THE OCCUPIERS' LIABILITY ACT 1983 (VIC.) SANITY RESTORED?

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1. *INTRODUCTION*

The common law liability of an occupier of premises in respect of injuries sustained by entrants onto the occupier's premises is governed by a complex set of legal rules, which revolve around determining the standard of the duty of care owed by the occupier to the entrant by reference to the categorisation of the entrant's purpose for visiting the premises. There are now five categories of entrant in the common law of Australia, namely, persons entering by contractual right, invitees, licensees, entrants as of right and trespassers, each of whom is owed a different duty of care by the occupier.[1] This duty of care varies from the very strict duty to a contractual entrant to ensure that the premises are as safe for the mutually contemplated purpose as reasonable care and skill on the part of anyone can make them,[2] down to a trespasser, who is owed a duty of 'common humanity'.[3]

Because of the stong social value attached to landholding, the common law has tended to resist fully exposing occupiers of land to the rapidly developing doctrine of negligence. Despite widespread criticism of the vagueness, and even irrelevance, of the distinctions between categories of entrant and the ensuing duty of care owed to them by occupiers, law reformers, particularly in Australia, have moved slowly in this area, influenced by a fear of imposing sudden increased burdens on occupiers[4] and a prejudice against abandoning controls over juries, whom they believe will favour injured plaintiffs.[5]

In 1957 the English Legislature enacted the Occupiers' Liability Act[6] which imposed on occupiers a 'common duty' of reasonable care towards all lawful visitors. In 1962 similar legislation was introduced in New Zealand,[7] and several

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1 For a detailed discussion of these categories and the respective duties owed, see Fleming J.G., *The Law of Torts* (6th ed., 1983), 416-50, and Luntz H., Hambly D. and Hayes R., *Torts: Cases and Commentary* (1980) 461-529.

2 *Watson v. George* (1953) 89 C.L.R. 409.

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

4 Victoria, Chief Justice's Law Reform Committee, *Report of Sub-Committee* (Chairman Nelson J.), 24 February 1975, 10.

5 *Ibid.* 2, 5, 6.

6 5 & 6 Eliz. 2, c. 31. The provisions of this Act have been extended by the Occupiers' Liability Act 1984 to cover unlawful entrants.

7 Occupiers' Liability Act 1962 (N.Z.).

Canadian and American jurisdictions have also followed suit.[8] In 1960 the Occupiers' Liability (Scotland) Act was enacted and extended the English concept of a common duty of care to all persons entering on premises, including trespassers.

2. *REFORM IN VICTORIA*

The Victorian Chief Justice's Law Reform Committee considered the matter, on and off, for 26 years, from 1956 to 1982. In December 1957 a sub-committe of this Committee reported that the law in Victoria relating to occupier's liability was in need of substantial legislative reform, but recommended that such reform be deferred until the impact of the newly enacted English Occupiers' Liability Act 1957 could be gauged, so as to assess its success and any problems arising under it.

There were subsequently three sub-committee reports on the subject. In 1975 a sub-committee headed by Mr Justice Nelson recommended that legislation similar to the English Occupiers' Liability Act be introduced to establish a common duty of care owed by occupiers to all lawful visitors, and that the common law rules determining the duty owed in particular circumstances by an occupier to a trespasser remain unchanged.[9] This report was not acted upon. In September 1981 a re-constituted sub-committee chaired by Mr Justice O'Bryan considered that there should be a limited amelioration of the position of a trespasser at common law. The sub-committee thus recommended extending the occupier's statutory duty of care to trespassers under the age of 15 years and to persons trespassing on the premises 'innocently', that is, if he or she is on the premises involuntarily, or if he or she has entered the premises in the belief that his or her presence thereon was not unlawful.[10] After some discussion the matter went back to the sub-committee which again reported in June 1982 and recommended that any legislation dealing with occupiers' liability ought to extend to all entrants on the land.[11]

3. *THE OCCUPIERS' LIABILITY ACT 1983*

Late in 1983 the Victorian Legislature enacted the Occupiers' Liability Act 1983, which came into operation on July 1, 1984. The Act amends the Wrongs Act 1958 (Vic.) by inserting Part IIA, comprising sections 14A to 14D, which deals with the standard of care owed by occupiers and landlords of premises to persons on the premises. The Act adopts the principle recommended by the 1982 report, but in addition sets out various factors to assist the court to determine how the duty of care should apply in a particular case.[12] The following is a brief analysis of the Act.

[8] Occupiers' Liability Act 1974 (B.C.); Occupiers' Liability Act 1973 (Alta); Occupiers' Liability Act 1980 (Ont.).

[9] Victoria, Chief Justice's Law Reform Committee, *Report of Sub-Committee* (Chairman Nelson J.), 24 February 1975, 12.

[10] Victoria, Chief Justice's Law Reform Committee, *Report of Sub-Committee* (Chairman O'Bryan J.), 18 September 1981, 4.

[11] Victoria, Chief Justice's Law Reform Committee, *Supplementary Report of the Sub-Committee* (Chairman O'Bryan J.), 2 June 1982, para. 7.

[12] S. 14B(4) — *infra* 516.

(i) *The extension of the definition of 'Occupier'*

The Act does not fully define an 'occupier', but instead adopts and extends the definition of 'occupier' at common law.

Section 14A(a) of the Wrongs Act now provides that in relation to Part IIA reference to 'the occupier of premises' includes the landlord of premises let under a tenancy who is either under an obligation to the tenant to maintain or repair the premises, or who 'is, or could have put himself in, a position to exercise a right to enter on the premises to carry out maintenance or repairs'.[13] Under section 97 of the Residential Tenancies Act 1981 (Vic.) a landlord under a tenancy agreement has a basic duty to ensure that the rented premises are maintained in good repair.

At common law the responsibilities of the occupier are based on the control, and not the ownership, of the premises. The occupier need not have entire or exclusive control. Rather, any person having a sufficient degree of control over the state of the premises is an occupier.[14] At common law, however, when a landlord lets premises to a tenant he is treated as parting with all control even though he may have undertaken to repair.[15] Thus a landlord is not an occupier at common law. The impact of section 14A(a) of the Wrongs Act is, therefore, to extend the common law definition of occupier by including landlords satisfying the criteria in that section. Such a landlord would have a duty of care to any entrant, including the tenant.[16]

One interesting result of section 14A(a) is that it has the effect of overriding the old House of Lords decision in *Cavalier v. Pope*[17] which held a landlord not to be liable to his tenant's wife for injury she sustained falling through a defective floor. The two grounds for this decision were, first, that the landlord was not an occupier, and, secondly, that the wife was not a party to the oral agreement between the landlord and her husband the tenant, under which the landlord undertook to repair the premises. According to section 14A(a) if the landlord had an obligation to the tenant to maintain or repair the premises, as he did under the contract in *Cavalier v. Pope*, the landlord is an occupier and the privity issue never arises.

(ii) *The definition of 'Premises'*

Section 14A(b) of the Wrongs Act defines 'premises' to include any fixed or movable structure, including any vessel, vehicle or aircraft. This merely codifies the common law which applies the rules of occupiers' liability to accidents on defective chattels which are structures on the land, even if they are movable, like vessels[18] or vehicles (at least when stationary).[19]

(iii) *The Occupiers' Duty of Care*

Section 14B of the Wrongs Act replaces the common law rules determining the standard of care of an occupier 'towards persons entering on his premises in

[13] Wrongs Act 1958 (Vic.), s. 14A(a)(ii).
[14] *Wheat v. E. Lacon & Co. Ltd* [1966] A.C. 552, 577-9 *per* Lord Denning.
[15] *Ibid.* 579.
[16] See s. 14B(3) which refers to the occupier's duty of care to 'any person on the premises'.
[17] [1906] A.C. 428.
[18] *Woods v. Duncan* [1946] A.C. 401, *Swinton v. China MSN Co.* (1951) 83 C.L.R. 553.
[19] See Fleming *op. cit.* 419, 439.

respect of dangers to them'[20] with 'a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or things done or omitted to be done in relation to the state of the premises'[21]. All other rules of common law relating to the liability of occupiers to persons entering their premises remain unchanged.[22]

The new legislation thus sweeps away the old common law rules applying different standards of care to the different entrants on the land, and applies a general duty of reasonable care to the occupier to prevent damage or injury by reason of the state of the premises to any person on the premises. Unlike the 1957 English Act and the New Zealand Acts, no distinction is drawn between lawful and unlawful entrants, and, contrary to the 1981 Victorian recommendation but following the 1982 Victorian recommendation, all trespassers, not just innocent trespassers, are covered by the duty of care. No doubt there will be critics who will argue that this extension of the duty of care to trespassers will impose too great a burden on occupiers of premises, particularly the owners of 'broad dry acres'.[23] It is submitted, however, that the common law principles of negligence are sufficiently developed, sophisticated and elastic to cope with assessing an occupier's duty of care to the wide range of persons likely to be on his or her premises. The generalised duty will enable the court to weigh up all the pertinent factors in assessing liability, without resorting to rigid formulae.

This latter point is well illustrated by the recent House of Lords decision in *Titchener v. British Railways Board*[24] which dealt with the common duty to take reasonable care in all the circumstances owed to a trespasser by an occupier under the Occupiers' Liability (Scotland) Act 1960. In that case the 15 year old appellant was seriously injured when she was struck by a train while walking across a railway line late at night. She had climbed up a slope and then through a gap in the boundary fence to get onto the railway line. She alleged that the respondents, in failing to maintain the fence along the railway line in a reasonable state of repair, were in breach of their duty of care under the Act. The House of Lords unanimously dismissed the appeal and took into account a wide range of factors, including the age and intelligence of the appellant,[25] and the fact that she admitted that 'she was fully aware that the line existed, that there was danger in walking across it or along it, that she ought to have kept a lookout for trains and, that she had done so when crossing the line on previous occasions'.[26]

Additional factors were that the line was so situated that the appellant could not have strayed onto the line unawares and that there was no difficulty in seeing trains as they approached in the dark with their lights on.[27] The House of Lords went

20 Wrongs Act, s. 14B(1).
21 Wrongs Act, s. 14B(3).
22 Wrongs Act, s. 14B(2).
23 See, for example, the debates in the Victorian Legislative Council: Victoria, *Parliamentary Debates*, Legislative Council, 8 November 1983, 826-7. See also McInerney J. in *Shaw* v *Hackshaw* [1983] 2 V.R. 65, 90.
24 [1983] 3 All E.R. 770.
25 *Ibid*. 774.
26 *Ibid*. 775 *per* Lord Fraser.
27 *Ibid*.

further and said that even if a duty to maintain and repair the gaps in the fence had been established, the respondent's failure to maintain and repair had not caused the accident because, on the evidence, the appellant would not have been deterred by a post and wire fence from crossing the line.[28]

The Act has the welcome consequence of removing any real distinction between 'occupancy duties', relating to liability for dangers due to the state of the premises, and 'activity duties', which relate to liability due to activities carried out on the premises. Whereas previously the former were governed by the common law occupiers' liability rules and the latter by the common law principles of negligence, and the distinction was important in ascertaining the relevant standard of care, now there is no real distinction as in both instances the standard of care is to be formulated from the same principles. The distinction's only relevance is that in the formulation of the 'occupancy duties' reference must first be made to the Act, and then through the Act to the common law, while the formulation of the 'activity duty' requires reference only to the common law principles of negligence.

Both the main provisions of the Act formulating the new standard of care, sections 14B(1) and 14B(3), omit any reference to property brought onto the premises. Section 14B(4)(d) and section 14C both, however, do refer to 'persons and property' and so it would be reasonable to presume that the Act does cover damage to an entrant's property. It is highly improbable that the Victorian legislature intended personal injury to an entrant to be covered by the Act, but damage to his or her property to be covered by the cumbersome common law rules of occupiers' liability. A court, however, may face problems in trying to read the words 'or property' into sections 14B(1) and 14B(3).[29]

(iv) *Factors to be taken into account in determining the duty of care*

In determining whether the duty of care has been discharged by the occupier, section 14B(4), following the example of the Saskatchewan draft Bill,[30] lists seven factors, which without limiting the generality of the duty of care in section 14B(3), should be taken into consideration. It is submitted that these seven factors merely draw the attention of the court to considerations already prominent in any formulation of the standard of care in negligence cases.

Two of the factors, 'the nature of the premises'[31] and 'the knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises'[32] are basic to any formulation of the duty of care in negligence. Two other factors, 'the gravity and likelihood of the probable injury'[33] and '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'[34]

[28] *Ibid.* 775-6.

[29] *Cooper Brookes (Woolongong) Pty Ltd v. Federal Commissioner of Taxation* (1981) 147 C.L.R. 297, 304-7 *per* Gibbs C.J. and 335-9 *per* Aickin J.

[30] Saskatchewan, Law Reform Commission, *Proposals for an Occupiers' Liability Act*, October 1980, 8.

[31] Wrongs Act, s. 14B(4)(c).

[32] Wrongs Act, s. 14B(4)(d).

[33] Wrongs Act, s. 14B(4)(a).

[34] Wrongs Act, s. 14B(4)(g).

cover the three elements in the classical formulation of the 'calculus of negligence' first explicitly enunciated by the American judge, Learned Hand J. in *United States v. Carroll Towing Co.*[35] and acknowledged by the High Court in *Ryan v. Fisher*.[36]

The fifth factor is 'the age of the person entering the premises'.[37] Many occupiers' liability cases centre around injuries to young children who trespass, quite innocently, onto inadequately fenced premises.[38] This factor is in accord with common law principles of negligence which have made considerable concessions to the age of children in formulating the standard of care.[39]

The sixth factor is 'the ability of the person entering the premises to appreciate the danger'.[40] Presumably this draws attention to two elements: first, the unusualness of the danger or the degree to which it is concealed from the entrant, and secondly, the entrant's own personal characteristics, such as his or her intelligence, experience and physical disabilities such as blindness or deafness. It is unlikely that this would allow a court to take into account the fact that the entrant may not have appreciated the danger because he or she was inattentive or careless.[41] If this interpretation is correct, the Act is once again merely drawing attention to factors already considered by the courts in negligence.

The final factor is 'the circumstances of the entry onto the premises'.[42] This factor is quite obviously highly relevant in the area of occupiers' liability where entrants vary from persons paying a fee for the use of premises, to innocently trespassing children, to not so innocently trespassing burglars. In particular, courts and legislatures have always been reluctant to impose on occupiers a heavy duty towards trespassers who are forced on occupiers against the occupier's will.[43] Decided cases such as *Titchener v. British Railways Board*[44] illustrate how the courts can intelligently assess the circumstances surrounding the entry onto the land in deciding an occupier's duty of care without resorting to the cumbersome categories of entrant under the old common law.

In summary the seven factors add very little to the occupier's duty of care formulated in section 14B(3) and merely serve as guidelines to the courts as they endeavour to apply the common law duty of care to a new and wide range of circumstances. By applying these guidelines courts should easily be able to formulate the different standards of care owed by an occupier to a trespasser onto

[35] (1947) 159 F.2d 169.

[36] (1977) 51 A.L.J.R. 125.

[37] Wrongs Act, s. 14B(4)(e).

[38] For example *Robert Addie & Sons (Collieries) Ltd v. Dumbreck* [1929] A.C. 358, *Thompson v. The Municipality of Bankstown* (1953) 87 C.L.R. 619, *Commissioner for Railways v. Cardy* (1960) 104 C.L.R. 274. Indeed, it was the harshness of the rule in *Addie's* case which led the court in *Thomson* and *Cardy* to try to circumvent the application of the rule to children.

[39] See for example *McHale v. Watson* (1966) 115 C.L.R. 199 and *Titchener's* case (*supra* 515).

[40] Wrongs Act, s. 14B(4)(f).

[41] This would be relevant in deciding whether the entrant was contributorily negligent — *infra* 518.

[42] Wrongs Act, s. 14B(4)(b).

[43] See for example the judgment of the Privy Council in *Southern Portland Cement Ltd v. Cooper* [1974] A.C. 623, and McInerney J. in *Shaw* v *Hackshaw* [1983] 2 V.R. 65, 90.

[44] [1983] 3 All E.R. 770.

farm property in rural Victoria, and to a person who has been invited onto premises in inner suburban Melbourne.

(v) *The defences available to an Occupier*

Section 14D of the Wrongs Act specifically provides that Part V of the Wrongs Act, which relates to the contributory negligence of the plaintiff, applies to the new occupiers' liability provisions in Part IIA.

The Act makes no express reference as to whether the principles of 'voluntary assumption of risk' can apply to persons entering an occupier's premises. Section 14B(2) provides that, apart from the provisions replacing the common law rules determining the standard of care owed by an occupier to an entrant, the rules of common law relating to the liability of occupiers to entrants are not affected by the Act. It would thus appear that the existing rules of *volenti non fit injuria* are applicable to occupiers' liability cases under the Act.

Thus where an entrant knowingly exposes herself or himself, while on the premises, to a particular physical risk, the occupier may raise the defence of voluntary assumption of risk. The entrant must accept the risk voluntarily, and this element is absent if the entrant had no real choice as to whether or not to enter the premises.[45] In addition the entrant must have willingly accepted the danger which actually caused his or her injury. This usually means that the entrant must have known the precise risk in advance.[46]

It is highly likely, however, that Victorian courts, in dealing with the conduct of the entrant on the premises, will apply the principles of contributory negligence, resulting in a reduction of damages, and not the principles of voluntary assumption of risk, which amount to a complete defence to the entrant's claim.

Two other areas can be conveniently discussed at this point. Under the old common rules of occupiers' liability it had been held by the House of Lords in *London Graving Dock Co. Ltd. v. Horton*[47] that notice to or knowledge by the entrant of the risk, provided he or she recognized its full significance, was sufficient to exculpate the occupier. Provided the requisite degree of knowledge was brought home to the entrant, his or her claim was defeated whether or not he or she freely undertook the risk.[48] It would appear that section 14B(3) has the effect of overriding this harsh rule, because that section requires a court to look at 'all the circumstances of the case' in formulating the standard of care. A warning to the entrant may, or may not, on the facts of the particular case, be enough to enable the visitor to be reasonably safe. Likewise, mere knowledge of the risk would no longer automatically prevent the entrant from recovering. All the circumstances of the case will have to be investigated by the court.[49]

When an occupier, by contract, excludes his or her liability, that contractual exclusion will usually be effective to limit, or exempt, the occupier from liability to the entrant.[50] The Act does not refer to the situation where an occupier purports

[45] *Burnett v. British Waterways Board* [1973] 1 W.L.R. 700.
[46] *White v. Blackmore* [1972] 2 Q.B. 651.
[47] [1951] A.C. 737.
[48] *Ibid.*
[49] *Bunker v. Charles Brand & Son Ltd* [1969] 2 Q.B. 480.
[50] See *infra* 520.

to exclude his or her liability other than by contract. For example an occupier may erect a sign at the entrance to his or her property specifying that entrants come onto the property at their own risk. The English Court of Appeal has held non-contractual excluding notices to be valid at common law.[51] As the Occupiers' Liability Act does not refer to this situation, it is arguable that 'Parliament must be taken to have known the law [as laid down in *Ashdown's case*] and to have decided as a matter of policy not to alter it . . .'[52].

Both *Ashdown* and *White* held that the entrant may enter at his or her own risk even though he or she is unaware of the notice, the test being whether the occupier made reasonable efforts to bring the notice to the attention of the entrant. *White* also showed that this defence can succeed even where an occupier's defence of *volenti non fit injuria* fails, because the rules governing the validity of the exclusion of liability by notice have evolved into something separate and wider than the volenti principles. However the defence will not apply if the entrant did not, in practical rather than strictly legal terms, have a free choice as to whether or not to enter the property, as would be the case where the police or an ambulance attendant were called onto the premises.[53]

It may be debatable, however, whether this defence of exclusion by notice applies to the Occupiers' Liability Act. The defence would appear to be based upon an implied licence, in the sense that the occupier permits the entrant to enter only on condition that the entrant exempts the occupier from liability for negligent injury. If the entrant does not accept this condition he or she enters as a trespasser.[54] The principle in *Ashdown* was formulated before the enactment of the English Occupiers' Liability Act, and before *British Railways Board v. Herrington*[55] made the occupier liable to trespassers for at least some negligent injuries. It thus only applied to the old categories of contractual entrants, invitees and licencees. *White* was decided after the English Act, but before *Herrington*, and so it too only had to deal with a situation where a duty of care was owed by an occupier to an entrant entering the premises with at least implied permission.

It is thus open to a Victorian Court to hold that, because the Occupiers' Liability Act does away with the categories of entrant, particularly the distinction between lawful entrants and trespassers, it would be illogical to apply the *Ashdown* principle to exclude liability to entrants coming onto the land with implied permission, but not to 'trespassers'. If the *Ashdown* principle were to be applied in Victoria to entrants at least coming onto the premises under an implied licence, but not to trespassers, it would have the absurd consequence of putting an unlawful entrant in a better position than a lawful entrant when either was faced with a notice excluding an occupier's liability for injury to an entrant. The better solution would be simply to treat such a notice as one factor to be considered with all the other circumstances in formulating the occupier's standard of care.

[51] *Ashdown v. Samuel Williams & Sons Ltd* [1957] 1 Q.B. 409; *White v. Blackmore* [1972] 2 Q.B. 651.

[52] *White v. Blackmore* [1972] 2 Q.B. 651, 674 *per* Roskill L.J.

[53] *White v. Blackmore* [1972] 2 Q.B. 651; *Burnett v. British Waterways Board* [1973] 1 W.L.R. 700.

[54] *Ashdown v. Samuel Williams & Sons Ltd* [1957] 1 Q.B. 409.

[55] [1972] A.C. 877.

An alternative view is put forword by Seddon,[56] who argues that the above analysis depends on the assumption that the only way in which excluding conditions can be imposed on another is by some kind of notional agreement. In contract the terms of a reasonably displayed notice form part of the agreement between the parties, but it is the action of the parties, and not the notice itself, which creates the agreement. The role of 'reasonable notice' in contract is merely to ascertain whether the party exposed to the notice must be held to know, given the existence of the contract, that his rights are affected by it.[57] Where there is no agreement, 'reasonable notice' plays a similar role, namely to ascertain whether, given some other relationship, a party's rights are affected. Thus a 'trespassing' entrant must be taken to know that his rights are affected because he has put himself in a certain proximity with the occupier and cannot argue that he did not see, or understand, the notice, provided the notice is prominently displayed.[58] Thus it is arguable that the exclusion by notice principle can be applied without looking at the relationship between the occupier and the entrant.

(vi) *Other provisions*

Section 14C of the Wrongs Act provides that an occupier's duty of care applies to the Crown in its capacity as occupier or landlord of any premises.

Section 14B(5) provides that nothing in section 14B 'affects any obligation to which an occupier of premises is subject by reason of any other Act or any statutory rule or any contract'. Thus where a person enters another's premises pursuant to a contract which expressly sets out the nature and extent of the occupier's obligations in relation to the entrant's safety, the contractual standard prevails regardless of whether it is more or less onerous to the occupier or advantageous to the entrant than the standard of care which would apply under section 14B(3) of the Wrongs Act. When the contract is silent on the matter the law may imply such terms as are reasonable and appropriate in all the circumstances,[59] and it would appear that implied terms relating to the entrant's safety would override section 14B, even if those terms had the effect of placing upon the occupier a lower standard of care than would have been the case under section 14B.

Presumably, the effect of the doctrine of privity of contract on section 14B(5) is only to apply the standards specified, expressly or impliedly, in the contract to the parties to the contract, and not to persons who merely gained admission to the premises under a contract between the occupier and another party.[60] Thus, while under the old common law occupiers' liability rules applicable to contractual entrants it does not matter who made the contract under which the plaintiff gained

[56] Seddon N.C., 'Fault without Liability — Exemption Clauses in Tort' (1981) 55 *Australian Law Journal* 22, 24-30.

[57] *Ibid*. 29-30.

[58] *Ibid*. 30.

[59] See generally Fleming *op. cit*. 421.

[60] Usually a friend or relative of the injured entrant, or alternatively the organiser of a function attended by the entrant.

admission, at least with respect to premises for hire to the public,[61] this principle does not apply to entrants under contract under the new legislation.

Finally, it should be noted that one problem not dealt with by the Occupiers' Liability Act 1983 is the old controversy as to whether an occupier's obligation to exercise reasonable care can be fulfilled by delegating construction, maintenance or repair jobs to an independent contractor. The common law has encountered conceptual problems in answering this question in relation to an invitor's obligation of reasonable care to an invitee. One line of authority places the occupier under a 'non-delegable' duty, at least in relation to non-technical jobs, like cleaning stairs[62] that could have been performed personally by the occupier. It is even arguable that the occupier could also be liable for dangers actually created by the contractor in dealing with existing dangers.[63] According to another line of authority, an occupier discharges his or her duty of care by entrusting to a reputable expert the performance of tasks calling for special knowledge or experience which the occupier lacks, such as the repair of electrical wiring, and the occupier will not be liable for defects in the contractor's work, provided reasonable care was exercised in selecting and supervising the contractor.[64] It is hoped that the courts will approach this problem afresh in interpreting the new Act and steer clear of the contradictory lines of authority under the old common law.

4. *CONCLUSION*

The Occupiers' Liability Act 1983 simplifies and modernizes the law relating to the liability of occupiers of land for harm suffered by people who come onto their land, by applying to the situation the general principles of negligence which have been developed by the courts over the past fifty years. The definition of an occupier is also widened to include landlords under certain conditions. The most striking aspect of the new Act is its simplicity: it is much shorter than the other legislative attempts at reform in this area. Perhaps it is too simple. In particular, perhaps the Legislature should have dealt expressly with the application of the principles of *volenti non fit injuria* and exclusion by notice, rather than leave these areas to be considered by the courts. However, it is confidently expected that the overall result will be more just treatment for occupiers and entrants alike than was accorded them under the common law occupiers' liability rules. One can only hope that in twelve years time some eminent jurist, in discussing the Occupiers' Liability Act 1983 (Vic.), will echo the words of Lord Diplock when he said of the English Occupiers' Liability Act at the sixteenth Australian Legal Convention:

> it has been going now for 12 years and it has worked like a charm — none of the difficulties that I expected . . . have arisen.[65]

[61] The so-called 'Voli principle': *Voli v. Inglewood Shire Council* (1963) 110. C.L.R. 74, 93. The 'Voli principle' seems to depend on the fact that the duty of an occupier to a contractual entrant is primarily in tort and so, arguably, if section 14B(3) of the Wrongs Act does away with the common law tortious duty of care to a contractual entrant, the 'Voli principle' no longer applies — see generally Fleming *loc. cit.*

[62] *Vial v. Housing Commission of New South Wales* [1976] 1 N.S.W.L.R. 388.

[63] *Thomson v. Cremin* [1956] 1 W.L.R. 103. (note) [1953] 2 All E.R. 1185.

[64] *Haseldine v. C. A. Daw & Son Ltd* [1941] 2 K.B. 343.

[65] 45 A.L.J. 569.