

TWO PROBLEMS OF OCCUPIERS' LIABILITY
PART ONE — THE OCCUPIERS' LIABILITY ACTS
AND THE COMMON LAW

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*The enactment of occupiers' liability legislation in four Australian jurisdictions between 1983 and 2002 has given rise to important problems about the relationship between the legislation and the common law of negligence. From 2002 onwards, the civil liability legislation has added another dimension of difficulty: the courts have to contend not only with the relationship between each enactment and the common law, but also with that between the two sets of statutory provisions. As the Chief Justice of Western Australia said in *Town of Port Hedland v Hodder*, in many cases courts are failing to grapple with these issues. In this two-part article the authors explore the relationship between the occupiers' liability Acts and the common law, and between those Acts and the civil liability legislation. With the aid of comparative insights, and applying principles of statutory interpretation, they offer conclusions as to the way in which occupiers' liability actions should be pleaded and determined in the four occupiers' liability Act jurisdictions. Key provisions are gathered together in a table which appears at the end of Part Two of this article.*

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I INTRODUCTION

It seems that much tort litigation in this State is being conducted as if the legislation had never been passed, on the basis, as here, that the application of the legislation would make no material difference to the outcome. This has meant that important issues with respect to the interrelationship between the common law and the legislative provisions and as between the particular legislative provisions remain unresolved.¹

Australian Safeway Stores Pty Ltd v Zaluzna ('Zaluzna')² changed the direction of Australian occupiers' liability law. Prior to the 1980s, the law in Australia followed the traditional approach of the common law to questions of occupiers' liability: in the words of the leading Irish text, '[t]he law relating to occupiers' liability for injuries to entrants on their premises represented one piece of dry land which was not swamped when Lord Atkin, in *Donoghue v*

¹ *Town of Port Hedland v Hodder* [No 2] (2012) 43 WAR 383, 396 [47] (Martin CJ).

² (1987) 162 CLR 479.

Stevenson, opened the floodgates of the modern law of negligence.³ Starting in the 19th century, the courts, concerned to protect the freedoms of the landowner class, had divided entrants on premises into categories. Thus, for example, the duty to an invitee (a person who entered at the invitation of the occupier, express or implied) was to exercise reasonable care to prevent damage from unusual danger of which the occupier knew or ought to have known,⁴ whereas the duty to a licensee (a person merely permitted to be on the premises) was the lower duty to warn of any concealed danger on the premises known to the occupier.⁵ Other categories included entrants under a contract, where the duty depended on the terms of the contract, and persons who entered as of right, for example under a statutory right of entry. The lowest category of entrant was the trespasser, as respects whom the occupier's obligation was limited to abstaining from intentional or reckless injury.⁶

Though some courts in the United States had held that the categories were superseded by the general law of negligence,⁷ elsewhere in the common law world it came to be assumed that they were too firmly entrenched to be dislodged by judicial decision. The problems were particularly acute in England in the 1950s, as a result of some unsatisfactory House of Lords decisions.⁸ Accordingly, England chose the path of statutory reform.⁹ The *Occupiers' Liability Act 1957*, 5 & 6 Eliz 2, c 31 ('1957 OLA')¹⁰ provided that all lawful visitors would henceforth be owed the 'common duty of care'.¹¹

³ Bryan M E McMahon and William Binchy, *Law of Torts* (Butterworths, 3rd ed, 2000) 299 (citations omitted).

⁴ *Indermaur v Dames* (1866) LR 1 CP 274, 287 (Willes J), aff'd (1867) LR 2 CP 311.

⁵ *Lipman v Clendinnen* (1932) 46 CLR 550, 569–70 (Dixon J).

⁶ *Robert Addie and Sons (Collieries) Ltd v Dumbreck* [1929] AC 358.

⁷ Commencing with California: *Rowland v Christian*, 443 P 2d 561 (1968).

⁸ *Jacobs v London County Council* [1950] AC 361; *London Graving Dock Co v Horton* [1951] AC 737.

⁹ See generally Stephen Bailey, 'Occupiers' Liability: The Enactment of Common Law Principles' in T T Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013) 187, 203.

¹⁰ 'A little gem of a statute': United Kingdom, *Parliamentary Debates*, House of Lords, 12 July 1983, vol 443, col 720 (Lord Hailsham, Lord Chancellor). The statute resulted from the report of the Law Reform Committee, *Occupiers' Liability to Invitees, Licensees and Trespassers*, Cmd 9305 (1954). Similar provisions were enacted for Northern Ireland: *Occupiers' Liability Act (Northern Ireland) 1957* (NI) c 25.

¹¹ 1957 OLA s 2(1).

Trespassers thus remained outside the purview of the Act. In contrast, Scotland three years later enacted legislation which applied the same duty of care to all entrants including trespassers.¹² Eventually, after the House of Lords had moved away from the old restrictive rule by holding that trespassers were owed a duty of common humanity,¹³ the *Occupiers' Liability Act 1984* (UK) c 3 extended a duty of care to them also.¹⁴ The 1957 OLA has provided the impetus for statutory reform in other parts of the common law world: starting with Hong Kong in 1959, it has been copied in at least 10 jurisdictions¹⁵ and adopted in at least five others.¹⁶ Beginning in the 1970s, Canada developed its own versions of occupiers' liability legislation: six of the nine common law provinces now have occupiers' liability Acts.¹⁷ Occupiers' liability legislation was also enacted in Bermuda and Ireland.¹⁸

¹² *Occupiers' Liability (Scotland) Act 1960*, 8 & 9 Eliz 2, c 30, s 2(1). See Law Reform Committee for Scotland, *First Report*, Cmnd 88 (1957).

¹³ *British Railways Board v Herrington* [1972] AC 877.

¹⁴ By enacting, rather awkwardly, that the common duty of care was owed to persons other than 'visitors' as defined by the 1957 OLA: *Occupiers' Liability Act 1984* (UK) c 3, s 1. See also Law Commission, *Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability*, Report No 75 (1976) 8–16.

¹⁵ *Occupiers Liability Act* (Barbados) c 208 [No 31 of 1965]; *Occupiers' Liability Act* (Fiji) c 33 (1968); *Occupiers Liability Ordinance* (Hong Kong) cap 314 (1959); *Occupiers' Liability Act 1964* (Isle of Man); *Occupiers' Liability Act* (Jamaica) [No 24 of 1969]; *Occupiers' Liability Act* (Kenya) c 34 [No 21 of 1962]; *Occupiers' Liability Act 1962* (NZ); *Wrongs (Miscellaneous Provisions) Act 1975* (Papua New Guinea) pt XII; *Occupiers Liability Act 1968* (Tanzania); *Occupiers' Liability Act* (Zambia) c 70 [No 33 of 1963].

¹⁶ The 1957 OLA was in force in Kiribati, the Solomon Islands, Tonga, Tuvalu and Vanuatu, and the *Occupiers' Liability Act 1962* (NZ) in the Cook Islands.

¹⁷ Alberta: *Occupiers' Liability Act*, RSA 2000, c O-4 ('Alta OLA'); British Columbia: *Occupiers Liability Act*, RSBC 1996, c 337 ('BC OLA'); Ontario: *Occupiers' Liability Act*, RSO 1990, c O.2 ('Ont OLA'); Manitoba: *Occupiers' Liability Act*, SM, c O8 ('Man OLA'); Prince Edward Island: *Occupiers' Liability Act*, RSPEI 1988, c O-2 ('PEI OLA'); Nova Scotia: *Occupiers' Liability Act*, SNS 1996, c 27 ('NS OLA'). Most of these statutes are based, to a greater or lesser extent, on the draft uniform occupiers' liability Act prepared by what is now the Uniform Law Conference of Canada: Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Fifty-Fifth Annual Meeting* (1973) 328–35. Saskatchewan and the three Territories are now the only Canadian jurisdictions in which the old common law applies. For New Brunswick and Newfoundland, see below n 29.

¹⁸ *Occupiers' and Highway Authorities' Liability Act 1978* (Bermuda); *Occupiers' Liability Act 1995* (Ireland). Both Acts have been influenced to some extent by Canadian legislation. The Irish Act places greater restrictions on liability to trespassers than the pre-Act Irish common law.

The Australian experience has been different. It was not until the 1980s that occupiers' liability legislation began to appear, and then only in a minority of jurisdictions — Victoria in 1983,¹⁹ Western Australia in 1985²⁰ and South Australia in 1987.²¹ In each case, the legislation applies to all entrants, including trespassers,²² though in Western Australia a lower duty is owed to persons who enter the premises with the intention of committing, or in the commission of, an offence punishable by imprisonment.²³ Prior to this, the High Court had made a determined attempt to overcome the restrictions of the common law in a series of decisions which held that the limitations on the liability of the occupier qua occupier did not preclude the recognition that the occupier might owe a duty of care in another capacity.²⁴ Though this line of authority was rejected by the Privy Council in 1964,²⁵ the High Court continued to develop this jurisprudence,²⁶ especially after the abolition of appeals to the Privy Council in 1975.²⁷ Ultimately Deane J, in two important judgments,²⁸ suggested that it was no longer necessary to distinguish between

¹⁹ *Wrongs Act 1958* (Vic) pt IIA, as inserted by *Occupiers' Liability Act 1983* (Vic). The Act was preceded by the Victorian Chief Justice's Law Reform Committee, *Report on Occupiers' Liability* (1982).

²⁰ *Occupiers' Liability Act 1985* (WA); Peter Handford, 'Occupiers' Liability Reform in Western Australia — and Elsewhere' (1987) 17 *University of Western Australia Law Review* 182, 182.

²¹ *Wrongs Act 1936* (SA) as amended by the *Wrongs Act Amendment Act 1987* (SA) inserting *Civil Liability Act 1936* (SA) pt 4. The occupiers' liability provisions, originally ss 17B–17E, were renumbered as ss 19–22 when the *Wrongs Act 1936* (SA) was renamed the *Civil Liability Act 1936* (SA) in 2003.

²² See, eg, *Occupiers' Liability Act 1983* (Vic) s 14B(3).

²³ *Occupiers' Liability Act 1985* (WA) ss 5(2)–(3). The Northern Territory has a similar legislative determination of the duty owed to trespassers: *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 9.

²⁴ *Thompson v Bankstown Corporation* (1953) 87 CLR 619; *Rich v Commissioner for Railways (NSW)* (1959) 101 CLR 135; *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274. See Peter Handford, 'The Snail's Antipodean Adventures' [2013] *Juridical Review* 315, 327–36.

²⁵ *Commissioner for Railways v Quinlan* [1964] AC 1054. This has been called a 'scholastic and retrograde' decision: M A Millner, *Negligence in Modern Law* (Butterworths, 1967) 178.

²⁶ See, eg, *Munnings v Hydro-Electric Commission* (1971) 125 CLR 1; *Cooper v Southern Portland Cement Ltd* (1972) 128 CLR 427; *Public Transport Commission (NSW) v Perry* (1977) 137 CLR 107.

²⁷ *Privy Council (Appeals from the High Court) Act 1975* (Cth).

²⁸ *Hackshaw v Shaw* (1984) 155 CLR 614, 662–3; *Papatoukakis v Australian Telecommunications Commission* (1985) 156 CLR 7, 32.

the occupier's special duty and the ordinary duty of care: the two streams of authority had become one, and all that was necessary was to ask whether the occupier owed a duty of care under the ordinary principles of negligence. This was the view ultimately adopted by the majority of the High Court in *Zaluzna*.²⁹

This decision, it might have been thought, rendered the Australian legislation unnecessary: proposals for legislation in New South Wales and Tasmania³⁰ were abandoned, although occupiers' liability legislation was unexpectedly inserted in the *Civil Law (Wrongs) Act 2002* (ACT),³¹ a package of consolidating legislation and reform measures enacted in response to the *Review of the Law of Negligence: Final Report* ('Ipp Report').³² Since 1987, it is the common law of negligence that has made the running in questions of occupiers' liability. The principles initiated by *Zaluzna* have been developed by a series of High Court decisions,³³ and it is the common law which is now the chief focus of the leading texts.³⁴ However, in the jurisdictions with an

²⁹ (1987) 162 CLR 479, 488 (Mason, Wilson, Deane and Dawson JJ). Note similar common law developments in Newfoundland: in *Stacey v Anglican Churches of Canada (Diocesan Synod of Eastern Newfoundland & Labrador)* (1999) 182 Nfld & PEIR 1, the Newfoundland Court of Appeal held that the traditional categories had been superseded by general negligence law. The Singapore Court of Appeal recently took a similar step: See *Toh Siew Kee v Ho Ah Lam Ferrocement Pte Ltd* [2013] SGCA 29 (24 April 2013). In New Brunswick it was the legislature which acted: *Law Reform Act*, RSNB 2011, c 184, s 2(1). This Act provided that the law of occupiers' liability was abolished, with the effect that the ordinary law of negligence now applies: see *Jones v Richard* (2000) 226 NBR (2d) 207; *Reid v Hatty* (2005) 279 NBR (2d) 202.

³⁰ See New South Wales Law Reform Commission, *Working Paper on Occupiers' Liability*, Working Paper No 3 (1969); Law Reform Commission of Tasmania, *Occupiers' Liability*, Report No 53 (1988).

³¹ *Civil Law (Wrongs) Act 2002* (ACT) s 168. The provision applies to all entrants, including trespassers. The Australian Law Reform Commission had previously recommended that legislation was unnecessary: Australian Law Reform Commission, *Occupiers' Liability*, Report No 42 (1988) 2. The Australian Capital Territory Community Law Reform Committee agreed: Australian Capital Territory Community Law Reform Committee, *Occupiers Liability*, Report No 2 (1991).

³² Panel of Eminent Persons, *Review of the Law of Negligence: Final Report* (2002).

³³ See, eg, *Nagle v Rotttnest Island Authority* (1993) 177 CLR 423; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469; *Thompson v Woolworths (Qld) Pty Ltd* (2005) 221 CLR 234.

³⁴ See, eg, R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 237–42 [7.39]–[7.40]; Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 569–82 [11.1.1]–[11.1.9]; Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 7th ed, 2013) 409–22 [7.5.1]–[7.5.20]; Carolyn Sappideen, Prue

occupiers' liability Act ('OLA'), these developments are only of indirect relevance. The OLAs generally say that the provisions of the Act apply in place of the rules of the common law.³⁵ The courts have had to develop the law by the processes of statutory interpretation, and the common law jurisprudence is at best only indirectly relevant. The OLAs, however, only apply to the extent that they say they apply. The boundaries of the legislation have to be carefully observed, and in areas outside those boundaries the general law of negligence takes over. It has sometimes been said that it is not important whether the Act or the common law applies, because the common duty of care under the Acts is so similar to the duty of care which applies under the general law of negligence.³⁶ Not everyone agrees, however. Buss JA of the Western Australian Court of Appeal has been a leading figure in highlighting the problem of these boundary disputes. In *Department of Housing and Works v Smith [No 2]*, his Honour drew attention to the unsatisfactory nature of the relationship between the *Occupiers' Liability Act 1985* (WA) ('WA OLA') and the common law of negligence, in particular the juridical basis of the occupier's duty of care, and said:

It is unnecessary to resolve the issue in the present case. However, the true position should be determined by this court in an appropriate case. The unsatisfactory state of the law ... must not remain unresolved indefinitely.³⁷

The authors agree with the view of Buss JA that it is important to determine the juridical boundaries of the OLAs, and this is the problem that is discussed in Part One of this article. However, this is not the end of the story. The civil liability Acts ('CLAs') enacted in Australian jurisdictions in 2002 and 2003 have added another dimension of complexity to Australian occupiers'

Vines and Penelope Watson, *Torts: Commentary and Materials* (Lawbook, 11th ed, 2012) 352–5 [9.110]–[9.115].

³⁵ *Civil Law (Wrongs) Act 2002* (ACT) s 168(4); *Wrongs Act 1958* (Vic) s 14B(1); *Occupiers' Liability Act 1985* (WA) s 4(1). The South Australian legislation is differently drafted: the *Civil Liability Act 1936* (SA) s 20(1) provides that 'the liability of the occupier of premises ... shall be determined in accordance with the principles of the law of negligence'.

³⁶ See, eg, *Department of Housing and Works v Smith [No 2]* (2010) 41 WAR 217, 220 [3], 223 [20] (Pullin JA), 244 [126] (Newnes JA).

³⁷ (2010) 41 WAR 217, 230 [63]. 'This unfortunate situation can only benefit lawyers' pockets': Barker et al, above n 34, 571. The distinction was important in *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84, where an insurance policy imposed different indemnity limits for occupiers' liability and general public liability.

liability law. This problem is unique to Australia because no other common law jurisdiction has equivalent legislation. In nearly all cases the CLAs have implemented a recommendation of the Ipp Report that the factors which should be taken into account in determining whether a reasonable person would have taken precautions against the risk of harm should be set out in statutory form.³⁸ So, in the OLA jurisdictions, there is a potential conflict of statutory factors: does one set of factors apply to the exclusion of the other, or do the courts take an eclectic approach and apply both? These issues are discussed in Part Two of this article.

II STATUTORY INTERPRETATION: A BRIEF REFRESHER

Since the legislation dealing with occupiers' liability (and its interaction with the common law and with other statutory provisions) lies at the heart of this article, it is apposite to say something of the approach(es) adopted to determining the meaning and operation of written law. Much has been written on this topic³⁹ and it is well beyond the scope of this piece to attempt more than a brief outline of some key themes and concepts that will be relevant to our analysis.

Many contributions to the scholarship of statutory interpretation come from members of the current and former judiciary, reflecting the centrality of that task to the judicial role. It is axiomatic to say that interpretation

³⁸ See *Civil Law (Wrongs) Act 2002 (ACT)* s 43; *Civil Liability Act 2002 (NSW)* s 5B; *Civil Liability Act 2003 (Qld)* s 9; *Civil Liability Act 1936 (SA)* s 32; *Civil Liability Act 2002 (Tas)* s 11; *Wrongs Act 1958 (Vic)* s 48; *Civil Liability Act 2002 (WA)* s 5B. See also Ipp Report, above n 32, 106–7.

³⁹ See, eg, Evan Bell, 'Judicial Perspectives on Statutory Interpretation' (2013) 39 *Commonwealth Law Bulletin* 245; Justice Kenneth Hayne, 'Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?' (2013) 13 *Oxford University Commonwealth Law Journal* 271; Chief Justice JJ Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84 *Australian Law Journal* 822; Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35 *Melbourne University Law Review* 113; Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1; Joachim Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy' (2006) 65 *Cambridge Law Journal* 549; J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *Law Quarterly Review* 247.

must be anchored in the text of the legislation,⁴⁰ and that the objective of interpretation is to give effect to the intention of Parliament or purpose of the Act.⁴¹ Although caution must be exercised in approaching the question of intention,⁴² it is clear that adopting a purposive approach⁴³ to interpretation requires that particular attention be paid to ‘such things as the existing state of the law and the [discernible] mischief ... the statute was intended to remedy’.⁴⁴ For this reason, in the analysis that follows, we have sought to identify the relevant background to the introduction of the OLA and CLA provisions in Australia.

A notable development in modern case law on interpretation is the increased attention given to context and the related concept of coherence of the law in the interpretive process.⁴⁵ These ideas are not new. As far back as 1955, Dixon CJ commented that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’.⁴⁶ Rather, the change has been one of emphasis. In perhaps the leading modern judgment on interpretive approach, the High Court stated that the process of construction must always begin by examining the context of the provision that is being construed.⁴⁷ Further, and of particular importance to the analysis that follows, the High Court has increasingly focused on the need to ensure coherence between the common

⁴⁰ Kirby, above n 39, 116, citing *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, 10 n 35 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2007) 234 CLR 96, 111–12 [34] (Kirby J); *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, 83 [96] (Kirby J). See also Bell, above n 39, 251–2.

⁴¹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ). See Kirby, above n 39, 116.

⁴² Hayne, above n 39.

⁴³ Which is mandated by both Commonwealth and state interpretation legislation: see, eg, *Acts Interpretation Act 1901* (Cth) s 15AA.

⁴⁴ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); see also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

⁴⁵ See Bell, above n 39, 249.

⁴⁶ *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, 397.

⁴⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69], 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

law and statutory rules⁴⁸ and between intersecting bodies of statute.⁴⁹ The High Court has recently described this as a central policy consideration,⁵⁰ applying it in a case involving the joint illegality defence as follows:

[Coherence] is a consideration that is important at two levels. First, the principles applied in relation to the tort of negligence must be congruent with those applied in other areas of the civil law (most notably contract and trusts). Secondly, and more fundamentally, the issue that is presented by observing that a plaintiff was acting illegally when injured as a result of the defendant's negligence is whether there is some relevant intersection between the law that made the plaintiff's conduct unlawful and the legal principles that determine whether the plaintiff should have a cause of action for negligence against the defendant. Ultimately, the question is: would it be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course, or as a result, of that unlawful conduct?⁵¹

Accordingly, when the language and application of statutory provisions are in question, courts will generally favour a construction that facilitates the greatest congruity between those provisions and the other bodies of law with which they intersect.

A second notable development is the increasing recognition of the degree to which the common law and statute influence each other. The High Court has commented that '[t]he common law evolves in the orbit of statute'⁵² while

⁴⁸ *Sullivan v Moody* (2001) 207 CLR 562, 581 [55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 257 [123] (Crennan and Kiefel JJ); *New South Wales v Fahy* (2007) 232 CLR 486, 558 [250] (Crennan J); *Miller v Miller* (2011) 242 CLR 446, 454 [15], 467 [56], 473 [74], 482 [102] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Pam Stewart and Anita Stuhmcke, 'The Rise of the Common Law in Statutory Interpretation of Tort Law Reform Legislation: Oil and Water or a Milky Pond?' (2013) 21 *Torts Law Journal* 126, 141.

⁴⁹ *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 432 [11] (French CJ, Gummow, Hayne, Heydon and Crennan JJ); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 23 [53]–[54] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁵⁰ *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁵¹ *Ibid* 454–5 [15]–[16].

⁵² *Roads and Traffic Authority v Royal* (2008) 245 ALR 653, 677 [93] (Kirby J), citing *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 602 [231].

also informing the meaning and operation of legislation,⁵³ particularly in Acts (like the OLAs and CLAs) laden with language that already has a developed legal meaning.⁵⁴ This interchange, variously described as a ‘legal partnership’⁵⁵ or ‘symbiotic relationship’,⁵⁶ has been shown to be particularly evident and influential in the development of the law of negligence following the introduction of the civil liability reforms.⁵⁷

III THE OCCUPIERS’ LIABILITY ACTS AND THE COMMON LAW

A *The Overseas Experience*

1 *England*

The 1957 OLA provides that it has effect in place of the rules of the common law to regulate the duty which an occupier of premises owes to his or her visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.⁵⁸ The rules so enacted regulate the nature of the duty imposed by law in consequence of a person’s occupation or control of premises, but do not alter the rules of the common law as to the persons on whom the duty is imposed or to whom it is owed, and so the persons who are to be treated as an occupier and his or her visitors are the same as those who at common law would be treated as an occupier and his or her invitees or licensees.⁵⁹ The occupier owes the same duty, the common duty of care, to all his or her visitors, except in so far as he or she is free to and does extend, restrict, modify or exclude it, by agreement or otherwise.⁶⁰ The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable, to see that the visitor will be reasonably safe in using the premises

⁵³ Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room’ (2013) 36 *University of New South Wales Law Journal* 1002, 1014.

⁵⁴ *Ibid* 1015–17.

⁵⁵ P S Atiyah, ‘Common Law and Statute Law’ (1985) 48 *Modern Law Review* 1, 6.

⁵⁶ *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31] (Gleeson CJ).

⁵⁷ Stewart and Stuhmcke, above n 48.

⁵⁸ 1957 OLA s 1(1).

⁵⁹ *Ibid* s 1(2).

⁶⁰ *Ibid* s 2(1).

for the purposes for which he or she is invited or permitted to be there.⁶¹ The Act gives examples of particular circumstances which may be relevant.⁶²

The Act clearly covers both the duty and breach elements of negligence — ss 1(1), 1(2) and 2(1) all deal with the occupier's duty of care, and s 2(2) functions as a combined statement of duty and standard of care. The examples in later subsections relate to the question whether the standard has been met. However, the Act is not totally self-sufficient, since it refers particular questions back to the common law: the common law determines on whom the duty is placed, and to whom it is owed.⁶³ There are no provisions about causation and remoteness of damage, and references to defences such as assumption of risk⁶⁴ and exclusion of liability⁶⁵ also rely on the common law.

Because the Act provides that it has effect in place of the rules of the common law, it supplants the common law of negligence in the area which it covers. However, its coverage is not complete. As already mentioned, the original 1957 OLA, by being restricted to lawful visitors, left one important class of entrant, namely trespassers, to be regulated by the common law, and it was only in 1984 that trespassers were brought within the statutory regime.⁶⁶ The Act also contained some restrictions as to damage covered. In addition to personal injury, the Act extended to the obligations of the occupier in respect of damage to property, including the property of persons who were not visitors.⁶⁷ At common law, where a visitor brought someone else's property onto the premises, it was not clear whether the invitee and licensee categories extended to the non-entering owner, or whether general negligence applied;⁶⁸

⁶¹ Ibid s 2(2).

⁶² Ibid ss 2(3)–(4).

⁶³ Ibid s 1(2).

⁶⁴ Ibid s 2(5).

⁶⁵ Ibid ss 2(1), 3.

⁶⁶ See also *British Railways Board v Herrington* [1972] AC 877.

⁶⁷ 1957 OLA s 1(3)(b). At common law, it was suggested that there was no liability for damage to property in the absence of personal injury: *Tinsley v Dudley* [1951] 2 KB 18, 25 (Lord Evershed MR), but, at 31, Jenkins LJ appeared to take a different view. Jenkins LJ's view was affirmed by the Full Court of the Supreme Court of New South Wales in *Drive-Yourself Lessey's Pty Ltd v Burnside* [1959] SR (NSW) 390, 399 (Street CJ), 404–5 (Owen J). Economic loss consequent on damage to property is recoverable: *AMF International Ltd v Magnet Bowling Ltd* [1968] 1 WLR 1028.

⁶⁸ In *Drive-Yourself Lessey's Pty Ltd v Burnside* [1959] SR (NSW) 390, where a car owned by the plaintiff and rented out to H was damaged by falling rocks after H had parked it in a car park

because the Act regulated the duty owed by the occupier to his or her visitors, it appeared that the owner's remedy continues to be governed by the common law.⁶⁹ The later Act extending the statutory regime to trespassers is limited to personal injury, and so damage to trespassers' property remains subject to the common law.⁷⁰ It appears that at common law an occupier was not liable for loss of property,⁷¹ and the *1957 OLA* is silent on the matter.

The most important potential limitation on the ambit of the *1957 OLA* is the view that it only applies to injuries due to the static condition of the premises (the so-called occupancy duty) and that injuries caused by activities on the premises (the activity duty) remained outside the Act and were governed by the common law. This distinction was forged by the pre-1957 case law, and was applied in cases involving both licensees⁷² and trespassers.⁷³ It was important because it provided a means by which, in cases involving injury caused by a negligent activity on the premises, it was possible to escape from the limitations of the common law categories and especially the limited duty owed to licensees.⁷⁴ Underpinning this whole area is the fact that in making the occupier liable for injuries caused by static conditions the law is imposing liability for omission, which has always been more limited than

owned by the defendant in order to go on a boat trip, Street CJ at 400 and Owen J at 404 held the defendant liable on the ground that H's invitation or licence extended to the plaintiff as owner of the car, whereas Herron J at 409 held that the defendant owed a duty of care under general negligence principles.

⁶⁹ In *Tutton v A D Walter Ltd* [1986] 1 QB 61, the plaintiff kept bees in a hive near a field in which the defendant grew oil seed rape, a crop known to be attractive to bees. The bees died after the defendant sprayed the crop with pesticide. It was held that the defendant was liable to the plaintiff under general negligence principles. Unusually, the defendant argued that the bees were trespassers, owed at most a duty of common humanity, but this argument overlooked the fact that the duty was owed not to the bees but to their owner.

⁷⁰ With the interesting result that the occupier must act with common humanity towards a trespasser's property.

⁷¹ *Tinsley v Dudley* [1951] 2 KB 18.

⁷² *Dunster v Abbott* [1954] 1 WLR 58; *Slater v Clay Cross Co Ltd* [1956] 2 QB 264; *Riden v A C Billings & Son Ltd* [1957] 1 QB 46, affd [1958] AC 240.

⁷³ *Videan v British Transport Commission* [1963] 2 QB 650, 662–8 (Lord Denning MR); cf at 672 (Pearson LJ); however, the occupancy–activity distinction was rejected by the Privy Council in *Commissioner for Railways v Quinlan* [1964] AC 1054.

⁷⁴ The development of 'overriding duties' by the High Court of Australia was motivated by the same need to escape from the limitations of the common law categories. For a useful discussion of the distinction between overriding duties and activity duties, see *Heard v New Zealand Forest Products Ltd* [1960] NZLR 329, 359–62 (North and Cleary JJ).

liability for negligence in act⁷⁵ — so there is some apparent logic in classifying the activity duty as part of general negligence, and the more limited instances of occupancy duty as exceptions to a general rule of non-liability.

It appears that the 1957 OLA aimed to overcome this distinction, at least in relation to lawful visitors, and to extend the common duty of care to activities on the premises as well as those caused by static conditions.⁷⁶ Section 1(1), read in isolation, cannot be read any other way, but s 1(2) introduced an element of doubt. The majority of textbook writers have endorsed the view that s 1(2) prevails over s 1(1) and so the Act is limited to occupancy duties.⁷⁷ There is now a considerable body of judicial decisions supporting this view,⁷⁸ including some interpreting the similar words in s 1(1) of the *Occupiers' Liability Act 1984* (UK).⁷⁹ For better or worse, English law now adheres to the view that the OLA only covers liability for static conditions, with activities being part of the law of general negligence.⁸⁰

⁷⁵ Bailey, above n 9, 188.

⁷⁶ *Ibid* 203–5.

⁷⁷ See, eg, W V H Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell, 18th ed, 2010) 442; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press, 7th ed 2013) 261; Michael A Jones (ed), *Clerk & Lindsell on Torts* (Sweet & Maxwell, 20th ed, 2010) [12-04]; Christopher Walton (ed), *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 12th ed, 2010) [8-11]; Peter North, *Occupiers' Liability* (Butterworths, 1971) 81; see also John Murphy and Christian Witting, *Street on Torts* (Oxford University Press, 13th ed, 2012) 223. The major dissenters are David Howarth, *Textbook on Tort* (Butterworths, 1995) 369; Tony Weir, *A Casebook on Tort* (Sweet & Maxwell, 10th ed, 2004) 148: '[T]he courts seem determined to follow the alleged distinction between the "activity" duty and the "occupancy" duty, contrary to the very clear terms of the statute, which manifestly amalgamates them'.

⁷⁸ See, eg, *Ogwo v Taylor* [1988] 1 AC 431, 438 (Stephen Brown LJ); *Ferguson v Welsh* [1987] 1 WLR 1553, 1563 (Lord Goff); cf at 1559 (Lord Keith); *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 WLR 1052, 1085–8 [122]–[131] (Brooke J for the Court); *Bottomley v Todmorden Cricket Club* [2004] PIQR P18 [31] (Brooke LJ).

⁷⁹ *Revill v Newbery* [1996] QB 567 (though the Court of Appeal applied the statutory rules by analogy); *Tomlinson v Congleton Borough Council* [2004] 1 AC 46; *Keown v Coventry Healthcare NHS Trust* [2006] 1 WLR 953; see also *Donoghue v Folkestone Properties Ltd* [2003] QB 1008, 1024 [53] (Lord Phillips MR).

⁸⁰ The 1957 OLA s 1(3)(a) provides that the rules in the Act apply to regulate: 'the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft'. The interpretation of the Act as limited to the occupancy duty avoids speculation over whether it could apply to injuries caused to a passenger by negligent driving. At common law the rules of occupiers' liability did not apply to such cases: *Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343, 373 (Goddard LJ). The Act

The English experience thus provides us with a number of conclusions which will be of value when we come to an analysis of the Australian OLAs. The English Act is not a complete code, but depends in all sorts of ways on the common law. However, in the area which it covers, it applies in place of the common law, leaving no room for recourse to general negligence principles as a supposedly preferable alternative. Finally, there is no suggestion whatsoever that the 1957 OLA is confined to standard of care and does not deal with duty.

2 Scotland

The *Occupiers' Liability (Scotland) Act 1960*, 8 & 9 Eliz 2 ('OLSA') differs from the English Act in a number of respects, most obviously in extending its provisions to all entrants including trespassers. However, the drafting was also different, and perhaps simpler. Most sections have their equivalents in the English Act, but the wording is not always the same. Thus the Act provided that it would:

have effect, in place of the rules of the common law, for the purpose of determining *the care* which a person occupying or having control of land or other premises is required, by reason of such occupation or control, to show towards persons entering on the premises in respect of dangers due to the state of the premises or to anything done or omitted to be done on them and for which he is in law responsible.⁸¹

There is no express reference here to duty, although the sidenote reads '[v]ariation of rules of common law as to duty of care owed by occupiers.' The common law determines who is an occupier for this purpose.⁸² The care which the occupier is required, by reason of his or her occupation or control of the premises, to show towards a person entering thereon in respect of the specified dangers,⁸³ except in so far as he or she is entitled to and does extend, restrict, modify or exclude his or her obligations by agreement,⁸⁴ is such care

presumably applies to injuries caused by static conditions, such as a passenger injured due to falling through the defective floor of the vehicle: see generally *Houweling v Wesseler* (1963) 40 DLR (2d) 956.

⁸¹ OLSA s 1(1) (emphasis added).

⁸² *Ibid* s 1(2).

⁸³ Here the section repeats the words in s 1(1) set out above.

⁸⁴ Cf 1957 OLA s 2(1), which allows for exclusion 'by agreement or otherwise' (emphasis added).

as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.⁸⁵ Any higher standard of care owed by the occupier by virtue of any other enactment or rule of law is preserved.⁸⁶

The inclusion of trespassers has not occasioned any problems,⁸⁷ and the simplicity of the Scottish legislation compares favourably with the awkwardness of the solution adopted in England, which was to enact another Act dealing with liability to 'persons other than visitors'.⁸⁸ Other points made above about the English Act generally hold good for Scotland also. The *OLSA* covers both the duty and the breach elements of negligence, subject to the limitation stated in s 1(1): the fact that ss 1(1) and 2(1) choose to refer to 'the care' which the occupier is required to show does not mask the fact that s 1(1) states who owes the duty, and to whom, and s 2(1) is a combined statement of duty and standard of care. The Act applies not only to personal injury but also to damage to property on the premises, including the property of persons who have not themselves entered on the premises.⁸⁹

In one important respect, the interpretation of the Act by the Scottish judiciary has given the *OLSA* a much wider reach than its English counterpart. Though both Acts are said to apply in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them,⁹⁰ there is no suggestion that the *OLSA* is limited to occupancy rather than activity duties. This may have something to do with the different history of Scottish occupiers' liability law, which was much more flexible than in England, until the House of Lords planted the English common law categories in alien soil north of the border.⁹¹ On the few occasions on which the Scottish courts have referred to the question of activities, they have generally included

⁸⁵ *OLSA* s 2(1).

⁸⁶ *Ibid* s 2(2).

⁸⁷ See, eg, *M'Glone v British Railways Board* [1966] SC HL 1; *Titchener v British Railways Board* [1983] 1 WLR 1427.

⁸⁸ See *Occupiers' Liability Act 1984* (UK) c 3, s 1.

⁸⁹ *OLSA* s 1(3).

⁹⁰ *Ibid* ss 1(1), 2(1); *1957 OLA* s 1(1). The English Act refers to 'things' rather than 'anything'.

⁹¹ *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358. See David M Walker, *The Law of Delict in Scotland* (W Green & Son Ltd, 2nd ed, 1981) vol 2, 579.

them within the scope of the Act,⁹² but most cases involving activities simply assume that the Act applies without commenting on the matter.⁹³ Likewise, the texts generally make no mention of this issue, which suggests that it is a non-existent problem. Scottish courts are characteristically cautious about reliance on English authorities on questions of occupiers' liability.⁹⁴

3 Canada

As noted above, six of the nine Canadian common law provinces now have occupiers' liability legislation. Alberta, British Columbia, Ontario, Manitoba and Prince Edward Island all legislated between 1973 and 1984, and Nova Scotia followed in 1996.⁹⁵ Most Canadian OLAs expressly state that the rules in the Act apply in place of the rules of the common law.⁹⁶ All cover trespassers, to a greater or lesser extent. The Alberta Act limits liability to trespassers to wilful or reckless misconduct,⁹⁷ whereas Manitoba follows the Scottish pattern of including all entrants.⁹⁸ British Columbia, Ontario, Prince Edward Island and Nova Scotia adopt a middle course by including trespassers but

⁹² See, eg, *Titchener v British Railways Board* [1983] 1 WLR 1427, 1432 (Lord Fraser); *Wallace v Glasgow District Council* 1985 SLT 23; *Cronk v Morrison Construction Ltd* [2003] CSOH 121 (25 April 2003) [18] (Temporary Judge Coutts); *Honeybourne v Burgess* 2006 SLT 585, 588 [14] (Lady Smith). Cf *M'Glone v British Railways Board* [1966] SC HL 1, 15 (Lord Guest), saying that the Act defined the occupier's duty 'in respect of dangers due to the state of the premises', a remark probably explained by the context of the case, where a child trespasser was burned as a result of coming into contact with live wires on a transformer.

⁹³ See, eg, *Hill v Lovett* 1992 SLT 994 (window-cleaner bitten by pugnacious West Highland terriers); *Dunn v Carlin* 2003 SLT 342 (petrol ignited when being decanted from vehicle); *Nicol v Advocate General Scotland* [2003] CSOH 65 (11 March 2003) (car collided with cable of 'fun slide' at racecourse); *Donaldson v Hays Distribution Services Ltd* [2004] CSOH 44 (25 February 2004), affd 2005 SLT 733 (pursuer injured when hit by lorry); *Stewart v Matalan Retail Ltd* [2006] CSOH 167 (20 October 2006) (pursuer injured by child running into her); *Phee v Gordon* [2011] CSOH 181 (4 November 2011), affd 2013 SLT 439 (pursuer hit by golf ball while playing golf).

⁹⁴ See, eg, *Titchener v British Railways Board* 1983 SLT 269, 272 (Lord Hunter): 'as the law of England has taken a somewhat different course from that followed in the Scottish statute I do not consider it advisable or safe to attempt to apply principles derived from English cases in the field of occupiers' liability'.

⁹⁵ See above n 17. There is a useful analysis of each Act in Allen M Linden and Bruce Feldthusen, *Canadian Tort Law* (LexisNexis, 9th ed, 2011) 719–42.

⁹⁶ *Man OLA* s 2; *NS OLA* s 3; *Ont OLA* s 2; *PEI OLA* s 2. *Alta OLA* and *BC OLA* do not contain an express statement to this effect.

⁹⁷ *Alta OLA* s 12.

⁹⁸ *Man OLA* s 3(1).

making an exception for persons committing a criminal act, who are owed a lower duty.⁹⁹ Most Acts also provide that a lower duty is owed to recreational users of certain premises.¹⁰⁰

Like the English and Scottish Acts, the Canadian OLAs state that the occupier owes a duty to entrants on the premises to take such care as in all the circumstances of the case is reasonable to see that the entrant will be reasonably safe whilst on the premises.¹⁰¹ In every case, the language of the Acts refers expressly to the duty of the occupier, and there is no suggestion that they are somehow limited to dealing only with standard of care. Rather than following the English and Scottish example of saying that the person on whom the duty is imposed is the same as at common law, most Acts provide a full definition,¹⁰² but in Manitoba and Nova Scotia the common law still has a role to play.¹⁰³

An important illustration of the comprehensiveness of the Canadian OLAs is that they generally provide that they apply not only to the condition of the premises and to activities on the premises, but also to the conduct of third parties on the premises¹⁰⁴ — giving them a wider scope than either of the United Kingdom equivalents. In the face of such provisions, there is no question of any limitation to occupancy duty, even though there might have been some suggestion of this at common law.¹⁰⁵

⁹⁹ *BC OLA* ss 3(3)–(3.1); *NS OLA* ss 5(1)–(2); *Ont OLA* ss 4(1)–(2); *PEI OLA* ss 4(1)–(2).

¹⁰⁰ *Alta OLA* s 6; *BC OLA* s 3(3.3); *Man OLA* s 3(4.1); *NS OLA* s 6; *Ont OLA* ss 4(3)–(4); *PEI OLA* ss 4(3)–(4). Uniquely, the *NS OLA* sets out factors to be taken into account in determining whether the duty of care has been discharged: s 4(3). For Australian equivalents, see below Part III(B).

¹⁰¹ *Alta OLA* s 5; *BC OLA* s 3(1); *Man OLA* s 3(1); *Ont OLA* s 3(1); *NS OLA* s 4(1); *PEI OLA* s 3(1).

¹⁰² *Alta OLA* s 1(c); *BC OLA* s 1; *Ont OLA* s 1; *PEI OLA* s 1(a). However, note that the definition in the latter two Acts is worded inclusively.

¹⁰³ *Man OLA* ss 1(1), 2; *NS OLA* s 2(a).

¹⁰⁴ *Alta OLA* s 6; *BC OLA* s 3(2); *Man OLA* s 3(2); *NS OLA* s 4(2). In the other provinces, the provisions are limited to conditions and activities and make no mention of the conduct of third parties: *Ont OLA* s 3(2); *PEI OLA* s 3(2).

¹⁰⁵ See Edwin C Harris, 'Occupiers' Liability in Canada' in Allen M Linden (ed), *Studies in Canadian Tort Law* (Butterworths, 1968) 250, 258.

B Australia

1 Introduction

In Australia, as already related, occupiers' liability legislation was not enacted until the 1980s, and then only in three jurisdictions, with a fourth appearing belatedly in 2002. As a result, the law of occupiers' liability in the Australian OLA jurisdictions has been affected by some special factors that are not present in England, Scotland or Canada.

First, about the time the Australian OLAs were being enacted, the High Court began to develop the common law. Deane J, and then the High Court as a whole, held that the common law categories had been absorbed by the ordinary law of negligence.¹⁰⁶ Since then, the High Court has continued to develop the common law in appeals from jurisdictions without occupiers' liability legislation.¹⁰⁷ As a result, there has been a tendency for courts in OLA jurisdictions to look to common law authorities when dealing with duty and breach issues under the legislation. However, in *Neindorf v Junkovic* ('*Neindorf*'),¹⁰⁸ an appeal from South Australia where the plaintiff tripped while walking up the drive of a house where a garage sale was being held, Kirby J issued a timely reminder of the importance of the legislation in OLA jurisdictions. Some of the judges in the court below concentrated on the common law and gave only passing consideration to the occupiers' liability provisions in the *Wrongs Act 1936* (SA).¹⁰⁹ Kirby J said:

This court has repeatedly said in recent times that, where a statute of relevant operation has been enacted, it is the duty of Australian courts to start their analysis of the legal liability of parties affected not with the pre-existing common law but with the statutory prescription. The reason for this requirement is simple. Legislation of a parliament, acting within its constitutional powers, has an authority that displaces the common law to the extent of the

¹⁰⁶ *Hackshaw v Shaw* (1984) 155 CLR 614; *Zaluzna* (1987) 162 CLR 479; see above nn 28–9 and accompanying text.

¹⁰⁷ See above Part I.

¹⁰⁸ (2005) 222 ALR 631.

¹⁰⁹ See *Junkovic v Neindorf* (2004) 89 SASR 572, 588–91 [80]–[84] (Gray J), 574 [1] (Doyle CJ), 580 [46] (Nyland J). The *Wrongs Act 1936* (SA) has now been renamed the *Civil Liability Act 1936* (SA).

statutory provisions. Where parliament has spoken, it is a mistake to start with common law authority.¹¹⁰

Secondly, in Victoria the OLA in its terms confines its effect to amending the standard of care of occupiers, rather than extending to both duty and standard. This limitation is evident both in the operative provisions¹¹¹ and the long title. The long title of the Western Australian Act follows the Victorian example, though the operative provisions are differently drafted. As a result, there has been some suggestion in the case law in Western Australia that the Act only deals with standard of care,¹¹² a controversy not found in the overseas OLAs discussed above. The other Australian OLAs are not drafted in this form. This is a complication that was probably not envisaged when this legislation was drafted.

Thirdly, the Victorian Act was again innovative in incorporating a statutory list of factors to which consideration has to be given in determining whether the duty of care has been discharged.¹¹³ Though this list by and large sets out considerations that would have been taken into account anyway, had this process been left to the common law, it appears that it was thought advisable to have a statutory list because of the likelihood that the issue of whether the defendant was in breach of duty would be determined by a jury,¹¹⁴ since jury trials are still not uncommon in Victoria in personal injury cases. Even though there are no jury trials in the other three Australian OLA jurisdictions, the legislation in those jurisdictions has followed Victoria and incorporates the statutory factors.

Finally, in 2002 and 2003 most Australian states and territories, including the four OLA jurisdictions, adopted statutory statements determining when a defendant is guilty of negligence. As a result, in cases of occupiers' liability there are two overlapping sets of criteria, without any legislative statement of the relationship between them.

¹¹⁰ *Neindorf* (2005) 222 ALR 631, 641 [42] (citations omitted).

¹¹¹ *Wrongs Act 1958* (Vic) s 14B(1).

¹¹² See below Part III(B)(5)(b).

¹¹³ *Wrongs Act 1958* (Vic) s 14B(4).

¹¹⁴ See Victoria, *Parliamentary Debates*, Legislative Council, 8 November 1983, 830 (J H Kennan, Attorney-General). It appears that the model was a Saskatchewan Bill which was never enacted: at 832–3 (J H Kennan, Haddon Storey). Saskatchewan has retained the common law: see above n 17.

These factors have influenced the way in which the OLAs have been interpreted by courts in Victoria, Western Australia, South Australia and the Australian Capital Territory. Drafting differences make it preferable to examine each Act separately. While there are some common problems, case law in each jurisdiction has generally developed in isolation from the others. We look first at Victoria, the first jurisdiction to legislate, then at the Australian Capital Territory because the legislation is very similar to Victoria. We then look at South Australia, and finally at Western Australia where, perhaps surprisingly, there has been more case law, and more controversy, than anywhere else.

2 Victoria

After protracted consideration by the Victorian Chief Justice's Law Reform Committee,¹¹⁵ Victoria in 1983 became the first Australian jurisdiction to enact occupiers' liability legislation. The *Occupiers' Liability Act 1983* (Vic) added a new pt IIA to the *Wrongs Act 1958* (Vic). The main section so added was s 14B, which provides (in part):

14B Liability of occupiers

- (1) The provisions of this Part apply in place of the rules of the common law which before the commencement of the *Occupiers' Liability Act 1983* determined the standard of care that an occupier was required to show towards persons entering on his premises in respect of dangers to them.
- (2) Except as provided by subsection (1) the rules of common law are not affected by this Part with respect to the liability of occupiers to persons entering on their premises.
- (3) 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.

Subsection (4) sets out the circumstances which have to be considered 'in determining whether the duty of care under subsection (3) has been dis-

¹¹⁵ See Victorian Chief Justice's Law Reform Committee, above n 19. The matter was under consideration from 1956 to 1982: Victoria, *Parliamentary Debates*, Legislative Council, 12 October 1983, 437 (J H Kennan, Attorney-General).

charged.¹¹⁶ The long title of the 1983 Act, which does not appear in the *Wrongs Act 1958* (Vic), was: 'An Act relating to the Standard of Care owed by Occupiers and Landlords of Premises to Persons on the Premises, to amend the *Wrongs Act 1958* and for other purposes'. Having achieved its objective, the 1983 Act was eventually repealed.¹¹⁷ The cases on s 14B explore a number of themes.

(a) *Relationship with the Common Law*

In general, the Victorian courts have resisted the temptation to look primarily to common law developments in the field of occupiers' liability rather than starting with the Act. There is an important statement by Neave JA of the Victorian Court of Appeal in *Central Goldfields Shire v Haley*,¹¹⁸ an action against a local authority in respect of an accident on a footpath. Referring to the judgment of Kirby J in *Neindorf*, her Honour said:

Since the appellant was not an occupier of the temporary footpath, it is unnecessary for the purpose of this appeal to define the nature of the duty of care which the appellant would have owed Mrs Haley in that capacity. Had this court been required to determine the duty of care which an occupier owed an entrant onto the occupier's property, I consider that it would have been incorrect for the court to begin its analysis by applying the common law duty of care. The duty of an occupier is governed by the words of s 14B(3) ...¹¹⁹

It is true that there are a few first instance cases where judges seem to have been heavily influenced by common law authorities, and make only passing reference to the statutory provisions.¹²⁰ There are also cases where judges have suggested that nothing turns on the difference between the common law and the Act: Phillips JA expressed this view in *Kocis v S E Dickens Pty Ltd*,¹²¹ where the plaintiff slipped on a pool of disinfectant on the floor of a supermarket, and claimed in the alternative at common law and under the Act. It

¹¹⁶ Further matters were added by the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic) s 3.

¹¹⁷ *Statute Law Revision Act 1995* (Vic) sch 1 s 3(1).

¹¹⁸ (2009) 24 VR 378.

¹¹⁹ *Ibid* 380 [4].

¹²⁰ See, eg, *Brown v Owners Corporation SP021532U* [2013] VSC 126 (21 March 2013) [2]–[4] (Dixon J).

¹²¹ [1998] 3 VR 408, 411.

was common ground that the defendant owed a duty of care and it did not matter whether it arose at common law or under s 14B. Similarly, in *Secretary to the Department of Natural Resources and Energy v Harper*¹²² the parties agreed that the defendant owed a duty of care both at common law and as an occupier under the Act and that the standard of care was the same in both cases. Batt JA, in a judgment with which Tadjell JA and Callaway JA agreed, asked whether the standard of care of an occupier at common law could coexist with that enacted by s 14B(3), but said it was unnecessary to decide the question because it was not suggested that the standard of care at common law was any higher.¹²³ Such statements are understandable given that these questions were not in issue. However, it is suggested that the clear guidance given by Neave JA provides the most helpful approach.¹²⁴

(b) *The Standard–Duty Issue*

As already noted, problems not confined to Victoria have resulted from the statement in the *Wrongs Act 1958* (Vic) s 14B(1) that pt IIA applies in place of the rules of the common law which formerly determined the *standard* of care of the occupier. The long title of the 1983 Act likewise noted that it was an Act relating to the standard of care owed by occupiers. However, s 14B(3) says that the occupier owes a *duty* to take such care as in all the circumstances of the case is reasonable, and s 14B(4) sets out the matters which must be considered in determining whether the *duty* of care under subsection (3) has been discharged. There is another reference to duty in s 14C, dealing with the liability of the Crown.

Despite the inconsistencies in the statutory wording, the Victorian Court of Appeal has consistently accepted that s 14B is not limited to the standard of care of occupiers, but also states the duty imposed on them.¹²⁵ The view of Neave JA in *Central Goldfields Shire v Haley* is the most recent authoritative

¹²² (2000) 1 VR 133.

¹²³ *Ibid* 145 [39].

¹²⁴ Neave JA's statement was applied in *South East Water Ltd v Transpacific Cleanaway Pty Ltd* (2010) 27 VR 387, 409 [36] (Cavanough J).

¹²⁵ It appears to be accepted that pt IIA does not create a statutory duty but redefines the occupier's common law duty: see, eg, *Victorian Workcover Authority v Jones Lang LaSalle (Vic) Pty Ltd* [2012] VSC 412 (12 September 2012) [5] (Beach J).

statement of this principle, but there has been a long line of similar dicta in the Full Court of the Supreme Court of Victoria¹²⁶ and the Court of Appeal.¹²⁷

(c) *The Activity–Static Conditions Issue*

The question whether the occupiers' liability legislation covers injuries due to activities on the premises as well as injuries caused by their defective condition, which has caused so much controversy in England, has not really been an issue in Victoria. The scope of the Act is quite clear: the *Wrongs Act 1958* (Vic) s 14B(3) covers injury or damage 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'. Most cases involve injuries due to static conditions and so occasion no problem. Even in exceptional cases which involve activities, nothing is generally made of the issue. One of the few references occurs in *Agresta v Agresta*,¹²⁸ where the plaintiff, who was assisting his brother to dig post holes for an extension to his verandah using a machine hired for the purpose, was injured when the machine unexpectedly swung round and hit him. The Court of Appeal confirmed the trial judge's finding that there had been no negligence. The trial judge had commented that none of the particulars alleged that the plaintiff's injuries were due to the state of the premises or things done or omitted to be done in relation to the state of the premises. Counsel for the plaintiff contended that the fact that the plaintiff was injured as a result of the activity of working on the premises brought the case within the Act, but Buchanan JA said that s 14B(3) did not encompass an operation such as that on which the plaintiff was engaged.¹²⁹ Clearly this was something being done, but not in relation to the state of the premises. Likewise, in *Downunder Rock Cafe Pty Ltd v Roberts*, the plaintiff was injured in a nightclub when another patron, during the playing of a Van Halen song called 'Jump', obeyed the band's instruction to 'go ahead and jump' and leapt in the air, grabbing a

¹²⁶ *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408, 409 (Ormiston JA); *Mountain Cattlemen's Association of Victoria Inc v Barron* [1998] 3 VR 302, 305 (Brooking JA).

¹²⁷ *Secretary to the Department of Natural Resources and Energy v Harper* (2000) 1 VR 133, 144–5 [39] (Batt JA); *Agresta v Agresta* [2002] VSCA 23 (14 March 2002) [29] (Buchanan JA); *Cehner v Borg* [2003] VSCA 72 (12 June 2003) [10] (Chernov JA); *Kingswood Golf Club Ltd v Smith* [2005] VSCA 224 (16 September 2005) [20] (Callaway JA); *Raciti v Wadren Pty Ltd* (2006) Aust Torts Reports ¶81-848, 68 638 [4] (Chernov JA), 68 645 [45] (Ashley JA).

¹²⁸ [2002] VSCA 23 (14 March 2002).

¹²⁹ *Ibid* [29].

lighting grid and bringing it down on the plaintiff's head.¹³⁰ This was dealt with as a case of general negligence, and the judge accepted a submission that there could be no case under s 14B(3). This was clearly correct, since the activity was not in relation to the state of the premises.¹³¹

3 *Australian Capital Territory*

The Australian Capital Territory occupiers' liability legislation closely resembles the Victorian Act, though it was enacted much later. Section 168(1) of the *Civil Law (Wrongs) Act 2002* (ACT)¹³² provides that:

- (1) An occupier of premises owes a duty to take all care that is reasonable in the circumstances to ensure that anyone on the premises does not suffer injury or damage because of—
 - (a) the state of the premises; or
 - (b) things done or omitted to be done about the state of the premises.

Section 168(2) reproduces the Victorian provision setting out the matters to which consideration must be given in deciding whether the duty of care has been discharged.¹³³ Section 168(4) says that the section replaces the common law rules about the standard of care an occupier of premises must show to people entering on the premises in relation to any dangers to them.

Prior to 1987, occupiers' liability legislation was under discussion in the Australian Capital Territory, but these plans were shelved following the decision of the High Court in *Zaluzna*.¹³⁴ From 1987 onwards the Australian Capital Territory courts applied mainstream common law principles in

¹³⁰ (1998) Aust Torts Reports ¶81-481, 65 180 (Charles JA).

¹³¹ See also *Victorian Workcover Authority v Victorian Institute of Forensic Mental Health* [2009] VCC 0827 (3 July 2009) [56] (Judge O'Neill). It seems that *O'Hare v Garvey* [2009] VCC 1473 (14 September 2009), where injury caused by tripping over a dog was dealt with under s 14B, must be explained on the basis that the dog lying on a dark rug in a darkened hallway was part of the state of the premises.

¹³² Originally numbered s 101, renumbered by the *Civil Law (Wrongs) Amendment Act 2003* (No 2) (ACT) s 55.

¹³³ The extra items added to the Victorian provision in 2002 (see above n 116) are not reproduced in the Australian Capital Territory provision.

¹³⁴ *Zaluzna* was an appeal from the Victorian Full Court: the accident occurred in 1979 and so the Victorian OLA was not applicable.

occupiers' liability cases.¹³⁵ However, s 168 was unexpectedly inserted into the *Civil Law (Wrongs) Act 2002* (ACT), which aimed to combine implementing the recommendations of the Ipp Report with codifying the Australian Capital Territory statutory provisions on tort. The Explanatory Memorandum said that the purpose of the provision was to remove the emphasis on categories and replace it with general principles, and so it abolished the 'old law relating to categories and substituted the general law of negligence'.¹³⁶ The Explanatory Memorandum noted that the High Court had reached the same position in *Zaluzna* (without appreciating that the High Court decision had already made the necessary change in the law of the Australian Capital Territory without any need for legislation). The Explanatory Memorandum was referred to by Besanko J in *Doolan v Belgravia Health and Leisure Group Pty Ltd*,¹³⁷ who noted that s 168 was generally similar to the South Australian legislation considered by the High Court in *Neindorf*.

The reform has resulted in more than a little confusion. In at least one case where the injury occurred after the legislation came into force, no mention was made of s 168.¹³⁸ Other cases apply s 168, but a major issue has been the relationship between this section and the statutory test of breach of duty and the other general principles of negligence set out in ch 4 of the *Civil Law (Wrongs) Act 2002* (ACT). In *Morales v Commissioner for Social Housing* ('*Morales*'), Master Harper said it was unclear whether the legislature intended ch 4 to apply to claims against an occupier, and a factor against its application was that s 168(3) specified particular provisions of the Act which did apply (not including ch 4).¹³⁹ However, in his view it was not necessary to determine this question in order to decide the case. This issue is pursued in Part Two of this article.¹⁴⁰

¹³⁵ See, eg, *O'Meara v Dominican Fathers* (2003) 153 ACTR 1; see also *Hauser v Commissioner for Social Housing* [2013] ACTSC 104 (13 June 2013) [37] (Master Harper).

¹³⁶ Explanatory Memorandum, *Civil Law (Wrongs) Bill 2002* (ACT) pt 8.1.

¹³⁷ [2011] ACTSC 202 (16 December 2011) [48].

¹³⁸ *Jennings v Westfield Shopping Centre Management Co (ACT) Pty Ltd* [2010] ACTSC 11 (19 February 2010).

¹³⁹ [2012] ACTSC 117 (13 July 2012) [21].

¹⁴⁰ See also *Doolan v Belgravia Health and Leisure Group Pty Ltd* [2011] ACTSC 202 (16 December 2011) [48] (Besanko J); *Brozinic v Iss Facility Services Australia Ltd* [2014] ACTSC 8 (7 February 2014) [52] (Master Mossop).

Issues which have arisen in Victoria have also occurred in the Australian Capital Territory jurisprudence. Section 168(4), like its Victorian equivalent, says that the section replaces the common law rules about the *standard* of care of the occupier. In *Morales*, Master Harper quoted this subsection but said in the very next paragraph of his judgment that '[b]y virtue of s 168(1), an occupier owes a *duty* to take all care that is reasonable in the circumstances'.¹⁴¹ The same diversity of language is evident in another of his judgments.¹⁴² There is at least one case which tests the limitation in s 168(1) that it applies to injury or damage because of the state of the premises or things done or omitted to be done about the state of the premises. *Harris v Commissioner for Social Housing*¹⁴³ was a claim by a tenant against the defendant as occupier for injury resulting from the disruptive behaviour of another tenant. Master Mossop said this case raised the question whether 'state of the premises' extended beyond the physical condition of the premises to include the behaviour of another tenant in the same complex, and if it did not, whether the consequence was that the matter was left to the common law.¹⁴⁴ As in many other such cases, the judge was able to avoid answering this question because '[t]he test applied under s 168 and under the common law is, in substance, the same'.¹⁴⁵

Master Mossop examined the Explanatory Memorandum for the Civil Law (Wrongs) Bill 2002 (ACT) and concluded that its intention was to make the class of entrant irrelevant for the purpose of assessing the standard of care of an occupier.¹⁴⁶ He noted that the High Court had reached the same position in *Zaluzna* in 1987, and commented:

Having regard to the fact that *Zaluzna* had represented the common law of Australia since 1987 it is not at all clear what the legislature in 2002 was intending to achieve by this provision. However it can be seen that the provision, in so

¹⁴¹ [2012] ACTSC 117 (13 July 2012), [17]–[18] (emphasis added).

¹⁴² *Bailey v Lend Lease Funds Management Ltd* [2013] ACTSC 56 (5 April 2013) [67].

¹⁴³ (2013) 8 ACTLR 98.

¹⁴⁴ *Ibid* 128–9 [143].

¹⁴⁵ *Ibid* 129 [146].

¹⁴⁶ *Ibid* 129 [144].

far as it achieved anything at all, was not intended to limit in any significant way the rights of entrants against occupiers.¹⁴⁷

It is hard to disagree with the view that the 2002 Australian Capital Territory legislation achieved very little.

4 South Australia

South Australia legislated on occupiers' liability in 1987, adding pt IV to what was then the *Wrongs Act 1936* (SA). This Act was renamed the '*Civil Liability Act*' in 2003 when the reforms recommended by the Ipp Report were implemented in South Australia, and the sections were renumbered. Section 20,¹⁴⁸ headed '[o]ccupier's duty of care', provides:

- (1) Subject to this Part, the liability of the occupier of premises for injury, damage or loss attributable to the dangerous state or condition of the premises shall be determined in accordance with the principles of the law of negligence.

Section 20(2) sets out the matters that a court must take into account in determining the standard of care to be exercised by the occupier. These are a little more elaborate than the original Victorian draft which was copied in the Australian Capital Territory (and Western Australia). Section 20(3) emphasises that the 'fact that the occupier has not taken any measures to eliminate, reduce or warn against' the danger does not necessarily show a failure to exercise a reasonable standard of care. There is a specific limitation of liability to trespassers: under s 20(6) the occupier owes no duty of care to trespassers unless 'the presence of trespassers, and their consequent exposure to danger, were reasonably foreseeable', and 'the nature or extent of the danger was such that measures which were not in fact taken should have been taken for their protection'.¹⁴⁹ Part 4 operates to the exclusion of any other principles on which liability for injury, damage or loss attributable to the state or condition of premises would be determined in tort,¹⁵⁰ except that it does not apply to a case where an occupier causes a dangerous state or condition of

¹⁴⁷ Ibid 129 [145].

¹⁴⁸ Formerly s 17C of the *Wrongs Act 1936* (SA).

¹⁴⁹ See generally *Diletto v Strata Corporation 10135 Inc* (Unreported, Supreme Court of South Australia, Williams J, 21 October 1995).

¹⁵⁰ *Civil Liability Act 1936* (SA) s 22(1).

premises, or allows premises to fall into a dangerous state or condition, intending to cause injury, damage or loss to another.¹⁵¹ The section clearly deals with issues of both duty and standard of care: that it regulates duty as well as standard is confirmed by the section heading and various references in the section itself.¹⁵²

The Bill inserting this legislation into the *Wrongs Act 1936* (SA) was introduced into the South Australian Legislative Council on 19 March 1987,¹⁵³ nine days after the High Court had handed down its decision in *Zaluzna* — though this case is not mentioned in the second reading speech and there is no suggestion anywhere in the debates on the Bill that Parliament was aware of this decision. However, the drafting of the legislation is more satisfactory in many respects than its equivalents elsewhere, since instead of setting out the obligation to be imposed on occupiers (as recommended by the South Australian Law Reform Committee 14 years earlier),¹⁵⁴ it simply says that the occupier's liability shall be determined in accordance with the principles of negligence.

There is thus no difference between the law applicable to the occupiers' liability for injury attributable to the dangerous state or condition of the premises by virtue of s 20(1) and the law applicable to the occupiers' liability for injury caused in any other way under general negligence principles — except for the need to consider the statutory factors in determining the standard of care in the former instance. Given that *Zaluzna* had ruled that occupiers' liability was simply an application of ordinary negligence, it was perhaps understandable that South Australian courts might wish to bypass this bifurcation of the law and simply apply ordinary negligence; this is what they did in *Benton v Tea Tree Plaza Nominees Pty Ltd*.¹⁵⁵ This was a clear case of injury due to the state or condition of premises (the plaintiff tripped over an unusually high concrete barrier in a car park) but there was no mention of the legislation.¹⁵⁶ However, the legislation

¹⁵¹ *Ibid* s 22(2).

¹⁵² See, eg, *ibid* s 20(4) (occupier's duty may be reduced or excluded by contract), s 20(6) (limited duty to trespassers).

¹⁵³ South Australia, *Parliamentary Debates*, Legislative Council, 19 March 1987, 3531 (C J Sumner, Attorney-General). It came into operation on 5 July 1987.

¹⁵⁴ South Australian Law Reform Committee, *Occupiers' Liability*, Report No 24 (1973).

¹⁵⁵ (1995) 64 SASR 494, 498 (Bollen J), 504 (Duggan J), 511 (Lander J).

¹⁵⁶ See also *Wilbe v City of Munno Para* [2002] SASC 425 (20 December 2002).

applies to such cases in place of the common law,¹⁵⁷ and so it is the court's duty to begin with the relevant statutory provisions, as Kirby J emphasised in the High Court in *Neindorf*, which was a South Australian appeal. Since the statute directs the courts to apply the law of negligence, there is no problem in referring to *Zaluzna* and other common law authorities.¹⁵⁸

Confining the statutory provisions to the dangerous state or condition of the premises eliminates the controversy experienced in England and elsewhere about whether the legislation applies to activities. In several cases, courts have said expressly that in cases where the loss is not attributable to the dangerous state or condition of the premises, the legislation is not relevant. In *Glenmont Investments Pty Ltd v O'Loughlin [No 2]*, for example, a large mechanical dinosaur on exhibition at the Royal Adelaide Show caught fire while being dismantled, due to the negligence of one of the defendants who was using oxyacetylene cutting equipment.¹⁵⁹ The Full Court of the Supreme Court of South Australia said that the legislation had to be put to one side because it dealt with liability for injury, damage or loss attributable to the dangerous state or condition of the premises, and the plaintiff's loss in this case was not attributable to any of these things.¹⁶⁰ One case where the proper classification of the facts made a difference was *Rabbitt v Roberts*,¹⁶¹ where a one-year-old child being cared for at a day centre was negligently supervised and allowed to fall into a dam. The issue was whether the defendant could claim on his insurance policy, which only covered his liability as owner or occupier. The Full Court of the Supreme Court of South Australia confirmed the trial judge's decision that the defend-

¹⁵⁷ *Civil Liability Act 1936* (SA) s 22(1). See *Errington v Target Australia Pty Ltd* (1995) 65 SASR 378, 381–2 (Williams J).

¹⁵⁸ See, eg, *Spargo v Haden Engineering Pty Ltd* (1993) 60 SASR 39; *Cutts v O'Neil* (1998) 72 SASR 56; *Junkovic v Neindorf* (2004) 89 SASR 572; *Ragnelli v David Jones (Adelaide) Pty Ltd* (2004) 90 SASR 233.

¹⁵⁹ (2000) 79 SASR 185, 266 [359] (Doyle CJ, Nyland and Martin JJ). See also *Nguyen v Hiotis* (2000) 76 SASR 522 (threats by security guards at fashion parade); *Akula Pty Ltd v CSX World Terminals Pty Ltd* [2006] SASC 67 (16 March 2006) (semitrailer parked overnight on unsealed road, goods damaged as result of trailer sinking into soft surface); *McVicar v S & J White Pty Ltd* (2007) 97 SASR 160 (cleaner cleaning commercial cooking range upset bucket of petrol, having failed to turn off pilot light).

¹⁶⁰ *Glenmont Investments Pty Ltd v O'Loughlin [No 2]* (2000) 79 SASR 185, 266 [359] (Doyle CJ, Nyland and Martin JJ).

¹⁶¹ (1996) 67 SASR 358.

ant could not have been held liable in this capacity, because the premises were not in a dangerous state and he was not liable by reason of occupation or control of the premises.¹⁶² The Court said that though the defendant had been sued in negligence, it was necessary to show that he could have been sued under a relevant law as to occupiers' liability, one where it would have been a necessary averment that he was the occupier of the premises.¹⁶³ This was not possible, because the plaintiff could not have succeeded in an action under the predecessor of the *Civil Liability Act 1936* (SA) s 20.¹⁶⁴

5 *Western Australia*

Western Australia, like Victoria, anticipated the reform of the common law brought about by *Zaluzna*.¹⁶⁵ The WA OLA, which commenced on 25 November 1985, was based on the United Kingdom legislation but the key provisions used the Scottish Act,¹⁶⁶ rather than the English Act, as a model.¹⁶⁷

4 Application of sections 5 to 7

- (1) Sections 5 to 7 shall have effect, in place of the rules of the common law, for the purpose of determining the care which an occupier of premises is required, by reason of the occupation or control of the premises, to show towards a person entering on the premises in respect of dangers —
- (a) to that person; or

¹⁶² Ibid 364 (Cox J), 364 (Matheson J), 365 (Duggan J).

¹⁶³ Ibid 362 (Cox J).

¹⁶⁴ Ibid 366.

¹⁶⁵ The Occupiers' Liability Bill 1984 (WA) was introduced into the Legislative Council on 21 November 1984, three weeks before the publication of Deane J's judgment in *Hackshaw v Shaw* (1984) 155 CLR 614: Western Australia, *Parliamentary Debates*, Legislative Council, 21 November 1984, 4368 (J M Berinson, Attorney-General). There is no reference to this judgment in subsequent debates on the Bill.

¹⁶⁶ OLSA ss 1(1)–(2), 2(1).

¹⁶⁷ The Bill was drafted by the Crown Solicitor with some assistance from the Law Reform Commission of Western Australia, but there was no formal reference to, or report by, the Commission. The aim was to adopt the best provisions from other jurisdictions and weave them into a coherent whole, rather than starting afresh. The first-named author, who at the time was the Executive Officer and Director of Research of the Commission, represented the Commission in this initiative. See Handford, 'Occupiers' Liability Reform', above n 20, 186–7; Peter Handford, 'Through a Glass Door Darkly: *Jones v Bartlett* in the High Court' (2001) 30 *University of Western Australia Law Review* 75, 85–7.

- (b) to any property brought onto the premises by, and remaining in the control of, that person, whether it is owned by that person or by any other person,
- which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier of premises is by law responsible.
- (2) Nothing in sections 5 to 7 shall be taken to alter the rules of the common law which determine the person on whom, in relation to any premises, a duty to show the care referred to in subsection (1) towards a person entering those premises is incumbent.

5 Duty of care of occupier

- (1) Subject to subsections (2) and (3) the care which an occupier of premises is required by reason of the occupation or control of the premises to show towards a person entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier of premises is by law responsible shall ... be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

Sections 5(2) and 5(3) deviate from the Scottish model to ensure that a lower duty is owed to certain categories of trespasser. Under s 5(2), '[t]he duty of care referred to in subsection (1) does not apply in respect of risks willingly assumed' by the entrant, and in such a case the occupier owes a duty 'not to create a danger with the deliberate intent of doing harm ... and not to act with reckless disregard of the presence of the [entrant]'. Under s 5(3), persons on premises with the intention of committing a criminal offence punishable with imprisonment are owed only this lower duty.¹⁶⁸ Section 5(4) reproduces the factors to be taken into account in determining whether the occupier has discharged the duty of care found in the Victorian Act.¹⁶⁹ The long title¹⁷⁰ was also reproduced from the Victorian Act.

¹⁶⁸ The model for these subsections was the *Occupiers' Liability Act*, RSO 1980, c 14; now *Ont OLA* ss 4(1)–(2). *WA OLA* s 5(3) is now subject to the *Offenders (Legal Action) Act 2000* (WA) s 5, which gives a complete defence to a defendant who can show that injury or loss was suffered in the course of criminal conduct.

¹⁶⁹ Other provisions of the *WA OLA* deal with the negligence of independent contractors: at s 6; exclusion or restriction by contract: at s 7; the preservation of higher obligations: at s 8; the

(a) *Occupancy and Activity Duties*

At the time when the Act was passed, it seemed likely that the Western Australian courts would adopt the approach found in the English authorities and confine the Act to occupancy duties, leaving damage due to activities on the premises to the common law.¹⁷¹ It was assumed that this would be the effect of *WA OLA* s 5(1), which referred to the duty of care which the occupier was required to show ‘by reason of the occupation or control of the premises’, despite the reference in s 4(1) to ‘dangers ... due to the state of the premises or to anything done or omitted to be done on them’, because this was the way in which the equivalent English provisions had been interpreted.¹⁷² It is clear that the pre-1985 Western Australian case law had adopted the occupancy–activity distinction, so confining the common law categories to cases where damage resulted from the static condition of the premises.¹⁷³

However, the scope of the Act has not been restricted in this way, and the issue has not proved at all controversial, in contrast to the English experience. This could perhaps be ascribed to the adoption of Scottish rather than English drafting models, because there has been no attempt to confine the Scottish provisions to static conditions, and there is a similar lack of controversy in the Scottish jurisprudence,¹⁷⁴ but since there is no reference to Scottish authorities in any Western Australian case this must remain pure speculation. There are very few Western Australian decisions in which the judges have discussed the distinction between occupancy and activity duties.¹⁷⁵ Most general statements

duty of care of landlords: at s 9; and the application of the contributory negligence legislation: at s 10. Some of these provisions are not found in the other Australian OLAs.

¹⁷⁰ ‘An Act prescribing the standard of care owed by occupiers and landlords of premises to persons and property on the premises’: *ibid*.

¹⁷¹ See Handford, ‘Occupiers’ Liability Reform’, above n 20, 213–15.

¹⁷² *1957 OLA* ss 1(1)–(2); see above nn 77–80 and accompanying text.

¹⁷³ See *Bylsma v Kitson* (1984) Aust Torts Reports ¶80-679, 68 881 (Brinsden J); *Blackman v M & D J Bossie Pty Ltd* [1968] WAR 97. See also *Nagle v Rottneest Island Authority* (1993) 177 CLR 423, 435, an appeal from Western Australia, where Brennan J (dissenting) said that Deane J’s approach in *Hackshaw v Shaw* (1984) 155 CLR 614, 662–3 was much easier to apply in cases where damage resulted from an act done rather than from occupation of premises.

¹⁷⁴ See above nn 90–4 and accompanying text.

¹⁷⁵ *Eyfe v Pioneer Concrete (WA) Pty Ltd* (Unreported, Supreme Court of Western Australia, Full Court, Pidgeon, Franklyn and Owen JJ, 15 April 1994) is an exception. Pidgeon J referred to the distinction, and said that there was little practical difference between the Act and the common law in respect of activity duties, but potentially some difference between occupancy

about the scope of the Act suggest that the duty under the Act is owed both in relation to the condition of the premises and things that happen on them.¹⁷⁶ In the very few cases in which damage has resulted from some activity on the premises, rather than their condition, and the court has been conscious of the issue, the Act has usually been applied.¹⁷⁷ In cases in which the issue has not been adverted to, the outcomes have varied.¹⁷⁸

(b) *Relationship between the Act and the Common Law*

The most controversial issue that has arisen in the Western Australian case law on the WA OLA is one that could not have been foreseen at the time it was enacted: the extent to which, in the words of Pullin JA, it reflects, supplants or modifies the common law.¹⁷⁹ As already noted, the Act was based on the similar legislation in England and Scotland, and it stated that its main

duties: at 7. On the facts, it was not necessary to decide the issue. In *Oates v Butterly* [2000] WASCA 406 (20 December 2000) (plaintiff kicked by pony in caravan park), the trial judge referred to the distinction and said that the injury was the result of an activity being carried out on the premises. The Full Court said at [18]–[20] that there was no need to review this issue, and decided the case on general negligence principles.

¹⁷⁶ See, eg, *Kschammer v R W Piper & Sons Pty Ltd* [2003] WASCA 298 (3 December 2003) [54] (Malcolm CJ):

By s 5(1) of the Act, ANI owed to persons entering on the premises, in respect of dangers which were due to the state of the premises, or anything on the premises and for which ANI was responsible, a duty to take such care as, in all the circumstances of the case was reasonable, to see that a person would not suffer injury or damage by reason of any such danger.

See also *Tonich v Macaw Nominees Pty Ltd* (Unreported, Supreme Court of Western Australia, Full Court, Malcolm CJ, Ipp and Anderson JJ, 11 March 1994) 10 (Anderson J): ‘Since the *Occupiers’ Liability Act 1985* (WA) was passed, there is no need to consider whether in the field of occupiers’ liability there are concurrent general and special duties’; *Woods v Multi-Sport Holdings Pty Ltd* [2000] WASCA 45 (1 March 2000) [18] (Murray J).

¹⁷⁷ See, eg, *Jefferies v Perkins* [2012] WADC 140 (21 September 2012) (plaintiff injured when sick horse fell on him).

¹⁷⁸ See, eg, *Gibbings v Harris* (1995) 15 SR (WA) 1 (plaintiff injured by truck at Bindoon Rock Festival, Act applied); *Mounsey v Orange Grove Bricks Pty Ltd* (1996) Aust Torts Reports ¶81-392 (plaintiff struck in chest by hook and hammerlock, common law applied); *Edith Cowan University v Czatoryko* [2002] WASCA 334 (9 December 2002) (‘Czatoryko’) (plaintiff fell off back of truck, thinking hoist had been raised; common law applied), revd (2005) 79 ALJR 839 without reference to this issue; *Snelgar v Westralia Airports Corporation Pty Ltd* (2006) Aust Torts Reports ¶81-854 (plaintiff injured by small child pushing trolley, common law applied). The WA OLA does not apply where the injury is caused by the act of a third party: *Thompson v Restoration Inc* [2001] WADC 278 (14 December 2001).

¹⁷⁹ *Department of Housing and Works v Smith [No 2]* (2010) 41 WAR 217, 223 [20].

provisions were to have effect in place of the rules of the common law.¹⁸⁰ It was assumed that the common law had no continuing role, in the same way that in England and Scotland common law development had come to a halt once the Acts had been passed.¹⁸¹

All this underestimated the creative power of the High Court of Australia. Inspired by a landmark judgment of Deane J, the High Court in *Zaluzna* abolished the common law categories and held that general negligence principles were to be applied to questions of occupiers' liability. The post-*Zaluzna* case law now dominates this area in the four Australian jurisdictions which never enacted occupiers' liability legislation. The courts in Western Australia have had to ask themselves to what extent all this is relevant when considering the interpretation of the *WA OLA*. The issue has been complicated by the fact that the long title of the Act followed Victoria in describing it as an Act prescribing the *standard* of care owed by occupiers. Did this mean that the Act said nothing about duty, leaving it to the common law?

The first hint of a problem occurred in *Westralian Caterers Pty Ltd v Eastment Ltd* ('*Eastment*')¹⁸² in 1992. Following a claim for workers' compensation, the employer claimed an indemnity from the occupier of the premises where the accident occurred. The third party notice alleged negligence, and by later amendment asserted that the respondent was an occupier under the Act. The issue was whether the claim satisfied the requirements of the *Workers Compensation and Rehabilitation Act 1981* (WA) s 93, which was restricted to 'negligence': it was argued by the occupier that the claim under the Act was a claim for breach of statutory duty. The Full Court of the Supreme Court of Western Australia held that this was not correct. Malcolm CJ (Franklyn J and Murray J agreeing) referred to the purpose of the Act as stated in the long title and said that the purpose of the Act was to achieve by statute what the High Court had achieved by the development of the common law:

The statutory provisions did not create a new cause of action for breach of statutory duty. What they did was to replace the former common law rules regulat-

¹⁸⁰ *WA OLA* s 4(1).

¹⁸¹ In areas covered by the legislation. In England, where the *1957 OLA* did not originally cover trespassers, common law development continued until the legislation was extended to trespassers by the *Occupiers' Liability Act 1984* (UK): *British Railways Board v Herrington* [1972] AC 877.

¹⁸² (1992) 8 WAR 139.

ing the standard of care owed by occupiers to persons entering the premises in given situations, by a single standard of care in terms of the general duty of care referred to in *Donoghue v Stevenson*.

In other words, the statute did no more than reform the content of the duty of care at common law in the case of occupiers for the purpose of the common law action for negligence.¹⁸³

Shortly afterwards Murray J, one of the concurring judges, adopted a similar view in *Bryant v Fawdon Pty Ltd* ('*Bryant*'),¹⁸⁴ where the plaintiff, late at night, climbed over a gate at the rear of the defendant's premises to use the toilet and was injured when an old concrete cistern (not secured in any way, but merely resting on wooden beams) fell on her. The trial judge, applying ss 5(1) and 5(4) of the Act, had held that the defendant was negligent but the claim failed due to inability to prove causation. On appeal, Murray J said that the judge erred in proceeding straight to the question of standard of care without investigating the issue of duty. The only role of the Act was to reform the law relating to standard of care, as s 4 and the long title confirmed.¹⁸⁵ The law as to duty of care had been settled by the High Court in *Zaluzna*. On the facts as found by the trial judge, the defendant owed no duty of care. White J, who concurred in this conclusion, discussed the duty issue purely in terms of the High Court decision in *Zaluzna*.¹⁸⁶

However, a differently constituted Full Court took a very different view of the Act in *Tonich v Macaw Nominees Pty Ltd* ('*Tonich*'), where a plaintiff wheeling a barrow laden with boxes down a ramp at the Metropolitan Markets slipped and suffered injury.¹⁸⁷ The Full Court held that the plaintiff had failed to prove there was discarded fruit or other refuse on the ramp. Anderson J canvassed the question whether after the Act there was any room for a general duty of care running concurrently with the special duty under the Act, and said:

¹⁸³ Ibid 146 (citations omitted).

¹⁸⁴ (1993) Aust Torts Reports ¶81-204.

¹⁸⁵ Ibid 62 004–6.

¹⁸⁶ Ibid 62 011–12. Wallwork J, who dissented, discussed the standard of care provisions of the WA OLA and the High Court decision in *Zaluzna* without clearly distinguishing the roles played by each: at 62 000–1.

¹⁸⁷ (Unreported, Supreme Court of Western Australia, Full Court, Malcolm CJ, Ipp and Anderson JJ, 11 March 1994) 13 (Anderson JJ).

In my opinion the *Occupiers' Liability Act* leaves no room for the operation of the doctrines of the common law as regards the duty of care that is owed by an occupier to an entrant. It is no longer the common law that imposes the duty but the statute and the nature and extent of the duty is defined by the statute. Insofar as para6 of the statement of claim seeks to plead a separate cause of action based upon common law principles ... it is misconceived and discloses no cause of action.¹⁸⁸

Malcolm CJ and Ipp J agreed.

By 1994, therefore, there were two different lines of authority — with inconsistencies in the views adopted by Malcolm CJ. For the next 13 years, nothing was done to resolve these issues. Plaintiffs continued to plead separate causes of action in negligence and under the OLA, and the Full Court (which in 2004 became the Court of Appeal) did nothing to impose any order on this branch of the law until *Homestyle Pty Ltd v Perrozzi* ('Perrozzi') in 2007.¹⁸⁹ In that case, Buss JA called attention to the divergent approach of the early decisions and a long line of later cases which had permitted alternative claims but done nothing to solve the problem.¹⁹⁰ Though it was unnecessary in that case to determine the proper relationship between the Act and the common law (because the parties and the trial judge had collectively decided to ignore the Act and determine the case on common law principles), '[i]t is an issue which will, no doubt, require consideration and resolution in an appropriate case.'¹⁹¹ In subsequent cases Buss JA and others have continued to draw attention to the divergences in the case law,¹⁹² but so far there has not been a

¹⁸⁸ Ibid 13.

¹⁸⁹ (2007) 33 WAR 209.

¹⁹⁰ Ibid 218–19 [23]–[29], citing: *Coatz v WestCourt Ltd* [2003] WASCA 49 (21 March 2003) [2] (Murray J); *Kschammer v R W Piper & Sons Pty Ltd* [2003] WASCA 298 (3 December 2003) [54] (Malcolm CJ); *Uzabeaga v Town of Cottesloe* (2004) Aust Torts Reports ¶81-739, 65 628 [14] (Murray ACJ); *Howells v Murray River North Pty Ltd* [2004] WASCA 276 (26 November 2004) [25] (Malcolm CJ); *Geroheev Pty Ltd v Wheare* [2004] WASCA 206 (14 September 2004) [51] (McLure J); *Town of Mosman Park v Tait* (2005) 141 LGERA 171, 181 [39] (McLure JA). Buss JA pointed out that in none of these cases had *Bryant and Tonich* been cited: at 219 [29].

¹⁹¹ *Perrozzi* (2007) 33 WAR 209, 219 [30] (Buss JA).

¹⁹² See, eg, *Watch Tower Bible Society and Tract Society of Australia v Sahas* (2008) 36 WAR 234, 237 [9]–[11] (Pullin JA), 242–3 [36]–[37] (E M Heenan AJA); *Department of Housing and Works v Smith [No 2]* (2010) 41 WAR 217, 223 [19]–[20] (Pullin JA), 230 [62]–[63] (Buss JA). See also *Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 3]* [2009] WASC 52 (9 March

case in which the matter has required resolution: sometimes the issue was not argued, and sometimes it was agreed that it would make no difference to the result of the case. In *Town of Port Hedland v Hodder*, Martin CJ, referring to the relationship between the common law and the OLA, and also to the CLA in Western Australia,¹⁹³ complained that much tort litigation in Western Australia was being conducted as if the two statutes had never been enacted, on the basis that applying the legislation would make no material difference.¹⁹⁴ Important issues with respect to the interrelationship between the common law and the legislative provisions, and between the two statutes, thus remain unresolved. We hope to provide such a resolution.

It appears that there are three lines of cases:

- 1 those in which it is simply assumed that the common law claim and the claim under the OLA exist side by side;
- 2 the *Eastment* and *Bryant* view which suggests that the Act merely reforms the standard of care, leaving duty to the common law; and
- 3 the *Tonich* view which suggests that the Act covers the field, leaving no room for a concurrent common law duty.

We will argue that one particular version of the third view is the correct approach.

(c) *The First Approach: Concurrent Claims at Common Law and under the Act*

In practically all the Western Australian cases, plaintiffs have pleaded concurrent claims in common law negligence and under the *WA OLA*,¹⁹⁵ and in

2009) [709] (E M Heenan J); *Shire of Gingin v Coombe* (2009) 169 LGERA 236, 242 [23] (Martin CJ), 261 [113] (McLure JA); *Shire of Manjimup v Cheetham* [2010] WASCA 225 (29 November 2010) [13] (Buss JA).

¹⁹³ Dealt with in Part Two of this article.

¹⁹⁴ *Town of Port Hedland v Hodder [No 2]* (2012) 43 WAR 383, 396 [47], as quoted at the commencement of this article.

¹⁹⁵ In addition to the cases cited by Buss JA in *Perrozzi*, cases in which claims were pleaded in the alternative include *Bryant* and *Tonich*, as well as: *Fyfe v Pioneer Concrete (WA) Pty Ltd* (Unreported, Supreme Court of Western Australia, Full Court, Pidgeon, Franklyn and Owen JJ, 15 April 1994); *Bartlett v Jones* (Unreported, Supreme Court of Western Australia, Full Court, Murray, White and Scott JJ, 22 February 1999), affd (2000) 205 CLR 166; *Prast v Town of Cottesloe* (2000) 22 WAR 474; *Shire of Manjimup v Bill* [2000] WASCA 256 (14 August 2000) [8] (Ipp J); *Roman Catholic Bishop of Broome v Watson* [2002] WASCA 7 (1 February 2002) [10] (Scott J); *Sault v City of Melville* [2002] WASCA 84 (21 March 2002) [2] (Ander-

most of the cases the courts have affirmed the view that there are concurrent claims,¹⁹⁶ or have at least been content to proceed on the basis that it is correct.¹⁹⁷ However, it is very hard to justify such an interpretation. Section 4(1) of the Act says that its key sections ‘shall have effect, *in place of the rules of the common law*, for the purposes of determining the care which an occupier of premises is required ... to show towards a person entering on the premises’.¹⁹⁸ It is accepted that there is more than one view of the scope of this section — a matter which will be pursued below — but it cannot be interpreted as leaving room for a parallel common law claim covering the area marked out by s 4(1) because it says that it has effect in place of the rules of the common law. Though the Act preserves obligations to show a higher standard of care by virtue of any enactment or rule of law imposing special standards of

son J); *Gondoline Pty Ltd v Hansford* [2002] WASCA 214 (14 August 2002) [17] (Murray J); *Czatyryko* [2002] WASCA 334 (9 December 2002) [4] (Murray J); *Apex Holiday Centre Inc v Lynn* [2005] WASCA 58 (31 March 2005) [42] (Simmonds J); *Snelgar v Westralia Airports Corporation Pty Ltd* [2006] WASCA 83 (23 May 2006) [2] (Steytler P); *Hanna-Pauley v AMP Shopping Centres Pty Ltd* [2007] WASCA 174 (22 August 2007) [5] (Wheeler JA); *Watch Tower Bible Society and Tract Society of Australia v Sahas* (2008) 36 WAR 234; *Department of Housing and Works v Smith [No 2]* (2010) 41 WAR 217 — to cite only cases in which there was an appeal to the Full Court or Court of Appeal. There are many more which did not proceed beyond the District Court or the Supreme Court. Often, the OLA claim is described as a claim for breach of statutory duty.

¹⁹⁶ See, eg, *Western Australia v Dale* (1996) 15 WAR 464, 472 (Kennedy J); *Geroheev Pty Ltd v Wheare* [2004] WASCA 206 (14 September 2004) [51] (McLure J); *Gove v Black* [2006] WASC 298 (21 December 2006) [383] (Templeman J). See also *Jones v Bartlett* (2000) 205 CLR 166, 183 [52] (Gleeson CJ), 190 [84] (Gaudron J), 194 [98]–[99] (McHugh J), 204–5 [136], 213 [166] (Gummow and Hayne JJ), 231 [227] (Kirby J); in *Watch Tower Bible Society and Tract Society of Australia v Sahas* (2008) 36 WAR 234, 243 [37], E M Heenan AJA said ‘[s]uch dicta as there are in *Jones v Bartlett* seem to assume the parallel existence of an action for negligence at law and a statutory cause of action under the 1985 Act’. Cf *Bartlett v Jones* (Unreported, Supreme Court of Western Australia, Full Court, Murray, White and Scott JJ, 22 February 1999) where the trial judge held that the duty imposed on the occupier under the Act had effect in place of the common law; in the Full Court, the defendants argued unsuccessfully that they were not occupiers, but instead owed a duty as landlords under s 9, which did not operate to the exclusion of the common law.

¹⁹⁷ See, eg, *Prast v Town of Cottesloe* (2000) 22 WAR 474; *Czatyryko* [2002] WASCA 334 (9 December 2002); *Coatz v WestCourt Ltd* [2003] WASCA 49 (21 March 2003); *Uzabeaga v Town of Cottesloe* (2004) Aust Torts Reports ¶81-739; *Howells v Murray River North Pty Ltd* [2004] WASCA 276 (26 November 2004); *Geroheev Pty Ltd v Wheare* [2004] WASCA 206 (14 September 2004); *Town of Mosman Park v Tait* (2005) 141 LGERA 171; *Apex Holiday Centre Inc v Lynn* [2005] WASCA 58 (31 March 2005).

¹⁹⁸ WA OLA s 4(1) (emphasis added).

care on particular persons,¹⁹⁹ this cannot be read as preserving the obligation owed to invitees at common law (assuming this to be higher than the standard of care imposed by the Act). In British Columbia, this argument has been specifically rejected.²⁰⁰

Support for the view that the first approach is incorrect can be provided by looking at what s 4(1) says about the occupier's liability for damage to property brought onto the premises. In this respect, the Western Australian OLA is drafted more narrowly than any other, because the occupier's liability is limited to dangers to any property brought onto the premises by the entrant *and remaining on the premises in the possession and control of that person*, whether it is owned by the entrant or a third person.²⁰¹ At common law, it appears that the occupier would have been liable to the entrant even though the property had ceased to be under the entrant's control,²⁰² but the Western Australian Act reflects a policy decision that the entrant should have no cause of action against the occupier except where the property remained in his or her possession and control.²⁰³ There could be no question of an entrant whose property was damaged in circumstances where it was no longer in his or her possession and control invoking the wider rights conferred by the common law.²⁰⁴

¹⁹⁹ *Ibid* s 8(1).

²⁰⁰ *Stein v Hudson's Bay Co* (1976) 70 DLR (3d) 723, 727–8 (Bouck J). In *Weiss v Greater Vancouver YMCA* (1979) 11 BCLR 112, 118 [15]–[16] (Aikins JA for the Court) the British Columbia Court of Appeal, though declining to comment on this contention because it had not been pleaded or argued, held that the standard of care under the British Columbia Act was comprehensive and it was unnecessary to consider the common law standard of care.

²⁰¹ WA OLA s 4(1)(b) (emphasis added).

²⁰² See, eg, *Drive-Yourself Lessey's Pty Ltd v Burnside* [1959] SR (NSW) 390 and other cases discussed above nn 67–9.

²⁰³ Note the similar situation in Ireland, where the *Occupiers' Liability Act 1995* (Ireland) limits liability to trespassers within narrower confines than the pre-existing common law (as a result of the influence of farming organisations and similar groups): see McMahon and Binchy, above n 3, 315–16.

²⁰⁴ There is very little authority on s 4(1)(b). However in *McHugh v Macedonian United Society Community Centre of WA Inc* (Unreported, Perth Local Court, 30 August 1995) Senior Magistrate Martin considered the effect of the WA OLA on the occupier's liability for theft. The plaintiff's car was stolen from a car park while she was playing bingo, and she sued the occupier. The defendant argued that there was no duty of care owed, citing *Tinsley v Dudley* [1951] 2 KB 18, 31 (Jenkins LJ), but Senior Magistrate Martin held that the Act had superseded the common law: at 15. His Honour confirmed that there had been no bailment and so

A further argument against the first approach is provided by Callinan J in *Jones v Bartlett*,²⁰⁵ discussing s 9 of the *WA OLA*, which deals with the duty of care of landlords. The High Court considered the nature of the duty of care owed by landlords at common law, but his Honour was the only member of the Court to consider whether the Act left room for landlords to be subjected to common law duties.²⁰⁶ His Honour came to the conclusion that s 9 covered the field.²⁰⁷

(d) The Second Approach: The Occupiers' Liability Act is Limited to Standard of Care

As we have seen, some judicial statements have adopted the view that the *WA OLA* is confined to reforming the rules as to standard of care, replacing the old category-specific rules with a single standard of care owed to all entrants,²⁰⁸ and leaving duty to be dealt with by the common law. This approach is founded on the long title, which says that the Act prescribes the *standard* of care owed by occupiers and landlords. However, it is submitted that it is incorrect. Section 4(1) refers to the duty of care of occupiers, and s 5(1) is either a statement of that duty, or a combined statement of duty and breach.²⁰⁹ This may be concealed by the fact that these sections, following the wording of the Scottish *OLSA*, simply refer to 'the care' which an occupier of premises is required to show, whereas the equivalent English provisions refer to the *duty* of the occupier.²¹⁰ The surrounding provisions of the Act refer to the occupier's duty of care,²¹¹ and the heading to s 5 reads: '[d]uty of care of occupier'.²¹²

the property remained in the possession and control of the entrant: at 7. However, there was no liability because there was no breach of duty by the occupier.

²⁰⁵ (2000) 205 CLR 166.

²⁰⁶ The other justices simply assumed that the Act existed alongside the common law.

²⁰⁷ *Jones v Bartlett* (2000) 205 CLR 166, 252–3 [290]–[291]. Callinan J's argument is discussed in more detail in Handford, 'Through a Glass Door Darkly', above n 167, 87–90.

²⁰⁸ Subject to *WA OLA* ss 5(2)–(3); *Eastment* (1992) 8 WAR 139.

²⁰⁹ In *Geroheev Pty Ltd v Wheare* [2004] WASCA 206 (14 September 2004) [50], McLure P suggested that s 5(1) 'conflates issues of duty of care and breach of duty'. The authors suggest that this is the correct approach to this section.

²¹⁰ 1957 *OLA* ss 1(1)–(2), 2(1)–(2).

²¹¹ *WA OLA* ss 4(2), 5(2) ('[t]he duty of care referred to in subsection (1)'), 5(3), 5(4), 7(1) ('[t]he duty of an occupier of premises under this Act').

²¹² In the same way, the heading to *WA OLA* s 9 is '[d]uty of care of landlord'. See also at s 7: '[d]uty not restricted or excluded by contract'.

It is a settled principle of statutory interpretation that statutes should be read as a whole.²¹³ By this test, the statute clearly deals with duty of care as well as standard of care.

In *Birch v Allen*, Latham CJ said that the long title could be looked at for the 'purpose of determining the scope of an Act', and to resolve uncertainty, but it could not be used 'to contradict any clear and unambiguous language'.²¹⁴ More recent cases recognise that the long title may have a role in determining the purpose of the Act (now provisions have been added to most interpretation Acts which require courts to prefer a construction which promotes the underlying purpose or object), but there are still limitations on the role of the long title as compared with the operative provisions.²¹⁵ As noted above, the long title of the Western Australian Act was copied from the Victorian Act, but this was an unfortunate borrowing.²¹⁶ The Victorian Act expressly says that its provisions apply in place of the rules of the common law which formerly determined the *standard* of care of the occupier.²¹⁷ The Victorian long title is inappropriate for the Western Australian Act, which clearly contains many provisions about the occupier's *duty*; the long title apart, the only other reference to standard of care is in s 8, which deals with preservation of higher obligations. With the exception of the early cases referred to above, there are hardly any Western Australian cases which refer to the long title as a reason for adopting the second approach.²¹⁸

More generally, the authorities which support the second approach are few in number. Though there are prominent endorsements by Malcolm CJ and

²¹³ See, eg, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J); *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J).

²¹⁴ (1942) 65 CLR 621, 625–6.

²¹⁵ See *Amatek Ltd v Googoorewon Pty Ltd* (1993) 176 CLR 471, 477 (Mason CJ, Brennan, Gaudron, Dawson and McHugh JJ). See also *Re Groos* [1904] P 269, 273 (Gorell Barnes J), which is a well-known example of a case where the Court refused to limit the general words of the Act by reference to the long title.

²¹⁶ No other OLA, in Australia or elsewhere, has a long title in this form. Other Acts follow the precedent set by the 1957 OLA: 'An Act to amend the law of England and Wales as to the liability of occupiers and others for injury or damage resulting to persons or goods ...'.

²¹⁷ *Wrongs Act 1958* (Vic) s 14B(1).

²¹⁸ Two District Court decisions which refer to the 'preamble' are clearly of little assistance: *Hodge v Barham* (2011) 74 SR (WA) 340, 366 [191] (Derrick DCJ); *French v Van der Giezen* [2013] WADC 173 (8 November 2013) [83] (Scott DCJ).

Murray J in the early cases,²¹⁹ Malcolm CJ's view is compromised by the fact that he was party to the endorsement of a different approach in another early case.²²⁰ The same can be said of another early pronouncement.²²¹ Since then, most judges have simply pointed to the existence of two lines of cases, saying there was no need to resolve the matter in the instant case, or suggesting that it would make no difference to the result of the case whether the matter was determined according to the Act or the common law.²²² Exceptionally, in two cases, District Court judges have come out in favour of the second approach, most notably the decision of Eaton DCJ in *Sahas v Watch Tower Bible Society and Tract Society of Australia*.²²³ The Court of Appeal decision in this case, discussed below, was based on a narrower ground, but the judgment of E M Heenan AJA also perhaps provided some limited support for the second approach. This case apart, the conclusion must be that the case for regarding the *WA OLA* as reforming only the standard of care is weak, and in the absence of the long title would be almost non-existent.²²⁴

²¹⁹ *Eastment* (1992) 8 WAR 139, 146 (Malcolm CJ); *Bryant* (1993) Aust Torts Reports ¶81-204, 62 004-5 (Murray J).

²²⁰ *Tonich* (Unreported, Supreme Court of Western Australia, Full Court, Malcolm CJ, Ipp and Anderson JJ, 11 March 1994) 3 (Malcolm CJ), 13 (Anderson J). See above Part III(B)(5). See also *Kschammer v R W Piper & Sons Pty Ltd* [2003] WASCA 298 (3 December 2003) [72] (Malcolm CJ):

The question whether a person or company is an 'occupier' of premises is one determined in accordance with the common law ... Once that question is answered in the affirmative, the statutory regime under the [*WA OLA*] applies to determine the content and extent of the duty of care.

²²¹ *Baker v Shire of Albany* (1994) Aust Torts Reports ¶81-296, 61 581, where Kennedy J said that the Act merely modified the rules as to standard of care. However, in a previous case his Honour had referred to breach of the duty of care under s 5(1) of the Act: *Schmitz v Pilpel* (1988) Aust Torts Reports ¶80-178, 67 671.

²²² See above Part III(B)(5)(a).

²²³ (2007) 54 SR (WA) 134. See also *Hodge v Barham* (2011) 74 SR (WA) 340, 366 [191] (Derrick DCJ); but see above n 218 and accompanying text.

²²⁴ The parliamentary debates provide no assistance. The Attorney-General's second reading speech refers to 'standard of care', but the former Attorney-General refers to the different 'duties' owed at common law: Western Australia, *Parliamentary Debates*, Legislative Council, 21 November 1984, 4368 (J M Berinson); Western Australia, *Parliamentary Debates*, Legislative Council, 26 February 1985, 195 (I G Medcalf).

(e) *The Third Approach: The Act Covers the Field*

The third possible approach goes to the opposite extreme and suggests that the WA OLA has replaced the common law with a statutory duty of care, leaving no room for any common law duty. In the words of Buss JA in *Perrozzi*, stating the effect of Anderson J's judgment in *Tonich*, the leading statement of the third approach: 'Anderson J (with whom Malcolm CJ and Ipp J agreed) held that the Act imposes on an occupier a duty of care to entrants and that the Act covers the field'.²²⁵

It seems an overstatement to say that there is *no* role left for the common law. Even if statements of this kind are read as limited to the duty of care issue, rather than the tort of negligence as a whole, it is clear that the common law still plays a part. Most obviously, the person on whom the duty to show care is placed is determined by the common law: s 4(2) provides that nothing is to be 'taken to alter the rules of the common law which determine the person on whom [the duty to show care] is incumbent'.²²⁶ It is clear that the provisions of the Act cover the main issues relating to standard of care,²²⁷ but the Act has nothing to say about causation or remoteness of damage, and if such issues arise in the context of an occupiers' liability claim they will be resolved by the application of common law principles.²²⁸ As to defences, the Act leaves most issues to the common law, for example relying on the common law principles under which an occupier can exclude or restrict his or her obligations and the common law defence of voluntary assumption of risk.²²⁹ Section 7 modifies the common law rules about the extent to which the occupier can restrict or exclude his or her obligations by a contract to which the person to whom the

²²⁵ (2007) 33 WAR 209, 217 [22]; see also *Cant v Fleay* (Unreported, Supreme Court of Western Australia, Full Court, Franklyn, Wallwork and Scott JJ, 18 July 1996) 13–14 (Franklyn J); *Bartlett v Jones* (Unreported, Supreme Court of Western Australia, Full Court, Murray, White and Scott JJ, 22 February 1999); *Apex Holiday Centre Inc v Lynn* [2005] WASCA 58 (31 March 2005) [21] (E M Heenan J).

²²⁶ See, eg, *Kschammer v R W Piper & Sons Pty Ltd* [2003] WASCA 298 (3 December 2003) [72] (Malcolm CJ). The English Act also refers the question to whom the duty is owed to the common law: 1957 OLA s 1(2) provides that the visitors to whom the occupier owes the duty are those who at common law would be treated as invitees and licensees.

²²⁷ WA OLA ss 5(1), 5(4).

²²⁸ Or, after 2003, by reference to *Civil Liability Act 2002* (WA) s 5C.

²²⁹ WA OLA ss 5(1)–(2).

duty is owed is not a party.²³⁰ Section 8 preserves higher obligations, and specifically those of an employer, and s 9(3) preserves duties of landlords under the existing law.

The third approach was put to the test in *Watch Tower Bible Society and Tract Society of Australia v Sahas*.²³¹ The plaintiff was injured in a fall at the defendant's premises when someone switched off the lights when she was in the toilet, and she issued a writ with a general indorsement alleging negligence. More than six years after the accident, a statement of claim was filed pleading that the accident was caused by negligence or breach of a duty of care under the WA OLA. The defendants argued that this was a pleading of two causes of action, a common law action for negligence and a statutory cause of action under the Act.²³² They sought an order striking out the action on the basis that the common law cause of action did not exist by virtue of the OLA and the cause of action under the Act was statute-barred because it sought to introduce a claim after the limitation period had expired, contrary to the rule in *Weldon v Neal*.²³³ Eaton DCJ rejected this argument at trial, indicating that he preferred the view that the Act merely made amendments to the standard of care, leaving the common law duty of care intact — the second approach discussed above. The Court of Appeal dismissed the defendant's appeal, but on narrower grounds and without taking a definitive stand on the interpretation of the Act. Pullin JA held that a general indorsement was sufficiently wide to encompass either cause of action: even if the only cause of action was that under the statute, it could still be properly described as 'negligence'.²³⁴ E M Heenan AJA agreed but, following a full discussion of the authorities dealing with the relationship between the Act and the common law, gave some indication of where he stood on the interpretation question:

As earlier explained, this is not the occasion to resolve finally the controversy about whether or not the *Occupiers' Liability Act* creates an exclusive statutory liability which excludes the general law of negligence, although I certainly incline to the view that it does not have that effect, notwithstanding that,

²³⁰ See Handford, 'Occupiers' Liability Reform', above n 20, 203–5.

²³¹ (2008) 36 WAR 234.

²³² Ibid 236–7 (Pullin JA).

²³³ (1887) 19 QBD 394.

²³⁴ *Watch Tower Bible Society and Tract Society of Australia v Sahas* (2008) 36 WAR 234, 238 [12].

to a significant extent, it supplies the content of the standard of care owed by the occupier. ...

Nevertheless, if contrary to this indication, I am to adopt, as a working hypothesis, the view advanced by the appellants that a separate and exclusive statutory cause of action had been established by the *Occupiers' Liability Act*, that still would not mean that the amended indorsement of claim in this present action failed to disclose or to advance such a putative cause of action.²³⁵

Though this case decisively rejects the hard-line third approach, it provides only muted support for the second approach. The Court of Appeal specifically avoided endorsing Eaton DCJ's adoption of the second approach and proceeded on a narrower ground. E M Heenan AJA's support for the second approach is hedged around with qualifications, as the above quotation shows. Though his Honour says only that the Act supplies the content of the *standard* of care, this statement is perhaps not as complete an endorsement of the second approach as those found in the earlier authorities, and indicates that the truth lies somewhere in between the extremes of the second and third approaches.

We would suggest that the true view is that the *WA OLA* has replaced the common law claim for negligence in the areas which s 4(1) indicates are covered by the Act — the liability of the occupier to the entrant for injuries to person and property caused by dangers which are due to the state of the premises or anything done or omitted to be done on them for which the occupier is legally responsible — but that it is only a partial codification. It states the duty of care, though it continues to rely on the common law for key elements such as the identification of the person who owes the duty. It states the main principles as to the applicable standard of care and the determination of whether the defendant is in breach. Other issues are generally left to the common law. Partial codification of this kind is by no means unique.²³⁶ An important consequence of the preferred view is that lawyers in Western

²³⁵ Ibid 249–50 [60]–[61].

²³⁶ The *Civil Liability Acts* contain statutory statements of breach of duty and causation (eg, *Civil Liability Act 2002* (NSW) ss 5B, 5D) but for the most part leave questions of duty of care to the common law. See also the recommendations of the England and Wales Law Commission for a scheme of partial codification of the common law in the field of psychiatric illness: Law Commission, *Liability for Psychiatric Illness*, Law Com No 249 (1998) 118–20 [8.1]–[8.7]. It was recommended that the proposed statutory duty of care should replace the common law duty of care to the extent that they would overlap.

Australia should abandon the practice of claiming under the common law as an alternative to claims under the *WA OLA*: in areas covered by the Act, the duty set out in the Act is the only one that exists.