

The Law
Reform
Commission

Report No 42

OCCUPIERS' LIABILITY

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The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 to review, modernise and simplify of the law. The first members were appointed in 1975. The offices of the Commission are at 99 Elizabeth Street, Sydney, NSW Australia (Tel (02) 231 1733; VOCADEx (02) 223 1203).

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Terms of reference

AUSTRALIAN CAPITAL TERRITORY — OCCUPIERS LIABILITY

I, GARETH JOHN EVANS, Attorney-General of Australia, HAVING REGARD TO —

- (a) the Community Law Reform Program for the Australian Capital Territory; and
- (b) criticisms that have been made of the operations of the law in force in the Australian Capital Territory concerning the liabilities of occupiers and lessors of property to entrants,

in pursuance of section 6 of the *Law Reform Commission Act 1973*, HEREBY REFER to the Law Reform Commission, at its suggestion, the following matters as part of the Community Law Reform Program —

- (a) whether the law in force in the Australian Capital Territory concerning the liabilities of occupiers and lessors of property to entrants (including trespassers) is adequate and appropriate to current conditions; and
- (b) any related matter.

DATED 18 July 1984

Gareth Evans
Attorney-General

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* The recommendations, statements of opinion and conclusions in this report are those of the Members of the Law Reform Commission. They do not necessarily represent the views of consultants or of the organisations with which they are associated.

Summary

The report

This report deals with that part of the law in the Australian Capital Territory that determines whether, and to what extent, occupiers of property are to be liable for damage or injury caused to visitors to their property. The reference to the Commission was given as a result of suggestions made under the Community Law Reform Program for the Australian Capital Territory.

The old law

When the Reference was given, the Australian Capital Territory law on this subject consisted of a set of rules that divided visitors, and the hazards on property that they might fall foul of, into different classes. The basis of these distinctions was archaic and the results of injury claims were, to a considerable extent, arbitrary. The distinctions themselves were difficult to apply and could lead to absurd results. These rules, and their effects, are set out in paragraphs 8 to 15 of this report.

A more flexible approach

In many comparable jurisdictions, these old rules had been reformed by statute to apply a more flexible, general rule based on the familiar negligence principle: a rule that an occupier should take reasonable steps to safeguard visitors (see paragraph 6 of this report for an explanation of this rule). The application of the negligence principle allows courts to take into account the very many varying circumstances that arise in occupiers' liability cases. In early 1987 the High Court held that this approach should be applied as the common law of Australia instead of the old rules. In the Australian Capital Territory occupiers' obligations to their visitors are governed by the general negligence principle as a result of this case.

The Commission's view

The general rule. The Commission has concluded that this flexible standard, which covers all occupiers — from the rural landholder to the suburban householder — is the appropriate standard to apply. It has also concluded that, as the common law now applies that standard, there is no need to legislate to change the law. Indeed, it would be counterproductive to enact legislation to do what the High Court has already done for the Australian Capital Territory.

Trespassers. The Commission has given particular attention to the application of this rule to trespassers. The word 'trespasser' covers a wide class of people. It covers the child who climbs over the fence to retrieve a ball, the person who loses his or her way and accidentally goes onto another's land and the burglar who comes by night. The best way to determine whether or not the occupier should be liable for injuries caused to any one of these people is to apply the general negligence standard set out above. It will cover, in an appropriate way, all classes of 'trespasser'. Accordingly, no special rule needs to be made to cover 'trespassers'.

Landlord and tenant. The Commission has also been asked to examine the law in the Australian Capital Territory that determines whether, and to what extent, landlords are to be liable for damage or injury caused to visitors to the leased property. A rule of the common law (called the rule in *Cavalier v Pope*) provides that landlords, by virtue of their status as landlords, cannot be made liable in these cases. There is some doubt whether that rule applies in the Australian Capital Territory or in Australia at all: in early 1987 the South Australian Supreme Court refused to recognise it as part of the law. The Commission has concluded that such an exception for landlords, based simply on the fact that they are landlords, cannot be justified. Accordingly, the Commission recommends that any such immunity be abolished.

Miscellaneous matters

Two other related matters are considered in this report. The first concerns the question whether an occupier who hires an independent contractor to remove dangers on the property should nevertheless remain liable if the contractor negligently carries out the work. The Commission concludes that this question is best left to the general negligence principle outlined above: no change is needed to the law. The second question is whether occupiers should be able to exclude liability by notice or agreement. This question has wide implications beyond occupiers' liability cases. It is not a significant question in occupiers' liability cases. The Commission makes no recommendation on this subject.

1. The reference

Introduction

1. The Commission received this Reference from the Attorney-General on 18 July 1984. The Reference requires the Commission to report whether the law in force in the Australian Capital Territory concerning the liabilities of occupiers and lessors of property to entrants, including trespassers, is adequate and appropriate to current conditions. The Terms of Reference of the Community law reform program for the ACT¹ enable the Commission to recommend that the Attorney-General issue the Commission with a specific reference. The Commission, after considering suggestions made to it under the Community law reform program, identified reform of the law of occupiers' liability as a matter suitable to be referred to the Commission.

Course of the inquiry

2. A number of consultants were appointed to the Reference. They included officers from the Attorney-General's Department and the Department of ACT Administration (formerly the Department of Territories), representatives of the judiciary, of the legal profession, of the ACT Rural Lessees Association and of the Insurance Council of Australia. Work on occupier's liability was initially postponed to allow for the completion of more urgent work on domestic violence. With the completion of that report in 1986 (ALRC 30) work on this reference resumed. In April 1987 a Discussion Paper *Occupiers' Liability* (DP 28) was published. It contained proposals for and against the reform of the law concerning the liability of occupiers of land and premises. The Discussion Paper was circulated to a large number of individuals and organisations within the ACT. These included members of the judiciary, the legal profession, the ACT Administration, the Federal Attorney-General's Department, the National Capital Development Commission, the ACT Schools Authority, the ACT Hospital Services, the Trades and Labour Council, landowners, property developers, political parties, the ACT Council of Social Services, chambers of commerce, local government organisations and insurance representatives. The Commission received a number of submissions responding to the proposals.

¹ Para 3 of these Terms of Reference.

Reforms in other jurisdictions

Statutory reform

3. There have been legislative reforms in a number of jurisdictions. In England,² Scotland,³ New Zealand⁴ and Canada,⁵ legislative reforms have simplified occupier's liability law by bringing it within the ordinary rules of negligence. In doing so the legislation attempts to spell out the content of the duty owed by an occupier to an entrant. There have been similar legislative reforms in Victoria,⁶ Western Australia⁷ and South Australia.⁸ Tasmania⁹ is preparing similar reforms. These reforms are examined in chapter 3.

Judicial reform

4. Much of the Commission's work on occupier's liability was simplified when the High Court held¹⁰ that the relationship between occupiers and visitors of all kinds, including trespassers, should be dealt with on the basis of the ordinary laws of negligence. This decision was in accordance with the Commission's thinking and to a large extent made legislative changes unnecessary. A further development in the law occurred after the release of the discussion paper. The Full Court of the Supreme Court of South Australia decided¹¹ that a landlord was not immune at common law from liability in negligence for injuries sustained in dangerous premises. A common theme in reforming occupiers' liability legislation in many jurisdictions is to remove the supposed immunity enjoyed by landlords. This report examines, among other things, whether a legislative change is still necessary after these recent cases or whether the common law in the Australian Capital Territory should be allowed to take its course.

² Occupiers' Liability Act 1957 (UK); Occupiers' Liability Act 1984 (UK).

³ Occupiers' Liability (Scotland) Act 1960.

⁴ Occupiers' Liability Act 1962 (NZ).

⁵ Uniform Occupiers' Liability Act 1973 (Can); Occupiers' Liability Act 1973 (Alb); Occupiers' Liability Act 1974 (BC); Occupiers' Liability Act 1980 (Ont); Occupiers' Liability Act 1983 (Man).

⁶ Wrongs Act 1958 (Vic) Pt IIA.

⁷ Occupiers' Liability Act 1985 (WA).

⁸ Wrongs Act Amendment Act 1987 (SA).

⁹ Atkinson 1984.

¹⁰ *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 69 ALR 615; 61 ALJR 180.

¹¹ *Parker v South Australian Housing Trust* (1987) 41 SASR 493.

2. Occupiers' liability: the present law

Introduction

5. The Commission has been asked in this reference to consider

whether the law in force in the Australian Capital Territory concerning the liabilities of occupiers and lessors of property to entrants (including trespassers) is adequate and appropriate to current conditions; and any related matter.

The relevant law in force in the Australian Capital Territory is the common law. In 1987 the High Court in the *Australian Safeway*¹ case changed the common law in a way which accords with the Commission's thinking. Accordingly, much of what would have been proposed by the Commission is no longer necessary. In order to explain how this High Court decision has changed the law, it is first necessary to look at the law as it was before 1987.

Negligence — the common law

6. When a person is injured, or his or her property is damaged, because of the unintentional fault of another, the law allows the former (the plaintiff) to claim money compensation (damages) from the latter (the defendant). The plaintiff has to establish that the conduct of the defendant which caused damage to the plaintiff was negligent — which means that the defendant failed to take reasonable care in the circumstances. This is the common law of negligence, which is characterised by broad and flexible concepts rather than strict and prescriptive rules. In, for example, a motor accident case where the common law still operates, the courts are concerned with three basic inquiries:

- did the defendant owe the plaintiff a duty of care?
- was the defendant in breach of the duty of care?
- were the plaintiff's injuries a consequence of the defendant's failure to observe due care?

The first question is invariably easy to answer. The defendant owes a duty of care to anyone who will foreseeably be injured by his or her activities. The expression used by lawyers to describe the legal relationship in which a duty of care is owed by one to another is that the parties are 'neighbours'.² This word is used in its broad sense and is not restricted to people who live next door to each

¹ *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 69 ALR 615; 61 ALJR 180.

² *Donoghue v Stevenson* [1932] AC 562, 580 (Lord Atkin).

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other. Thus, a motorist owes a duty of care to all other road users, pedestrians and people living along the road. These people are his or her 'neighbours'. The second question is usually the one which determines whether or not the plaintiff can obtain compensation. It is this question which determines fault. It is the issue which in very many cases is hardest fought if the case goes to court. The plaintiff argues that the defendant should have been more careful and that the accident could have been avoided; the defendant argues that he or she acted with proper regard for safety. Finally, the third question usually causes little difficulty in the great majority of cases because it is usually obvious that the plaintiff's injuries were a consequence of the accident caused by the defendant's carelessness.

Occupiers' liability — the common law

Introduction

7. The law of occupiers' liability is concerned with the duty of care owed by occupiers of premises or land toward visitors, whether invited or uninvited, who suffer either personal injury or property damage during the course of their visits. Just as in all negligence cases, the broad issue for the court to determine is: what steps is the occupier reasonably expected to take to safeguard visitors from injury or damage? Occupiers' liability is that part of the law which sets the safety standards which householders, farmers, tenants, companies and anyone else in control of land or buildings should observe to safeguard those who come onto the premises. Special and complex rules were developed to set the appropriate safety standards for occupiers. These are to be contrasted with the ordinary negligence rules which govern other cases.

A survey of the law

8. *Special rules.* The broad concepts of negligence described above have generally not been used in occupiers' liability cases. The reasons for this will be examined briefly below.³ Instead, over the years the courts in the United Kingdom, and then in Australia and other countries which inherited the common law tradition, developed very specific rules which applied only in occupiers' liability cases. These rules were very complicated. They employed a large number of categories and verbal formulae which made arguing cases before courts a very elaborate process. There is no need to describe the full complexities of these rules here. These can be found in specialist works.⁴ Instead, the rules will be broadly described so as to illustrate their complexity.

9. *Survey of the rules.* At the outset, it was sometimes necessary to determine whether the defendant was an 'occupier' in the legal sense. If not, the ordinary rules of negligence would apply and not the special rules of occupiers' liability.

³ See below para 10-2.

⁴ See Trindade & Cane 1985, ch 14; Fleming 1987, ch 22; Heuston & Chambers 1981, ch 11.

An 'occupier' is the person who has control over the premises. It is possible for two or more people to be occupiers of the same area.⁵ It is not necessary for an occupier to be actually in occupation.⁶ In relation to rented premises, the tenant, not the landlord is the occupier.⁷ Next, it was necessary to determine whether the visitor was

- a trespasser — one who was there without the occupier's permission
- a licensee — a person permitted or invited to be there
- an invitee — the same as a licensee except that there must in addition have been something in the nature of a business relationship between occupier and invitee.⁸ The invitee must have been there on a matter of material interest to the occupier
- an entrant as of right — this covered a heterogeneous group of people who had a right to go onto the occupier's land, including visitors to public facilities such as parks and playgrounds, the person who came to read the meter and the fireman who came to extinguish a fire
- a contractual entrant — these were people who had paid to use the occupier's premises, such as cinema goers. (It made no difference if somebody else actually paid for the ticket).

A different and very specific standard of care was owed by the occupier to each person falling into each group. The standard of care ascended in stringency as one progressed down the list, so that the highest standard was owed to contractual entrants. The standard owed in each category was very precisely described (except the standard owed to entrants as of right, which was unclear). A fixed verbal formula was used for each category. For example, in relation to licensees, the occupier's duty was to safeguard the licensee against 'concealed traps' of which the occupier was aware,⁹ whereas towards invitees the occupier had to use reasonable care to prevent damage from unusual dangers of which the occupier knew or ought to have known.¹⁰ Trespassers and contractual entrants also had their own special formulae. Trespassers were owed a duty of 'common humanity'.¹¹ Contractual entrants, at the other end of the scale, were entitled to a standard of safety which was almost absolute. The occupier had to ensure that the premises were safe.¹² Superimposed on these categories was the possibility that, in any particular case, the court would not employ the

⁵ *Canberra Formwork Pty Ltd v Civil and Civic Ltd* (1982) 41 ACTR 1; *Thompson v Commonwealth* (1969) 70 SR (NSW) 398; *Wheat v Lacon & Co Ltd* [1966] AC 552.

⁶ *Harris v Birkenhead Corporation* [1976] 1 All ER 341.

⁷ For difficulties this creates see ch 5.

⁸ *Lipman v Clendinnen* (1932) 46 CLR 550, 559 (Dixon J).

⁹ *id.*, 556.

¹⁰ *Indermaur v Dames* (1866) LR 1 CP 274, 288 (Willes J).

¹¹ *Southern Portland Cement Ltd v Cooper* [1974] AC 623; *British Railways Board v Herrington* [1972] AC 877.

¹² *Francis v Cockrell* (1870) LR 5 QB 501; *Voli v Inglewood Shire Council* (1962-63) 110 CLR 74; cf *Watson v George* (1953) 89 CLR 409 which may have set a less stringent standard.

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complex occupiers' liability rules but instead resort to the ordinary 'neighbour' test described above. This was done by some, but not all, the judges in two recent High Court cases.¹³ The test for determining when a court should employ the neighbour principle in preference to the occupiers' liability rules was not settled or clear.¹⁴

Rationales for the occupiers' liability rules

10. *Ownership of property.* The law of occupiers' liability was developed in the nineteenth century and reflected traditional attitudes about ownership of property. Accompanying the aphorism 'an Englishman's home is his castle' was the view that what he did on his land was his business. Visitors should take the land or premises as they find them. Thus no duty of care was traditionally owed to trespassers,¹⁵ though the law did place limits on dangerous and intentional infliction of harm, such as setting traps for trespassers.¹⁶ A very low standard of care was owed to licensees because it was thought that such visitors were there by way of indulgence and it would have been an imposition on the landholder to do more than to remove 'concealed traps'. The paradigm for a licensee was the person permitted to take a short cut across the occupier's land. Only if there was some benefit to the landholder arising out of the visit would the law impose a higher standard of care. Thus the person who paid to enter premises, the contractual entrant, or the person who came to do business, the invitee, were owed higher (and different) standards of care. The rationale for these higher standards was that the occupier was no longer merely granting an indulgence but was materially gaining from the visit. That gain had to be 'paid for' by the imposition of a more stringent standard of safety. Something in the nature of a contractual exchange seems to have been behind the standard of care owed to invitees and contractual entrants.

11. *Liability for omissions.* Another rationale for occupiers not being burdened with too heavy responsibilities was that the common law has traditionally been reluctant to impose liability for mere omissions, that is, for failing to take positive steps to prevent others from coming to harm where the potential for that harm was not created by that person. On the other hand, if a person engaged in a course of conduct which created risks — such as manufacturing and distributing products, driving a motor car or running a factory — positive duties to take appropriate safety precautions were imposed. Ownership or control of land or premises was not regarded as in the same category. The analogy with omissions, however, could not be taken so far as to grant complete immunity from liability to landholders. The law therefore imposed safety responsibilities which required more positive action by the occupier the more actively he or she sought to encourage the visitor to come. This was an odd solution because

¹³ *Hackshaw v Shaw* (1984) 155 CLR 614; *Papatonakis v Australian Telecommunications Commission* (1984-85) 156 CLR 7.

¹⁴ Seddon 1985.

¹⁵ *Addie (Robert) & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358.

¹⁶ *Bird v Holbrook* (1828) 4 Bing 628; 130 ER 911.

it focused on the purpose of the visit rather than the nature of the hazard. A more logical approach, and one which would have been more consistent with the ordinary rules of negligence, would have been to impose a more stringent duty the more dangerous were the premises.

12. *An explanation.* A third explanation, rather than a rationale, for the occupiers' liability rules was that they were worked out by the courts long before the law of negligence was definitively stated in *Donoghue v Stevenson*¹⁷ in 1932. After this seminal case, the courts in England evidently thought that the occupiers' liability rules were far too well-established and could not, as a general rule, be modified or assimilated within the neighbour principle. So they survived as a special class of rules. There were some exceptions, notably those cases in which 'active operations' (for example, running a railway) were the source of the danger, where the courts used the neighbour principle rather than the special rules.¹⁸ In Australia the High Court has more readily accepted that assimilation or absorption of the special rules into the more general negligence formula was possible.

Problems with the rules

13. *Complexity.* Difficult legal questions faced lawyers and judges who became involved in occupiers' liability cases.¹⁹ There have been many articles written by practising and academic lawyers about the intricacies of the occupiers' liability rules.²⁰ In such cases the parties were beset by the 'refinements and snares that characterize and disfigure the law relating to occupiers'.²¹ Much legal energy was used to argue that a particular plaintiff did or did not fall into a particular category. Instead of asking whether the plaintiff was the occupier's 'neighbour' — that is, someone who could foreseeably be harmed if the occupier did not take due care — the occupiers' liability rules made it necessary to categorise the plaintiff more specifically. Even if this could be done with some degree of certainty in a particular case, the court's time would then be taken up with a minute examination of the formulae described above. For example, in relation to an invitee, the court had to decide whether the hazard that the plaintiff alleged the defendant/occupier was responsible for amounted to an 'unusual danger'. By contrast, applying the ordinary rules of negligence, the court would have to determine whether in all the circumstances the occupier had taken adequate safety precautions which he or she could reasonably be expected to take in the circumstances. In short, the rules were complex,

¹⁷ [1932] AC 562.

¹⁸ eg, *Slade v Battersea Hospital* [1955] 1 All ER 429; *Commissioner for Railways v McDermott* [1967] 1 AC 169.

¹⁹ eg the NSW Law Reform Commission's working paper on occupiers' liability devoted 34 foolscap pages to the various legal problems which the occupiers' liability rules generated.

²⁰ eg Marsh 1953; Odgers 1955; Bowett 1956; Newark 1956; Payne 1958. There is at least one comment or article on occupiers' liability in 34 of the first 50 volumes of the *Australian Law Journal*.

²¹ *Clements v Bagot's Executor and Trustee Co Ltd* (1981) 26 SASR 399, 402, (Cox J).

cumbersome and expensive to administer because they required elaborate arguments in courts.

14. *Practical difficulties.* Often a negligence case involves multiple defendants, particularly industrial and building site cases. Employing the traditional approach required a careful analysis of the relationship between the injured party and each defendant. It was not uncommon for there to be two or three different relationships, each with their own standard of care. Settlement of such cases became complicated and was less likely to occur because of these complications.

15. *Arbitrary operation.* The rules could operate arbitrarily. For example, whether a plaintiff won or not could turn on whether that person was an invitee or a licensee because the hazard which caused the accident was an 'unusual danger' but not a 'concealed trap'. The categorisation of a person as a licensee rather than an invitee could be quite arbitrary. A person who came to your door to sell brushes might have been an invitee but, if no sale was made, was probably a licensee when he or she went.²² A person living with a tenant in a block of flats was probably a licensee vis-a-vis the landlord when using the common stairways but was an invitee if he or she happened to be going to pay the rent.²³ A person who was invited to dinner was a licensee in the usual case. However, if the host and the guest discussed a business matter over the meal, the guest was an invitee. (Whether a guest, who was initially invited for social reasons and who happened to become involved in discussions for a business proposition in the course of a meal, changed his or her status was not clear.) The host, according to the old law, did not have to remove a visible hazard if the guest was merely coming for good company, but was obliged to take that safety precaution if the guest was coming to talk business. Again, a person who visited a shop, even with no intention of buying, was an invitee so long as the visit was to look at the wares. But if a person went into a shop to ask the way, he or she was probably a licensee. If then the visitor was tempted by some display in the shop and contemplated for an instant a purchase, the visitor was an invitee. These arbitrary distinctions could not only cause injustice to litigants but they could also bring the law into disrepute. The non-lawyer in an occupiers' liability case could have been excused for thinking that the law was an ass after his or her lawyer had patiently explained why the case was lost. 'You cannot be compensated for your broken leg because, although your host should have removed the child's toy from the step, the law says that that elementary precaution need not have been taken in this particular case because you were there on a social visit and not a business one.'

Judicial reform in Australia

16. Before *Australian Safeway Stores Pty Ltd v Zaluzna*, the High Court had, in a number of cases, shown a marked leaning towards replacing the old

²² *Dunster v Abbott* [1953] 2 All ER 1572.

²³ *Vial v Housing Commission of New South Wales* [1976] 1 NSWLR 388.

occupiers' liability rules with the ordinary negligence rules.²⁴ The New South Wales Court of Appeal and the Supreme Court of Queensland had shown a similar tendency.²⁵ However, there were uncertainties emerging from those cases —

- only Justice Deane of the High Court was prepared effectively to abolish the old occupiers' liability rules and use the neighbour principle instead
- in some cases it was said that there were concurrent duties — the old rules and the neighbour principle existing side by side
- some judges still said that, in some circumstances, only the old rules applied
- it was sometimes not clear what circumstances justified the use of the neighbour principle in preference to the old rules.

These uncertainties have now been removed by the High Court. The *Australian Safeway* case raised the very question generated by the uncertainties listed above. In what circumstances should the ordinary negligence rules be used in occupiers' liability cases? A majority of the High Court (Justices Mason, Wilson, Deane and Dawson, Justice Brennan dissenting) answered: the negligence rules should from now on always be used. The 'concurrent duties' theory and the old rules were abandoned.

Does a theory of concurrent general and special duties, giving rise as it does to complications that raise 'some intricate and possibly confusing arguments' . . . 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? . . . There remains neither warrant nor reason for continuing to search for fine distinctions between the so-called special duty . . . 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 . . . We are unable to see sufficient justification for their continued recognition.²⁶

This decision was foreshadowed and justified by the New South Wales Court of Appeal.

It should not be forgotten that the law on a subject such as this is ultimately designed to be understood and obeyed by citizens. It has relevance to the determination of liability for compensation to the taking of precautions by occupiers and to the fixing of insurance premiums in large numbers of cases. These are powerful arguments for

²⁴ This process started in the 1950's in the cases of *Thompson v The Municipality of Bankstown* (1953) 87 CLR 619 and *Rich v Commissioner for Railways (NSW)* (1959) 101 CLR 135. The same approach was used in *Commissioner for Railways (NSW) v Cardy* (1959–60) 104 CLR 274. More recently, see, in particular, *Hackshaw v Shaw* (1984) 155 CLR 614; *Papatonakis v Australian Telecommunications Commission* (1984–85) 156 CLR 7.

²⁵ *Gorman v Williams* [1985] 2 NSWLR 662; *Eyres v Butt* [1986] 2 Qd R 243.

²⁶ (1987) 69 ALR 615, 619–20; 61 ALJR 180, 182–3.

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simplicity and clarity in the law and for adoption of a principle which will appear immediately justifiable and understandable to those principally affected.²⁷

In the Australian Capital Territory it is the common law of negligence that is now, as a result of the *Australian Safeway* case, the relevant law covering the responsibilities of occupiers. The question is whether the law as represented by this decision is adequate and appropriate and whether further reforms are necessary.

²⁷ *Gorman v Williams* [1985] 2 NSWLR 662, 665 (Kirby P).

3. Policy options for reform

A proper allocation of responsibilities

17. This chapter examines the appropriate allocation of responsibilities between an occupier of property and an entrant for harm suffered by that entrant. The old 'categories' approach was one way of determining the appropriate allocation of responsibility. The *Australian Safeway* case requires that the allocation of responsibility now be determined on the basis of negligence principles. Legislative reforms have generally taken the latter approach. They have abolished the old occupiers' liability rules and have substituted the ordinary rules of negligence. There are other options available. It would be possible to make occupiers strictly liable for any injuries suffered by entrants. At the other end of the spectrum it would be possible to exempt occupiers from all liability. Neither of these latter alternatives may be particularly desirable. Once the appropriate allocation of responsibility is determined, the question becomes one of choosing the appropriate legal means of giving effect to this allocation.

Strict liability

18. One allocation of safety responsibilities, which has not been considered in any jurisdiction, is to make occupiers strictly liable for any injuries suffered by visitors.¹ Strict liability does not require proof of fault. A strict liability regime would have to be complemented by compulsory liability insurance, because householders and the like would otherwise be unable to bear the losses generated by successful damages claims.² Such a measure would not necessarily be impossible to implement but would be difficult. It would be difficult to find a common taxing point for all occupiers, whether they be houseowners, tenants, companies or government departments. A strict liability regime would also have to accommodate the problem of trespassers. Presumably, some types of trespassers would be excluded from being able automatically to claim compensation. So radical a change to the rules of liability should form part of a wider inquiry into compensation schemes.

¹ This approach is suggested in Trindade & Cane 1985, 460.

² The compulsory third party scheme for motor accidents illustrates how ordinary members of the public can be made to be good loss bearers. But this is not the only way in which efficient loss distribution may operate. In other circumstances the defendant may be a good loss bearer, for example, because of an ability to pass on the costs of damages claims by raising the prices of goods or services supplied.

No liability

19. It would be possible to exempt occupiers from all liability for harm to entrants. This would be undesirable. Occupiers clearly should have some responsibility for harm caused to those who enter onto their property. There are many circumstances in which the general law requires that individuals be responsible to others for harm they negligently cause others.³ Occupiers should not be placed under a lesser duty of care, just because of their status as occupiers. No liability is not an option which has received support in any equivalent jurisdiction or in any submission to the Commission.

A flexible approach

A flexible approach needed

20. In deciding to what extent property owners and other occupiers should take steps for the safety of their visitors, it is necessary to be flexible because of the wide variety of circumstances. A farmer could not, for example, be expected to accept the same level of responsibility as would be expected of a person conducting a roller skating rink. The reasons for imposing a higher standard of care on the latter are dictated by common sense: the hazards of, for example, defective flooring are obvious and avoidable and are properly the responsibility of the operator; whereas the hazards on a farm are more diffuse, probably more easily avoided by the visitor and less easy to remove. This example shows that there is no simple answer to the question: what is the proper allocation of responsibilities? The answer is that it depends on the circumstances. Those circumstances encompass a great number of possible diverse factors. The nature of the hazards, the extent to which they can be foreseen and extent to which visitors can be expected to look out for themselves will all vary from case to case. In short, a flexible approach is needed to deal with the very many different circumstances that can arise in occupiers' liability cases.

Achieving a flexible approach

21. *Returning to the old rules.* The old 'categories' approach to occupiers' liability was a crude attempt to recognise that there needs to be a variety of responses to the many different possible situations posed by these cases. There is, however, little justification for distinguishing between entrants except in relation to trespassers.⁴ Trespassers apart, the idea that an occupier would or would not take safety precautions according to the purpose of a forthcoming visit was obviously absurd. In practice, occupiers never made such decisions. It was only a court which, after the event, had to decide whether in the circumstances the occupier had taken sufficient care or should have done more. As has

³ eg para 6 above.

⁴ Trespassers are dealt with in ch 4.

been seen above,⁵ these old rules worked poorly. They involved a number of artificial distinctions which unnecessarily absorbed the courts' time. A return to the old rules would be an inadequate way of meeting the need for flexibility.

22. *Occupancy should not be treated differently.* Despite these difficulties, is there something special about occupancy duties? One point, made earlier⁶ when explaining why the law regarded occupancy of land as involving, generally speaking, less onerous duties, was that the law has traditionally drawn a distinction between omissions and positive acts. Occupying land is not the same as driving a vehicle or running a factory. Failing to rectify dangers on land is not as culpable as failing to take measures to eliminate risks created by positive conduct. This dichotomy has traditionally been reflected in the rule that 'active operations' on land attracted the ordinary negligence principle whereas hazards created by the 'static condition' of the land attracted the less onerous occupiers' liability rules. Cases can well be imagined, particularly in rural Australia, where to require the occupier to render his or her premises safe would be impossible or unduly burdensome.⁷ Even in suburban Australia it may be too burdensome to expect the occupier to be vigilant to eliminate all hazards. But, even if it is accepted that occupancy is to be treated differently for the reasons outlined above, the common law of negligence is adequate to the task. In any given case, the court's job would be to judge whether the occupier owed a duty of care to the entrant (a question which would be simply and positively answered, at least for lawful entrants) and, if owed, whether the occupier had fulfilled what reasonable care in the circumstance demanded.

23. *Negligence principles appropriate.* The negligence rules provide the necessary flexibility. They make no attempt to provide for particular circumstances but, instead, leave it to the court to determine in each case what should reasonably have been done by the occupier. This was recognised by the High Court in the *Australian Safeway* case and in earlier cases where the Court used the ordinary negligence principle in preference to the old rules. The ordinary negligence principle is ideally suited to taking into account the many different types of occupancy and hazards that can arise. Its flexibility allows for both outback conditions and suburban living. The negligence principle only demands of the occupier what would be *reasonable* in the circumstances. It is the living and evolving negligence principle, not rigid and inflexible formulae, which will most appropriately determine occupiers' liability.

⁵ Para 13-5.

⁶ Above para 11.

⁷ See ACT Rural Lessees Association (BP Buckmaster) *Submission* (15 September 1987).

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Support for negligence principles

24. *Legislative reforms.* This conclusion is supported by the thrust of reform in England,⁸ Scotland,⁹ New Zealand¹⁰ and Canada,¹¹ where the old rules have been, to a greater or lesser extent, replaced by a simpler formula for deciding occupiers' liability cases. Victoria,¹² Western Australia¹³ and South Australia¹⁴ have followed suit with Tasmania¹⁵ preparing to do the same. The aim of all these reforms has been to substitute the 'neighbour' test for the complex categories and formulae described above. In other words, the aim of reform was to simplify the law by bringing these sorts of accidents within the ordinary rules of negligence.

25. *Support for reforms.* There were some initial reservations to the legislative endorsement of the negligence approach. One commentator¹⁶ feared that replacing the elaborate categorisation approach with the more free-ranging 'neighbour' principle, with its concomitant adjustable standard of care according to the circumstances of the case, would place too much faith in fallible judicial discretion, thereby creating uncertainty in the law. Another commentator argued that the old rules had had the tendency to limit both the number and level of successful occupiers' liability compensation claims.¹⁷ He feared that the reform would expose householders to indeterminate liability, particularly where juries sit in compensation cases. These fears were apparently not well-founded. Lord Denning MR commented on the Occupiers' Liability Act 1957 (UK)

[T]his is the first time that we have had to consider that Act. It has been very beneficial. It has rid us of those two unpleasant characters, the invitee and 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. The Act has now been in force six years, and hardly any case has come before the courts in which its interpretation has had to be considered.¹⁸

Other commentators have expressed similar sentiments.¹⁹

⁸ Occupiers' Liability Act 1957 (UK); Occupiers' Liability Act 1984 (UK).

⁹ Occupiers' Liability (Scotland) Act 1960.

¹⁰ Occupiers' Liability Act 1962 (NZ).

¹¹ Uniform Occupiers' Liability Act 1973 (Can); Occupiers' Liability Act 1973 (Alb); Occupiers' Liability Act 1974 (BC); Occupiers' Liability Act 1980 (Ont); Occupiers' Liability Act 1983 (Man).

¹² Wrongs Act 1958 (Vic) Pt IIA.

¹³ Occupiers' Liability Act 1985 (WA).

¹⁴ Wrongs Act Amendment Act 1987 (SA).

¹⁵ Atkinson 1984.

¹⁶ Payne 1958, 359.

¹⁷ Shatwell 1957, 328.

¹⁸ *Roles v Nathan* [1963] 2 All ER 908, 912.

¹⁹ Goodhart 1959, 137.

26. *Simplification and costs savings.* Finally, adoption of the negligence rules have resulted in cost savings and simplifications. The number of occupiers' liability cases which had to be decided by courts dropped quite dramatically in those jurisdictions where the legislation was implemented. This fact alone is a powerful argument which justifies the reforming measures taken. Simpler law helped out of court settlement which, in turn, saved resources.²⁰

Implementing the flexible approach

Legislation or common law

27. *The issue.* The common law approach as expounded in the *Australian Safeway* case is now the law of the Australian Capital Territory. It accords with the recommendations just made. Is there any point in introducing this approach by legislative provision, as has been done in every other jurisdiction where the law of occupiers' liability has been reformed? In all these jurisdictions the thrust of the legislation has been to replace the old rules with the ordinary negligence rules. Yet in none of the legislation has it been said simply that the courts shall henceforth use the ordinary negligence formula in place of the old occupiers' liability rules. Instead, the legislation, in differing degrees of detail, has sought to spell out the content of the duty owed by an occupier to entrants.

28. *The English model.* For example, the first legislative attempt, the Occupiers' Liability Act 1957 (UK), though it spoke of the 'common duty of care', spelled out what that phrase meant.

The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.²¹

The Act spells out circumstances, by way of example, for the guidance of the court in determining whether or not the occupier has taken reasonable care.²² It specifically excludes from its effect the question whether a duty of care is owed;²³ it only concerns itself with the standard of care. In other words, whether someone is an 'occupier' is determined by the common law and therefore reference back to occupiers' liability cases is necessary to determine this issue.

29. *The Victorian model.* The legislation in other jurisdictions has adopted the same approach, some of it more elaborate in spelling out what considerations the court should have regard to, some of it less so. For example, in Victoria seven criteria are spelled out:

²⁰ Dr JL Robson, the New Zealand Secretary for Justice, told the NSW Law Reform Commission that the paucity of reported cases after the passing of the Occupiers' Liability Act 1962 (NZ) presumably indicated that few difficulties had been encountered with the new legislation: NSWLRC WP, 37.

²¹ Occupiers' Liability Act 1957 (UK) s 2(2).

²² id s 2(3)-(4).

²³ id s 1(2).

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- (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 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;
- (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.²⁴

The Western Australian legislation is similar in this respect.²⁵

Arguments for the common law

30. *No improvement in legislative approach.* The question that is raised by the approach so far adopted in other jurisdictions is whether it is desirable to attempt in effect to codify the ordinary negligence principle by spelling out its content or whether it is better to leave it to the courts to determine in each case the appropriate standard of care, that is, leave the common law to develop. The principal argument for leaving the common law to develop (and against legislation) is that codification does not do anything which a court, in using the ordinary negligence principle, would not do. This can be tested by looking at the Victorian criteria set out above. Any or all of these matters are, as a matter of course, taken into account to the extent that they are relevant in ordinary negligence cases when determining whether there has been a breach of duty. It might then be said that it does no harm to spell out the criteria, particularly if they do not attempt to be comprehensive and exhaustive (as the Victorian criteria do not attempt to be — they are by way of guidelines). But there is a danger in spelling out criteria. It can give rise to arguments about whether the legislature intended them to be a subtly different standard in cases coming within the legislation. This argument may have some force in Victoria because the court 'shall' give consideration to the seven criteria (whether or not one or any of them are relevant to the circumstances of the case). If case law develops which draws fine distinctions between the statutory scheme and the ordinary negligence principle, the reform is not effective. It will simply have replaced one set of detailed criteria with another. This was one reason why Mr K Diplock, QC (as he then was) dissented from the English Law Reform Committee's report on occupiers' liability. He argued that if legislation rejects the old formula and substitutes a new formula, judges will compare the old and new and ascribe some significance to the differences. Such a process has unpredictable consequences.²⁶

²⁴ Wrongs Act 1958 (Vic) s 14B(4).

²⁵ Occupiers' Liability Act 1985 (WA) s 5(4).

²⁶ UK Law Reform Committee No 3, 43-4. However, he later retracted his view and commented, some 12 years after the reform, 'it has worked like a charm — none of the difficulties that I expected . . . have arisen': see (1971) 45 *Australian Law Journal* 569.

31. *Demarcation arguments.* There will still be 'demarcation' arguments about whether a particular case is governed by the statute or by the common law. For example, an English text on occupiers' liability specifically poses the question:

in what circumstances, if any, will an occupier be liable for injuries caused to a lawful visitor on his land, not for breach of the statutory common duty of care, but under Lord Atkin's 'neighbour principle' as expressed in *Donoghue v Stevenson*?²⁷

Such a question is raised by the wording of the 1957 Act which covers 'dangers due to the state of the premises or to things done or omitted to be done on them'. What is uncertain is whether any activity on premises, such as driving a vehicle, would fall within the Act or be governed by the common law.²⁸ Such a question would be unnecessary if the statutory duty and the neighbour duty were one and the same or there was no statutory duty at all. Yet the writer devotes over six pages to answering the question, arguing that it is wrong to treat a case as coming within the statute when it ought to be dealt with as an ordinary negligence case²⁹ and vice-versa.³⁰ The writer concedes that '[m]ost writers suggest that the problem is essentially academic, for there is little substantial difference between the two duties'.³¹ One aim of effective law reform in the area of occupiers' liability should be to eliminate the need to argue whether a case falls within or outside the reforming legislation.

Arguments for legislation

32. It may be argued that there is a need to replace the common law with a statutory scheme because otherwise there would be a vacuum. The common law, so recently changed, has not been worked out. How will lawyers advise their clients? It might be said, in support of codification, that occupancy duties are special and need to be defined with more particularity than is provided by the 'neighbour' principle, the very flexibility of which may give rise to uncertainty. Further, the public has a right to know what are its duties and rights in relation to the safety of premises. But the legislation in the jurisdictions which have followed the English or Scottish models has not spelled out the content of the duty owed by occupier to entrant with any more precision than would be employed by a court hearing an ordinary negligence case. It was earlier concluded³² that the criteria spelled out in, for example, the Victorian legislation, do not add anything to what would be judged to be the ordinary duty of care. Further, the High Court has taken the view that the ordinary negligence principle can adequately meet the demands of occupiers' liability cases. A further argument

²⁷ North 1971, 80.

²⁸ See also *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 where, for the purposes of an insurance policy, it was necessary to determine whether an accident arose out of breach of occupancy duties or breach of the ordinary duty of care.

²⁹ North 1971, 86-7.

³⁰ eg *Appleton v Cunard Steam-Ship Co Ltd* [1969] 1 Lloyd's Rep 150.

³¹ North 1971, 87.

³² Above para 30.

which has been advanced in favour of a more detailed statutory code is that it imposes some control on juries who may, at times, be over-sympathetic to an accident victim.³³ This is not a problem in the Australian Capital Territory as there are no jury trials in negligence cases.

Recommendation

33. Legislative reforms of the kind found in other jurisdictions do not improve the common law. No useful end would be served by enacting legislation simply to mimic what the High Court has achieved through judge-made law. Any attempt to do so would be counter-productive. The common law should remain.

³³ See eg NSWLRC WP.

4. Trespassers

Introduction

Definition

34. Under the old occupiers' liability rules, there were special rules defining an occupier's duty to trespassers. Trespassers cover a wide range of people. A trespasser is anyone who is not permitted to be on premises or land. It is not necessary for there to be an express prohibition (such as 'no hawkers or canvassers') for a person to be a trespasser. On the other hand, in certain circumstances, it is usually safe to assume that there is an implied permission for someone to enter the land or premises. In the absence of a notice of prohibition, there is, for example, an implied licence for people to come to the front door of a house for varied purposes. A person who visits a home to ask the way or to conduct a survey is not a trespasser because there is an implied licence. By contrast, a person who gets over a fence to retrieve a ball, or who takes a short cut across another's land, or who loses his or her way and accidentally goes onto another's land are all trespassers. All that is required is lack of permission to be on the premises. It follows that trespassers come in many forms, ranging from the innocent, such as a person on an errand of mercy, to the guilty, such as a burglar who comes by night. It also follows that a confidence man or a thief who enters as an invitee and is subsequently injured is not a trespasser.

Determining liability

35. The question whether an occupier of premises or land should be liable to trespassers who are injured is one which arouses strong feelings. It needs special attention. This chapter contains recommendations on how best to determine the appropriate level of responsibility to the diverse range of individuals who have been classified as trespassers. If it assumed that an occupier should, at least in some circumstances, take some steps for the safety of visitors, even trespassers, then the question arises: what steps? Should the occupier take the same steps for all trespassers? Should a distinction be made between innocent trespassers, children and criminal trespassers?

What is the proper allocation of responsibility?

Options

36. *Strict liability.* It would be possible to impose strict liability on occupiers towards trespassers. However, for reasons given in the preceding chapter,¹ the

¹ See above para 18.

Commission rejects the imposition of strict liability for harm suffered to any entrants, whether welcome or unwelcome.

37. *A no liability rule.* Another possibility is that occupiers should be entirely exempt from any possible liability to all trespassers. This would be a harsher rule than has existed for at least the last century and a half.² Such a rule would be out of step with all that has been said in trespasser cases in which, at the very least, the occupier must not act with reckless disregard of the trespasser's presence. In addition, the justification for imposing some kind of a duty is that ownership of land carries certain responsibilities.

38. *An unexacting standard: the Addie Rule.* In the nineteenth and early twentieth centuries the courts imposed an unexacting standard whereby an occupier was obliged simply to refrain from deliberately or recklessly injuring a trespasser (known as the *Addie* rule³). This rule ignored the fact that trespassers were not necessarily thieves or poachers. The courts developed devices for avoiding the rule, particularly in cases involving child trespassers. One device, which was rejected in Australia,⁴ was for the courts to treat certain trespassers as licensees, on the theory that, if the occupier knew of the repeated presence of trespassers and did not object, there must have been an implied permission for them to be there.⁵ This device was combined with a 'doctrine of allurements' to provide a more humanitarian approach to the problem of child trespassers. In the Ontario and Manitoba Acts, and in the Saskatchewan draft legislation, special provisions have been made to deal with the problem of trespassing hunters, recreational vehicle users and the like. The *Addie* rule applies to such people.⁶ The *Addie* rule applies to all adult trespassers in the Alberta Act.⁷ This type of provision gives the courts no flexibility in deciding what degree of care should be expected of an occupier in a particular case. For example, under the Alberta Act an adult who has lost his or her way is in exactly the same position as a burglar. For reasons explained below⁸ the *Addie* rule is not recommended because it is not in accordance with humanitarian principles. Its application would mean that very negligent conduct to innocent trespassers would attract no responsibility so long as that conduct was not deliberate or reckless. A more flexible rule is required.

39. *A middle ground: the 'common humanity' approach.* In more recent times the courts have sought to mitigate the apparently harsh effects of the

² In *Bird v Holbrook* (1828) 4 Bing 628; 130 ER 911 it was established that an occupier could not set out deliberately to harm a trespasser.

³ *Robert Addie & Sons (Colliers) Ltd v Dumbreck* [1929] AC 358.

⁴ *Commissioner for Railways (NSW) v Cardy* (1959-60) 104 CLR 274, 281 (Dixon CJ).

⁵ Implied licence cases are discussed in *Cardy v Commissioner for Railways* (1959) 59 SR (NSW) 230, 233-4 (Roper CJ, Herron J).

⁶ Occupiers' Liability Act 1980 (Ont) s 4(3)-(4); Occupiers' Liability Act 1983 (Man) s 3(4); Draft Occupiers' Liability Bill 1980 (Sask) cl 3(8).

⁷ Occupiers' Liability Act 1973 (Alb) s 12.

⁸ See para 40-1 below.

Addie rule. In the House of Lords and in the Privy Council (on appeal from the High Court) two cases established a more humane approach to the duty owed by an occupier to a trespasser.⁹ The formula which emerged from these cases was that an occupier must act with 'common humanity' towards trespassers. The meaning of these words was not immediately obvious but they denoted a standard of care which was higher than that owed under the *Addie* rule but not as high as that traditionally owed to a licensee.¹⁰ One explanation is that the 'common humanity' approach was a flexible standard which was 'really an application to the trespasser of ordinary negligence principles in the light of his nature as a trespasser'.¹¹ A similar explanation is that the duty of common humanity

means no more than a requirement that the defendant, in light of his knowledge, skill and resources, should take reasonable care for the trespasser's protection. It is, in other words, negligence with a subjective element.¹²

40. *The neighbour principle: the Australian approach.* In Australia the High Court has, at least since the 1950s, shown an inclination to use the ordinary neighbour principle, when appropriate, in trespasser cases.¹³ Despite being reprimanded by the Privy Council for adopting this approach,¹⁴ the High Court has gone its own way and has unequivocally advocated the use of the neighbour principle in all occupiers' liability cases, including those involving trespassers.¹⁵ The relevance of the earlier cases now is possibly that the duty of 'common humanity' will be regarded as a benchmark or guide in determining what amounts to reasonable care (if such a duty is owed at all) in trespasser cases.

The present law

41. The High Court's application of the ordinary negligence principle may easily be misconstrued. It does *not* mean that trespassers are to be treated in exactly the same way as lawful entrants. The very flexibility of the common law principles allows courts to impose greater or lesser (or even no) responsibilities in relation to trespassers. The courts assess in each case whether a duty was owed at all and, if it was, what standard of care was appropriate in the circumstances of the case, as the courts already do in any other negligence action.

⁹ *British Railways Board v Herrington* [1972] AC 877; *Southern Portland Cement Ltd v Cooper* [1974] AC 623; (1973) 129 CLR 295.

¹⁰ *Trindade & Cane* 1985, 457.

¹¹ *ibid.*

¹² *Luntz, Hambly, & Hayes* 1985, 527. The reference to 'a subjective element' meant that the occupier is only expected to take such safety precautions as he or she is capable of, given his or her resources. Normally, the standard of care in negligence cases is objective and the particular weaknesses, lack of resources or idiosyncracies of the defendant are ignored.

¹³ *Thompson v The Municipality of Bankstown* (1953) 87 CLR 619; *Rich v Commissioner for Railways (NSW)* (1959) 101 CLR 135; *Commissioner for Railways (NSW) v Cardy* (1959-60) 104 CLR 274; *Hackshaw v Shaw* (1984) 155 CLR 614.

¹⁴ *Commissioner for Railways v Quinlan* [1964] AC 1054.

¹⁵ *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 69 ALR 615.

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This approach to the issue of trespassers provides a great deal of flexibility. It accommodates the different types of trespassers. This is demonstrated by the High Court's use of the neighbour principle in trespasser cases over the years. The fact that the ordinary duty of care is employed in occupiers' liability cases concerning trespassers does not necessarily mean that trespassers will win compensation. This is shown by two Scottish cases (where the ordinary negligence principle applies) where trespassers were unable to succeed.¹⁶ The suitability of the ordinary neighbour principle in trespasser cases has been considered by Justice Deane of the High Court in the context of the duty of care owed by an occupier to an entrant.

A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk. . . . When the visitor is on the land as a trespasser, the mere relationship of occupier and trespasser which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may, as a matter of law, supply the requisite degree of proximity or give rise to a reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence.¹⁷

Justice Deane then went on to say that the standard of care expected of the occupier was determined by all the circumstances of the case, which must 'vary infinitely from case to case'.¹⁸ 'The circumstance that the plaintiff is a trespasser, and the sort of trespasser he is, must clearly be of great importance'.¹⁹ The practical consequences of using this approach are that a duty of care would not be owed when the occupier was unaware or had no reason to be aware of the trespasser's presence; and even when a duty is owed, the occupier is only required to do what is *reasonable* in the circumstances. In some cases, particularly in rural areas, this may require very little of the occupier who cannot be expected to render large areas of land completely safe for visitors, both welcome and unwelcome.

¹⁶ *M'Glone v British Railways Board* [1965] SC(HL) 107 (12 year old boy climbed through protective fence around a transformer); *Titchener v British Railways Board* [1983] 3 All ER 770 (15 year old girl who took a short cut across railway).

¹⁷ *Hackshaw v Shaw* (1984) 155 CLR 614, 663.

¹⁸ *ibid*, citing *Herrington v British Railways Board* [1971] 2 QB 107, 120 (Salmon LJ).

¹⁹ *ibid*.

What is the appropriate response?

Ordinary negligence principles

42. Leaving open for the present the possibility of special rules for criminal trespassers, it is clear that something more than an obligation to refrain from deliberately or recklessly injuring a trespasser is required. At the very least trespassers are owed a duty of 'common humanity'. An analogy may be made with other areas of negligence law which impose responsibilities on owners of land. For example, a landholder is obliged to stop the spread of fire from his or her property even though the fire started from natural causes.²⁰ Thus a landowner, initially innocent of fault, can become guilty of negligence if adequate steps have not been taken to contain the fire. Is a duty of 'common humanity' sufficient or should the ordinary rules of negligence apply? Presumably, no sense of moral outrage would be felt if courts were to impose duties of care on occupiers towards innocent trespassers, particularly children. The standard of such care will clearly vary according to the circumstances. This will be taken up below. The important point to keep in mind when addressing the problem of trespassers is that they come in many forms. It is because of this fact that the law has run into difficulties in trying to lay down a single standard described by a fixed verbal formula. The 'common humanity' rule probably can never impose a standard higher than that traditionally owed to a licensee and thus it, too, is inflexible and, by itself, cannot meet every case. It should be regarded as a minimum standard. The neighbour principle, on the other hand, meets the case of the young child who finds the occupier's land an attractive place to play, as well as the case of the thief who comes by night.

Public views

43. *Discussion Paper.* In its Discussion Paper the Commission endorsed the High Court's decision in the *Australian Safeway* case that the neighbour principle is appropriate for trespassers as well as permitted visitors. The Commission argued that the ordinary neighbour principle was sufficiently flexible to accommodate the range of entrants classified as trespassers. However the Commission also pointed out that the 'community may not accept legal rules which appear to treat at least some trespassers on the same footing as other visitors'.²¹ The Commission pointed out that moral outrage cannot be ignored and suggested that special provision may have to be made for trespassers.

44. *Submissions.* The majority of the submissions received by the Commission raised concerns about applying negligence principles to occupiers in relation to trespassers, particularly criminal trespassers. For example, the National Capital Development Commission said

²⁰ *Hargrave v Goldman* (1963) 110 CLR 40 (HC); *Goldman v Hargrave* [1967] 1 AC 645 (PC).

²¹ ALRC DP 28 para 16.

24/ Occupiers' liability

I am unconvinced the duty of care owed to trespassers should be the same as the duty owed to other types of visitors. As the authority responsible for the planning, development and construction of Canberra the issue of trespassers is an increasingly pertinent one given the number and nature of construction sites throughout the ACT and the fact that unauthorised entry onto these sites in many circumstances may be inherently dangerous. While the distinction you have drawn between all types of trespassers is noted, I am concerned that the proposed change appears to offer additional protection to persons entering such sites for improper and perhaps criminal purposes, eg vandalism.²²

The ACT Rural Lessees Association said that the general laws of negligence were 'not entirely appropriate in rural situations'.²³ They argued that there are inherent dangers in large scale rural operations, that it is reasonable for rural landowners to assume that there are no unauthorised persons on the land and it is impractical to use warning signs or physical inspection of land as a means of controlling trespassers. Saying that the proposals in the Discussion Paper would impose a substantial additional burden on rural landowners, the Association argued that special rules should exempt rural landowners as occupiers for injury or loss suffered by trespassers on the landholders' property. Justice Lee argued that if the Commission were to recommend an extension of the liability of occupiers to trespassers, it should

explain its recommendations in reasonably precise terms, — not make generalities such as 'reasonable care' — which will enable householders and others affected to understand the nature and circumstances which expose them to liability.²⁴

It should be emphasised that the Commission's proposals merely endorse the *Australian Safeway* decision. They do not extend the common law. Each of the concerns expressed by the ACT Rural Lessees Association would be taken into account by the court in determining whether a duty of care was owed and whether in fact that duty had been met. However, the submissions do raise two substantial issues. The first is whether to apply the ordinary rules of negligence to trespassers. The second is whether there should be special provision for a trespasser intent on a criminal purpose. These issues will be dealt with in turn.

Arguments for restricting liability to trespassers

45. *Ownership of land.* It has already been noted²⁵ that the traditional occupiers' liability rules could be explained by a reluctance to impose burdensome duties on owners and occupiers of land, and that a failure to make land and buildings safe was not to be treated with the same disapprobation as, for example, running an unsafe factory or driving dangerously.

²² National Capital Development Commission (A Phillips) *Submission* (14 September 1987).

²³ ACT Rural Lessees Association (PB Buckmaster) *Submission* (15 September 1987).

²⁴ Justice Lee *Submission* (29 May 1987).

²⁵ See para 10-1.

46. *Involuntary relationship.* This attitude may have particular force in relation to trespassers. A trespasser, after all, imposes upon the occupier. To impose a duty

is to accept the proposition that a trespasser who insists on forcing himself onto the occupier's premises and lets him know that he intends to enter in this way can impose upon the latter, against his will, a duty to take precautions and have care which may seriously impede the conduct of his lawful activities.²⁶

47. *Trespasser enters at own risk.* The reluctance to impose burdens on occupiers is complemented by the view that trespassers go onto land or enter premises at their own risk, a sentiment that is reflected in the legal maxim *volenti non fit iniuria* — a person who knowingly and willingly encounters a danger voluntarily assumes the risk and cannot claim compensation.

Statutory solutions

48. *Statutory negligence without guidelines.* In some jurisdictions the solution which has been adopted for trespassers is to legislate for the ordinary negligence principle without further elaboration. This statutory approach has been used in Scotland,²⁷ South Australia²⁸ and in the model Canadian Occupiers' Liability Act. Such legislation makes no specific provision for trespassers,²⁹ leaving it to the courts to determine what amounts to

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 [ie dangers either due to the state of the land or premises or due to anything done or omitted to be done thereon].³⁰

This approach is very close to the common law approach but, as argued earlier, could in some cases give rise to arguments about whether a particular situation is governed by the legislation or by the common law and whether there is any difference between the two.

49. *With guidelines – the Victorian approach.* In Victoria the statutory negligence solution has been adopted but, in addition, the legislation spells out guidelines for the court to consider. These have been set out earlier.³¹ It seems clear that the guidelines were drafted with trespasser cases in mind, though the Act makes no specific mention of trespassers.

²⁶ *Commissioner for Railways v Quinlan* [1964] AC 1054, 1086 (Viscount Radcliffe).

²⁷ Occupiers' Liability (Scotland) Act 1960.

²⁸ Wrongs Act 1936 (SA) s 17c(6).

²⁹ In South Australia trespassers are specifically dealt with but the effect of the provision is to leave it to the court to decide whether a duty is owed to a trespasser and, if so, the content of that duty: see para 52 below.

³⁰ Taken from the Uniform Canadian Occupiers' Liability Act, s 2(1).

³¹ Para 29 above.

50. *English legislation.* In the original English legislation dealing with occupiers' liability,³² trespassers were not included so that the development of the law in this regard was left to the courts. The only other jurisdiction to follow this approach was New Zealand. The Occupiers' Liability Act 1984 (UK) has now been passed to cover trespassers. This legislation is unusual in one respect because, whereas in other legislation dealing with occupiers the legislation is generally silent about whether a duty of care is owed (preferring to confine it only to spelling out the standard of care), the English Act deals with the duty question. An occupier owes a duty to trespassers in respect of any risk of their suffering injury by reason of any danger on the premises if

- (a) he [the occupier] is aware of the danger or has reasonable grounds to believe that it exists;
- (b) he knows or has reasonable grounds to believe that the other [the trespasser] is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in the vicinity or not); and
- (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

The Act then goes on to specify the standard of care, if it is found that a duty is owed. The occupier is expected 'to take such care as is reasonable in all the circumstances of the case to see that he [the trespasser] does not suffer injury on the premises by reason of the danger concerned'.³³

51. *English Law Commission proposals.* The English Law Commission considered that their proposals would impose a flexible and less onerous legal regime on occupiers in relation to trespassers as compared with their responsibilities to lawful visitors.³⁴ Under the 1957 Act, dealing with lawful visitors, the duty of care is owed automatically because of the relationship of occupier and invited or permitted visitor. The Act then specifies a standard which is intended to be the same as in ordinary negligence cases. Under the 1984 Act, dealing with trespassers, the court has the option of holding that there is no duty at all. The standard, though couched in different language, is difficult to distinguish from the flexible common law standard. The Law Commission specifically rejected the possibility of the standard being modified according to the particular resources of the occupier,³⁵ a view which has been expressed in case law.³⁶ What has been proposed and implemented in England by legislation is precisely the same as Justice Deane of the High Court has advocated (without any need for legislation) in *Hackshaw v Shaw*.³⁷

³² Occupiers' Liability Act 1957 (UK).

³³ Occupiers' Liability Act 1984 (UK) s 1(4).

³⁴ Law Com No 75, para 28.

³⁵ *id.*, para 29.

³⁶ *British Railways Board v Herrington* [1972] AC 877, 920 (Lord Wilberforce); 899 (Lord Reid); 942 (Lord Diplock); and see *Goldman v Hargrave* [1967] 1 AC 645, 663 (Lord Wilberforce).

³⁷ See below para 53.

52. *The South Australian approach.* The English approach is followed in South Australia, though the legislation is less complicated.

An occupier owes no duty of care to a trespasser unless —

- (a) the presence of trespassers on the premises, and their consequent exposure to danger, were reasonably foreseeable; and
- (b) the nature or extent of the danger was such that measures which were not in fact taken should have been taken for their protection.³⁸

Again, this approach reflects precisely how a court would deal with a trespasser case under the common law negligence principles.

Support for negligence rules

53. To the view that extending the ordinary duty of care to trespassers would be to cast an 'unduly onerous' burden on occupiers, Justice Deane of the High Court has said:

That view fails, however, to pay sufficient regard to the importance which may attach to the circumstances of the plaintiff's presence on premises in relation to the questions whether the necessary proximity of relationship existed between him and the defendant occupier, whether there had been reasonable foreseeability of a real risk of relevant injury and whether, if a duty of care had arisen, the defendant's response to it had, in all the circumstances, satisfied the requirement of reasonable care. To recognize that the ordinary principles of the law of negligence apply to govern the existence and content of a duty of care to a trespasser is not to equate the duty of care to a trespasser with that to an invitee or licensee in the sense of saying that the one will exist whenever the other would exist or that the particular content of one will be the same as would be the content of the other. To the extent that it remains appropriate to draw distinctions, for the purposes of the common law of negligence, by reference to the broad categories of 'invitee', 'licensee' and 'trespasser', it is probably accurate to say that an occupier's duty to a 'trespasser' cannot 'exceed his duty to a licensee' . . . in the sense that a duty of care to a trespasser is less likely to exist and is likely to be less onerous than would be the duty owed in otherwise corresponding circumstances to a licensee. Such broad categories are however inappropriate to provide a sound basis for such generalizations. A trespasser may be a burglar, a traveller in difficulty, a person on an errand of mercy, a person who walks on another's land believing it to be his own, a person who honestly follows a mistaken direction or accepts an unauthorized invitation, a person who cannot see or a child who cannot understand. To classify 'all these persons under one doctrinal rubric . . . makes no sense'.³⁹

Conclusion

54. The common law of negligence provides the most flexible approach to the trespasser issue. At the same time it does mean that in some cases the occupier will be required to exhibit as high a standard of care as to lawful entrants. On the other hand, in other cases the court has the option of holding that no duty at all is owed.

³⁸ Wrongs Act 1936 (SA) s 17c(6).

³⁹ *Hackshaw v Shaw* (1984) 155 CLR 614, 664. The last quotation is from Hughes 1959, 688.

Criminal trespassers

The issue

55. *Criminal trespassers.* The question remains whether there should be a special provision for criminal trespassers or whether the ordinary laws of negligence should apply. There is no overriding rule which exempts occupiers from a general duty of care in favour of a trespasser, even a criminal trespasser. That being the case, the question whether the occupier owed a duty of care to the criminal trespasser is determined by reference to whether the required relationship of proximity exists between the occupier and trespasser and whether there was a reasonably foreseeable risk of injury to the trespasser.⁴⁰

56. *Moral outrage.* However, moral outrage has been expressed when the courts impose such a liability on occupiers. Such sentiments are obviously strongest in cases such as *Hackshaw v Shaw*⁴¹ in which a farmer was found liable to compensate the girlfriend of a thief who was injured when the farmer shot at the thief's car. The Commission received the following letter after that case:

The judgement has to be considered against the background that theft, burglary and related offences have now reached pandemic proportions in Australian society, that the police clear up rate for this type of crime is low and falling, and in effect, according to some reports, the police have more or less given up serious efforts to investigate the majority of the crimes of this type reported to them. Reasonable people have no wish to import into this country the 'right to bear arms' mentality of the US National Rifle Association, but surely the decision in this case points to the urgent need to amend, and amend radically, the law of negligence in relation to trespassers, especially trespassers with criminal intent.

A cross section of friends and acquaintances I have shown the report to have been incredulous that such a decision could have been handed down, and have shared my sense of outrage that the highest court in the land has decided the matter in the way it did.

Somewhat similar views were expressed in the Supreme Court of Victoria in the same case by Justice McInerney.

I can, furthermore, see no reason why an occupier of farm lands is bound to regulate his behaviour towards a known trespasser engaged in criminal activities on the footing that there is, or may be, a possibility that the known trespasser is, or may be, accompanied by another or other trespassers. It may be legitimate to doubt whether the law should be solicitous to give a remedy in damages to persons who have acted in knowing disregard of the property rights of other persons, or who have set out to impose their own will — sometimes violently, sometimes not — on those other persons, eg by entering farm lands uninvited to do 'spotlight shooting'.⁴²

⁴⁰ *Hackshaw v Shaw* (1984) 155 CLR 614.

⁴¹ *ibid.*

⁴² *Shaw v Hackshaw* [1983] 2 VR 65, 90.

Reduced liability?

57. *Reduced liability to criminal trespassers.* In Ontario,⁴³ Saskatchewan⁴⁴ and in Western Australia⁴⁵ the legislation or draft legislation has reduced the standard of care owed to entrants engaged in criminal activity so that the occupier must simply refrain from engaging in deliberate or reckless conduct which endangers them. In short, the *Addie* rule applies in these cases. The Occupiers' Liability Act 1985 (WA) reduces the occupier's duty of care in relation to a person who is on the premises with the intention of committing (or who is committing) an offence punishable by imprisonment. In this instance the occupier's duty is

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.⁴⁶

58. *Problems with legislation.* The problem with this type of provision is that it is too wide in its effect. None of the provisions applies exclusively to criminal trespassers, so that a visitor who is invited or permitted to be on the premises would be covered too. Thus a guest who is injured whilst (but not because of) smoking marijuana will be deprived of his or her common law rights. Even if these provisions were applicable only to trespasser cases, they would be too wide. They would catch trespassers who were engaged in a criminal conspiracy as they walked across the occupier's land; or the escaping convict; or the trespassing person who allowed his or her greyhound off the lead. The fact that these people come as trespassers is very relevant to the occupier's duty; the fact they are engaged in criminal conduct is not, so long as that conduct does not adversely affect the occupier. If criminal conduct is to be included in legislation, then it should apply only to trespassers whose criminal activities are directed against the occupier or against the occupier's neighbour.⁴⁷ It would be necessary to single out what criminal activities were relevant to occupancy duties so that only in appropriate cases would either no duty be owed or would the standard be lowered.⁴⁸ It was these difficulties which, presumably, persuaded the South Australian and Victorian governments not to make specific provision for criminal trespassers but, instead, to leave it to the courts to decide each case according to its particular facts. Nonetheless, drafting difficulties aside, the question remains, should a lesser standard of care apply in relation to criminal trespassers?

⁴³ Occupiers' Liability Bill 1980 (Ont).

⁴⁴ Draft Occupiers' Liability Bill 1980 (Sask).

⁴⁵ Occupiers' Liability Act 1985 (WA) s 5(3).

⁴⁶ *id* s 5(2).

⁴⁷ eg where a burglar is using the occupier's premises to gain access to the neighbouring premises.

⁴⁸ The English Law Commission considered that trying to specify the type of criminal conduct which would preclude a trespasser from claiming was too difficult: Law Com No 75, para 31-4.

Application of the common law

59. After the Occupiers' Liability Act 1983 (Vic) was passed, the Legal Aid Commission of Victoria published an advertisement in a 'Know Your Rights' series. The advertisement was headed 'Home Sweet Home?' and showed a burglar about to suffer injury while falling through a loose floor board.

The law says that if you occupy a property, you could be responsible for any injury caused to any person who enters, invited or uninvited . . . It is possible that even a trespasser or a thief could successfully claim compensation.

The Victorian Act, which mimics the common law, does cover trespassers. But it would be inconceivable that a court would award damages in the circumstances depicted in the advertisement. This is because a court would employ one or more of several possible arguments to deny liability. First, it may be that the plaintiff would simply be denied a remedy on public policy grounds, that is, a court will not grant compensation to someone injured in the course of criminal activities.⁴⁹ It must, however, be recognised that the law on illegality is somewhat uncertain.⁵⁰ Secondly, a court may decide either that no duty of care is owed in the circumstances, or else the standard of care expected of an occupier towards a burglar is very low and has not been breached. Thirdly, a court may decide that the effective cause of the injury was the illegal conduct and not the supposed negligence of the occupier.⁵¹ Fourthly, a court may decide that the burglar is precluded from claiming because he or she voluntarily assumed the risk of injury.⁵² Fifthly, if any of the above arguments should fail, a court could regard the burglar's conduct as being contributorily negligent because entering by stealth, often in darkness, is clearly risky.⁵³ This final argument allows a court to reduce damages,⁵⁴ even to zero in appropriate circumstances. Only in the most unusual and rare circumstances would a court hold an occupier liable to a thief, and then only if the occupier has done something very dangerous, as in *Hackshaw v Shaw*.

Criminal trespassers — conclusion

60. Despite the misgivings that have been expressed to the Commission, criminal trespassers do not need special treatment. The common law reflects

⁴⁹ *Godbolt v Fittock* (1963) 63 SR (NSW) 617.

⁵⁰ See *Smith v Jenkins* (1969-70) 119 CLR 397; *Jackson v Harrison* (1978) 138 CLR 438; Ford 1977. A powerful argument against the defence of illegality is made in *Jackson v Harrison* (1978) 138 CLR 438, 464-466 (Murphy J). Most of the cases involve joint participation between plaintiff and defendant in illegal activities, and so may not provide guidance to the present problem. The cases are rare. Usually criminals do not have the gall to seek compensation in the civil courts for injuries suffered in the course of their criminal activities.

⁵¹ Discussed by Ford 1977, 41-9.

⁵² *id.*, 179-81.

⁵³ *id.*, 178-9. *Hackshaw v Shaw* illustrates the use of contributory negligence. The plaintiff's damages were reduced by 40%.

⁵⁴ See Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT) Pt V.

common sense. There is no need to embellish the neighbour principle, which would almost never award compensation to a burglar.

Summary

61. The law should not be changed in relation to trespassers. The best way to deal with the problems they pose is through the flexible common law of negligence, as expounded by the High Court in the *Australian Safeway* case. Further, there should be no special rules for criminal trespassers, nor should legislation be introduced to provide that the common law rules apply to trespassers. Existing legislative models do not improve on the common law. The principal difficulty with this recommendation is that it may be misconstrued by those unfamiliar with the law. The Commission does not believe that lay people's erroneous interpretation of the law should be a reason for changing it, at least not in this area.

5. Landlord and tenant

Introduction

62. The Commission is required in this reference to examine the law of occupiers' liability and the related issue of a landlord's possible liability for the safety of rented premises. It should be remembered that the *tenant* is regarded by the law as the occupier of leased premises, rather than the landlord. The law has focussed on the fact that the tenant is the occupier and has tended to exempt landlords from safety responsibilities. The tenant is potentially liable for all hazards on leased premises. This approach probably does not accord with the average person's expectations about the proper allocation of responsibilities for the safety of rented premises. One would normally expect that the landlord should be responsible for some aspects of safety. To continue to exempt landlords from responsibility would be a departure from the general thrust of the Commission's recommendations in this Report. However, before determining whether any exceptions for landlords can be justified, the relevant common law as it appears to apply to the Australian Capital Territory should be explained.

The present law

*The rule in Cavalier v Pope*¹

63. *Landlord's immunity.* According to this rule, a landlord is not liable in negligence for letting a 'tumbledown house'.² If a tenant's guest or customer is injured because of the dangerous state of the premises, it is the tenant who is occupier and therefore regarded in law as responsible, not the landlord. Accordingly, the injured person must look to the tenant for compensation. This applies whether or not the tenant had the responsibility for effecting repairs. The rule also means that a tenant cannot sue the landlord in negligence for injuries suffered as a result of unsafe premises.

64. *The tenancy agreement.* Under the contract between landlord and tenant, the respective responsibilities of the parties for matters such as repairs may be set out. The terms of this contract may themselves be modified by statutory provisions dealing with the landlord and tenant relationship. It may therefore be possible for the tenant to sue the landlord in contract. The agreement may, however, simply provide that the landlord has a right to enter to do repairs without imposing an obligation to do so, in which case the tenant would have no remedy in contract.

¹ [1906] AC 428.

² *Robbins v Jones* (1863) 15 CB (NS) 221, 240.

65. *Examples of the rule.* Whatever the contractual arrangement between landlord and tenant, the law of negligence apparently provides an exemption for landlords:

- a landlord who, after frequent complaints from the tenant, promised to do repairs to the kitchen floor but failed to do so, was not liable to the tenant's wife after she was seriously injured when the legs of a chair she was standing on went through the floor³
- there was no liability in negligence in respect of a couple who were gassed on their wedding night as a result of the negligent removal of a gas fire by the landlord's son⁴
- a negligence action was unsuccessful when a lodger was gassed after a vent pipe of a geyser was negligently installed.⁵

Circumstances where the rule does not apply

66. *Nuisance cases.* If the rule in *Cavalier v Pope* is part of the law, it nevertheless does not apply in certain circumstances. There are thus some situations in which safety responsibilities are imposed on landlords. One is the case of liability in nuisance. An owner of premises may be liable for the unsafe state of the premises when the danger amounts to an actionable nuisance, rather than negligence. Thus, if a tile should fall off the building either into the street⁶ or into the neighbouring property,⁷ the owner, not the tenant, may have to pay any damages arising from the accident. The law of nuisance in connection with the liability of landlords is somewhat complicated⁸ but need not be pursued further here because occupiers' liability is concerned with damage suffered by entrants on the premises, not on other premises. It would be anomalous if a landlord were obliged to keep the building in repair for the purposes of the law of nuisance but not for the purposes of the law of negligence.

67. *Licensees.* If the person in occupation of a building is a licensee and not a tenant, the owner remains liable. For example, in *Voli v Inglewood Shire Council*⁹ a defective stage in a shire hall collapsed, injuring members of a group who were hiring the hall for a meeting. The defendant council argued unsuccessfully that the occupier was the group who had hired the hall rather than the council who owned it. The hire of the hall did not create a tenancy and so the owner remained liable. Similarly, an owner may be liable to a paying guest or a lodger so long as that person is not legally a tenant.¹⁰

³ *Cavalier v Pope* [1906] AC 428.

⁴ *Davis v Fooks* [1940] 1 KB 116.

⁵ *Travers v Gloucester Corp* [1947] KB 71.

⁶ See, eg *Mint v Good* [1951] 1 KB 517.

⁷ See, eg *Wringe v Cohen* [1940] 1 KB 229.

⁸ See Law Com No 40, para 60–5 where the law is discussed.

⁹ (1962–63) 110 CLR 74, 91.

¹⁰ *Watson v George* (1953) 89 CLR 409. The actual result of this case was that there was no liability because the owner had not, according to the High Court, failed in her duty.

68. *Other cases.* Three other cases should be mentioned where the landlord's exemption may not, or does not, apply:

- *Public facilities.* Even if in *Voli's* case a tenancy had been created, Justice Windeyer was inclined to the view that the rule in *Cavalier v Pope* only covered rented accommodation (and probably commercial premises) and not public facilities such as a shire hall.¹¹
- *Common areas in blocks of flats.* The landlord of, for example, a block of flats remains liable for taking care that the common areas, such as stairways, corridors and lifts, are reasonably safe.¹²
- *Possible lack of immunity for furnished dwellings.* It has been said¹³ that the immunity provided by the rule in *Cavalier v Pope* does not apply when the premises which are let are furnished.¹⁴ It would seem that this exception would only make the landlord liable to the tenant and not to third parties, because the principle depends upon an implied condition that the premises are habitable. The status of this exception is uncertain in Australia, particularly as the rule in *Cavalier v Pope* is itself in doubt.

69. *Where some other relationship exists.* The courts in England have increasingly been inclined to find that the rule in *Cavalier v Pope* does not apply. In particular, if some other relationship exists which gives rise to liability on some other basis than that of as landlord and tenant, the higher duty prevails. Thus, the immunity of a landlord from liability in negligence towards a tenant has been held to be overshadowed by the fact that the landlord was also the builder and architect of a flat which had a dangerous glass panel. In these latter capacities, a duty of care was owed to tenants, their families and visitors.¹⁵

Explanation and justification

70. *Explanation.* The rule in *Cavalier v Pope* was developed in the United Kingdom before the general negligence principle was finally settled in 1932. One explanation for the rule was that, at that time, it was thought that, if a contractual relationship exists between parties (the tenancy agreement), all rights and liabilities should be determined by the contract.¹⁶ This meant that only the tenant could sue, and then only if the contract had been breached. This, in turn, depended on the terms of the contract, which were usually dictated by the landlord. One of the most important consequences of the decision

¹¹ *Voli v Inglewood Shire Council* (1962-63) 110 CLR 74, 91-2 (Windeyer J).

¹² *Vial v Housing Commission of New South Wales* [1976] 1 NSWLR 388.

¹³ *Rimmer v Liverpool City Council* [1985] QB 1, 9 (Stephenson LJ).

¹⁴ Citing *Smith v Marrable* (1843) 11 M & W 5; 152 ER 693; *Wilson v Finch Hatton* (1877) 2 Ex D 336.

¹⁵ *Rimmer v Liverpool City Council* [1985] QB 1.

¹⁶ 'No duty is cast upon a landlord to effect internal repairs unless he contracts so to do': *Cavalier v Pope* [1906] AC 428, 431 (Lord James of Hereford).

in *Donoghue v Stevenson* was to eliminate the 'contract only' basis for liability so that a duty of care could be established whenever a sufficient relationship of proximity or 'neighbourhood' existed. The neighbour principle depended upon foreseeability of harm. If applied to landlords, whenever a landlord could foresee that matters within his or her control relating to the premises could give rise to the risk of injury, a duty of care should be owed to all those who came within the zone of risk. The 'neighbour' principle, however, did not apply to landlords: this was made clear in *Donoghue v Stevenson* itself.¹⁷

71. *Consistent with old occupiers' liability rules.* The exemption of landlords from a general duty of care was justified by reference to the established occupiers' liability rules. The tenant was the occupier (so much so that a landlord making an unauthorised entry would be a trespasser). It was the occupier who was regarded as responsible for making the premises reasonably safe. The tenant had the opportunity of inspecting the premises before entering into the lease and, it was argued, had substantial control over the state of the premises after moving in. Further, the tenant got what he or she paid for. If the rent was very low, then the tenant could not expect the landlord to provide premises free of defects. These justifications are valid to some extent. For example, the tenant should clearly be responsible for a roller skate left on the front step on a dark night. On the other hand, there are other hazards which are beyond the tenant's control, as illustrated by the cases summarised above. It is for this reason that the rule has been criticised.¹⁸

Criticism of the rule

72. *Unfair allocation of responsibility.* Under the *Cavalier v Pope* rule, it would be quite possible for a tenant to be liable to a visiting landlord for a defect which ought to have been the responsibility of the landlord. The landlord's immunity, and the consequent imposition upon the tenant of responsibility for unsafe premises, does not strike a sensible balance between the two in respect of hazards over which the tenant has no control. This has been recognised recently in South Australia where it was decided that the rule does not apply.¹⁹ The same view has been taken in all jurisdictions where occupiers' liability legislation has been enacted or drafted. The thrust of reforming legislation is to impose on the landlord responsibility for the safety of premises to the extent that matters affecting safety are within the landlord's control. This may depend upon the contract terms in the lease and so the landlord's area of responsibility may vary from case to case. This issue will be taken up below.

73. *Uncertainty.* It is unclear whether *Cavalier v Pope* is part of the law of Australia. The supposed rule has never apparently been applied directly in a higher court in Australia, so far as the reported cases show. It has been held

¹⁷ [1932] AC 562, 597, (Lord Atkin), 609 (Lord Macmillan).

¹⁸ See *Voli v Inglewood Shire Council* (1962-63) 110 CLR 74, 90-1 (Windeyer J) where some of the academic criticisms are collected.

¹⁹ *Parker v South Australian Housing Trust* (1986) 41 SASR 493.

that the government was not responsible for a defective plank on the Manly pier, the pier having been leased to a ferry company.²⁰ Very recently, the rule has been rejected by the Full Court of the South Australian Supreme Court, when it held that the landlord was liable to the tenant's daughter for injuries caused by a defective gas stove. The Full Court said that it was not bound by a House of Lords decision of 1906 which, in any case, was quite out of step with modern notions of negligence law.²¹ At the same time, it is probably correct to say that the rule has been assumed to be part of the law of Australia.²² The rule has been discussed in the High Court in *Voli v Inglewood Shire Council*²³ by Justice Windeyer but it was not applicable to the circumstances of that case because there was no tenancy relationship between the plaintiff and defendant. In all likelihood the Supreme Court of the Australian Capital Territory would find the reasoning in *Parker* persuasive and would follow it. But, until a suitable case is decided, the law is uncertain and requires clarification.

Options for reform

A proper allocation of safety responsibilities

74. *Minimum housing standards not present concern.* In discussing options for reform, broader policy issues inevitably arise. They are: what is the proper balance to strike between landlord and tenant in relation to responsibility for safety of the premises? Should landlords be obliged by statute to undertake certain obligations for the safety of the premises? Should landlords be prevented from divesting themselves of such obligations through the contract of tenancy? These questions relate to the safety of the premises and do not purport to address the issue of minimum standards of housing, apart from the safety aspect. In this report, the Commission does not express any views about low cost accommodation, that is, about the trade-off between low rents and appropriate housing standards. In England, legislation has been passed which imposes certain obligations on landlords.²⁴ It is not appropriate in this report to attempt to spell out these kinds of responsibilities for landlords.

75. *Insurance.* One matter which is relevant to the question of allocation of responsibilities for safety as between landlord and tenant is insurance. It is probable that, at present, landlords are more likely than tenants to be in-

²⁰ *Silk v Reid* (1847) 18 NSWLR 29; 13 WN 156. This case was decided before *Cavalier v Pope*. In the circumstances of the case, it was probably correct to hold the ferry company responsible for the particular hazard.

²¹ *Parker v South Australian Housing Trust* (1986) 41 SASR 493.

²² Fleming 1987, 454-5; Trindade & Cane 1985, 488. In *Spackman v Wellington Shire Council and Water Conservation and Irrigation Commission* (1957) 57 SR (NSW) 343 it was assumed that *Cavalier v Pope* applied in Australia but the reference was not relevant to the facts of the case.

²³ (1962-63) 110 CLR 74.

²⁴ Housing Act 1961 (UK); Defective Premises Act 1972 (UK).

sured against possible liability to visitors. Some estate agents in the Australian Capital Territory make it a condition of letting that the tenant take out the necessary insurance cover, a practice which reflects the supposed legal position that the tenant bears responsibility for the safety of the premises. This practice is almost always followed in commercial leases. The insurance factor is in some cases neutral because it is equally easy for either or both to obtain insurance which, to date, has been relatively cheap. In other cases, particularly government and poorer private tenants, insurance will probably not be taken out by the tenant unless the landlord or his or her agent insists. If joint responsibility is imposed on landlord and tenant for their respective areas of control, each should take out insurance. In theory, the premiums for the two policies added together should be more or less equal to the premium on a single policy because each party is responsible only for certain risks. A more efficient solution would be a single policy covering both landlords' and tenants' responsibilities. If some responsibility is to be imposed on landlords then they may insure against potential liability without any difficulty.

Conclusion

76. The blanket immunity provided by the rule in *Cavalier v Pope* should be removed (if it exists in Australia). It should be left to the courts to determine, on the facts of a particular case, whether the landlord was the injured party's 'neighbour' or whether the tenant was more appropriately responsible for the particular hazard. This is consistent with the general rejection of the old categories approach to occupiers' liability²⁵ and the support for the general rules of negligence found throughout this Report. Exceptions for landlords cannot be justified. A similar view has been taken in those Australian jurisdictions that have taken legislative steps to abolish or mitigate the rule in *Cavalier v Pope*.²⁶ The Commission does not make any recommendations about minimum housing standards in this reference. Following on this recommendation, however, some publicity should be given to the alteration to the law to impose a wider, more acceptable, level of safety responsibility on landlords. The Insurance Council of Australia would be the appropriate body to mount a publicity campaign. Individual insurance companies marketing liability policies should also publicise the need for both landlords and tenants to obtain appropriate insurance cover.

²⁵ See para 8-9 above.

²⁶ Occupiers' Liability Act 1983 (Vic), inserting Pt IIA in the Wrongs Act 1958 (Vic); Occupiers' Liability Act 1985 (WA); Wrongs Act Amendment Act 1987 (SA) inserting Pt IB in the Wrongs Act 1936 (SA). The provision was passed after, but not because of, the decision in *Parker v South Australian Housing Trust* (1986) 41 SASR 493.

Implementation

Varying legislative models

77. *Victoria.* In Victoria, the rule in *Cavalier v Pope* has been abolished to the extent that the landlord

- (i) is under an obligation to the tenant to maintain or repair the premises;
or
- (ii) is, or could have put himself in, a position to exercise a right to enter on the premises to carry out maintenance or repairs.²⁷

Under the Residential Tenancies Act 1980 (Vic) s 97, the landlord is obliged to maintain the property in good repair. This provision does not cover all tenancies. Under the Victorian scheme, the landlord's responsibilities to visitors to the leased premises are not necessarily limited to his or her responsibilities under the lease agreement. This is because the landlord is made responsible for matters which the landlord could have put himself or herself in a position to deal with.

78. *Western Australia.* By contrast, the Western Australian provision limits the landlord's safety responsibilities to those which he or she is obliged to carry out under the tenancy agreement.²⁸ As there are no minimum standards imposed on landlords in Western Australia, such as by the Residential Tenancies Act 1980 (Vic), the landlord may, by contract, eliminate any possibility of liability for safety towards both the tenant and the tenant's visitors.

79. *South Australia.* The South Australian provision is in similar terms to the Western Australian provision, that is, the landlord's responsibilities are governed by what are his or her obligations to the tenant regarding repairs and maintenance.²⁹ However, under the Residential Tenancies Act 1978 (SA), a compulsory term is included in the lease agreement that the landlord shall provide and maintain the premises in a reasonable state of repair having regard to their age, character and prospective life. It also imposes safety standards by reference to relevant building, health and safety legislation.

Recommendations

80. *Preferred approach.* None of these models is satisfactory for the Australian Capital Territory. The Victorian model may be unfair to landlords in that it may impose liability on a landlord who, though in a position to exercise a right to carry out repairs, did not do so because he or she was not aware of any problem. The Western Australian model is defective because it allows landlords to reduce or eliminate their potential liability to the tenant's visitors and to the tenant simply by putting an appropriate clause in the tenancy

²⁷ Wrongs Act 1958 (Vic) s 14A(a).

²⁸ Occupiers' Liability Act 1985 (WA) s 9(1).

²⁹ Wrongs Act 1936 (SA) s 17d.

agreement. This would certainly be possible in the Australian Capital Territory because the Landlord and Tenant Ordinance 1949 (ACT) does not impose any obligation on the landlord to maintain and repair the property once the tenancy has started to run. Section 39 does provide that the premises must be let in 'fair and tenantable repair'. Thereafter, the contract may or may not provide that the landlord is obliged to repair and maintain the premises. In fact, the standard agreement commonly used in the Australian Capital Territory³⁰ does so provide. The South Australian Act depends upon cross-reference to other legislation, particularly the Residential Tenancies Act 1978 (SA), which imposes minimum standards on landlords. It is not appropriate that this report recommend particular minimum standards be imposed on landlords by changing the landlord and tenant legislation. On the other hand, the landlord should not enjoy the immunity which the rule in *Cavalier v Pope* provides (if it is still the law). The appropriate course of action is to eliminate that immunity by legislation and to leave the courts to decide, applying the general negligence principles based on foreseeability and proximity, what is the fair balance in safety responsibilities as between a particular landlord and tenant. The advantage of this approach is that it does not tie the landlord's responsibilities to his or her contractual obligations. The court will be left free to decide whether those contractual duties are or are not relevant to a claim by someone who is not a party to that contract. Accordingly, legislation should provide that a lessor of premises is not exempt from owing a duty of care to persons on the premises merely because of his or her status as lessor.

81. *Land tenure in the ACT.* In the Australian Capital Territory, the system of land tenure, whereby homeowners are lessees from the Commonwealth, could give rise to the argument that the Commonwealth is the 'landlord' referred to in the proposed legislation.³¹ The possibility of the Commonwealth being found liable under the proposed provision is very remote, because the Commonwealth would not reasonably be expected to take any steps to safeguard visitors to homeowners. Nevertheless, the Commonwealth does remain responsible for some potential hazards on land in the Australian Capital Territory, such as power poles and lines. Accordingly, the proposed legislation should not exclude the Commonwealth. There is no reason to single out the Commonwealth as a landlord for the purposes of conferring an immunity in these cases, especially if other landlords are not exempt.

Squatters

82. A problem drawn to the Commission's attention is that of squatters and whether both private and public (government) landlords should be responsible for hazards posed by derelict buildings awaiting demolition or refurbishment. If it is assumed that the ordinary neighbour principle applies, the liability arising from hazards in derelict buildings, at least to adult trespassers, would not

³⁰ REI (ACT) lease cl 14(b).

³¹ National Capital Development Commission *Submission* September 1987.

be very high because adult trespassers in such buildings are expected to look after their own interests. A court would not impose a high standard of care in such cases. Even if the landlord were to be found liable, perhaps to a child trespasser,³² the cost of paying for a claim through insurance may be an unavoidable burden. No-one expects landlords to render derelict buildings safe for trespassers and the ordinary rules of negligence reflect this. No special legislative provision is needed to deal with squatters and the like.

³² As in *Harris v Birkenhead Corp* [1976] 1 All ER 341.

6. Independent contractors

The present law

Vicarious liability

83. The law of negligence allows an injured person to sue the employer of a negligent person who injured him or her, so long as the negligent conduct was sufficiently connected with the work which the negligent person was employed to do.¹ This is called vicarious liability — the employer is vicariously liable for the negligent acts of employees. The reason for imposing vicarious liability is that the injured person will generally be more likely to be compensated by an employer (who will usually be covered by insurance) rather than an employee (who will usually not be insured). Vicarious liability does not operate if the negligent person is not an employee but an independent contractor.² Thus, if A employs a chauffeur (an employee), A can be held legally responsible for the chauffeur's negligent driving. By contrast A is not legally responsible for a taxi driver's (independent contractor's) negligent driving.

Non-delegable duties

84. The rule that a person is not legally responsible for the negligent conduct of independent contractors has some important exceptions. Some safety responsibilities are regarded by the courts as 'non-delegable', that is, the potential defendant remains personally liable for taking sufficient care and cannot say, 'I hired a responsible independent contractor to do this job. It is not me but the contractor you should be suing.' Examples of non-delegable duties are

- the duty of a hospital authority to take reasonable care of patients³
- the duty of a school authority to take reasonable care for the safety of pupils⁴
- the duty of an employer to provide a safe working environment.⁵

¹ Trindade & Cane 1985, ch 23.

² *Wright v A-G (Tasmania)* (1954) 94 CLR 409.

³ *Cassidy v Ministry of Health* [1951] 2 KB 343; *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.

⁴ *Commonwealth v Introvigne* (1981–82) 150 CLR 258.

⁵ *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57; *Kondis v State Transport Authority* (1984) 154 CLR 672.

Uncertainty in the law

85. One of the complications which plagued the law of occupiers' liability was the extent to which occupancy duties were non-delegable. The law was certain in relation to the following:

- an occupier was liable for the negligence of independent contractors when a contractual entrant was injured by that negligence⁶
- an occupier was not liable for the negligence of independent contractors when a licensee⁷ or trespasser were injured.

There have been no cases testing the point in relation to entrants as of right. The duties of an occupier owed to invitees were sometimes delegable⁸ and sometimes not.⁹ A distinction which has been put forward to reconcile these cases is that ordinary jobs (such as clearing snow from a step¹⁰) are not delegable whereas jobs requiring expertise (such as repairing a lift¹¹) are delegable, with the consequence that the occupier cannot be held liable if the supposed expert has been negligent. The distinction, has however, been blurred, or even eliminated, because the House of Lords in England held that all duties owed to invitees were not delegable¹² and the position in Australia was by no means certain, though it appeared to be the same.¹³

The effect of the Australian Safeway decision

86. If occupiers' liability cases are treated as ordinary negligence cases, then, unless the unsafe conduct falls under one of the established categories of non-delegable duties, (such as, for example, a school authority's safety responsibilities) an occupier will not be liable for the acts of independent contractors. This means that there will be a 'lowering' of an occupier's responsibility to what were formerly classed as contractual entrants and, it would seem, invitees. Whereas under the former law an occupier had to ensure, vis-a-vis these two types of entrant, that the independent contractor had done the work properly, this may no longer be so now that the ordinary rules of negligence are employed. This result is not necessarily an undesirable one. In applying the ordinary negligence

⁶ *Francis v Cockrell* (1870) LR 5 QB 501; *Voli v Inglewood Shire Council* (1962-63) 110 CLR 74.

⁷ *Morgan v Incorporated Central Council of the Girls' Friendly Society* [1936] 1 All ER 404.

⁸ *Haseldine v CA Daw & Son Ltd* [1941] 2 KB 343; *Green v Fibreglass Ltd* [1958] 2 QB 245.

⁹ *Woodward v Mayor of Hastings* [1945] KB 174; *Bloomstein v Railway Executive* [1952] 2 All ER 418; *Thomson v Cremin* [1953] 2 All ER 1185; *Voli v Inglewood Shire Council* (1962-63) 110 CLR 74; *Vial v Housing Commission of New South Wales* [1976] 1 NSWLR 388.

¹⁰ *Woodward v Mayor of Hastings* [1945] KB 174.

¹¹ *Haseldine v CA Daw & Son Ltd* [1941] 2 KB 343; *Green v Fibreglass Ltd* [1958] 2 QB 245.

¹² *Thomson v Cremin* [1953] 2 All ER 1185.

¹³ *Voli v Inglewood Shire Council* (1962-63) 110 CLR 74 appeared to endorse *Thomson v Cremin*. An expert task (designing the structure of a stage) was held to be non-delegable in *Voli*.

rules, if a duty of care is owed, the question whether it had been properly discharged should be determined by what is reasonable in the circumstances. If a person has hired an apparently competent independent contractor to do a job then it is a fair defence to say: 'I am not at fault. I did all that I could to get the job done.' The courts may develop new categories of non-delegable duties in the future. The Commission believes that this is a proper area for judicial development rather than statutory prescription.

Reform?

87. In those jurisdictions which have passed or drafted occupiers' liability legislation, either no provision has been made for dealing with the issue of independent contractors¹⁴ or a provision is included that states that an occupier is not liable for the negligence of independent contractors so long as the occupier has acted reasonably in entrusting the work to and selecting the independent contractor.¹⁵ Spelling out these criteria in legislative form does no more than what a court would in any case do in deciding whether an occupier has discharged his or her responsibilities by employing an independent contractor. Accordingly there is no need for a provision dealing with independent contractors.

¹⁴ eg in Victoria.

¹⁵ eg Occupiers' Liability Act 1985 (WA) s 6.

7. Exclusion of liability

Freedom to exclude liability for negligence¹

The present law

88. *Exclusion by notice or agreement.* It is possible for a person to exclude legal liability for negligence by putting up an adequate notice which makes it clear that liability is being excluded or by securing an agreement from the person who may be injured. The agreement may be secured by contract or otherwise. Thus an occupier may be able to rid himself or herself of responsibility for the safety of visitors by simply putting up a notice, so long as the notice can be seen and read by an entrant.²

89. *Exclusion when entrant voluntarily accepts risk.* A related rule is that an entrant may not be able to claim for his or her injuries if the risk of those injuries was known about and the entrant freely assumed the risk. Voluntary assumption of the risk is a defence potentially available in all negligence actions, though its scope is narrowly confined. Its effect is to defeat the plaintiff's claim altogether. The courts nowadays prefer to reduce damages under the contributory negligence legislation³ rather than deny compensation to an injured plaintiff who has been at fault.⁴

Legislative preservation of these rules

90. These rules have been preserved or modified in most of those jurisdictions which have passed or drafted occupiers' liability legislation. This has been achieved either by making no mention of those rules (so that the common law continues to operate) or by spelling the rules out in statutory form. In Saskatchewan, for example, the draft legislation provides that exclusion of liability is prohibited in respect of death or personal injury⁵ and is not permitted unless it is reasonable in relation to other damage.⁶ Criteria for determining reasonableness are spelled out. In Alberta the legislation does not permit exclusion of liability to entrants as of right.⁷ In England, under separate legislation,⁸

¹ See generally, Seddon 1981.

² *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409.

³ Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT) Pt V.

⁴ eg *Hackshaw v Shaw* (1984) 155 CLR 614.

⁵ Occupiers' Liability Bill 1980 (Sask) cl 4(2)(b).

⁶ id, cl 4(1)(c).

⁷ Occupiers' Liability Act 1973 (Alb) s 8(2).

⁸ Unfair Contract Terms Act 1977 (UK).

exclusion of liability by a business for death or personal injury is prohibited and exclusion of liability for other types of harm or damage is subject to a test of reasonableness.

Exclusion of liability to third parties

91. There is a curious rule which principally applies to the relationship of landlord and tenant but which may apply in other circumstances. If an occupier of premises is bound by contract to permit third parties (that is, people who are not parties to the contract) to enter the premises, then it is possible for the contract to limit the liability of the occupier to those third parties.⁹ Thus a visitor to a tenant in a block of flats may be adversely affected by the terms of the contract between landlord and tenant, which the visitor has never seen. The arguments used to justify this curious rule are that the visitor cannot be in a better position than the tenant and that the tenant, not the landlord, should let the visitor know the terms of entry onto the premises.¹⁰ As far as can be discovered, this rule has never been applied in Australia and is regarded as of doubtful validity by Fleming.¹¹ Yet in many examples of occupiers' liability legislation it has been thought necessary to abrogate this rule by specific provision, as, for example, in Western Australia.¹² The Commission has concluded that, until this supposed rule proves to be a problem, there is no need to legislate to abrogate it.

Recommendation

92. As noted above, in some jurisdictions limits have been placed on an occupier's or other person's ability to exclude liability by notice or agreement. Should there be a prohibition or limitation on the ability to exclude, for example, liability for personal injuries or death? It has been argued¹³ that there ought to be limits on a person's ability unilaterally to divest himself or herself of tort liability. In the Commission's view, this report is not the place to make recommendations on this issue. In the context of occupiers' liability, exemption clauses are not a serious problem. There are very few reported cases where occupiers have tried to rely on an exemption clause.¹⁴ This issue raises some important policy questions. It is better to deal with the general question of exclusion of liability where that issue is of central concern rather than marginal significance. Accordingly, the Commission's view is that no provision is necessary to deal with exclusion of liability by notice or agreement.

⁹ See *Fosbrooke-Hobbes v Airwork Ltd* [1937] 1 All ER 108. This case concerned a contract for the hire of an aeroplane. The hirer's guest would be bound by any excluding terms of the contract of hire.

¹⁰ *id.*, 112.

¹¹ Fleming 1987, 421 fn 33.

¹² Occupiers' Liability Act 1985 (WA) s 7.

¹³ Seddon 1981.

¹⁴ *ibid.*

Appendix A

Draft legislation

LAW REFORM (MISCELLANEOUS PROVISIONS) AMENDMENT ORDINANCE 1987

An Ordinance to amend the *Law Reform (Miscellaneous Provisions) Ordinance 1955*

Short title

1. This Ordinance may be cited as the *Law Reform (Miscellaneous Provisions) Amendment Ordinance 1988*.

Principal Ordinance

2. The *Law Reform (Miscellaneous Provisions) Ordinance 1955* is in this Ordinance referred to as the principal Ordinance.

3. After Part V of the Principal Ordinance the following Part is inserted:

“PART VA — THE RULE IN *CAVALIER v POPE*

Rule in *Cavalier v Pope* abolished

“20B. A lessor of premises is not exempt from owing a duty of care to persons on the premises merely because of his or her status as lessor.”.

List of written submissions

ACT Rural Lessees Association (P Buckmaster)
Building Owners and Managers Association of Australia Ltd (P Street)
TJ Chamberlain, Barrister and Solicitor
Fyshwick Chamber of Commerce (D Thomas)
Justice JF Gallop (Supreme Court of the Australian Capital Territory)
Insurance Council of Australia Ltd (AJ De Domenico)
Law Society of Western Australia (P Fitzpatrick)
Justice J Lee (Supreme Court of New South Wales)
National Capital Development Commission
Real Estate Institute of the Australian Capital Territory Ltd

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