THE LIABILITY OF THE USER OF A WIND GENERATOR IN TORT FOR PERSONAL INJURIES

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Wind energy is amongst the most likely alternative energy sources to make a significant contribution to electricity demands. Dr Bradbrook discusses the liability of the user of a wind generator in tort for personal injuries. He identifies four situations which may give rise to such liability and applies the present law — negligence, occupiers' liability and Rylands v. Fletcher *liability — to them. The result is a substantial risk of incurring such liability, and this clearly runs counter to the government policy of encouraging the use of alternative energy sources. Several solutions are suggested which would eliminate or at least reduce the threat of personal liability, while still ensuring that neighbours are compensated.*

Introduction

Since the world oil crisis in 1973 the Australian government has shown increasing interest in alternative energy resources. Over the past decade the potential significance of deriving power from solar energy, wind energy, biomass,[1] ocean thermal energy conversion[2] and the harnessing of the tides and waves has been assessed by various government instrumentalities. The majority of these resources have been assessed as unlikely to be capable of making a significant contribution to the country's energy requirements by the year 2000. However, this cannot be said of solar and wind energy. After solar energy, wind energy ranks as the most likely of the various alternative energy resources to make a significant contribution to the projected demands for electricity in the short and medium term.

The extent of the potential for wind electricity generation in Australia is currently being researched.[3] The National Energy Advisory Committee reported in 1981 that certain coastal areas of South Australia, the south-western corner of Western Australia and the west coast of Tasmania are well endowed

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[1] Biomass means material of biological origin. It has numerous possible applications as an energy resource. For example, animal wastes can be converted to methane gas; sugar crops and starch can be converted to ethanol, a liquid fuel; and certain vegetable oils can be used as diesel fuel. The prospects of deriving energy from biomass are discussed in National Energy Advisory Committee, *Alternative Liquid Fuels*, Report No. 12, Canberra (1980); National Energy Advisory Committee, *Renewable Energy Resources in Australia*, Report No. 17, Canberra (1981) ch. 4.

[2] For a discussion of O.T.E.C. and the legal issues associated with it, see Joseph, S., 'Legal Issues Confronting the Exploitation of Renewable Sources of Energy from the Oceans' (1981) 11 *California Western International Law Journal* 387; Keith, K., 'Laws Affecting the Development of Ocean Thermal Energy Conversion in the United States' (1981-2) 43 *University of Pittsburg Law Review* 1; Krueger, R. and Yarema, G., 'New Institutions for New Energy Technology: The Case of Ocean Thermal Energy Conversion' (1980-1) 54 *Southern California Law Review* 767.

[3] For a discussion of the development of wind generators in Australia, see Pausacker, I. and Andrews, J., *Living Better with Less* (1981) 51ff; Martin, B., 'Feasibility of Wind Power' (1981) 2 *Solar Progress* 14; National Energy Advisory Committee, Report No. 17, *op. cit.* 6.1ff.

with wind resources, with annual energy productions of between 3,000 and 4,500 kWh per kW of installed wind capacity possible.[4] The Committee predicted that in these three states large-scale grid connected wind-generated electricity could become economically viable by 1990, and stated that large wind generators[5] are likely to be first considered for application in areas such as Esperance, Western Australia and King Island, Tasmania, where there is a combination of high winds and expensive electricity. Since 1981 the possibility of more widespread use of wind-generated electricity has been recognized. For example, the coastal areas of Victoria have been recognized as a suitable area for wind-generated electricity and a joint study has recently been undertaken by the Victorian Solar Energy Council and the State Electricity Commission of the coastline between Portland and Orbost to identify exact locations for wind generators.

Although the current research emphasis is on large-scale wind generators for community use, the number of small-scale privately owned wind generators is also projected to increase, particularly in country districts and in remote townships which are not connected to the electricity grid system. The Australian Senate Standing Committee reported in 1977 that wind power has a viable role in the future for small-scale applications in all areas where wind is a reliable energy source.[6]

The increasing use of wind generators gives rise to a number of interesting legal issues. One of these is the extent to which and the circumstances in which a user of a wind generator (hereafter referred to as a 'wind user') may incur liability in tort for personal injuries caused to neighbours or other affected persons by the use of a wind generator.[7] Four situations can be identified which may give rise to such liability: blade throwing, fire damage, the total or partial collapse of the supporting tower of a generator, and injury to children climbing a generator. This article will identify the nature of these problems and will discuss the application of the present law to each one. The article will conclude by suggesting possible law reforms designed to eliminate or reduce in scope the liability of a wind user for personal injuries resulting from the use of a wind generator.

BLADE THROWING

The first commercial wind generator in the United States located at Grandpa's Knob, Vermont, threw an 8-ton blade 225 metres in 1945.[8] The larger the

4 National Energy Advisory Committee, Report No. 17, *ibid.* 6.1.

5 Wind generators are sometimes referred to as wind energy conversion systems.

6 Senate Standing Committee on National Resources, *Report on Solar Energy*, Canberra (1977) 78.

7 Other legal issues are the obtaining of planning permission for the erection of a wind generator, the obtaining of guaranteed access to the wind and the tortious liability of a wind user for damage caused to neighbouring properties.

8 Coit, L., *Wind Energy: Legal Issues and Institutional Barriers*, U.S. Department of Energy, Washington D.C., (1979) 14.

generator the greater distance the blade may be thrown in the event of a mechanical failure as a result of centrifugal force. It has been calculated that blade failure in a 1.5 MW generator could result in fragments being flung out to a distance of 400 metres.[9] Such a situation could easily lead to personal injury or death to occupiers of neighbouring properties.

The problem of blade throwing used to arise most commonly in high winds and storms. However, this problem has been significantly reduced by technological advances in recent years. Today all large-scale wind generators feather their blades in high winds and shut down completely when the wind exceeds a fixed velocity.[10] Thus, blade throwing in high winds is not as serious a problem as it used to be. However, the possibility of blade throwing still exists in the event of a mechanical failure.[11]

If a rotor blade is thrown from a wind generator and injures a neighbouring landowner, the neighbour may sue the wind user under the rule in *Rylands v. Fletcher*[12] or in negligence. It might be thought that a rotor blade thrown from a generator on adjoining land would constitute a trespass to land and be actionable by the neighbour accordingly. Trespass would appear to be inapplicable in this context, however, because of the requirement of the law of trespass that the injury be direct as opposed to consequential.[13] Finally, if personal injury is caused to a person on the wind user's property, the wind user may be liable in negligence under the rules of occupiers' liability.

The issue of occupiers' liability for negligence is more likely to arise in the context of damage caused by the total or partial collapse of the supporting tower of a wind generator and will be discussed in detail in that context.[14] The remainder of this section will consider the application of the rule in *Rylands v. Fletcher* and the tort of negligence.

(a) *The rule in Rylands v. Fletcher*

Blackburn J. stated the relevant proposition of law in *Rylands v. Fletcher* as follows:

> [T]he true rule of law is, that the person, who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.[15]

9 Phillips, P.D., 'NEPA and Alternative Energy: Wind as a Case Study' (1979) 1 *Solar Law Reporter* 29, 47.

10 Coit, *op. cit.* 14.

11 For example, in March 1982 at Tehachapi Valley, California, a 50kw wind generator rotated out of control in high winds and threw its blades. This incident occurred because blade tip air spoilers designed to control the speed of the revolution of the rotor blades failed to operate: see Evans, N., 'Windfarming in America' (1982) 24 *Wind Power Digest* 6, 10.

12 (1868) L.R. 3 H.L. 330.

13 See Heuston, R.V. and Chambers, R.S., *Salmond and Heuston on Torts* (18th ed. 1981) 5, 39-40. See also *Hutchins v. Maughan* [1947] V.L.R. 131, 133, *per* Herring C.J.; *Leame v. Bray* (1803) 3 East 593, 602; 102 E.R. 724, 727, *per* Le Blanc J.

14 See *infra* pp.262-73.

15 (1866) L.R. 1 Exch. 265, 279; adopted by Lord Cairns in the House of Lords in (1868) L.R. 3 H.L. 330, 339-40.

Strict liability is imposed under this rule, and it is no defence for the defendant to prove that he had taken reasonable precautions to prevent the escape of the dangerous object. On the other hand, liability is not absolute since, as will be discussed later,[16] a number of defences have been recognized.

The question whether a person on neighbouring land can claim damages under the rule in *Rylands v. Fletcher* for personal injury caused by a severed rotor blade must be considered as a preliminary issue.[17] This matter is contentious, although the better view appears to be that damages for personal injury are recoverable. According to Lord Macmillan in *Read v. J. Lyons & Co. Ltd*,[18] damages for personal injury cannot be allowed as the rule in *Rylands v. Fletcher* is based on the mutual duties of neighbouring landowners and was never intended to include personal injuries. While this reasoning is valid in terms of legal theory, such a limitation has been ignored in many decisions handed down both before and after Lord Macmillan's *dictum* was made. The most recent High Court case in which this matter has been considered is *Benning v. Wong*.[19] There are persuasive *dicta* by Barwick C.J. and Windeyer J. rejecting the application of such a limitation. Barwick C.J. stated:

> The suggestion that I can recover for an explosion wrecking my conservatory or a horse trespassing on my rose bed, but not for an explosion blowing me out of my deck chair in my own garden, or a horse treading on my face as I sleep on my lawn, has little to commend it.[20]

It is submitted that the balance of authorities at present strongly suggests that damages for personal injury may be awarded under the rule in *Rylands v. Fletcher*.[21]

There are two factors affecting the scope of the rule in *Rylands v. Fletcher*: first, there must be an escape of a dangerous object; and secondly, the rule is limited to cases where the defendant is making a 'non-natural' use of his land.[22]

In relation to the first factor, it is clear that a rotor blade severed from a wind generator would be treated as a 'dangerous object'. Although there is no reported case directly on point, numerous analogies could be drawn by the courts. A useful illustration is *Shiffman v. Order of St John*,[23] where Atkinson J. held that a flag pole supported only by four guy ropes comes within the rule in *Rylands v. Fletcher*. A further illustration is *Hale v. Jennings Brothers*.[24] In this case, the Court of Appeal held the defendants to be liable in damages under the rule in *Rylands v. Fletcher* where a chair-o-plane, a form of fairground roundabout, fractured and one of the chairs fell and injured the plain-

16 See *infra* pp.255-6.

17 See *Winfield and Jolowicz on Tort* (12th ed. 1984) 431-3.

18 [1947] A.C. 156, 173. The other four Law Lords did not express an opinion on this issue.

19 (1969) 122 C.L.R. 249. See also *Hale v. Jennings Brothers* [1938] 1 All E.R. 579; *Perry v. Kendricks Transport Ltd* [1956] 1 W.L.R. 85. *Cf. Weller & Co. v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569.

20 (1969) 122 C.L.R. 249, 274-5.

21 Note that the scope of the rule in *Rylands v. Fletcher* extends to non-occupiers of neighbouring land injured by a severed rotor blade.

22 See Higgins, P.F., *Elements of Torts in Australia* (1970) 199.

23 [1936] 1 All E.R. 557.

24 [1938] 1 All E.R. 579.

tiff. The court had no hesitation in declaring the chair-o-plane to be a dangerous object.[25]

The application of the second factor in the present context is more uncertain. Its application is always a question of fact for the judge, and the courts have been keen to preserve the maximum degree of flexibility. As stated by Lord Porter in *Read v. J. Lyons & Co. Ltd*,[26] in each case 'all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to these circumstances'.

In the absence of any direct authority, the courts will apply analogies to determine whether a wind generator is a 'non-natural' use of the land. The reported cases are difficult to reconcile. There are authorities for the proposition that the escape of water from a domestic water system or lavatory[27] or the escape of electricity from a normal domestic supply[28] is a natural use of land and therefore beyond the scope of the rule in *Rylands v. Fletcher*. In contrast, the rule has been held to apply in the case of an escape of water from a water main[29] and an escape of electricity from an industrial supply.[30] There are *dicta* in *Rickards v. Lothian*[31] which suggest that ordinary household installations do not constitute a 'non-natural' use of land and therefore are not susceptible to the rule. In a particularly interesting passage of his judgment, Lord Moulton stated:

> In such matters as the domestic supply of water or gas it is essential that the mode of supply should be such as to permit ready access for the purpose of use, and hence it is impossible to guard against wilful mischief. Taps may be turned on, ball-cocks fastened open, supply pipes cut, and waste-pipes blocked. Against such acts no precaution can prevail. It would be wholly unreasonable to hold an occupier responsible for the consequences of such acts which he is powerless to prevent, when the provision of the supply is not only a reasonable act on his part but probably a duty.[32]

If it is correct to assume that the rule does not apply to ordinary household installations, a strong argument can be made that small wind generators designed for individual household use are not subject to an action under *Rylands v. Fletcher*. Difficulties exist with this reasoning, however. Due to the paucity of wind generators in Australia at the present time, it can be argued that the use of wind generators is not an 'ordinary' household use. The reasoning of Lord Moulton in *Rickards v. Lothian* appears to be based on the fact that a modern household cannot be expected to operate without a lavatory and a

[25] See also *Jones v. Festiniog Railway Co.* (1868) L.R. 3 Q.B. 733; *Firth v. Bowling Iron Co.* (1878) 3 C.P.D. 254; *National Telephone Co. v. Baker* [1893] 2 Ch. 186; *Ponting v. Noakes* [1894] 2 Q.B. 281; *Batcheller v. Tunbridge Wells Gas Co.* (1901) 84 L.T. 765; *A.-G. v. Cory Bros. & Co. Ltd* [1921] 1 A.C. 521; *Rainbham Chemical Works Ltd (In Liq.) v. Belvedere Fish Guano Co. Ltd* [1921] 2 A.C. 465. See also Stallybrass, W., 'Dangerous Things and the Non-Natural User of Land' (1929) 3 *Cambridge Law Journal* 376.

[26] [1947] A.C. 156, 176.

[27] *Rickards v. Lothian* [1913] A.C. 263; *Blake v. Woolf* [1898] 2 Q.B. 426.

[28] *Collingwood v. Home and Colonial Stores Ltd* [1936] 3 All E.R. 200.

[29] *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* [1914] 3 K.B. 772.

[30] *Fullarton v. North Melbourne Electric Tramways and Lighting Co. Ltd* (1916) 21 C.L.R. 181.

[31] [1913] A.C. 263.

[32] *Ibid.* 282.

water supply system. The same cannot be said in respect of a wind generator in light of the availability of conventional gas and electricity supplies. Another problem is that the application of this reasoning could lead to the result that the rule in *Rylands v. Fletcher* will apply to severed rotor blades from large wind generators designed for connection to the electricity grid system or for industrial or commercial use, but not for generators designed for household use. Such a distinction seems totally inappropriate in light of the similar nature of the escape in all cases.

These difficulties, however, relate solely to the question of whether household installations constitute a 'non-natural' use of land. Other cases strongly suggest by analogy that a wind generator should be regarded as a 'natural' use of land. The two most relevant cases are *Pett v. Sims Paving and Road Construction Co. Pty Ltd*[33] and *Tolmer v. Darling*,[34] both of which were concerned with the application of the rule in *Rylands v. Fletcher* in the context of fire damage. In the former case, the escape of fire was caused by a steam roller and bitumen melter brought onto the land by the defendant company. The company was held not liable under the rule in *Rylands v. Fletcher* on the basis that it was not an occupier of the land. The court added, however, that an alternative basis for its decision was that the company's operations had not been shown to be a non-natural use of the land. Irvine C.J. stated that the construction by ordinary methods of a paved driveway to a suburban house is a reasonable and natural use of the land, particularly where the grades are considerable.[35] In *Tolmer v. Darling*, it was similarly held that the rule had no application where the fire damage to neighbouring property was caused by the escape of burning charcoal from a motor car fitted with a gas producer which was damaged on the adjoining public road when the car hit the hard bank of a drain.[36]

If a bitumen melter and burning charcoal from a motor car can be regarded as a 'natural use' of land, *a fortiori* the same result should be reached in the case of wind generators. In the absence of direct authorities, however, the issue as to whether a wind generator is a 'natural' use of land must be regarded as uncertain.

If wind generators are held to be a 'natural' use of land, then further discussion of the rule in *Rylands v. Fletcher* is unnecessary as the rule will be inapplicable. In these circumstances the plaintiff must rely on his possible remedy in negligence. On the other hand, if such systems are held to be a 'non-natural' use of land and thus within the scope of the rule, we must consider whether there is any defence available to the wind user.

33 [1928] V.L.R. 247.
34 [1943] S.A.S.R. 81.
35 [1928] V.L.R. 247, 256-7.
36 *Cf. Mason v. Levy Auto Parts of England Ltd* [1967] 2 Q.B. 530, where the storage of combustible materials was held to be non-natural.

Note that even in the unlikely event that the wind user is held liable under the rule in *Rylands v. Fletcher* for the escape of fire, he could still plead the defence of act of stranger or Act of God. For a discussion of these defences, see *supra* pp.255-6.

A variety of defences to the rule in *Rylands v. Fletcher* have been devised by the courts. In the present context, only three are relevant: common benefit, the act of a stranger and an Act of God.

The defence of common benefit excuses the defendant from liability for the escape of a dangerous object if it is kept and maintained for the common benefit of both the plaintiff and the defendant.[37] Thus the defence will not apply in the typical situation where a householder or industry purchases a wind generator exclusively for his or its own purposes. It will, however, presumably apply in cases where a generator is established for community use (as occurs in some areas of outback Australia where it is built by an electricity authority for connection with the electricity grid system), or where a group of neighbouring landowners pool their resources and buy a generator which is shared among them.

The defence of the act of a stranger may apply in any situation. Under this defence, the rule in *Rylands v. Fletcher* has been held not to apply if the escape is caused by the malicious or reckless act of a stranger in circumstances in which the damage was unforseeable by the defendant.[38] The defence may not be used where the damage is caused by the defendant's servant or by an independent contractor employed by the defendant.[39] As in the case of all the defences, the onus of proof is on the defendant and is extremely heavy.[40] In the present context, this defence will be available in any case where the severance of a rotor blade is caused by a young child against whom the wind user should have taken precautions.

The final defence, an Act of God, can be treated cursorily in light of the very limited circumstances in which it has been held to apply. According to Latham C.J. in *Commissioner of Railways (W.A.) v. Stewart*, for the defence to succeed it must be shown that the event is 'due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected'.[41] In the present context, the only conceivable circumstances in which the defence might apply would be where the severance of the rotor blade occurred as a result of excessive rotation during a hurricane. Even in these circumstances the application of the defence is very doubtful in light of the fact that it has only ever been successful in one reported case.[42] According to Salmond and Heuston, the defence should be relegated to the pages of legal history.[43]

37 See *e.g. Gill v. Edouin* (1895) 72 L.T. 579; *Anderson v. Oppenheimer* (1880) 5 Q.B.D. 602; *Dunne v. North Western Gas Board* [1964] 2 Q.B. 806.

38 See *e.g. Rickards v. Lothian* [1913] A.C. 263; *Box v. Jubb* (1879) 4 Ex.D. 76.

39 *Hale v. Jennings Brothers* [1938] 1 All E.R. 579, 583, *per* Slesser L.J.; *Balfour v. Barty-King* [1957] 1 Q.B. 496, 504, *per* Lord Goddard C.J.

40 See *Northwestern Utilities Ltd v. London Guarantee and Accident Co. Ltd* [1936] A.C. 108; *A. Prosser & Son Ltd v. Levy* [1955] 1 W.L.R. 1224.

41 (1936) 56 C.L.R. 520, 528-9. See also *Nugent v. Smith* (1876) 1 C.P.D. 423, 444, *per* Mellish L.J.

42 *Nichols v. Marsland* (1875) L.R. 10 Exch. 255; affd (1876) L.R. 2 Ex.D. 1. *Cf. Cottrell v. Allen* (1882) 16 S.A.L.R. 122; *Lucas v. The Commissioners of Railways* (1890) 24 S.A.L.R. 24; *Lamb v. Phillips* (1911) 11 S.R. (N.S.W.) 109; *A.-G. Cory Bros. & Co. Ltd* [1921] 1 A.C. 521.

43 Salmond and Heuston, *op. cit.* 310.

In summary, it appears most unlikely that any of the defences will apply in the present context, and the issue of the wind user's liability to neighbours for personal injuries under the rule in *Rylands v. Fletcher* will depend on the contentious issue of whether a wind generator is a 'non-natural' use of the land.

(b) *Negligence*

As an alternative to or in addition to suing under the rule in *Rylands v. Fletcher* for damages for personal injury caused by a severed rotor blade, the neighbour may sue in negligence. The possible availability of negligence as a cause of action in this context is particularly significant in light of the continuing doubt as to whether a claim for personal injury can be made under the rule in *Rylands v. Fletcher*.[44] This exclusion is inapplicable in an action based on negligence.

Negligence was defined by Baron Alderson in *Blyth v. Birmingham Waterworks Co.* as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'.[45]

Liability in negligence in any fact situation will not arise unless there is an affirmative answer to both of the following questions: first, was the defendant under any duty of care to the plaintiff; and secondly, if so, did he observe the standard of care required in the circumstances of the case?[46]

In relation to the first of these questions, the seminal case traditionally relied upon to determine whether a duty of care exists is *Donoghue v. Stevenson*.[47] In this case, Lord Atkin formulated the so-called 'neighbour principle' to determine the necessary proximity between the parties which gives rise to a duty of care. His Lordship stated:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[48]

There appears to be little doubt that the wind user would be considered to be under a duty of care to his immediate neighbours to prevent personal injury resulting from a severed rotor blade. The test which the courts will apply in this

[44] (1868) L.R. 3 H.L. 330.

[45] (1856) 11 Exch. 781, 784; 156 E.R. 1047, 1049. Cited with approval by Windeyer J. in *Munnings v. Hydro-Electric Commission* (1971) 125 C.L.R. 1, 21. Winfield and Jolowicz (*op. cit.* 69) define 'negligence' as 'the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff'. See also the definition of Lord Wright in *Lochgelly Iron and Coal Co. Ltd v. M'Mullan* [1934] A.C. 1, 25.

[46] See Higgins, *op. cit.* 214; Salmond and Heuston, *op. cit.* 188. See also *Gorringe v. The Transport Commission (Tas.)* (1950) 80 C.L.R. 357, 379, *per* Fullagar J.

[47] [1932] A.C. 562.

[48] *Ibid.* 580.

situation was laid down by Lord Wilberforce in *Anns v. Merton London Borough Council* as follows:

> [T]he question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity of neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.[49]

The application of this test leaves little doubt that a wind user will be liable to his neighbour if his system malfunctions and causes personal injury. This conclusion is consistent with considerations of public policy.[50] While there is a public interest in the development of wind generators in light of the diminishing supplies of non-renewable energy resources, the fact that the problem of severed rotor blades is well known and documented and the fact that measures to prevent or minimize the problem have been devised should be sufficient to convince the court that a duty of care exists in this situation.

The question whether the wind user has observed the standard of care required in the circumstances of the case is less straightforward. Based on the decision in 1837 in *Vaughan v. Menlove*,[51] the wind user will be judged on an objective standard.[52] Thus, on the traditional analysis, the wind user must exercise the foresight of the reasonable man. More recent cases, however, appear to look more to the question of risk rather than foreseeability in determining whether the defendant has complied with the standard of care demanded of him.

According to Salmond and Heuston, 'negligence is conduct which falls below the standard established by the law for the protection of others against unreasonable risk of harm'.[53] On this analysis, the issue of negligence will be determined by a consideration of three factors: first, the degree of risk posed to others by the defendant's activities (in other words, the probability of harm being caused by the defendant's activities and the gravity of the possible damage); secondly, the importance of the object which the defendant seeks to attain by his activities; and thirdly, whether the defendant has taken sufficient

[49] *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-2. See also *Dorset Yacht Co. v. Home Office* [1970] A.C. 1004.

[50] See the strong endorsement of the relevance of public policy considerations in this context by the House of Lords in *McLoughlin v. O'Brien* [1983] 1 A.C. 410. *Cf. Jaensch v. Coffey* (1984) 58 A.L.J.R. 426.

[51] (1837) 3 Bing. N.C. 468; 132 E.R. 490.

[52] Lord MacMillan stated in *Glasgow Corporation v. Muir* [1943] A.C. 448, 457:

> The standard of foresight of the reasonable man is in no one sense an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence.

[53] Salmond and Heuston, *op. cit.* 209.

precautions to prevent damage from occurring in light of the cost and difficulty of such precautions.[54]

Although the liability of a wind user in negligence for damage caused by a severed rotor blade has not yet been determined by the courts, an analysis of the application of the three factors above leaves little doubt that the wind user will be liable in these circumstances.

In relation to the first factor, the degree of risk posed by the defendant's activities, two competing legal propositions have been advanced. The first proposition states that the defendant must guard against reasonable probabilities, but not unlikely possibilities. In other words, there must be a reasonable likelihood of damage occurring. On this view a risk of injury which is remote is of necessity not a real risk and falls outside the concept of foreseeability. In recent times this view has been supported by Windeyer J. in *Mount Isa Mines Ltd v. Pusey*[55] and by Barwick C.J. in *Caterson v. Commissioner for Railways*.[56] On this view there is at least a chance that the wind user could escape liability for negligence for injury caused by blade throwing. However, the second proposition seems to represent the current Australian position. The major authority on this issue is *Wyong Shire Council v. Shirt*.[57] In this case, the meaning of foreseeability in the context of a breach of a duty of care was exhaustively examined by Mason J., with whose judgment Stephen, Murphy and Aickin JJ. agreed. This second proposition completely separates the foreseeability of the risk of injury from the likelihood of that risk occurring. Mason J. explained the proposition as follows:

> A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v. Stone*, may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.[58]

Thus, a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and is therefore foreseeable.[59] Mason J. relied for support on the decision of the Privy Council in *Overseas Tankship (U.K.) Ltd v. The Miller Steamship Co. Pty Ltd (The Wagon Mound (No. 2))*,[60] particularly the judgment of Lord Reid.

[54] *Hicks v. British Transport Commission* [1958] 1 W.L.R. 493, 505, *per* Parker L.J. See also *Watt v. Hertfordshire County Council* [1954] 1 W.L.R. 835; *Morris v. West Hartlepool Steam Navigation Co. Ltd* [1956] A.C. 552.

[55] (1970) 125 C.L.R. 383, 398.

[56] (1972) 128 C.L.R. 99, 101-2

[57] (1980) 146 C.L.R. 40. Applied in *Bassett v. Host* [1982] 1 N.S.W.L.R. 206. See also *Introvigne v. Commonwealth* (1980) 32 A.L.R. 251; *Baggermaatschappij Boz & Kalis B.V. v. Australian Shipping Commission* (1980) 30 A.L.R. 387.

[58] *Wyong Shire Council v. Shirt* (1980) 146 C.L.R. 40, 47.

[59] *Ibid.*

[60] [1967] 1 A.C. 617.

If it is correct to conclude that the second proposition represents good law, then it appears that the first factor in determining negligence, namely the degree of risk posed by the defendant's activities, will be determined in the plaintiff's favour in the present context in light of the previous history of problems of blade throwing caused by wind generators.

The second factor requires the court to weigh the degree of risk of injury with the importance of the object to be attained.[61] If the court merely examines the importance of wind-generated energy for the wind user, it is most unlikely to determine the case in the wind user's favour. The risk of personal injury to the neighbour clearly outweighs the cost savings for the wind user in using a wind generator. The result may possibly be less predictable if the court, when considering the importance of the object to be attained, considers the advantages to the community at large from the use of wind generators. *Daborn v. Bath Tramways Motor Co. Ltd*[62] is an authority in favour of the latter approach. In this case, the driver of an ambulance succeeded in an action for damages for negligence against the employer of a bus driver with whose vehicle she collided. The accident occurred during the Second World War. The defendant company sought to deny liability on the basis, *inter alia*, that the ambulance was a left-hand drive vehicle which was completely shut in at the back and which severely reduced the driver's vision. On the facts, the Court of Appeal unanimously decided in favour of the ambulance driver. Asquith L.J. stated that the plaintiff had done all that could reasonably have been expected of her in light of the necessity in a time of national emergency of employing all available transport resources and the inherent limitations and incapacities of this particular form of transport.[63] Thus, the public interest in prosecuting the war to a successful conclusion was entitled to consideration in the determination of civil liability in negligence. These remarks are not merely relevant to wartime conditions. Elsewhere in his judgment, Asquith L.J. stated:

> A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down.[64]

Even if wider issues of public policy are considered by the courts, the position of the wind user will not necessarily be improved. At least at the present time, before the impending energy crisis predicted to affect Australia in the 1990's, the public policy in favour of the development of wind-generated and other forms of renewable sources of energy is unlikely to be considered as important as the policy of the national wartime effort or of an effective system of public rail transport. For this reason the *dicta* of Asquith L.J. in *Daborn v.*

61 Salmond and Heuston, *op. cit.* 213.

62 [1946] 2 All E.R. 333. Approved in *Watt v. Hertfordshire County Council* [1954] 1 W.L.R. 835.

63 *Ibid.* 336.

64 *Ibid.* See also *Bank of England v. Vagliano Brothers* [1891] A.C. 107, 156, *per* Lord Macnaghten; *Watt v. Hertfordshire County Council* [1954] 1 W.L.R. 835.

Bath Transport Motor Co. Ltd would in all probability be distinguished in the present context and, it is submitted, would not in itself provide a sufficient defence to an action in negligence in respect of injuries caused by blade throwing.

The third factor requires the court to weigh the risk of damage against the measures necessary to eliminate it.[65] The wind user may argue that the time, trouble or cost of installing safety mechanisms to eliminate the possibility of a severed rotor blade outweighs the risks of personal injuries resulting from a malfunction. This is a factor in favour of rejecting a negligence claim which must be weighed with the other considerations.[66] In light of the gravity of the hazard posed by a severed rotor blade, however, this factor is likely to be outweighed by the nature of the risk.

Thus, it appears that under the existing law of negligence a wind user will be liable to his neighbour if a severed rotor blade from his wind generator causes personal injury.

FIRE DAMAGE

The electrical features of a wind generator may also be a safety problem and in the event of damage may cause a fire. This problem will be exacerbated in the case of large-scale wind generators attached to the electricity grid system. Lightning strikes may also cause fire damage.[67]

Fire damage is another potential source of tort liability for a wind user. If the fire escapes onto neighbouring property, the wind user may be liable in damages for the injury caused. Liability for personal injuries may arise under negligence or under the rule in *Rylands v. Fletcher*.[68]

If an action based on negligence is brought against a wind user in New South Wales for personal injury to neighbours caused by fire, the case will be resolved on a straightforward application of the general common law principles on negligence discussed earlier.[69] However, if a similar action is brought elsewhere in Australia the application of the common law principles must be reconsidered in light of the terms of Imperial legislation re-enacted by some states and received as part of the common law in others. The relevant United Kingdom legislation is the Fire Prevention (Metropolis) Act 1774 s. 86, which states in part:

> No action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other buildings, or on whose estate any fire shall . . . accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding.[70]

65 Salmond and Heuston, *op. cit.* 213.

66 See *Hicks v. British Transport Commission* [1958] 1 W.L.R. 493, 505.

67 See Knox, K. R., 'Strategies and Warnings for Wind Generator Buyers' (1982) 24 *Wind Power Digest* 54, 56; Bass, L. and Weis, P., 'Safety Standards Development for Small Wind Energy Conversion Systems' (1981) 3 *Solar Law Reporter* 453, 459ff.

68 (1868) L.R. 3 H.L. 330.

69 See *supra* pp.256-60.

70 The equivalent state legislation in Australia is Supreme Court Act 1958 (Vic.) s. 68; Local Government (Consequential Amendments) Act 1962 (Tas.) s. 37; Careless Use of Fire Ordinance 1936 (A.C.T.). The Imperial legislation is still in force in Queensland, South Australia and Western Australia where it was received as part of the common law.

In a number of important decisions the courts have construed the legislation in such a way as to make it irrelevant in the present situation. In these circumstances the liability of a wind user for injury caused by fire originating in the electrical features of a wind generator will continue to be determined by common law principles. The Privy Council in *Goldman v. Hargrave*[71] construed the phrase 'shall . . . accidentally begin' to mean that the statute applies to fires caused by chance or without traceable cause and that fires due to negligence will still render the occupier of the land on which the fire started liable under that tort.[72] Another major limitation to the scope of the Act was created in *Musgrove v. Pandelis*,[73] where the English Court of Appeal held that the statute is inapplicable even if the fire begins by chance or without traceable cause if the spread of it to neighbouring property is due to negligence. In the present context, the effect of these decisions is that the statute will have no application if the wind user is sued in negligence for the escape of fire. Thus, despite the non-application of the Imperial legislation, the law in the present context will be the same in New South Wales as in the other states and territories.

A more detailed discussion of the rule in *Rylands v. Fletcher* is warranted in light of certain modifications in the application of the rule in its relation to the escape of fires. Any doubts as to the application of the rule to fires was laid to rest in *Musgrove v. Pandelis*,[74] where the Court of Appeal held that a landowner cannot escape liability under the rule by relying on the terms of the 1774 Imperial Statute. The Court justified its decision on its interpretation of the phrase 'accidentally begin'.

The modifications referred to in the preceding paragraph relate to the decision of MacKenna J. in *Mason v. Levy Auto Parts of England Ltd*,[75] in which damages were awarded under the rule in *Rylands v. Fletcher* to a landowner whose attractive garden was destroyed by a fire which started on neighbouring land and spread rapidly due to the storage on that property of combustible materials. In this case, his Lordship applied the decision in *Musgrove v. Pandelis*, in which the defendant was held liable under the rule in *Rylands v. Fletcher* when the petrol tank of his car caught fire in a garage and burnt out the plaintiff's rooms situated above. His Lordship stated:

> A defendant is not held liable under *Rylands v. Fletcher* unless two conditions are satisfied: (i) that he has brought something on to his land likely to do mischief if it escapes, which has in fact escaped, and (ii) that those things happened in the course of some non-natural user of the land. But in *Musgrove*'s case the car had not escaped from the land, neither had the petrol in its tank. The principle must be . . . the wider one on which *Rylands v. Fletcher* itself was based . . . *sic utere tuo* . . .

71 [1967] 1 A.C. 645. See also *Filliter v. Phippard* (1847) 11 Q.B. 347; 116 E.R. 506.

72 Other cases have also exempted from the scope of the statute fires due to a nuisance: see *Spicer v. Smee* [1946] 1 All E.R. 489; *Williams v. Owen* [1955] 1 W.L.R. 1293.

73 [1919] 2 K.B. 43.

74 *Ibid.* See also *MacKenzie v. Sloss* [1959] N.Z.L.R. 533.

75 [1967] 2 Q.B. 530.

> If for the rule in *Musgrove's* case to apply, there need be no escape of anything brought on to the defendant's land, what must be proved against him? There is, it seems to me, a choice of alternatives. The first would require the plaintiff to prove (1) that the defendant had brought something on to his land likely to do mischief if it escaped; (2) that he had done so in the course of a non-natural user of the land; and (3) that the thing had ignited and that the fire had spread. The second would be to hold the defendant liable if (1) he brought on to his land things likely to catch fire, and kept them there in such conditions that if they did ignite the fire would be likely to spread to the plaintiff's land; (2) he did so in the course of some non-natural use; and (3) the things ignited and the fire spread. The second test is, I think, the more reasonable one. To make the likelihood of damage if the thing escapes a criterion of liability, when the thing has not in fact escaped but has caught fire, would not be very sensible.[76]

As his Lordship went on to say, in future liability for injuries to neighbours caused by fire will be assessed in each situation on the basis of the answers to two questions: (i) did the defendants bring to their land things likely to catch fire, and keep them there in such conditions that if they did ignite the fire would be likely to spread to the plaintiff's land? If so, (ii) did the defendants do these things in the course of some non-natural user of the land?[77] Liability for damages will arise if both questions are answered in the affirmative.

Based on this recent authority, it is submitted that the wind user whose wind generator causes personal injury to neighbours by fire is most unlikely to be liable under the rule in *Rylands v. Fletcher*, although as mentioned earlier he may incur liability in negligence. In view of the very low incidence of fire caused by a wind generator it is most unlikely that a court would consider it to be 'likely' to catch fire. Even if a wind generator were to catch fire, the fire would most likely be contained within the wind user's property and would thus fail to satisfy the second element of the first question, namely that the defendants keep flammable objects 'in such conditions that if they did ignite the fire would be likely to spread to the plaintiff's land'.

A negative answer to the first question is sufficient to absolve the wind user from liability under the rule in *Rylands v. Fletcher* in respect of fire damage. The non-application of this rule is reinforced by a consideration of the second question propounded by MacKenna J., as it is submitted that the use of a wind generator is not a 'non-natural user' of the land (at least in the case of small generators designed for individual household use). This conclusion is based on the earlier discussion of the meaning of this phrase where injury is caused by a severed rotor blade.[78] There is nothing in the judgment of MacKenna J. in *Mason v. Levy Auto Parts of England Ltd* or in any other case to suggest that 'non-natural user' should be given a different meaning where the injury is caused by the escape of fire.

THE COLLAPSE OF THE SUPPORTING TOWER OF A WIND GENERATOR

The collapse of the supporting tower of a wind generator may cause personal injury or death. Such collapses have been documented from time to time. One

[76] *Ibid.* 541-2.
[77] *Ibid.* 542.
[78] See *supra* pp.252-4.

such illustration is the crash of a 500 kW wind generator in California during a test. The crash was caused by high winds which led to a control failure.[79] In this type of situation tortious liability for personal injury may arise regardless of whether the debris falls on the wind user's land or adjoining properties (or both). If the supporting tower of a wind generator totally or partially collapses onto adjoining land and causes personal injury to someone on the land, the wind user may be liable in damages under the rule in *Rylands v. Fletcher*[80] or in negligence. A more likely occurrence is for the tower to collapse onto the wind user's land. In this situation a person on the wind user's land who suffers personal injury may claim damages in negligence under the rules of occupiers' liability.

The relevant principles of the rule in *Rylands v. Fletcher* and the tort of negligence have already been discussed in the context of damage caused by severed rotor blades.[81] This section of the article will concentrate on the rules of occupiers' liability.

In Victoria, the liability of a landowner under occupiers' liability for negligence is regulated by the Wrongs Act 1958 (Vic.), as amended by the Occupiers' Liability Act 1983 (Vic.). Section 14B(3) of the Wrongs Act imposes a common duty of care on the occupier in respect of all persons on the premises.[82] In other parts of Australia, however, the common law rules apply as no equivalent legislation has been enacted in any other state or territory. The common law position will be considered first, followed by a discussion of the extent to which the recent Victorian legislation amends the common law.

Occupiers' Liability — The Common Law Position

At common law, the duty of care owed by the occupier has traditionally depended on the reason for the entry onto the land of the injured person. As pointed out by Dixon J. in *Lipman v. Clendinnen*, apart from contractual relations there are three mutually exclusive categories of entrants: invitees, licensees and trespassers; a particular set of rules has been formulated for the protection of each category and the issue whether the defendant is liable as an occupier for negligence must be judged by reference to the appropriate formula.[83] The artificial nature of the categories has been criticised on numerous occasions. A well-known illustration is the following *dictum* of Denning L. J. in *Dunster v. Abbott*:

[79] Current Developments, 'California: 500-Kilowatt Wind Generator Crashes' (1981) 3 *Solar Law Reporter* 205. See also Bass and Weis, *op. cit.* 458ff; *Legal-Institutional Implications of Wind Energy Conversion Systems*, Report to the National Science Foundation under NSF Grant APR75-19137, George Washington University, Washington, D.C. (1977) 57.

[80] (1868) L.R. 3 H.L. 330.

[81] See *supra* pp.250-60.

[82] The New South Wales Law Reform Commission (Working Paper, 1969) and the South Australian Law Reform Committee (24th Report, 1973) have made recommendations for legislative reform in this area. To date, these recommendations have not been acted upon.

[83] (1932) 46 C.L.R. 550, 555. See also *Read v. J. Lyons & Co. Ltd* [1947] A.C. 156, 184-5, *per* Lord Uthwatt.

> A canvasser who comes without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him it seems rather strange that your duty to him should be different when he comes up to the door that when he goes away. Does he really change his colour in the middle of the conversation? And what is the position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.[84]

Over the past year, the High Court has re-examined the common law of occupiers' liability in its decisions in *Hackshaw v. Shaw*[85] and *Papatonakis v. Australian Telecommunications Commission*.[86] The following two issues, *inter alia*, arose for consideration in these cases: first, whether an occupier of land is under a general duty of care to a person entering on the land, whether as invitee, licensee or trespasser, independent of any special duty, where there are circumstances giving rise to the general duty; and secondly, whether the special duties of care established by the rules of occupiers' liability are merely instances of the duty of care arising under the general law of negligence in the circumstances of the relevant category of entrant.

In order to understand the significance of these High Court decisions in the present context it is instructive to examine the wind user's liability to a person on the wind user's land who is injured by the collapse of a supporting tower under the traditional common law established prior to the recent decisions. This issue turned exclusively on the category of entrant into which the injured person fell. As will be shown, under the traditional analysis of the law of occupiers' liability, the wind user has the greatest liability to a contractual entrant and the least liability to a trespasser.

(i) *Liability to contractual entrants*

In situations where a person is entitled to enter the wind user's premises pursuant to a contract, the wind user will owe him a heightened duty of care to ensure that he is not injured while on the premises. This situation may occur, for example, if the wind user hires out the use of the premises.[87]

According to Martin B. in *Francis v. Cockrell*, 'it is the duty of a person, who so holds out a building . . . to have it in a fit and proper state for the safe reception of the persons who are admitted.'[88] The most recent statement of the applicable duty of care is that of McCardie J. in *Maclenan v. Segar*:

[84] [1953] 2 All E.R. 1572, 1574. This *dictum* was applied in *Slade v Battersea & Putney Group Hospital Management Committee* [1955] 1 All E.R. 429.
[85] (1985) 59 A.L.J.R. 156.
[86] (1985) 59 A.L.J.R. 201.
[87] See *e.g. Volt v. Inglewood Shire Council* (1963) 110 C.L.R. 74.
[88] (1870) L.R. 5 Q.B. 501, 509.

> Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises . . . But subject to this limitation it matters not whether the lack of care or skill be that of the defendant or his servants, or that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises.[89]

This passage has been quoted with approval in the High Court of Australia by Fullagar J. in *Watson v. George*[90] and by Windeyer J. in *Voli v. Inglewood Shire Council*.[91]

In *Watson v. George*,[92] the High Court emphasized that *someone* must have been at fault before the occupier will be held liable in damages to a contractual entrant. In this case a boarding house proprietor was held not liable for occupiers' liability for negligence to a guest who was overcome by fumes from a defective bath-heater. The basis of the decision was that there was nothing in the heater to cause the occupier, as a reasonable man, to conclude that the heater was in need of maintenance.

An application of these principles would almost certainly render the wind user liable under occupiers' liability for negligence to a contractual entrant injured by the collapse of a supporting tower. As a reasonable man, the owner should have known of the need for periodic maintenance of a wind generator and its supporting tower in light of the reported incidents of malfunctions and collapses of towers. Even if the owner has called in an expert to repair or maintain the supporting tower, the owner will still be responsible for injury caused to contractual entrants by the negligent failure of the expert to repair the supporting tower.

(ii) *Liability to invitees*

Dixon J. in *Lipman v. Clendinnen* described an invitee as a person who enters 'not merely with the consent but upon the invitation of the occupier, express or implied, for a purpose in which the occupier himself has some concern, a pecuniary, material or business interest'.[93] It is thus clear that a person is not an invitee merely because he has been invited by the occupier. Accordingly, the spouse of the occupier[94] or a social guest[95] will be a licensee rather than an invitee as the occupier has no 'pecuniary, material or business interest'

[89] [1917] 2 K.B. 325, 332-3.
[90] (1953) 89 C.L.R. 409, 424.
[91] (1963) 110 C.L.R. 74, 92.
[92] (1953) 89 C.L.R. 409. See the discussion of this case in Luntz, Hambly and Hayes, *Torts: Cases and Commentary* (2nd ed. 1984) 490.
[93] (1932) 46 C.L.R. 550, 556. This definition has been adopted by Higgins, *op. cit.* 319.
[94] The spouse of the occupier will be treated as a co-occupier rather than a licensee if he or she has a legal or equitable estate or interest in the land. See *Oldham v. Lawson (No. 1)* [1976] V.R. 654; *cf. Malone v. Laskey* [1907] 2 K.B. 141.
[95] *Southcote v. Stanley* (1856) 1 H. & N. 247; 156 E.R. 1195.

in the presence of these people. In all cases the occupier must derive an economic advantage from the visit.[96] This requirement drastically reduces the incidence of liability of a wind user in respect of the total or partial collapse of the supporting tower of a wind generator.

The classic statement of the standard of care owed to invitees was made by Willes J. in *Indermaur v. Dames*:

> And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows, or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by the jury as matter of fact.[97]

There are two major points to be noted in this *dictum*. The first is that liability is limited to danger that is 'unusual'. Lord Porter in *London Graving Dock Co. Ltd v. Horton* explained the meaning of 'unusual danger' as 'such danger as is not usually found in carrying out the task of fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises'.[98] According to Fleming, the quality of unusualness depends not only on the character of the danger itself, but also on the nature of the premises on which it is found and the range of experience with which the invitee may fairly be credited.[99] The second point is that the invitor's knowledge is assessed objectively, and the invitor will accordingly be liable for any dangerous situation of which a reasonable man would have been aware.[1] In essence, it appears that the occupier will be liable to an invitee if a reasonable man in his position would have foreseen the potential danger and would have guarded against the risk of injury.[2]

In the present context, it is very doubtful whether the application of the legal principles stated above would render the wind user liable at common law to an invitee for damage caused by the total or partial collapse of the supporting tower of a wind generator. Hazards of this nature would undoubtedly class as an 'unusual danger'. However, in light of the rarity of generator towers col-

96 See Fleming, J.G., *The Law of Torts* (6th ed. 1983) 425.

97 (1866) L.R. 1 C.P. 274, 288. Cited with approval by Dixon J. in *Lipman v. Clendinnen* (1932) 46 C.L.R. 550, 556; *Commissioner for Railways (N.S.W.) v. Anderson* (1961) 105 C.L.R. 42, 55-6, *per* Fullagar J.; and *Introvigne v. Commonwealth* (1980) 32 A.L.R. 251, 255, *per* Bowen C.J., Connor and Lockhart JJ. See also *Gautret v. Egerton* (1867) L.R. 2 C.P. 371; *Brown v. Target Australia Pty Ltd* (1984) 37 S.A.S.R. 145.

98 [1951] A.C. 737, 745. See also *Culley v. Silhouette Health Studios Pty Ltd* [1966] 2 N.S.W.R. 640. *Cf. Commissioner for Railways (N.S.W.) v. Anderson* (1961) 105 C.L.R. 42, 54, 61, 69. The objective test of Lord Porter as to the meaning of 'unusual danger' has been applied in *W. H. Wright Pty Ltd v. Commonwealth* [1958] V.R. 318; *Pinborough v. Minister of Agriculture* (1974) 7 S.A.S.R. 493; *Black v. City of South Melbourne* (1964) 38 A.L.J.R. 309; and *Christmas v. General Cleaning Contractors Ltd* [1952] 1 K.B. 141.

99 Fleming, *op. cit.* 432-3. See also *Suttons Foodlands Store Pty Ltd v. Goldsworthy* [1969] S.A.S.R. 282.

1 See Fleming, *op. cit.* 430; *Swinton v. China Mutual Steam Navigation Co. Ltd* (1951) 83 C.L.R. 553; *Burton v. Melbourne Harbour Trust Commissioners* [1954] V.L.R. 353.

2 However, there may be no liability if the risk of injury is very small and cannot reasonably be eliminated: *cf. Australian Iron & Steel Ltd v. Krstevski* (1973) 128 C.L.R. 666.

lapsing, it is unlikely that a court would hold that the objective standard of the knowledge of a dangerous situation is satisfied. If this is the case, the wind user will escape liability.

(iii) *Liability to licensees*

A licensee is described by Dixon J. in *Lipman v. Clendinnen* as a person who 'enters land or buildings with the consent of the occupier but for purposes in which the occupier has no direct or indirect material interest or concern'.[3] The definition thus encompasses social guests and members of the occupier's family, who are the persons most likely to be injured by a collapsing support tower. The duty of an occupier to his licensees under the traditional common law is to warn them of any concealed danger or trap of which he is aware and which would not be obvious to a reasonably careful person.[4] Dixon J. in *Lipman v. Clendinnen* explained the nature of the liability in more detail:

> [T]he obligation of an occupier towards a licensee is to take reasonable care to prevent harm to him from a state or condition of the premises known to the occupier, but unknown to the visitor, which the use of reasonable care on his part would not disclose and which, considering the nature of the premises, the occasion of the leave and licence, and the circumstances generally, a reasonable man would be misled into failing to anticipate or suspect.[5]

It is thus clear that the occupier will be liable to a licensee if he has actual knowledge of the danger.[6] He may conceivably also be liable if it can be shown that he ought to have known of the existence of the danger.[7] This latter point is unsettled. The doubt arises from the decision of the English Court of Appeal in *Baker v. Borough of Bethnal Green*.[8] In this case, Lord Greene M.R. stated that he found the suggestion of counsel for the respondent that an occupier who was ignorant of the danger should be liable to licensees if he ought to have known of the existence of the problem attractive, but was not prepared to act upon it in the absence of authorities.[9]

There seems to be little doubt that a collapsing generator support tower is capable at law of constituting a 'concealed trap'. However, it is submitted that unlike in the case of invitees a wind user will not be liable under the common law of occupiers' liability for negligence for damage to a licensee caused by a collapsing support tower unless he has actual knowledge that the tower was

3 (1932) 46 C.L.R. 550, 556. This definition has been adopted by Higgins, *op. cit.* 325.

4 See *Hawkins v. Coulsdon and Purley Urban District Council* [1954] 1 Q.B. 319, 326, *per* Somervell L.J. According to Hamilton L.J. in *Latham v. R. Johnson & Nephew, Ltd* [1913] 1 K.B. 398, 415, 'A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger'.

5 (1932) 46 C.L.R. 550, 569-70.

6 See especially *Aiken v. Kingborough Corporation* (1939) 62 C.L.R. 179, 208, *per* Dixon J.

7 It is sometimes said that the duty of an occupier to a licensee is only to warn of dangers actually known to the occupier, whereas his duty to an invitee is to warn him, not only of dangers of which the occupier actually knows, but also those of which he ought to know. This argument was rejected, however, by Denning L.J. in *Hawkins v. Coulsdon and Purley Urban District Council* [1954] 1 Q.B. 319, 330. *Cf. Pearson v. Lambeth Borough Council* [1950] 2 K.B. 353; *Vale v. Whiddon* (1950) 50 S.R. (N.S.W.) 90.

8 [1945] 1 All E.R. 135.

9 *Ibid.* 140. See also *Jackson v. Vaughan* [1966] 2 N.S.W.R. 147.

defective or damaged and that a collapse was likely to occur. If the wider view of the occupiers' liability argued for in *Baker v. Borough of Bethnal Green* is accepted, the occupier will also be liable if he ought to have known of the defect or damage to the supporting tower which causes its collapse.

(iv) *Liability to trespassers*[10]

The common law rules governing the liability of occupiers to trespassers in negligence has undergone rapid change. The old law was aptly summarized by Lord Hailsham L.C. in *Robert Addie & Sons (Collieries) Ltd v. Dumbreck*:

> Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.[11]

Despite various attempts by the High Court to circumvent this harsh rule during the 1950's,[12] the validity of the rule in *Addie's* case was strongly reasserted by the Privy Council in *Commissioner for Railways v. Quinlan*.[13] It was not until the 1970's that a new rule, the so-called 'duty of common humanity', was introduced. This rule was first devised by the House of Lords in *British Railways Board v. Herrington*.[14] In this case the court unanimously rejected the idea of a test of 'reasonable foreseeability', and held that the occupier's duty to trespassers must vary according to his knowledge, ability and resources. Lord Morris of Borth-y-Gest coined the test of 'common humanity' and defined the phrase as meaning in accordance with 'ordinary civilized behaviour'.[15]

In *Southern Portland Cement Ltd v. Cooper*,[16] the Privy Council endorsed the duty of common humanity and departed from its earlier decision in *Quinlan's* case. In this case the court upheld the verdict of the High Court awarding damages to a 13-year-old boy, who was electrocuted by touching an electric cable while trespassing on land. The defendant company was a quarrier of limestone and in the course of its operations deposited waste material from the crushing operations. The height of the mounds of waste material gradually reduced the distance between the ground level and the overhead electric cable.

[10] In some respects, the liability of an occupier towards trespassers differs where the trespasser is a child. Liability in respect of child trespassers is discussed *infra*.

[11] [1929] A.C. 358, 365. See also *Victorian Railways Commissioners v. Seal* [1966] V.R. 107, 132-3, *per* Gillard J.

[12] See *Thompson v. Municipality of Bankstown* (1953) 87 C.L.R. 619; *Rich v. Commissioner for Railways (N.S.W.)* (1959) 101 C.L.R. 135; *Commissioner for Railways (N.S.W.) v. Cardy* (1960) 104 C.L.R. 274.

[13] [1964] A.C. 1054.

[14] [1972] A.C. 877. This case has been applied in England in *Pannett v. P.M. McGuiness & Co. Ltd* [1972] 2 Q.B. 599 and *Harris v. Birkenhead Corporation* [1976] 1 All E.R. 341.

[15] [1972] A.C. 877, 906, 908, 909.

[16] [1974] A.C. 623. See also *dicta* in *Public Transport Commission (N.S.W.) v. Perry* (1977) 137 C.L.R. 107.

The company was aware of the potential danger and ordered that no more material should be dumped there, but the order was ignored. The plaintiff was later injured when he grabbed at the cable while standing on one of the mounds. Lord Reid, delivering the judgment of the court, first dealt with the rights and interests of the occupier. His Lordship stated:

> No unreasonable burden must be put on him. With regard to dangers which have arisen on his land without his knowledge he can have no obligation to make inquiries or inspection. With regard to dangers of which he has knowledge but which he did not create he cannot be required to incur what for him would be large expense.
>
> If the occupier creates the danger when he knows that there is a chance that trespassers will come that way and will not see or realize the danger he may have to do more. There may be difficult cases where the occupier will be hampered in the conduct of his own affairs if he has to take elaborate precautions. But in the present case it would have been easy to prevent the development of the dangerous situation which caused the plaintiff's injuries. The more serious the danger the greater is the obligation to avoid it.[17]

Lord Reid then referred to the question to whom the occupier owes a duty:

> Their Lordships have already rejected the view that no duty is owed unless the advent of a trespasser is extremely probable. It was argued that the duty could be limited to cases where the coming of trespassers is more probable than not. Their Lordships can find neither principle nor authority nor any practical reason to justify such a limitation. The only rational or practical answer would seem to be that the occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at least to give consideration to the matter when he knows facts which show a substantial chance that they may come there.
>
> Such consideration should be all-embracing. On the one hand the occupier is entitled to put in the scales every kind of disadvantage to him if he takes or refrains from action for the benefit of trespassers. On the other hand, he must consider the degree of likelihood of trespassers coming and the degree of hidden or unexpected danger to which they may be exposed if they come.[18]

The duty of common humanity thus requires the occupier to consider the likelihood of a trespass occurring and to issue a warning where a trespass is considered likely. However, this duty to trespassers only arises where the occupier has actual knowledge of the danger; he is not required to undertake an inspection.[19]

As in the case of liability to licensees, based on the authorities discussed above it is highly unlikely that the wind user will be liable under occupiers' liability for negligence to a trespasser who is injured if a generator supporting tower collapses. In these circumstances liability would only arise if the wind user has actual knowledge of the likelihood of a collapse.

The Recent High Court Decisions — A Reassessment

Hackshaw v. Shaw[20] concerned a negligence action brought by a trespasser against a landowner in country Victoria. The appellant was a girl aged sixteen years who was a passenger in a car driven by a man who entered the landowner's farm at night and commenced to steal petrol from a petrol tank owned

17 [1974] A.C. 623, 644.
18 *Ibid.*
19 Fleming, *op.cit.* 445. The duty to trespassers probably also arises where the occupier knows of the facts constituting the danger, even if he does not know of the danger: *cf. Commissioner for Railways (N.S.W.) v. Cardy* (1960) 104 C.L.R. 274, approved in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054 as to its result.
20 (1985) 59 A.L.J.R. 156.

by the farmer. The farmer was lying in wait for thieves, and fired two rifle shots at the car to frighten the driver. One of the shots penetrated the front door and hit the appellant in the arm. The jury found that the farmer did not know that the appellant was in the car, but that he should have realized that someone else might have been in the car. The trial judge held that the respondent was liable in negligence, but the decision was reversed by the Full Court of the Supreme Court of Victoria. The original decision was restored by the High Court (Dawson J. dissenting).

In *Papatonakis v. Australian Telecommunications Commission*,[21] there were two respondents, one (Telecom) the employer of the appellant, the other (Northern Research Pty Ltd) the owner of the property on which the appellant was injured. The appellant was an experienced linesman who sustained personal injuries when falling from a ladder while performing work on Northern's land. The appellant had been attempting to repair a cable, which included high tensile wire to bear the weight of the conductor wires. The line had been altered in a makeshift manner by Northern, which had added several poles and a length of low tensile domestic flex unaccompanied by a bearer wire. The flex snapped under the strain of the weight of the appellant climbing the ladder. This had caused the poles to rock and the appellant fell from the ladder. At first instance and on appeal to the Full Court of the Federal Court the claims against both respondents were dismissed. On further appeal, the High Court held (Mason J. dissenting) that Northern Research Pty Ltd were liable in negligence.

Apart from Murphy J. all the High Court judges in *Hackshaw v. Shaw* examined the question whether a trespasser may be owed the general duty of care in negligence actions as stipulated by Lord Atkin in *Donoghue v. Stevenson*.[22] Three judges (Gibbs C.J., Wilson and Deane JJ.) concurred that an occupier of land may in appropriate circumstances be under a general duty of care independent of any special duty of care established under the law of occupiers' liability. Gibbs C.J. stated:

> In the present case there can be no doubt that the actions of the plaintiff placed him under a duty of care which arose, not from the fact that he was an occupier, but from the fact that by discharging his firearms he was actively creating a present danger which he should reasonably have foreseen would be likely to result in injury to persons in the vicinity unless he took care to prevent it.[23]

This proposition was reaffirmed by the majority in *Papatonakis* and was stated to be settled law.[24] In this case, Brennan and Dawson JJ. added that it is also settled that any special duty of care owed by an occupier does not restrict the scope and burden of the general duty of care.[25]

21 (1985) 59 A.L.J.R. 201.
22 [1932] A.C. 562
23 (1985) 59 A.L.J.R. 156, 161.
24 (1985) 59 A.L.J.R. 201, 210.
25 *Ibid.*

The other major issue, whether the special duties owed by an occupier to a person on his land are merely instances of the duty of care arising under the general law of negligence in the circumstances of the relevant category of entrant, is more contentious. The proponent of this proposition is Deane J. In *Hackshaw v. Shaw*, after an exhaustive analysis of the authorities, and referring in particular to the judgments of Fullagar J. and Kitto J. in *Thompson v. Bankstown Corporation*[26] and *Commissioner for Railways (N.S.W.) v. Cardy*,[27] Deane J. held that *Donoghue v. Stevenson* should be regarded as having unified and re-oriented the whole law of negligence. His Honour stated:

> Provided the requisite relationship of proximity exists, a person is under a prima facie common law duty to take reasonable care in the presence of a reasonably forseeable real risk of injury to another. There is no general rule which precludes a duty of care arising under those ordinary principles in favour of a person merely because he is engaged in tortious conduct. The fact that a person is engaging in such conduct may well be a relevant consideration; it does not, however, make him an outlaw. Prima facie, those ordinary principles of common law negligence are applicable to determine whether the circumstances of a particular case are such as to place an occupier of premises under a duty of care to one who is upon them either lawfully or in the character of a trespasser.[28]

He added that the special duties of care established under the rules of occupier's liability are merely the application of the general law of negligence to the particular category of case.[29]

Deane J. reaffirmed this proposition in his judgment in *Papatonakis*, stating that the liability of Northern Research Pty Ltd must not be determined by some rigid formula made applicable by the fact that the appellant entered the land as an 'invitee', but rather in accordance with the general principles of the law of negligence.[30]

It remains to be seen whether Deane J.'s proposition that the rules of occupiers' liability should be discarded in favour of the application of the general law of negligence is adopted into Australian law. On this issue, the other High Court judges appear to be proceeding more cautiously. Brennan and Dawson JJ. stated in *Papatonakis*:

> We would not resolve this question until it is necessary to decide whether the special duty may, in some circumstances, impose a higher or more exacting burden than the general duty, or whether the special duty can arise in circumstances where the general duty does not. It is clear that the general duty does not restrict the scope and burden of the special duty and, until it is necessary to decide and it is decided that the limits of the special duty are within the limits of the general duty, we would not depart from the theory of co-existing duties.[31]

Wilson J. stated that he could see no reason to reject the traditional formulations of the duty of an occupier towards the different classes of entrant: the community's natural desire for certainty in the law is best served by their retention, so long as their relationship to the fundamental principles of the law of negligence is recognised and maintained.[32]

26 (1953) 87 C.L.R. 619.
27 (1960) 104 C.L.R. 274.
28 (1985) 59 A.L.J.R. 156, 173.
29 *Ibid.* 174.
30 (1985) 59 A.L.J.R. 201, 212.
31 *Ibid.* 210.
32 *Ibid.* 208.

To what extent (if any) will these two recent High Court decisions affect the liability of a wind user for personal injuries caused by the collapse of the supporting tower of a wind generator? As discussed above, the only major effect of the cases is to establish the proposition that the general duty of care applies to an occupier of the land in addition to the relevant special duty of care. The special duties of care for occupiers established by the pre-1985 cases will continue to apply unless and until Deane J.'s decision in *Papatonakis* in favour of subsuming the special duties of care within the general duty of care is adopted as good law by a majority of the High Court in a later case. Thus, the overall effect of the co-existence of the general and special duties of care may be to increase marginally the degree of risk of tortious liability for a wind user in that he may now have to discharge both duties to escape liability. All will depend on the facts of each case as to whether the general duty of care arises and, if so, whether the wind user has discharged it. Relevant considerations for the court will include the likelihood of persons entering the wind user's property, the likelihood of the occurrence of a collapse, whether the supporting tower has been adequately maintained, and whether there are measures which the owner could have taken to prevent or minimise the problem.

Occupiers' Liability—The Victorian Legislation[33]

Section 14B(3) of the Wrongs Act 1958 states:

> An occupier of premises owes 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 of things done or omitted to be done in relation to the state of the premises.

Section 14B(4) provides that in determining whether the duty of care under s. 14B(3) has been discharged the court must consider the following matters: '(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 of protecting the person entering the premises from the danger as compared to the risk of the danger to the person'.

At first glance this legislation appears to revolutionalize the common law of occupiers' liability. As the Act lays down a common duty of care owed by the occupier to all persons on the premises, it is purportedly no longer necessary to distinguish between the various categories of entrant in order to determine the wind user's liability as an occupier for personal injuries caused by his wind generator to any person on his premises. The practical significance of this legislation,

33 The Victorian legislation is discussed in Comment, 'The Occupiers' Liability Act 1983 (Vic.): Sanity Restored?' (1984) 14 M.U.L.R. 512.

however, may be less than appears at face value as some of the considerations listed in s. 14B(4) seem to permit a consideration of some of the old common law rules. For example, clause (b), 'the circumstances of the entry onto the premises' might be argued to justify a stricter application of the discharge of the common duty of care to trespassers than to lawful entrants. This clause could even be used to justify a continuation of the distinction between contractual entrants, invitees and licensees in relation to the circumstances in which an occupier discharges his common duty of care. Clauses (a) and (g) also appear to justify a continuation of certain common law rules discussed above concerning the duty of care in relation to invitees and licensees.

To date, there are no reported cases interpreting the new Victorian legislation. It is impossible to speculate with confidence on the likely construction given by the courts on the legislation, but it is submitted that the wind user's liability for personal injuries caused by the total or partial collapse of a supporting tower is likely to be analysed as follows. The wind user will probably be regarded in all cases as liable to the common duty of care contained in s. 14B(3). In relation to the discharge of this liability, the wind user is more likely to be put to a stricter test in respect of injuries caused to lawful entrants rather than trespassers. Where he is sued for damages for personal injuries, the wind user is likely to attempt to rely on s. 14B(4)(a) and plead that the occurrence of the injury was very improbable. However, this argument will be more than counterbalanced by the gravity of the probable injury (s. 14B(4)(a)) and the relatively small burden for the wind user of eliminating the danger in comparison with the possible risk of danger resulting from the collapse of a supporting tower (s. 14B(4)(g)). In summary, it is likely that in the majority of cases a wind user will be held liable under the Wrongs Act 1958 (Vic.) for personal injuries to a person injured on the wind user's property by the collapse of a supporting tower.

INJURY TO CHILDREN CLIMBING A WIND GENERATOR

In one respect the supporting tower of a wind generator represents a special safety hazard for children. Because of its prominent position and its novelty-value, a wind generator by its nature constitutes an allurement to young children who, once attracted to it, may be tempted to climb its supporting tower. Thus the possibility of personal injury caused by falling is raised. Where injury of this nature occurs the wind user may be liable for negligence under the rules of occupiers' liability. The major features of the common law of occupiers' liability and the Wrongs Act 1958 (Vic.) have already been discussed in the preceding section of this article. However, as in certain circumstances the liability of an occupier for personal injuries suffered by a child on his premises may be held to be more extensive than where the injuries are caused to an adult, it is necessary to reconsider the application of the law of occupiers' liability in the present context. In light of the decisions of the High Court in

Hackshaw v. Shaw[34] and *Papatonakis v. Australian Telecommunications Commission*[35] that an occupier of land is under a general duty of care to a person entering the land, whether as invitee, licensee or trespasser, independent of any special duty established under the rules of occupiers' liability, where there are circumstances giving rise to the general duty, it is also necessary to consider the general duty of care and the special duty of care separately.

Under the special duty of care, the reason why an occupier may incur more extensive liability for children injured on his premises is because the law has recognised that children are peculiarly susceptible to injury from concealed traps which may attract their curiosity. As explained by Fleming,

> [An occupier] is under a duty, not merely not to dig pitfalls for [children], but not to lead them into temptation. In order to constitute a trap in this sense, the object or condition must combine the properties of temptation and retribution; it must be both fascinating and fatal. Being merely attractive to children is not sufficient unless it also harbours an element of insidious danger.[36]

Devlin J. explained in *Phipps v. Rochester Corporation* that the duty of an occupier in respect of children has been framed 'so as to compromise between the robustness that would make children take the world as they found it and the tenderness which would give them nurseries wherever they go'.[37]

If a court wishes to award a child damages for injuries sustained on another person's land under occupiers' liability for negligence, the court has traditionally declared that the child should be regarded as an implied licensee rather than a trespasser, even though no permission to enter was given or intended by the occupier.[38] This elevation in the legal status of a child from a trespasser to an implied licensee is in reality a fiction, the purpose of which is to make the occupier liable to the duty of care which he has in respect of licensees generally to guard against concealed traps. Although this fiction does not arise by operation of law in all cases involving physical injury to children, it has been applied by the courts widely in either or both of the following situations. The first situation is where children have persistently intruded into the occupier's premises in the past and the occupier has failed to take effective measures to ensure that further intrusions do not occur. In this case, the occupier is deemed by acquiescence to consent to the entry of the children.[39] The second situation is where

34 (1985) 59 A.L.J.R. 156.
35 (1985) 59 A.L.J.R. 201.
36 Fleming, *op. cit.* 449.
37 *Phipps v. Rochester Corporation* [1955] 1 Q.B. 450, 459.
38 See *e.g.*, *Adams v. Naylor* [1944] K.B. 750; *Commissioner for Railways (N.S.W.) v. Cardy* (1960) 104 C.L.R. 274; *Commissioner for Railways v. Quinlan* [1964] A.C. 1054.
39 A well-known illustration of this is *Phipps v. Rochester Corporation* [1955] 1 Q.B. 450. In this case, Devlin J. stated (at 456):

> There must be a class of people who form something of a habit; and then one must ask oneself whether a reasonable owner would feel that unless he acted to stop the trespass, the belief would naturally be induced in those who used the land that they had his tacit permission to do so. This is a matter of degree . . .

Note that an occupier will not automatically be liable for damages in respect of children injured on his premises even if the children are held to be implied licensees. Thus, on the facts in *Phipps v. Rochester Corporation*, where a five-year-old boy was injured when falling into a trench dug on the defendant's land, the defendant was held not liable on the basis that a reasonable man in its position would have expected the child's parents either to satisfy themselves that the place held no danger for the child or to accompany the child. See also *David Jones (Canberra) Pty Ltd v. Stone* (1970) 123 C.L.R. 185.

the occupier does not actually know of the presence of the children but where there is present on his land something particularly alluring to young children which he should have known would make them likely to enter his property.[40] In the case of wind generators, both these situations could occur singly or in combination and render the wind user liable in damages as a licensor.

Based on *British Railways Board v. Herrington*[41] and *Southern Portland Cement Ltd v. Cooper*,[42] an alternative approach for the courts in respect of the special duty of care would be to drop the fiction of an implied licence and to declare the child entitled to recover damages against the occupier as a trespasser by virtue of occupier's expanded duty to trespassers under the 'common duty of humanity'. That this duty of care imposes a greater onus on occupiers in respect of children than in respect of adults is clear from the Privy Council decision in *Cooper's* case. For example, in one passage of its judgment the Court stated that more will be required of the occupier than a mere warning as warnings are generally of little value to protect children.[43] The inference thus appears to be that the wind user must take affirmative action to safeguard young children against the potential risks associated with climbing the supporting towers of wind generators.

From the standpoint of the wind user, the existence now of a general duty of care in addition to the special duty of care will (at best) be a neutral factor and (at worst) may significantly increase the risk of tortious liability. Relevant considerations for determining liability under the general duty of care will include the likelihood of children entering the property and whether the owner could have taken measures to prevent or minimize the problem.

It is submitted that in order to escape liability for negligence in respect of young children in these circumstances a wind user must isolate the supporting tower either by fences or by installing anti-climb devices at the base of the tower. If he does neither it is submitted that he will be liable both under the general duty of care and under the special duty of care for damages for creating a concealed trap. In relation to the special duty of care, it appears to make no practical difference in the present context as to whether the court adopts the notion of an implied licence or applies the 'common duty of humanity' as the result is likely to be identical in both cases.

An occupier will also incur more extensive liability for children injured on his premises under the new Victorian legislation. While children fall under the common duty of care owed pursuant to s. 14B(3) of the Wrongs Act 1958 by the occupier to all persons on his premises, a court is likely to require the occupier to exercise greater consideration of the position of children when it

[40] See *e.g. Cooke v. Midland Great Western Railway of Ireland* [1909] A.C. 229; *Williams v. Cardiff Corporation* [1950] 1 K.B. 514; *Gough v. National Coal Board* [1954] 1 Q.B. 191; *Glasgow Corporation v. Taylor* [1922] 1 A.C. 44; *Ramsay v. Appel* (1972) 46 A.L.J.R. 510. *Cf. Edwards v. Railway Executive* [1952] A.C. 737.

[41] [1972] A.C. 877.

[42] [1974] A.C. 623.

[43] *Ibid.* 644.

determines whether he has discharged his duty of care. Children appear to be entitled to special consideration under the legislation by virtue of the legislative requirement that the court must consider 'the age of the person entering the premises' (s. 14B(4)(e)) and 'the ability of the person entering the premises to appreciate the danger' (s. 14B(4)(f)). It will not be sufficient for an occupier to argue that he did not actually know of the presence of the children as s. 14B(4)(d) requires the court to consider 'the knowledge which the occupier has or *ought to have* of the likelihood of persons . . . being on the premises' (emphasis added). It is accordingly submitted that a wind user is likely to be held liable for injuries to children climbing a wind generator in the vast majority of cases. The only situations in which he may escape liability is if he can sensibly argue on the facts that he had no reason to believe that children would be likely to be on his property, or if he can show exceptional circumstances.

LAW REFORM CONSIDERATIONS

The above discussion shows that all wind users are subject to a significant risk of incurring liability in tort for personal injuries as a result of the normal operation of their generators. This problem is compounded when it is realized that in addition to the heads of liability in respect of personal injuries discussed above, the wind user may also incur tortious liability in nuisance for other types of damage by virtue of noise or vibration caused by a wind generator, interference with television or radio reception, micro-climate modification[44] and aesthetic injury caused by the allegedly unattractive appearance of a wind generator.[45]

The effect of this wide-ranging tortious liability may be to deter private individuals and the State electricity authorities from engaging in windpower electricity generation. Thus the existence of liability for personal injuries in this context appears to run counter to the Commonwealth government's policy of conserving fossil fuels and developing alternative sources of energy to the maximum extent practicable. A system of removing or reducing the present threat of personal liability for the use of wind generators while safeguarding the rights of neighbours to compensation for personal injuries must be devised if the use of windpower technology is to achieve its full potential application in Australia.

Two legal solutions are worthy of consideration. First, a product safety standard may be prescribed by the Commonwealth or state governments in respect of the manufacture of wind generators. The Commonwealth power is con-

[44] Wind generators significantly reduce the wind energy potential in the immediately surrounding area for a distance of ten times the diameter of the generator's blades depthwise and three times the diameter of the blades perpendicular to the wind. See Taubenfeld, R. F. and Taubenfeld, H. J., 'Wind Energy: Legal Issues and Legal Barriers' (1977) 31 *Southwestern Law Journal* 1053, 1072ff.

[45] These issues are discussed in Bradbrook, A.J., 'Liability in Nuisance for the Operation of Wind Generators' (1984) 2 *Environment and Planning Law Journal* 128.

tained in the Trade Practices Act 1974 (Cth). The government may prepare a suitable standard itself and prescribe it pursuant to s. 62; alternatively the standard may be prepared by the Standards Association of Australia, in which case the Minister pursuant to s. 63AA may declare the standard to be a consumer product safety standard for the purposes of s. 62. Section 62(1) states that a corporation shall not supply any goods in breach of any prescribed consumer product safety standard.[46] Non-compliance is an offence and may lead to a maximum fine of $50,000.[47] In addition, the Minister may grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of s. 62 or s. 63AA.[48] A parallel system of consumer product safety standards has been established by state legislation.[49] For example, s. 59(1) of the Consumer Affairs Act 1972 (Vic.) mirrors the wording of s. 62 of the Trade Practices Act, and it is an offence for any person to sell any goods in respect of which there are any requirements of regulations made under s. 59 in force unless all the requirements are complied with.[50]

Secondly, the possibility of personal injury resulting from wind generators can be significantly reduced by ensuring that such generators are set back a significant distance from the street frontage and property boundaries. The further a generator is located from a street or boundary, the less likely it is that children will be attracted to climb the generator and the more likely it is that any fire damage will be contained within the wind user's property and that the tower, if it fractures, will collapse onto the wind user's property rather than on adjoining property. Set-backs cannot totally eliminate the problem of liability for personal injuries, as fires or the collapse of a supporting tower may lead to a claim for occupiers' liability for negligence; in addition, any set-back, however severe, is unlikely to be sufficient to prevent a rotor blade being thrown onto neighbouring land or a public road in the event of a malfunction. Despite these difficulties, however, set-backs for wind generators have been adopted for safety reasons by a number of municipalities in the United States. A typical illustration is Ordinance 82-37 (1982) of the City and County of Honolulu, Hawaii, which states that wind generators shall be set back from all property boundaries a minimum distance equal to the height of the system (including the height of the tower and the furthest vertical extension of the rotor blades). In Australia, a provision of this nature would be added by amendment

46 Note that pursuant to s. 4B of the Act, a remedy will only be available if the wind generator is priced at less than $15,000.

47 Section 79(1). The maximum fine is only $10,000 if the offence is committed by a person not being a body corporate.

48 Trade Practices Act 1974 (Cth) s. 80(1).

49 Consumer Affairs Act 1972 (Vic.) s. 59; Consumer Protection Act 1969 (N.S.W.) Part IV; Trade Standards Act 1979 (S.A.); Consumer Affairs Act 1971-1983 (W.A.) Part IIIA; Sale of Hazardous Goods Act 1977 (Tas.); Consumer Protection Ordinance 1978 (N.T.) Part IV; Consumer Affairs Act 1970-1983 (Qld) ss 37-39. This legislation is discussed in Vernon, M.J., 'Consumer Product Safety', in Duggan, A.J. and Darvall, L.W., (eds), *Consumer Protection Law and Theory* (1980) 87ff.

50 Consumer Affairs Act 1972 (Vic.) ss 60(1), 61(2).

to the building regulations or by-laws of each state.[51] To date, there are no regulations or by-laws at all relating to wind generators.

These are only partial solutions to the problem under consideration, but they appear to be the only viable reforms specifically related to the issue. The only reform that would be certain to eliminate the risk of civil liability for personal injuries caused by wind generators would be state legislation exempting wind users from tort liability in negligence or under the rule in *Rylands v. Fletcher*.[52] While this is a technical possibility, it would appear to be politically unrealistic and quite unfair. If a person incurs physical injury as a result of the use of a wind generator it would seem to be a matter of simple justice that he should be recompensed for his loss.

While the two law reform proposals discussed above would undoubtedly minimize the occurrence of legal liability for personal injuries caused by the operation of wind generators, it is submitted that the final solution to the problem lies in a wider reform of the law of torts rather than in one or more *ad hoc* measures. By far the most satisfactory method of safeguarding the wind user against legal liability for personal injuries while doing justice to a person injured by a wind generator would be for the Commonwealth government to enact a comprehensive no-fault accident compensation scheme. The government could use as a model the present New Zealand scheme enacted under the Accidents Compensation Act 1972 (N.Z.), suitably amended as suggested by the National Committee of Inquiry into Compensation and Rehabilitation in Australia.[53]

51 Victorian Building Regulations 1983, made pursuant to the Building Control Act 1981 (Vic.); Ordinance No. 70, Building, made pursuant to the Local Government Act 1919 (N.S.W.); Standard Building By-laws 1975, made pursuant to the Building Act 1975-1981 (Qld); Building Regulations 1973, made pursuant to the Building Act 1970 (S.A.); Uniform Building By-laws 1974, made pursuant to the Local Government Act 1960-1983 (W.A.); Building Regulations 1978, made pursuant to the Local Government Act 1962 (Tas.).

52 (1868) L.R. 3 H.L. 330.

53 See *Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia*, Canberra (1974). The issues surrounding such a scheme are discussed in Luntz, H. L., *Compensation and Rehabilitation* (1975); Luntz, Hambly and Hayes, *op cit.* ch.1; and Harris, D. P., 'Accident Compensation in New Zealand: A Comprehensive Insurance System' (1974) 37 *Modern Law Review* 361.