, the end to be achieved, and so on. The Scottish Act, in fact, does not set out any special considerations to be taken into account.

However, it may be useful to list particular matters in the statute. The English Act, by way of example, provides that —

(1) the occupier must be prepared for children to be less careful than adults[61];
(2) the occupier may expect that a person in the exercise of his calling will appreciate and guard against any risks ordinarily incident to it[62]; and
(3) a warning is not to be treated without more as absolving the occupier from liability.[63]

In Western Australia, there is at least one precedent for statutes which impose liability in negligence to set out factors which may be taken into account in determining that liability.[64] The *Occupiers' Liability Act* likewise sets out such factors in the statute, adopting the list of factors which appears in the Victorian Act.[65] Without restricting the generality of subsection (1), consideration is to be given to the following factors:

(1) *The gravity and likelihood of the probable injury*

These are factors which are ordinarily taken into account in assessing the question of negligence.[66]

59. As the South Australian Act recognizes: ibid.
60. For a comprehensive list of examples, see Clerk and Lindsell, *Torts*, 15th ed. (1982), para. 12-13. Among more recent cases see *Salmon v. Seafarer Restaurants*, [1983] 3 All E.R. 729.
61. S. 2(3)(a).
62. S. 2(3)(b).
63. S. 2(4)(a).
64. *Highways (Liability for Straying Animals) Act, 1983*, s. 3(4) (W.A.).
65. S. 14B(4). The South Australian Act has an essentially similar list of factors to be taken into account: s. 17c(2).
66. The question of the gravity, as opposed to the likelihood, of injury was a key factor in *Paris v. Stepney Borough Council*, [1951] A.C. 367.

(2) *The circumstances of the entry into the premises*

Whether the entrant was a trespasser or a lawful visitor continues to be relevant, and in the case of lawful visitors the reason and the circumstances of the visit may also be relevant. However, there is no warrant in this provision for resurrecting the old distinction between invitees, licensees and so on. The English Act provides that the persons who are to be treated as visitors are the persons who would at common law be treated as invitees or licensees,[67] but the English courts have not found it necessary to go into the old distinctions in order to decide whether there has been a breach of the duty imposed by the Act. In Canada,[68] although a few early cases under the British Columbia Act interpreted the duty of care established by the act as identical to the duty of care owed to an invitee at common law,[69] most of the decisions under the Acts have eschewed any reference to the common law tests as an aid in interpreting the statutory duty, and have interpreted the duty of care as embodying the general principles of negligence law. In *Weiss v. Greater Vancouver YMCA*,[70] the British Columbia Court of Appeal rejected an attempt to resurrect the old specialized duty of care owed to an invitee. It held that:

> [S]ection 3(1) is comprehensive, in the sense that it fully and clearly imposes a duty on an occupier and defines the standard of care necessary to fulfil that duty. Thus ... it is unnecessary to an understanding of the standard prescribed by the subsection to refer to any of the specially formulated standards of care laid down in the common law cases. Indeed, to do so is more likely to mislead than assist in understanding what the subsection says.[71]

(3) *The nature of the premises*

(4) *The knowledge which the occupier of premises has or ought to have of the likelihood of persons or property being on the premises*

These two factors are important, in particular, where the entrant is a trespasser, and in effect reproduce factors which, under *British Railways Board v. Herrington*[72] and *Southern Portland Cement v.*

67. S. 1(2).

68. See generally Linden, *Canadian Tort Law*, 3rd ed. (1982) at 658-674.

69. *Hutchinson v. Woodward Stores (Mayfair)* (1977), 4 B.C. L.R. 309; *Thomas v Super-Valu Stores* (1978), 9 B.C. L.R. 210; *Story v City of Prince George* (1979), 11 B.C. L.R. 224.

70. (1979) 11 B.C. L.R. 112.

71. At 118.

72. [1972] A.C. 877.

Cooper,[73] had to be taken into account in determining when an occupier owed a trespasser a duty to act with common humanity.

(5) *The age of the person entering the premises*

This is similar to an example which appears in the English Act.[74] At common law the age of the entrant was particularly important if the entrant was a trespasser,[75] and this no doubt continues to be so under the Act.

(6) *The ability of the person entering the premises to appreciate the danger*

This is similar to another of the examples in the English Act.[76] In England, at common law, *London Graving Dock Co. v. Horton*[77] decided that knowledge of the danger barred the visitor's right of action, but this was rejected by the Act. In Australia, in *Commissioner for Railways (N.S.W.) v. Anderson*,[78] the High Court limited the effect of *Horton's* case by holding that knowledge of the risk bars recovery only when to make the visitor aware of the risk would discharge the occupier's duty.

(7) *The burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of danger to the person*

In ordinary negligence cases, the cost and the difficulty of avoiding the harm is a factor which is balanced against other factors such as its likelihood and seriousness.[79] The Act, it would seem, goes beyond the question of cost and difficulty, and brings in the question of the occupier's financial resources. Such considerations are relevant in ordinary negligence cases, when a person is held to be under a duty to act as a result of occupation or control of property,[80] and were relevant at common law in considering

73. [1974] A.C. 623.

74. S. 2(3)(a), referred to at text accompanying n. 61 above.

75. *British Railways Board v. Herrington*, [1972] A.C. 877, *Southern Portland Cement v Cooper*, [1974] A.C. 623, and most of the subsequent cases on trespassers involve child trespassers. Compare *Westwood v Post Office*,]1973] Q.B. 591 (reversed on other grounds [1974] A.C. 1.), a case involving an adult trespasser, where rather less was required of the occupier.

76. S. 2(4)(a), referred to in text accompanying n. 63 above. See, e.g , *Salmon v Seafarer Restaurants*, [1983] 3 All E.R. 729.

77. [1951] A.C. 737.

78. (1961), 105 C.L.R. 42.

79. *Latimer v A E C* , [1953] A.C. 643; *Overseas Tankship (U.K) v. Miller Steamship Co Pty Ltd (The Wagon Mound No 2)*, [1967] 1 A.C. 617.

80. *Goldman v. Hargrave*, [1967] 1 A.C. 645; *Leakey v National Trust*, [1980] Q.B. 485.

when a occupier owed the duty to act with common humanity towards a trespasser.[81]

(c) *Exclusion of liability: Section 5(1)*

The duty set out in section 5(1) applies except in so far as the occupier is entitled to and does extend, restrict, modify or exclude his or her obligations towards the entrant, by agreement or otherwise.

The occupier was allowed to exclude liability at common law. In *Ashdown v. Samuel Williams and Sons*[82] a notice containing an exclusion clause posted at the entrance to premises was held effective to exclude the occupier's liability to a visitor injured by the shunting of railway trucks.[83] The notice must, of course, on its terms be effective to cover the risk which materializes,[84] and reasonable steps must be taken to bring it to the attention of the visitor.[85] The English 1957 Act, which is in the same terms as the Western Australian Act, endorsed this principle.[86] In *White v. Blackmore*[87] a similar notice was held effective to exclude liability for injuries caused to spectators who had entered private property to watch jalopy racing. It will be noted that in these cases there is no need for a contractual relationship between occupier and visitor. The notice excludes tort liability and is effective whether or not there is a contract between the parties. This principle is well settled and has applications in other situations.[88] The Act en-

81. *British Railways Board v. Herrington*, [1972] A.C. 877.

82. [1957] 1 Q.B. 409.

83. Be it noted, an activity being carried out on the premises. For the distinction between static conditions and activities, see text accompanying nn. 145-162 below. The wording of the notice was wide enough to cover both static conditions and activities.

84. See, e.g., *Bright v Sampson and Duncan Enterprises Pty Ltd.* (1985), 1 N.S.W.L.R. 346.

85. Cf. *Parker v. South Eastern Railway Co* (1887), 2 C.P.D. 416, which was cited in *Ashdown v Samuel Williams and Sons*, [1957] 1 Q.B. 409.

86. England s. 2(1) See also Scotland s. 2(1); Ontario s. 3(3); South Australia s. 17c(4) There is no equivalent provision in the Victorian Act.

87. [1972] 2 Q.B. 651.

88 E.g. the disclaimer in *Hedley Byrne and Co v. Heller and Partners*, [1964] A C. 465; cases on notices in vehicles exempting liability to passengers such as *Buckpitt v. Oates*, [1968] 1 All E.R. 1145, *Bennett v Tugwell*, [1971] 2 Q.B. 267, and *Birch v Thomas*, [1972] 1 All E.R. 905, but see now *Road Traffic Act, 1972,* s. 148(3) (Eng.) and *Unfair Contract Terms Act, 1977* (Eng.); cases on exclusion clauses on bus tickets: *Wilkie v London Passenger Transport Board*, [1947] 1 All E.R 258, *Cosgrove v Horsfall* (1945), 62 T.L.R. 140, *Genys v Matthews*, [1965] 3 All E.R. 24, *Gore v Van der Lann*,]1967] 2 Q.B. 31, but see now *Unfair Contract Terms Act, 1977* (Eng.).

dorses these principles by using the phrase "by agreement or otherwise".[89]

The position in England is now altered as a result of the *Unfair Contract Terms Act, 1977*, which provides that a person cannot by any contract term or notice exclude or restrict liability for death or personal injury resulting from negligence,[90] and that in cases of other loss or damage such clauses are valid only if they satisfy a requirement of reasonableness.[91] These provisions, however, apply only if the liability is "business liability", that is, liability for breach of obligations or duties arising from things done or to be done by a person in the course of a business, or from the occupation of premises used for business purposes of the occupier.[92] The *Occupiers' Liability Act, 1984* modifies this by providing that where a person obtains access to premises for recreational or educational purposes the occupier's liability is not a business liability.[93] In Western Australia, there is no equivalent of the *Unfair Contract Terms Act* and the occupier remains free to exclude liability in most circumstances.

However, there are some limitations. The *Occupiers' Liability Act* provides that the occupier can only exclude liability in so far as he or she is entitled to do so. There are a number of situations in which the occupier is not entitled to exclude liability:

(1) Section 7 of the Act provides that the occupier cannot restrict or exclude liability by the provisions of a contract to which the visitor is not a party.[94]
(2) It appears that the occupier cannot exclude liability to persons who have a right to enter the premises, such exclusion being inconsistent with the conception of a right to enter.[95]
(3) The occupier cannot exclude or restrict liability where the visitor has, in practical terms, no choice as to whether he or she enters

89. Contrast Scotland s. 2(1) and South Australia s. 17c(4), which provide that the occupier's duty may only be excluded by agreement (Scotland) or by contract (South Australia).
90. S. 2(1).
91. S. 2(2).
92. S. 1(3).
93. S. 2. The doubt as to whether the liability in *White v. Blackmore*, [1972] 2 Q.B. 651, would be a business liability is thus now resolved.
94. See text accompanying nn. 118-124 below.
95. Winfield and Jolowicz, *Tort*, 12th ed. (1984), 219.

the property. In *Burnett v. British Waterways Board*[96] an employee on the barge when it was in a dock, injured by the snapping of a defective rope when working on a barge, was not bound by an exclusion notice displayed at the entrance, although on its wording it covered the accident and the employee knew what it said. According to Lord Denning, M.R., the barge was part of a train of barges; by the time it had got to the dock it was beyond the plaintiff's ability to make a choice and not enter. Similarly, it was suggested in *White v. Blackmore*[97] that police and ambulance men would not be affected by an exclusion notice.

(4) It may well be that the duty of "common humanity", the duty which at common law was owed to trespassers, represents a minimum legal standard which is unexcludable by agreement or notice to any visitor, since it would be odd if a lawful visitor were worse off than a trespasser. The duty owed to a trespasser before 1972, the duty not to injure a trespasser deliberately or recklessly, was certainly unexcludable, and it seems odd that a duty of common humanity should be excludable.[98]

(d) *Assumption of risk: Section 5(2)*

According to section 5(2) the duty of care in section 5(1) does not apply in respect of risks willingly assumed by the entrant, but in such a case the occupier owes a duty not to create a danger with a deliberate intent of doing harm and not to act with reckless disregard of the presence of the entrant or the entrant's property.

Section 5(2) (like section 5(3) considered below) is based on section 4 of the Ontario *Occupiers' Liability Act*. Assumption of risk, which is one of the standard defences to negligence, is recognized as a defence to an action against the occupier for the breach of the duties set out in the Act. In this respect, the Act echoes most other Occupiers' Liability Acts.[99] It is of course insufficient to show that

96. [1973] 2 All E.R. 631.

97. [1972] 2 Q.B. 651, at 677 (per Roskill, L.J.).

98. Clerk and Lindsell, *Torts*, 15th ed. (1982), para. 12-25; Winfield and Jolowicz, *Torts*, 12th ed. (1984). 219-20.

99. For example, England s. 2(5); Scotland s. 2(3). There is no equivalent provision in the Victorian Act or the South Australian Act.

the visitor knew of the risk[100]; it is necessary to go further and show that he or she willingly assented to it. Thus, in *Simms v. Leigh Rugby Football Club*[101] it was held that a visiting rugby league football player willingly accepted the risks necessarily involved in playing on a field with a concrete wall two metres from the touch line, such walls being permitted under the rules of the game.

Section 5(2) goes on to provide that the defence of assumption of risk is now limited. Although the visitor may assume the risk of negligence, the occupier still owes a duty not to harm the visitor intentionally or recklessly. As stated earlier, it seems that there is a minimum standard below which any exclusion of liability is ineffective.[102] It is likely that there was some similar limitation at common law in respect of the defence of assumption of risk: it is hard to see how a person can assume the risk of intentional or reckless harm. The Act now expressly provides that the occupier cannot plead assumption of risk where he or she has intentionally or recklessly caused harm to the visitor.

(e) *Trespassers: Section 5(3)*

As regards the vexed problem of liability to trespassers, the various Occupiers' Liability Acts can be divided into three categories:

(1) Some, such as the English 1957 Act and the New Zealand Act, confined the common duty of care set out in the statute to lawful visitors, leaving trespassers to the common law, which provided a lower duty.

(2) Some, such as the Scottish Act and the British Columbia Act (adopting the Canadian Uniform Act),[103] extended the duty of care to all entrants, including trespassers. With the enactment of the *Occupiers' Liability Act, 1984*, England has now also taken this step. The Victorian and South Australian Occupiers' Liability Acts also fall into this category.[104]

100. *London Graving Dock Co v Horton*, [1951] A.C. 737, which held the contrary, was overruled by the English Act and was repudiated at common law in Australia: see text accompanying nn. 77-78 above.

101 [1969] 2 All E.R. 923

102. See text accompanying n. 98 above.

103 And note also the proposals of the Manitoba Law Reform Commission in its report on *Occupiers' Liability* (Report 42, 1980), which endorsed this alternative.

104. S. 17c(6) of the South Australian Act sets out special considerations which must be taken into account in determining liability to a trespasser, as does s. 1(3) of the English 1984 Act.

(3) The problem with trespassers as a category is that it has to cover a very wide variety of situations, from wandering children to potential burglars. Some Canadian Acts therefore take a middle course. The Alberta Act has separate rules for child and adult trespassers, and the Ontario Act provides that a person who is on premises with the intention of committing, or in the course of, a criminal act is deemed to have willingly assumed all risks and is subject to the lower duty not to cause that person intentional or reckless harm.[105]

Which approach to adopt is very much a question of policy. The Western Australian Act opts for the Ontario alternative, but instead of the rather unsatisfactory idea of a "criminal act" substitutes the much more certain criterion of an offence punishable by imprisonment. Burglars and the like will not be owed a duty of care, but the lower duty which the common law held to be owed to a trespasser in the days before *British Railways Board v. Herrington*.[106] Even under *Herrington*, it is doubtful whether, in the case of a potential burglar, the duty to act with common humanity would have required much more. Other trespassers will be owed the duty of care set out in section 5(1), but in deciding whether that duty has been discharged the court will take into account the various factors set out in section 5(4).

A recent Scottish case is a useful example of how the question of trespassers will be approached under legislation which provides that all entrants, trespassers included, are owed a duty to take reasonable care. In *Titchener v. British Railways Board*,[107] the appellant, aged 15, was seriously injured by a train when walking across a railway line. She had climbed up a slope to the embankment and gone through a gap in the boundary fence. She had walked across the line on previous occasions and knew the dangers involved. The gaps in the fence had been there for some time and the respondent knew that people sometimes walked across the line. The House of Lords, dismissing the appeal, held that the duty of

105. S. 4(2). The proposals of the Saskatchewan Law Reform Commission on Occupiers' Liability also endorsed this alternative: *Proposals for an Occupiers' Liability Act* (Report No. 30, 1980).

106. [1972] A.C. 877.

107 [1983] 3 All E.R. 770.

reasonable care owed by the occupier depended on the circumstances of the case, including the age and intelligence of the entrant. On the facts, the respondents owed no duty to maintain the fence in a better condition. Even if such a duty had been established, the respondent's failure to maintain and repair had not caused the accident. In any event, under the equivalent of section 5(3) of the Western Australian Act, the respondent was exempted from liability on the ground that the appellant fully appreciated the risk she took in crossing the line.

4. Special situations

(a) *Negligence of independent contractor*

At common law, it was uncertain whether the occupier was liable for damage caused by independent contractors. In *Haseldine v. C.A. Daw & Son*[108] the Court of Appeal held that an occupier was not liable for the negligence of an independent contractor unless the occupier had himself been careless in the selection or supervision of the contractor. The occupier's general non-liability was qualified in *Woodward v. Mayor of Hastings*,[109] in which it was held that the occupier would only escape liability where the job delegated to the contractor required some technical expertise. (In that case the occupier was held liable for the negligence of a cleaner who failed to clean a snow-covered step.[110]) In *Thomson v. Cremin*[111] however, the House of Lords held that the occupier was automatically liable for work done by an independent contractor. The case was argued before the decision in *Haseldine v. Daw*, though judgment was delivered after the judgment in that case, and was not reported (except in Lloyd's Reports) until 1953.

The English *Occupiers' Liability Act, 1957*[112] provided that the occupier was not liable for the negligence of an independent contractor if the occupier had acted reasonably in entrusting the work to the contractor and had taken reasonable steps to satisfy himself that

108. [1941] 2 K.B. 343.

109. [1945] K.B. 174.

110. Cf. a number of Canadian cases: *Savage v. Wilby*, [1954] 3 D.L.R. 204; *Randall's Paints v Tanner* (1969), 4 D.L.R. (3d) 652; *Custom Ceilings v. S W Fleming and Co.* (1970), 12 D.L.R. (3d) 209.

111. (1941), 71 Ll. L. Rep. 1; [1953] 2 All E.R. 1185.

112. S. 2(4)(b).

the contractor was competent and that the work was properly done. Most other Occupiers' Liability Acts[113] adopt a similar view.[114] Section 6(1) of the Western Australian Act (which adopts the wording of the Alberta Act[115]), provides:

> An occupier is not liable under this Act where the damage is due to the negligence of an independent contractor engaged by the occupier if —
> (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and
> (b) it was reasonable in all the circumstances that the work that the independent contractor was engaged to do should have been undertaken.

Section 6(2) provides that section 6(1) does not operate to abrogate or restrict the liability of an occupier for the negligence of an independent contractor imposed by any other Act. Section 6 and similar provisions reverse the decision in *Thomson v. Cremin*. Section 6(1)(a) broadly reproduces the effect of the decision in *Haseldine v. Daw*. Section 6(1)(b) makes it clear that the occupier remains liable for hazardous activities, as at common law. The qualification placed on the independent contractor's general non-liability by *Woodward v. Mayor of Hastings* (endorsed in *Vial v. Housing Commission of New South Wales*[116]) is not expressly reproduced. It may therefore be the case that the Western Australian Act has departed from these cases; however in such cases the occupier was not negligent, and the contractor, who was negligent, will be liable.[117]

(b) *Duty not restricted or excluded by contract*

Section 7(1) of the Western Australian Act provides that:

> The duty of an occupier of premises under this Act, or his liability for breach thereof, shall not be restricted or excluded by the provisions of any contract to which the person to whom the duty is owed is not a party, whether or not the occupier of premises is bound by the contract to permit such person to enter or use the premises.[118]

113. E.g. Ontario s. 6.

114. But there is no such provision in the Scottish or Victorian Acts.

115. S. 11.

116. [1976] 1 N.S.W.L.R. 388.

117. It should be noted that, in contrast to the Western Australian Act and most other Occupiers' Liability Acts, neither the Victorian Act nor the South Australian Act contains any special provisions about an occupier's liability for independent contractors.

118. The section applies to contracts entered into before the commencement of the Act as well as to contracts entered into after its commencement: s. 7(2).

Section 7 is based on section 5 of the Ontario Act. Most Occupiers' Liability Acts have a similar provision,[119] although the English provision in particular differs in some important respects from the Ontario provision adopted in Western Australia.

There is, of course, a general rule that a person who is not a party to a contract cannot be subjected to any burdens (and is not entitled to any benefits) under it. Despite this, at common law it was held that an occupier could by contract restrict or exclude liability to third persons. In *Fosbroke-Hobbes v. Airwork*[120] Goddard, J., decided that where a person hired an aircraft for himself and his guests, and the contract between the occupier and the hirer contained a clause excluding liability to all passengers, the passengers were bound by the exclusion clause.

Under the Act this decision would be different. The occupier would by such a clause be able to exclude liability to the hirer, but the passengers, who were strangers to the contract, would not be affected.

Section 3(1) of the English Act goes even further, saying that not only can the occupier's duty of care owed to third parties not be restricted or excluded, but that it, "shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty." This is curious, because it enforces a contractual duty between parties who are not in a contractual relationship. The Western Australian Act omits this provision.[121]

Another difference between the English and Western Australian Acts is that the English Act is limited to the situation where the occupier is bound by contract to permit strangers to the contract to enter or use the premises. The Western Australian Act applies whether or not the occupier is so bound.

It will be noted that both the Western Australian Act and the English Act refer only to the situation where the exclusion clause

119. E.g. England s. 3, South Australia s. 17c(4). However the Scottish Act and the Victorian Act do not contain any such provision. As far as Scotland is concerned, this reflects the different attitude to privity of contract: see Walker, *Law of Contracts and Related Obligations in Scotland*, 2nd ed (1985), ch 29.

120. [1937] 1 All E.R. 108.

121. As does s. 17c(4) of the South Australian Act.

is contained in a contract between the occupier and some other person.[122] Suppose that the occupier is by contract with another party bound to permit third parties to enter the premises — for example, when the other party is a contractor and the entrants are the contractor's servants. Though the occupier cannot exclude liability to the servants by means of the contract between himself and the contractor, can the occupier exclude liability to the servants by a notice placed at the entrance to the premises? It has been suggested that this is not a case where the occupier is, in the terms of section 5(1), entitled to exclude liability. Exclusion by notice should not be possible if exclusion by contract is not possible, because it would defeat the purpose of the section.[123] Another view, however, is that exclusion by notice can justifiably be effective even though exclusion by contract is not, because the policy behind the restriction or exclusion by contract is to prevent entrants being deprived of their rights without their knowledge.[124] The wording of the section is consistent with this latter view, referring to exclusion by contract but not to exclusion by notice.

(c) *Preservation of higher obligations*

Section 8 provides that:

(1) Nothing in this Act relieves an occupier of premises in any particular case from any duty to show a higher standard of care than in that case is incumbent on him by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of common carriers and bailees.

(2) Nothing in this Act shall be construed to affect the rights, duties and liabilities arising from an employer and employee relationship where it exists.

Provisions similar to this are found in all Occupiers' Liability Acts,[125] although the drafting of the Western Australian provision owes most to the provisions of the Ontario Act.

In *Stein v. Hudson's Bay Co.*[126] it was argued that an invitee was

122. Again, s. 17c(4) of the South Australian Act is similar.

123. Winfield and Jolowicz, op cit., n. 98, 222; Clerk and Lindsell, op cit., n 98, para 12-29

124 D J. Payne, "The Occupiers' Liability Act" (1958), 21 Mod.L.Rev. 369, Baker, *Tort*, 3rd ed. (1981), 153-54

125 E g England s 5(3); Scotland s. 2(2), Ontario s. 9(1) and (2); Victoria s. 14B(5), South Australia s. 17c(5)

126 (1976), 70 D.L R (3d) 723.

owed a higher common law duty of care which was preserved by the equivalent of section 8(1). The court held that the standard of care the occupier owes to an invitee is no different from the standard of care imposed by the Act, and therefore the equivalent of section 8(1) was inapplicable. In *Weiss v. Greater Vancouver YMCA*,[127] the British Columbia Court of Appeal expressly declined to decide or comment on this issue as it was neither argued nor pleaded in the instant case.

(d) *Application to liability of landlords*

Once upon a time a landlord's liability for defects in the premises was almost non-existent.[128] According to *Robbins v. Jones*[129] the landlord's only liability was in contract to the tenant, and this was fairly limited. The landlord was not liable in negligence, either to the tenant or to others.

The position has now changed. The landlord is liable in negligence where he or she creates a source of danger after the premises have been leased to another,[130] or where he or she was responsible for the negligent construction of the premises.[131] The duty of care now recognized to exist in these situations is owed not only to the tenant[132] but to all persons who are foreseeably likely to be injured by the landlord's negligence.

There remains the question of the landlord's responsibility for the safety of the demised premises, in cases where the landlord is not responsible for the construction of the premises or for creating the danger that causes the injury. The landlord is not of course the occupier of the premises — though he or she will be the occupier of areas which are not part of the demised premises but are likely to be used by the tenant and others, such as the stairways and other common areas in a block of units. In *Cavalier v. Pope*[133]

127. (1979), 11 B.C. L.R. 112.

128. See generally North, *Occupiers' Liability* (1971), ch. 12; J.E. Martin, "Landlord and Tenant: Recent Developments in Negligence Liability" (1984), 37 Current Legal Prob. 85.

129. (1863), 15 C.B. (N.S.) 221.

130. *A.C. Billings and Sons v. Riden*, [1958] A.C. 240.

131. *Dutton v. Bognor Regis Urban District Council*, [1972] 1 Q.B. 373; *Anns v Merton London Borough Council*, [1978] A.C. 728; *Batty v. Metropolitan Property Realizations*, [1978] Q.B. 554.

132. As in *Batty v Metropolitan Property Realizations*, ibid

133. [1906] A.C. 428.

the landlord of a dilapidated house contracted to repair it but failed to do so. The tenant's wife was injured when the kitchen floor collapsed. It was held, following *Robbins v. Jones*, that since she was a stranger to the contract the landlord was under no liability at common law. This ruling was based on the "privity of contract fallacy" that when there was a contract between two parties (here the landlord and the tenant) the landlord's liability, whether in contract or tort, was circumscribed by the contract. Though the privity of contract fallacy was exploded by *Donoghue v. Stevenson*,[134] the *Cavalier v. Pope* line of cases was preserved.[135] Section 4 of the English *Occupiers' Liability Act, 1957* abolished the immunity in *Cavalier v. Pope*. It provided that where there was a tenancy under which the landlord was responsible for the maintenance or repair of the premises the landlord (though not the occupier of the premises) owed to all persons on the premises the same duty, in respect of dangers arising from any defaults by the landlord in carrying out that obligation, as if the landlord were an occupier. The other Occupiers' Liability Acts contain a similar provision,[136] and it appears in the Western Australian Act as section 9(1):

> Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who may from time to time be on the premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibilities of maintenance and repair of the premises as is required under this Act to be shown by an occupier of premises towards persons entering on those premises.

The other provisions of section 9 apply the provision to subtenancies,[137] preserve any other obligations owed by the landlord,[138] and make it clear that the section applies to tenancies created both before and after the commencement of the Act.[139]

134. [1932] A.C. 562.

135. See *Bottomley v Bannister*, [1932] 1 K.B. 458; *Otto v. Bolton and Norris*, [1936] 2 K.B. 46.

136. E.g. Scotland s. 3; Ontario s. 8. An exception, at least as to drafting style, is Victoria s. 14A(a) which provides that a reference to an occupier of premises includes a reference to a landlord of premises let under a tenancy who is under an obligation to maintain or repair the premises, or who is, or could have put himself or herself in, a position to exercise a right to enter on the premises to carry out maintenance or repairs. S. 17d of the South Australian Act is somewhat similar.

137. S. 9(2)

138. S. 9(3).

139. S. 9(4)

The law in England has now gone a stage further. Section 4 of the *Occupiers' Liability Act, 1957* has been replaced by section 4 of the *Defective Premises Act, 1972*,[140] under which, where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises (or where the landlord is expressly or impliedly given the right to enter the premises to carry out maintenance or repair) the landlord owes to all persons who might reasonably be expected to be affected by defects in the premises a duty to take such care as is reasonable in the circumstances to see that they are reasonably safe from personal injury or property damage. This gives a right of action not only to the tenant and the tenant's visitors, but also to other persons who do not enter the premises, such as passers-by, neighbouring occupiers and their families and guests.

No other Occupiers' Liability Act has adopted section 4 of the *Defective Premises Act*.[141] In particular, the *Defective Premises Act* does not apply in Scotland and section 3 of the Scottish Act, the equivalent of section 4 of the English 1957 Act, remains in force. It was section 3(1) of the Scottish Act, rather than section 4(1) of the English 1957 Act, which was used as the model for section 9 of the Western Australian Act. A number of the limitations of the English provision[142] are not incorporated in the Scottish Act and thus have not been adopted in Western Australia.

Since the *Defective Premises Act* gives rights of action to persons other than entrants to the premises, it raises wider issues than those of occupiers' liability pure and simple. Section 9 of the Western Australian Act is a reform confined to the liability of a person put in the position of an occupier towards entrants to the premises.

140. On the Defective Premises Act, see Holyoak and Allen, *Civil Liability for Defective Premises* (1982), especially ch 3, 4, 6 and 7; J R. Spencer, "The Defective Premises Act 1972 — Defective Law and Defective Law Reform," [1974] Camb L J 307, [1975] Camb. L J 48. Spencer, however, is not critical of s 4.

141. Though s. 6 of the Occupiers' Liability Act proposed by the Saskatchewan Law Reform Commission is in part based on s. 4 of the Defective Premises Act 1972 (Eng.): see *Proposals for an Occupiers' Liability Act* (Report No 30, 1980).

142. Such as the limitation of possible plaintiffs to the tenant's invitees and licensees: s 4(1), and the need for the breach of the landlord's obligations to be actionable by the tenant. s 4(4), a requirement satisfied only when the landlord has actual notice of disrepair: see Spencer in [1975] Camb. L.J. 48, at 66.

(e) *Contributory negligence*

In Western Australia the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act, 1947* provides for the apportionment of damages when the plaintiff is guilty of contributory negligence. It applies "in any claim for damages founded on an allegation of negligence",[143] negligence being defined to include breach of statutory duty.[144]

An action for breach of the duty of care imposed by section 5 of the *Occupiers' Liability Act* may well be regarded as a claim founded on an allegation of negligence, even though the duty is imposed by statute and not by the common law. Alternatively, it is possible that the *Contributory Negligence Act* applies to the occupiers' liability action on the basis that the occupier is in breach of a statutory duty. In either case the *Contributory Negligence Act* would apply without any need for a special provision. Section 10 of the *Occupiers' Liability Act* however expressly provides that the *Contributory Negligence Act* applies and thus removes any possible doubt.

Developments in the Common Law

1. The High Court Cases

Before the advent of the *Occupiers' Liability Act, 1957*, the courts in England had developed a means of controlling the limiting effect of the special duty categories. They identified a distinction between the "occupancy duty" and the "activity duty" of the occupier. In the first category of case, where the damage resulted from the static condition of the premises, the occupiers' liability rules applied a different duty to each category of entrant. In the second category the harm resulted from an activity being carried out on the premises by the occupier. The categories were irrelevant and ordinary negligence principles were applied.[145]

In England, the development of these principles came to a halt on the passing of the *Occupiers' Liability Act*. The Act provided that it was to have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owed to visitors

143. S. (4)1.

144. S. 3.

145. See, e.g., *Gallagher v Humphrey* (1862), 6 L.T. 684; *Dunster v Abbott*, [1953] 2 All E.R. 1572; *Slater v Clay Cross Co* , [1956] 2 Q.B. 264

in respect of dangers due to the state of the premises or to things done or omitted to be done on them.[146] By enlarging the special duties of occupiers, the Act seemingly reduced the role for the general duty of care. The Act did not cover liability to trespassers until 1984,[147] but the common law expanded the special duty owed to trespassers into a duty of common humanity. In *British Railways Board v. Herrington*,[148] the case in which the House of Lords first recognized this new duty, the court rejected the idea that in appropriate cases the occupier might also owe the trespasser a duty of care under the general principles of *Donoghue v. Stevenson*.

In Australia, however, where no jurisdiction adopted occupiers' liability legislation until 1983, the High Court has carefully developed the idea that an occupier, in addition to being under a special duty, may also be under a general duty of care. The special duty arises from the relationship of occupier and visitor of that particular category, but if the parties are also in some other sort of relationship the general duty may exist alongside the special duty.

This view was adopted in a series of High Court decisions in the 1950s involving liability to trespassers.[149] In *Commissioner for Railways v. Quinlan*,[150] on appeal from the High Court, the Privy Council were not enthusiastic about the idea of coexistent duties, and preferred to see the occupier's liability to a trespasser solely in terms of the special duty. In *Munnings v. Hydro-Electric Commission*[151] however, the High Court continued to endorse the idea of coexistent duties; and in *Southern Portland Cement v. Cooper*[152] the Privy Council, while remaining unconvinced about the need for two parallel duties, recognized that English and Australian law were developing along different lines. The idea that the occupier

146. S. 1(1). S. 1(2) provides that the rules enacted by the Act shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises.

147. *Occupiers' Liability Act, 1984* (Eng.). See text accompanying nn. 103-106 above.

148. [1972] A.C. 877.

149. *Thompson v Bankstown Municipal Council* (1953), 87 C.L.R. 619; *Rich v. Commissioner for Railways (N.S.W.)* (1959), 101 C.L.R. 135; *Commissioner for Railways (N.S.W.) v. Cardy* (1960), 104 C.L.R. 274.

150. [1964] A.C. 1054.

151. (1971), 125 C.L.R. 1.

152. [1974] A.C. 623.

might owe a general duty alongside the special duty qua occupier was also endorsed in cases involving lawful visitors.[153]

By the 1980s, following the abolition of appeals from the High Court to the Privy Council,[154] the High Court no longer regarded itself as bound by Privy Council decisions.[155] In *Hackshaw v. Shaw*[156] and *Papatonakis v. Australian Telecommunications Commission*[157] therefore, the High Court endorsed the notion that in appropriate circumstances the occupier might owe a general duty of care alongside the special occupiers' liability duty. In *Hackshaw v. Shaw*, an occupier fired shots at the car of a would-be petrol thief and hit his girlfriend who, unknown to the occupier, was in the car. The Victorian Full Court viewed liability in terms of the special duty, and refused to recognize the occupier's duty to a trespasser to act with common humanity as developed in *Herrington* and *Cooper*.[158] The High Court held however that the occupier was under a general duty of care, in that his acts in firing at the car carried a foreseeable risk of harm. In *Papatonakis v. Australian Telecommunications Commission*, a Telecom linesman was injured when he fell from a ladder due to defective wiring which had, unknown to him, been installed instead of the stronger cable normally used by Telecom. Though the defendants would have been liable under ordinary occupiers' liability principles, the High Court again leaned towards notions of general duty.

In each of these cases there were several separate judgments couched in rather different terms. This complicated the task of assessing how far the law had been advanced by these decisions. Deane, J., clearly held the most radical view, his judgments in both cases suggesting that the special duties owed by an occupier were simply the ordinary common law duty of care — in other words, that there were not two duties but one. However, it seems that

153. *Public Transport Commission (N.S.W.) v. Perry* (1977), 137 C.L.R. 107, at 132 (per Gibbs, J.)

154. *Privy Council (Appeals from the High Court) Act, 1975* (C'th).

155. *Viro v. Reg* (1978), 141 C.L.R. 88.

156. (1984), 155 C.L.R. 614.

157. (1985), 156 C.L.R. 7.

158. Reported sub nom. *Shaw v Hackshaw*, [1983] 2 V.R. 65.

at least in *Hackshaw v. Shaw* the majority were not prepared to go that far.[159]

The latest case, *Australian Safeway Stores Pty v. Zaluzna*,[160] is a landmark decision. The High Court, in a joint judgment of Mason, Wilson, Deane and Dawson, JJ., adopts the view put forward by Deane, J., in the two previous cases. The judgment finds support in passages from the earlier judgments of all four of its authors, and concludes:

> Does a theory of concurrent general and special duties ... serve any useful purpose as the law of negligence is now understood? Is there anything to be gained by striving to perpetuate a distinction between the static condition of the land and dynamic situations affecting the land as a basis for deciding whether the special duty is more appropriate to the circumstances than the general duty? .... If it was always the case that the formulations of an occupier's duty in specific terms contributed to the easy ascertainment of the law, there would be a case for their retention, ... but the pursuit of certainty in this way loses its attraction if its attainment depends on the resolution of difficult questions based on artificial distinctions. It seems to us that the utility of the theory of concurrent duties could be accepted only if a situation could arise in which it was possible to establish a cause of action in reliance upon *Indermaur v. Dames*[161] which could not be pursued by reference to the general duty of care postulated in *Donoghue v. Stevenson*. And yet case after case affirms ... that the special duties do not travel beyond the general law of negligence. They are no more than an expression of the general law in terms appropriate to the particular situation it was designed to address. ... There remains neither warrant nor reason for continuing to search for fine distinctions between the so-called special duty enunciated by Willes, J., [in *Indermaur v. Dames*[162]] and the general duty established by *Donoghue v. Stevenson*. The same is true of the so-called special duties resting on an occupier of land with respect to persons entering as licensees or trespassers.[163]

2. Effect on the Occupiers' Liability Act

In jurisdictions which as yet have no occupiers' liability legislation, it will be necessary to decide whether legislation on the traditional pattern is needed in the light of the step now taken by the

159. See the analysis of the judgments given in these two cases in the court's judgment in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987), 69 A.L.R. 615, at 617-19. For another useful discussion of the Australian cases, see *Morris v State Rail Authority of New South Wales* (1985), 2 N.S.W.L.R. 24, at 38-42 (per McHugh, J.A.)

160. (1987), 69 A.L.R. 615.

161. (1866), L.R. 1 C.P. 274.

162. Ibid.

163. (1987), 69 A.L.R. 615, at 619-20.

High Court.[163a] The Australian Law Reform Commission has already asked itself this question.[164] In Western Australia, Victoria and South Australia, where occupiers' liability legislation already exists, the question is rather different: one must ask whether there is any role for the new common law general duty. Before this question can be answered, it is necessary to analyze the ambit of the Occupiers' Liability Acts.

Section 4 of the Western Australian Act provides that sections 5 to 7 of the Act have effect, in place of the rules of the common law, for the purpose of determining the care which an occupier of premises is required, *by reason of the occupation or control of the premises*, to show towards a person entering the premises, *in respect of dangers to persons or property due to the state of the premises or to anything done or omitted to be done on the premises*. This section is based on the Scottish Act,[165] which in turn follows the English Act,[166] as does the occupiers' liability legislation in most other jurisdictions.[167]

What is the effect of provisions such as this? Although some dispute exists, there is a substantial body of opinion in favour of the view that the occupancy/activity distinction has been preserved.[168] Dangerous activities being carried out on the premises by the occupier generally entail liability because the occupier is carrying out that particular activity, and not by reason of the occupation or control of the premises.[169] Clerk and Lindsell reports that the English practice seems to be to ignore the Act when suing an

163a. Cf. the common law developments which caught up with the English *Defective Premises Act, 1972* almost as soon as it was enacted: see N.P. Gravells, "Defective Premises: Negligence Liability of Builders," [1979] Conv. 97.

164. *Occupiers' Liability* (Discussion Paper No. 28, 1987), 8.

165. S. 1

166. S.-ss. 1(1) and (2)

167. See, e.g. Ontario s. 3(2).

168. See North, op. cit., n. 98, 80-82; Clerk and Lindsell, op. cit., n. 98, para. 12-03; F J. Odgers, "Occupiers' Liability: A Further Comment," [1957] Camb. L.J. 39; Winfield and Jolowicz, op. cit., n. 98, 207. Contra: Salmond and Heuston, op. cit., n. 15, 244.

169. The logic of the distinction is underlined by situations involving movable structures, which are classified as premises by the Act: s. 2. In a Canadian case the court held that where the passenger in a car was injured as a result of the defective condition of the floor of the car, the rules of occupiers' liability applied. The court distinguished the situation from damage arising out of the negligent operation of the vehicle: *Houweling v Wesseler* (1963), 40 D.L.R. (2d) 956.

occupier for breach of the activity duty,[170] and suggests that the Act is sometimes ignored even in clear occupancy duty cases.[171] There is some discussion of the point in a recent case, *Ogwo v. Taylor*,[172] involving liability to a fireman summoned to put out a fire caused by an occupier using a blow-lamp in his loft. It was common ground that the Act did not impose any higher duty than the common law on the defendant in the circumstances of the case, and Dillon and Neill, L.JJ., found this a sufficient reason for putting the Act aside and dealing with the case by reference to the common law "rescue" cases.[173] Stephen Brown, L.J., however pointed out that the plaintiff was injured due to heat generated by the fire rather than as a result of the defect in the premises.[174]

The Western Australian Act adopts the same wording as the English and Scottish Acts. The Victorian Act, however, is slightly narrower. It provides that the occupier owes a duty to take care to see that entrants are not injured or damaged, "by reason of the state of the premises or things done or omitted to be done *in relation to the state of the premises*".[175] The South Australian Act is even narrower, dealing only with the occupier's liability for injury, damage or loss attributable to the dangerous state or condition of the premises.[176]

The High Court has questioned the logic of concurrent special and general duties, and suggested that there is simply a general duty. However, in those jurisdictions where there is occupiers' liability legislation, it takes effect in place of the rules of the common law. The legislature has enacted a special duty which must coexist alongside the general law unless it embraces all possible liabilities of the occupier in whatever capacity the occupier is acting. The Western Australian legislation does not, it appears, go that far. The Victorian legislation probably does not, and the South

170. Para. 12-03, citing *Griffiths v Taylor*, [1974] 2 Lloyd's Rep. 420; *Egerton v. Home Office*, [1978] Crim. L.R. 494; *Daly v General Steam Navigation Co* , [1979] 1 Lloyd's Rep. 257.

171. Citing *Davies v Borough of Tenby*, [1974] 2 Lloyd's Rep. 469; *Ward v Tesco Stores*, [1976] 1 All E.R. 219.

172. [1987] 1 All E.R. 668.

173. At 670 and 673.

174. At 673.

175. S. 14B(3). Emphasis added.

176. S. 17C(1).

Australian legislation certainly does not, go as far as the Western Australian Act.

In Western Australia, I would expect the English practice to be adopted. The Act will apply to situations where the occupier is required to show care by reason of the occupation or control of premises; the common law will take over where the liability depends on some relationship between the parties other than that of occupier and visitor. A somewhat similar distinction will no doubt be adopted in Victoria and South Australia. The long line of High Court cases prior to *Australian Safeway* will be of considerable assistance.

There will thus be distinctions in Western Australia, Victoria and South Australia which will be avoided in jurisdictions which rely on the common law and do not enact Occupiers' Liability Acts. Comments in some quarters imply that the existence of such distinctions might be thought a matter for regret.[177] However, it is probably a measure of the success of the occupiers' liability legislation that the High Court has been inspired to make up the ground lost since the draftsman of the English 1957 Act first set about repairing the defects of the common law.

177. Australian Law Reform Commission, *Occupiers' Liability* (Discussion Paper No. 28) (1987), 8; N. Seddon (1987), 61 Aust.L.J. 245, at 246.