OCCUPIER'S LIABILITY TOWARDS CONTRACTUAL ENTRANTS

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The High Court of Australia in *Australian Safeway Stores Pty. Ltd.* v. *Zaluzna*[1] held that Australian negligence law no longer recognizes that different standards of care are owed by occupiers of property towards invitees, licensees and trespassers. The same duty of reasonable care is owed towards these categories of entrant.[2] But what is the position of contractual entrants? The question arises whether their rights have been assimilated to those of lawful entrants generally, or whether the duty owed to them is still the higher duty which heretofore it was thought to be. The High Court was not called upon to consider the question in *Zaluzna*'s case as the plaintiff was an invitee.

Prima facie it would seem that, since the nature of the duty owed to contractual entrants has traditionally been said to derive from an implied term in the contract, the Court's decision about the nature of the tort duties owed to entrants has not affected their rights, if any, in contract. However it could be argued that the turnaround with respect to the occupier's tort duties has had an impact on his contractual obligations. If the better view is that, in Australian law, the same duty is considered to be owed to a contractual entrant, whether he chooses to sue in tort or contract, then the contractual duty may also be affected. Conceivably the majority judges in the High Court in *Zaluzna*'s case, in adopting a single standard of reasonable care as the tort duty towards entrants was not intending to exclude contractual entrants. They may have meant that the tort duty towards contractual entrants, no less than other categories of entrant, should now be taken to be a simple duty of reasonable care. If this is so, and if the tort and contract duties are the same, the High Court may inferentially have modified the term which is implied into contracts for entry upon and use of premises, reducing it to a simple duty of reasonable care. This inference may not be implausible when it is noted that the term giving rise to the contractual obligation is one which is implied in law rather than in fact.[3] In so far as it is imposed by law rather than assumed by the parties, it is similar to a tort obligation.[4]

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[1] (1987) 162 C.L.R. 479.

[2] The same step has been taken by legislation in some jurisdictions: see infra.

[3] *Bright* v. *Sampson & Duncan Enterprises Pty. Ltd.* [1985] 1 N.S.W.L.R. 346, 351 per Samuels J.A.; *Calvert* v. *Stollznow* [1982] 1 N.S.W.L.R. 175, 180 per Samuels J.A.; *Wettern Electric Ltd.* v. *Welsh Development Agency* [1983] 2 All E.R. 629, 636; J.G. Fleming, *The Law of Torts* (7th ed., Sydney, Law Book Co., 1987) p. 421.

[4] In *Francis* v. *Cockrell* (1870) L.R. 5 Q.B. 501, 509 Martin B. said: "I do not, at all pretend to say whether the relation of the parties raised a contract or a duty. It seems to me exactly the same thing"; quoted by Williams A.C.J. in *Watson* v. *George* (1953) 189 C.L.R. 409, 415.

However it is submitted that the liability of occupiers towards contractual entrants, whether in tort or contract, has not been affected by the decision in *Zaluzna*'s case. It would seem that there are sufficient grounds in logic and policy for imposing a higher duty towards contractual entrants and that the courts will continue to uphold and apply it. The rationale behind the old "categories" was that more should be required of an occupier by way of safety precautions for those entrants from whom he may expect some material benefit (invitees) than for those whom he gratuitously permits to use the premises with no advantage to himself (licensees) or those whose entry is forbidden (trespassers). *Zaluzna*'s case accepts that it is better to give expression to this thinking by recognizing that occupiers owe a single tort duty of reasonable care towards entrants, but acknowledging that in determining what constitutes breach of it the circumstances of the entry will clearly be a relevant factor.

It does not seem inconsistent with this attitude however to assert that where the occupier stipulates for remuneration, in the form of contractual consideration, in return for his permission to enter and use the premises, it is reasonable to subject him to a higher duty. It can be inferred that the furnishing of consideration by a promisee will, in this area as it does in others, continue to signify a greater willingness on the part of the courts to require duties of positive action from the promisor, and a greater tolerance for the imposition of a measure of strict liability on him, than would be the case if his sole duty were in tort. On the assumption therefore that the prior law regarding contractual entrants remains intact it is proposed here to examine and endeavour to state the extent of the civil liability for negligence of an occupier of property who, for reward, invites others to enter and remain on the premises.

THE NATURE OF THE CONTRACTUAL DUTY

The nature of the duty owed to contractual entrants turns on the terms, express or implied, of the contract. In the absence of an express term, the term implied may vary depending on the type of contract. Where there is no express term or well-settled standard for the type of contract in question, the term that is usually implied is that the premises are as safe as reasonable care on the part of anyone can make them. It is now clear, despite some earlier suggestions to the contrary,[5] that an occupier is not normally considered to have given an absolute guarantee of the safety of the premises. Nevertheless the duty is more than an ordinary duty of reasonable care, and has been described rather as a duty to see that care is taken. Thus the occupier is liable not only for the negligence of himself and his servants but also for that of independent contractors and previous occupiers.

The law was authoritatively stated along these lines in *Francis* v. *Cockrell*[6]

[5] E.g. *Silverman* v. *Imperial London Hotels Ltd.* (1927) 43 Times L.R. 260.
[6] (1870) L.R. 5 Q.B. 501.

where the plaintiff had paid the defendant for the right to view a steeplechase from a grandstand. The structure collapsed due to negligent construction on the part of the builder, an independent contractor. The defendant was held liable to the plaintiff for his injuries despite an absence of personal negligence. The six judges in the Exchequer Chamber expressed themselves in different terms and no single passage has consistently been cited in subsequent cases. However the formulation of the duty by McCardie J. in *Maclenan* v. *Segar,*[7] purporting to follow *Francis* v. *Cockrell,*[8] has frequently been adopted in later cases.[9] The plaintiff in that case was a guest in a hotel who was injured in a fire which was caused by the negligence of contractors employed by a previous owner to remodel the kitchen area of the hotel. The nature of the duty owed to her was expressed in the following terms:[10]

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

However the position was complicated, at any rate so far as English common law was concerned, by the decision in *Gillmore* v. *London County Council.*[11] Du Parcq L.J. did not consider that the formulation of the duty by McCardie J. in *Maclenan* v. *Segar*[12] was appropriate to the contract in the case before him. The plaintiff had, for a small fee, joined a physical education class organized by the defendant. He was injured when he slipped on the highly polished floor of the hall where the classes were held. His Honour thought that the term to be implied in the contract was a warranty by the occupier that he had taken reasonable care to see that the premises were reasonably safe for the purpose.[13] Thus at the time when the *Occupiers' Liability Act* 1957 (U.K.) abolished the "categories" and laid down a common standard of reasonable care for all lawful entrants, including contractual entrants, the position at common law regarding the latter was some-

[7] [1917] 2 K.B. 325.
[8] (1870) L.R. 5 Q.B. 501.
[9] *Hall* v. *Brooklands Auto Racing Club* [1933] 1 K.B. 205, 223 per Greer L.J. For Australian cases see fn.25 infra.
[10] [1917] 2 K.B. 325, 332-3.
[11] [1938] 4 All E.R. 331.
[12] [1917] 2 K.B. 325, 332-3.
[13] Criticized by F.J. Odgers (1955) *Cambridge L.J.* 1 on the ground that the duty owed to a contractual entrant would be less than that owed to an invitee, since the latter duty is sometimes non-delegable; cf. *Winfield & Jolowicz on Tort* (12th ed., London, Sweet & Maxwell, 1984) p. 203 and the English *Law Reform Committee Report on Occupiers' Liability to Invitees, Licensees and Trespassers* (1954) Cmnd. 9305 para. 4, who argue that if the duty owed to invitees is non-delegable, so too must be the *Gillmore* duty.

what unclear.[14] In a number of cases courts had preferred the formulation in *Gillmore*'s case to that in *Maclenan*'s case.[15] For example in *Protheroe* v. *The Railway Executive*[16] where the plaintiff, a ticketholder, tripped on a crack between two paving stones on the part of the railway platform adjacent to the track, Parker J. thought that the proper test was that in *Gillmore*'s case, not that in *Maclenan*'s case. Similarly in *Bell* v. *Travco Hotels Ltd.*[17] the Court of Appeal applied the *Gillmore* test where a hotel guest was injured when she slipped on the driveway a quarter of a mile from the hotel. It was considered that the stricter test in *Maclenan*'s case, though it might apply to the interior of the hotel, did not apply to the part of the premises where the plaintiff was injured.[18]

A "gallant"[19] attempt was made by Salmond[20] to reconcile the cases. Taking up a suggestion made by Willmer J. in *The Cawood III*[21] Salmond suggested that the law distinguished contracts for accommodation pure and simple from those in which the use of premises was incidental to some other contract. The stricter duty expressed in *Francis* v. *Cockrell*[22] and *Maclenan* v. *Segar*[23] applied in the former, but in the latter the duty was simply one of reasonable care, as stated in *Gillmore* v. *London County Council*.[24]

Whether or not this represents a correct statement of English common law at the time of the enactment of the *Occupiers' Liability Act* 1957 (U.K.), the question arises whether Australian cases have expressly or impliedly drawn such a distinction. They do not appear to have done so. The *Maclenan* test seems to be firmly entrenched in this country,[25] at any rate for situations where entry to the premises was gained pursuant to a contract, or, in other words, where the entrant could be said to have "bought" the right to enter.[26]

[14] Law Reform Committee, id. paras. 5, 39; G.H.L. Fridman, "Occupiers, Contractual Liability in England and Australia" (1954) 104 L.J. 22; *Salmond & Heuston on the Law of Torts* (19th ed., London, Sweet & Maxwell, 1987) p. 301; *Hall* v. *Brooklands Auto Racing Club* [1933] 1 K.B. 205, 212-3 per Scrutton L.J.

[15] It has been queried whether the tests are in fact different (*Charlesworth on Negligence* (3rd ed., London, Sweet & Maxwell, 1956) p. 184) though clearly du Parcq L.J. in *Gillmore*'s case thought they were.

[16] [1951] 1 K.B. 376; *Tomlinson* v. *Railway Executive* [1953] 1 All E.R. 1 to the same effect.

[17] [1953] 1 Q.B. 473. Crisp J. in *Smith* v. *Buckley* (1965) Tas. S.R. 210 thought that the *Gillmore* test also applied in relation to spectators at sporting functions.

[18] The distinction is criticized by Fridman, op.cit., and *Winfield on Tort* (6th ed., London, Sweet & Maxwell, 1954) p. 675 who submit that the duty should be the same in respect of every part of the premises, though what amounts to proper performance may be variable.

[19] Terminology used in (1951) 67 L.Q.R. 16.

[20] See *Salmond on The Law of Torts* (11th ed., London, Sweet & Maxwell, 1953) p. 552; the validity and rationale of the distinction are questioned by Fridman, op.cit.; Charlesworth, op.cit.

[21] [1951] P. 270, 278-279.

[22] [1870] L.R. 5 Q.B. 501.

[23] [1917] 2 K.B. 325.

[24] [1938] 4 All E.R. 331.

[25] *Watson* v. *George* (1953) 89 C.L.R. 409, 424 per Fullagar J.; *Voli* v. *Inglewood Shire Council* (1962) 110 C.L.R. 74, 92 per Windeyer J.; *Calvert* v. *Stollznow* [1982] 1 N.S.W.L.R. 175, 177 per Samuels J.A.; *Australian Racing Drivers Club Ltd.* v. *Metcalf* (1960) 106 C.L.R. 177; *Green* v. *Perry* (1955) 94 C.L.R. 606; *Key* v. *Commissioner for Railways* (1941) 41 S.R. (N.S.W.) 60, 65-66 per Jordan C.J.

[26] So expressed in *Calvert* v. *Stollznow* [1982] 1 N.S.W.L.R. 175, 178 per Samuels J.A.

Thus it correctly states the duty owed to a lodger,[27] a theatregoer,[28] the hirer of a public hall,[29] a hotel guest,[30] a sporting spectator,[31] a circus patron[32] and those who have paid to use recreational facilities.[33] The leading High Court case is *Watson* v. *George*[34] where the plaintiff was suing for the death of her husband who had been asphyxiated by a leak from a faulty bath heater in a boarding house where he was a guest. The defective condition of the heater would have been apparent to an expert but not to a layman. It was held that the duty owed by the proprietor of the boarding house was that which was expounded in *Francis* v. *Cockrell*[35] and *Maclenan* v. *Segar*,[36] but that there was no negligence in failing to have the heater inspected.

This is not to say however that whenever a person's right to be or remain on premises can be traced to an express or implied contractual term, he is entitled to the higher duty formulated in *Maclenan*'s case. Thus in *Calvert* v. *Stollznow*[37] the New South Wales Court of Appeal held that a restaurant patron was to be treated as an invitee so far as the structural condition of the premises was concerned, albeit that his contract for the provision of food and drink would contain a term, implied in fact, that he had a right to remain on the premises during the meal. The Court in this case doubted the reasoning in such cases as *Gillmore* v. *London County Council*,[38] *Protheroe* v. *The Railway Executive*[39] and *Bell* v. *Travco Hotels Ltd.*,[40] and pointed out that the dicta in *The Cawood III*[41] were obiter.[42] The Court appears to have thought that the relevant distinction was not between contracts whose main purpose was the provision of accommodation on the part of the premises where the plaintiff was injured, and those where the use of the premises was merely incidental to some other contract. Rather a distinction should be drawn between contracts by virtue of which the plaintiff could be said to have "bought" the right to *enter* the premises and those which merely entitled him to remain on or use the premises.

[27] *Watson* v. *George* (1953) 89 C.L.R. 409.

[28] Dicta in *Calvert* v. *Stollznow* [1982] 1 N.S.W.L.R. 175, 181 per Samuels J.A.

[29] *Voli* v. *Inglewood Shire Council* (1962) 110 C.L.R. 74.

[30] This would seem to follow from the acceptance by the High Court of the *Maclenan* test (see cases in fn.25 supra) since the plaintiff in that case was a hotel guest.

[31] *Smith* v. *Yarnold* [1969] 2 N.S.W.R. 410; *Australian Racing Drivers Club Ltd.* v. *Metcalf* (1960) 106 C.L.R. 177; *Green* v. *Perry* (1955) 94 C.L.R. 606; *Chatwood* v. *National Speedways Ltd.* [1929] Qd.St.R. 29; cf. *Smith* v. *Buckley* [1965] Tas. S.R. 210, 216.

[32] *Harper* v. *Ashtons Circus Pty. Ltd.* [1972] 2 N.S.W.L.R. 395.

[33] *Bright* v. *Sampson & Duncan Enterprises Pty. Ltd.* [1985] 1 N.S.W.L.R. 346; *Smith* v. *Buckley* [1965] Tas. S.R. 210; *Faux* v. *Williamstown Bathing Co. Ltd.* (1903) 29 V.L.R. 459.

[34] (1953) 89 C.L.R. 409.

[35] (1870) L.R. 5 Q.B. 501.

[36] [1917] 2 K.B. 325, 332-333.

[37] (1982) 1 N.S.W.L.R. 175; cf. *Brannigen* v. *Harrington* (1921) 37 Times L.R. 349 (restaurant customer a contractual entrant). Drinkers in hotels are also to be treated as invitees not contractual entrants: *Whiteman* v. *Boyd* [1962] N.S.W.R. 328; *Hurst* v. *Falconer* [1962] N.S.W.R. 543.

[38] [1938] 4 All E.R. 331.

[39] [1951] 1 K.B. 376.

[40] [1953] 1 Q.B. 473.

[41] [1951] P. 270, 278-279.

[42] [1982] 1 N.S.W.L.R. 175, 180 per Samuels J.A.

It remains difficult to state precisely what classes of person will qualify in Australian law as contractual entrants. It certainly seems that the Salmond test is too narrow since strictly it should mean that even a theatregoer or sporting spectator would not be entitled to the higher duty as the main purpose of their contracts is not accommodation in the premises but the viewing of a spectacle. But it may be queried whether the distinction between a contractual right to *enter* and a contractual right to *remain* draws the line at the right point. It would seem that there is a further requirement, namely that use of the premises was central to or the main purpose of the contract, rather than merely ancillary or incidental to it.[43] Furthermore, bearing in mind that the rationale for the imposition of a higher duty on the occupier towards contractual entrants is that the occupier is being paid for granting permission to enter, it is no doubt necessary that the entry should be for a purpose beneficial to the entrant,[44] or at any rate that it should be for a mutually contemplated purpose.[45]

If an entrant does not satisfy the criteria (whatever they may be) which qualify him as a contractual entrant, but if his entitlement to be on the premises is nevertheless referable to an express or implied term of the contract (such as the restaurant patron), what are his contractual rights if any? English authority would tend to indicate that there would be an implied term in the contract that reasonable care would be exercised, as was said in *Gillmore* v. *London County Council*.[46] But another possibility is that such a person is relegated to his rights in tort. It has been suggested that the latter is the preferable view since the duty owed to an invitee in tort is in some circumstances non-delegable and therefore stricter than a simple duty of reasonable care, and it is "inconceivable that the law should imply into a silent contract a duty less onerous than that where there is no contract".[47] The decision in *Calvert* v. *Stollznow*[48] where a restaurant patron, not being classified as a contractual entrant, was treated as an invitee, supports this approach.

[43] This is the way in which the test is stated in many of the leading texts, e.g., *Winfield & Jolowicz on Tort* (12th ed., London, Sweet & Maxwell, 1984) p. 202-203; *Clerk & Lindsell on Torts* (15th ed., London, Sweet & Maxwell, 1983) p. 592; *Charlesworth & Percy on Negligence* (7th ed., London, Sweet & Maxwell, 1983) p. 425; J.G. Fleming, *The Law of Torts* (7th ed., Sydney, Law Book Co., 1987) p. 423; Law Reform Committee, op. cit., para. 4; cf. F.A. Trindade & P. Cane, *The Law of Torts in Australia* (Melbourne, Oxford University Press, 1985) p. 453 who accept the distinction between a contractual right to enter and a contractual right to remain, while deprecating the rules as "ridiculously technical".

[44] It seems that it is not a requirement that the entry should benefit the occupier since it is not necessary that the consideration should move to him personally: *Francis* v. *Cockrell* (1870) L.R. 5 Q.B. 501.

[45] As stated in *Maclenan* v. *Segar* [1917] 2 K.B., 325, 332-333. But tradesmen and others employed to do work on the premises appear to have been treated as invitees rather than contractual entrants (*Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, 285; *Bates* v. *Parker* [1953] 2 Q.B. 231; *Green* v. *Fibreglass Ltd.* [1958] 2 Q.B. 245; Law Reform Committee, op. cit., paras. 4, 39; cf. *Sole* v. *W.J. Hallt Ltd.* [1973] Q.B. 574), though admittedly nearly all the cases have involved plaintiffs who were employees of the contractor and therefore not in contractual relations with the occupier.

[46] [1938] 4 All E.R. 331.

[47] F.J. Odgers, op. cit. p. 2.

[48] [1982] 1 N.S.W.L.R. 175.

But of course there can be no rigid rules in this regard since contracts differ and the terms which it would be appropriate to imply may vary.

An unsatisfactory aspect of the law is that it seems that even those who do qualify as contractual entrants may be disentitled to the higher duty if injured on a part of the premises to which the public is entitled to resort, since here the permission to enter does not derive from the contract. Thus it has been said that:[49]

> "a paying guest in a hotel may be a contractual entrant upon those portions of the premises reserved for paying guests, because he has paid to enter them. But he may be an invitee in the hotel's public restaurant. Similarly, a visitor to the theatre may be an invitee in the foyer, although a contractual entrant to the auditorium to which his ticket admits him. He may be an invitee in the lavatories if they are open to the public; but otherwise if they are reserved for holders of a ticket to the performance."

These fine distinctions have been criticized both judicially[50] and extra-judicially.[51]

It should be added that in most of the cases which have come before the courts it has been an academic question whether the *Maclenan* duty was owed, since the negligence has usually been that of the occupier himself or his servants rather than an independent contractor or previous owner. The courts have not therefore had many opportunities to expound the law in this area; hence the difficulty in stating with confidence the rules with respect to the types of entrant who qualify as contractual, and the extent to which the duty owed to them is stricter than that which is owed to other entrants.

As to whether the *Maclenan* duty normally applies where the damage is to property rather than the person, the position is unclear. It has been said that on principle the same duty should be owed.[52] However the matter has not been fully tested and the case law tends to suggest that the duty owed is simply one of reasonable care.[53]

A final point to note is that it seems that the *Maclenan* duty only applies to the structural or static condition of the premises. Where the plaintiff is injured as a result of active operations on the premises the plaintiff must rely on an implied term that reasonable care will be taken in carrying out or supervising the activities, or on his rights in tort.[54] However because the

[49] Id. p. 181 per Samuels J.A.

[50] Ibid.

[51] Fridman, op. cit., Trindade & Cane, op. cit. p. 453.

[52] *Liebigs Extract of Meat Co. Ltd.* v. *Mersey Docks & Harbour Board* [1918] 2 K.B. 381, 386 per McCardie J.; *AMF International Ltd.* v. *Magnet Bowling Ltd.* [1968] 1 W.L.R. 1028, 1040.

[53] *Liebigs Extract Meat Co. Ltd.* v. *Mersey Docks & Harbour Board* [1918] 2 K.B. 381; *Drive-Yourself Lessey's Pty. Ltd.* v. *Burnside* (1959) 59 S.R.(N.S.W.) 390; *The Cawood III* [1951] P. 270.

[54] *Cox* v. *Coulson* [1916] 2 K.B. 177; *Sheehan* v. *Dreamland, Margate Ltd.* (1923) 40 Times L.R. 155; *Fraser-Wallas* v. *Waters* (1939) 4 All E.R. 609; *Bright* v. *Sampson & Duncan Enterprises Pty. Ltd.* [1985] 1 N.S.W.L.R. 346, 360 per Samuels J.A.; G.H.L. Fridman. "Personal Safety of Innkeepers' Guests" (1952) 102 L.J. 689; Fleming, op. cit. p. 424 cf. *Smith* v. *Buckley* [1965] Tas.S.R. 210 (criticized in *Calvert* v. *Stollznow* [1982] N.S.W.L.R. 175, 180 per Samuels J.A.; *Stutsell* v. *Guthrie* (1967) 14 L.G.R.A. 128).

duty with respect to structural condition is contractual it does not seem that it is always necessary to draw the distinction insisted on in the law of tort, between those who are "entrants" in the strict sense and therefore owed the occupancy duty, and those who are not. The same contractual standard may be appropriate even though the injury or damage was not suffered on premises actually under the control of the defendant, or where the plaintiff was not literally on the premises at the time of the accident. Thus the same principles have been said to apply with respect to a shipping company's responsibility for areas of access for embarkation or landing;[55] and arguably the higher duty could be owed by a wharfowner towards owners of ships moored alongside, in respect of the structural condition of the wharf.[56]

THE NATURE OF THE TORT DUTY

It seems to be generally accepted in the occupiers' liability cases, and consistent with the law in other areas,[57] that a contractual entrant can elect to sue in tort or in contract.[58] However the exact relationship between the tort and contract claims has never been made clear.[59] One reason for this must be the enactment of the *Occupiers' Liability Act* 1957 (U.K.) which made it unnecessary for English courts to distinguish between duties in contract and tort owed to contractual entrants, since the common duty of care is the statutory standard for all lawful entrants whether they entered pursuant to a contract or not. English cases decided before the Act may be of dubious value since they pre-dated the increasing recognition of concurrent liability in contract and tort.

It would seem that there are two schools of thought with respect to the tort rights of contractual entrants at common law. Either the plaintiff's rights

[55] *Timbrell* v. *Waterhouse* (1885) 6 N.S.W.R. 77.

[56] cf. *The Cawood III* [1951] P. 270, 278-279 where, though it was not necessary to decide, Willmer J. tended towards the view that the duty was one of reasonable care. In *Shore* v. *Ministry of Works* [1950] 2 All E.R. 228 the Court of Appeal declined to imply the *Maclenan* warranty into a contract for membership of a social club whose premises were held under licence by the club.

[57] Fleming, op.cit. pp. 168-170.

[58] *Watson* v. *George* (1953) 89 C.L.R. 409, 414 per Williams A.C.J. quoting Jordan C.J. in *Key* v. *Commissioner for Railways* (1941) 41 S.R.(N.SW.) 60, 65-66; *Harper* v. *Ashtons Circus Pty. Ltd.* [1972] 2 N.S.W.L.R. 395, 398 per Manning J.A.; *Sole* v. *W.J. Hallt Ltd.* [1973] Q.B. 574, 578-579; *Bell* v. *Travco Hotels Ltd.* [1953] 1 Q.B. 473; *Sayers* v. *Harlow U.D.C.* [1958] 1 W.L.R. 623, 624-625 per Lord Evershed M.R.; *Bright* v. *Sampson & Duncan Enterprises Pty. Ltd.* [1985] 1 N.S.W.L.R. 346, 349 per Kirby P.; *Campbell* v. *Shelbourne Hotel Ltd.* [1939] 2 K.B. 534; but cf. *Tomlinson* v. *Railway Executive* [1953] 1 All E.R. 1 (apparently contract only). Fleming, op.cit., p. 422, thinks that the "duty is primarily in tort, even if it is permissible to plead alternatively in contract". Manning J.A. in *Harper* v. *Ashtons Circus Pty. Ltd.* [1972] 2 N.S.W.L.R. 395, 401 expressed the hope that the law will shift towards a position where a litigant with a cause of action in tort will be required to abandon a similar cause of action in contract; and Deane J. in *Hawkins* v. *Clayton* (1988) 62 A.L.J.R. 240, 260 doubted whether it is normally appropriate to imply a contractual duty of care where there exists a tort duty of co-extensive content and concurrent operation.

[59] This is noted by Kirby P. in *Bright* v. *Sampson & Duncan Enterprises Pty. Ltd.* [1985] 1 N.S.W.L.R. 346, 349; Fridman, op.cit. fn.14 Salmond, op.cit. p. 554.

in tort are those of an invitee, or, alternatively, the content of the tort duty is the same as that of the contractual duty. The English courts appear to have favoured the first approach. Their attitude seems to have been that a person who had a contractual right to be on premises and was owed either a *Maclenan* or a *Gillmore* duty pursuant to an implied term in the contract, could also claim as an invitee in tort.[60] Breach of the tort duty would normally have been harder to establish because the plaintiff would have had to prove he was injured due to an "unusual danger". He might also have had difficulty with the case of *London Graving Dock Co. Ltd.* v. *Horton*[61] (which was not thought to apply to a contractual claim[62]). On the other hand, as pointed out earlier, the tort duty owed to invitees may have been wider than the contractual obligation formulated in *Gillmore*'s case, in that it seems that it was in some circumstances non-delegable.[63]

So far as Australian law is concerned, there is considerable support for the second approach, namely, that if the plaintiff is owed the higher duty formulated in *Maclenan*'s case, then this constitutes the sum total of the defendant's civil liability in his capacity as occupier. The plaintiff can frame his action in contract or tort but the scope of the duty is the same. This appears to have been the attitude of the High Court in *Watson* v. *George*,[64] and is supported by dicta of Martin B. in *Francis* v. *Cockrell*[65] and Jordan J. in *Key* v. *Commissioner for Railways*.[66] This approach would be consistent with statements to the effect that the "categories" are mutually exclusive.[67] Thus it should not be possible for a person who is a contractual entrant also to be classified as an invitee. In further support of this approach it could

[60] *Hall* v. *Brooklands Auto Racing Club* [1933] 1 K.B. 205, 227-228 per Slesser L.J.; *Bell* v. *Travco Hotels Ltd* [1953] 1 Q.B. 473; *Protheroe* v. *Railway Executive* [1951] 1 K.B. 376; *Maclenan* v. *Segar* [1917] 2 K.B. 325.

[61] *London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 737 holding that an invitee's knowledge of the danger barred him; not fully accepted in Australia; *James* v. *Kogarah Municipal Council* [1961] S.R.(N.S.W.) 129; *Commissioner for Railways* v. *Anderson* (1961) 105 C.L.R. 42; *Australian Safeway Stores Pty. Ltd.* v. *Zaluzna* (1987) 162 C.L.R. 479, 483.

[62] *Protheroe* v. *Railway Executive* [1951] 1 K.B. 376, 379; *Watson* v. *George* [1953] S.A.S.R. 219, 222; Charlesworth, op.cit. p. 185; Winfield, op.cit. p. 676; Salmond, op.cit. p. 557; Fridman op.cit. fn.54.

[63] Discussed infra.

[64] (1953) 89 C.L.R. 409, 414-415 per Williams A.C.J. and 419-420 per Fullagar J.; see also *Voli* v. *Inglewood Shire Council* (1962) 110 C.L.R. 74, 93 per Windeyer J.; *Smith* v. *Buckley* [1965] Tas.S.R. 210, 214; *Bright* v. *Sampson & Duncan Enterprises Pty Ltd.* [1985] 1 N.S.W.L.R. 346, 356 per Samuels J.A. However some Australian courts have taken the English approach: *Smith* v. *Yarnold* [1969] 2 N.S.W.R. 410, 414 per Herron C.J.; *Stutsell* v. *Guthrie* (1967) 14 L.G.R.A. 128; *Bantoft* v. *Municipality of Clarence* (1977) 36 L.G.R.A. 41; *Bright* v. *Sampson & Duncan Enterprises Pty. Ltd.* [1985] 1 N.S.W.L.R. 346, 349 per Kirby P.; *Watson* v. *George* [1953] S.A.S.R. 219. Sometimes contractual entrants have chosen to frame their actions as invitees to whom are owed the *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274 duty, and the courts have not considered this inappropriate (though this may be because the danger did not consist of a defect in the structural condition of the premises): see *Delany* v. *Muttdon* (1964) 80 W.N.(N.S.W.) 1095; *Jackson* v. *Vaughan* [1966] 2 N.S.W.R. 147; *Culley* v. *Silhouette Health Studios Pty. Ltd.* [1966] 2 N.S.W.R. 640.

[65] (1870) L.R. 5 Q.B. 501.

[66] (1941) 41 S.R.(N.S.W.) 60, 65-66.

[67] Trindade & Cane, op.cit. p. 443. But perhaps all that is meant is that the categories of invitee, licensee and trespasser are exhaustive so far as the law of tort is concerned: Law Reform Committee, op.cit. para. 31; *Watson* v. *George* (1953) 89 C.L.R. 409, 418-419 per Fullagar J.

be said to appear unduly technical and to conflict with the increasing recognition of the blurring of the boundaries of tort and contract, to regard the occupier as owing two similar, but slightly different duties, one tortious, one contractual. Moreover it can be argued that as the law of tort does recognize that some classes of person owe a non-delegable duty, and as it is clearly the policy of the law to impose such a duty on occupiers vis-a-vis contractual entrants, it is absurd not to add this relationship to the categories of non-delegable tort duties.

Arguing the other way, one could suggest that the imposition of liability on the occupier for the negligence of independent contractors and previous owners can be rationally explained in terms of contract law, but less easily in terms of tort law. The law of contract is not generally concerned with the concept of vicarious liability. A contracting party who promises that something will be or has been done will be liable for breach of contract when failure in performance results from the conduct of anyone to whom he delegated the task of performance. The law does not inquire into his relationship with his delegate. As one writer has put it: "the defence of independent contractor is peculiar to the law of tort and is alien to the conception of breach of contract."[68] Lord Diplock has said of contractual duties that "the legal relationship between the promisor and the . . . person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent sub-contract, is generally irrelevant."[69] Thus if the implied term is that care has been exercised with regard to the condition of the premises, it is logical to impose liability in contract if care has not been exercised, irrespective of the occupier's relationship with the careless person.[70] This reasoning does not apply to tort claims where the rules of vicarious liability are paramount. These rules have been modified so far as to recognize that liability for independent contractors can arise where the duty owed by the defendant is classified as "non-delegable".[71] But how does one analyse or classify a tort duty which imposes liability for the negligence of a predecessor in title?

Another reason why it might seem preferable to keep the tort and contract duties distinct, is that the term which may be implied into the contract will not necessarily in all circumstances be that formulated by McCardie J. in *Maclenan* v. *Segar*.[72] It would complicate the law of tort to impose tortious duties unfamiliar to that branch of the law. Moreover it can be argued that recognition that the tort and contract duties differ would not, since the abolition of the "categories" in *Australian Safeway Stores Pty. Ltd.* v.

[68] Charlesworth, op.cit. p. 184.

[69] *Photo Production Ltd* v. *Securicor Transport Ltd.* [1980] A.C. 827, 848.

[70] *AMF International Ltd* v. *Magnet Bowling Ltd.* [1968] 1 W.L.R. 1028, 1040.

[71] Trindade & Cane, op.cit. pp. 602-606; Fleming, op.cit. pp. 360-365. Windeyer J. in *Voli* v. *Inglwood Shire Council* (1962) 110 C.L.R. 74, 95 said that "the distinction between delegable and non-delegable duties does not, it seems, really amount to more than the adoption of convenient headings for those cases in which defendants have been held not liable for the negligence of independent contractors and cases in which they have."

[72] [1917] 2 K.B. 325, 332-333; see text to fn. 10 supra.

Zaluzna,[73] conflict with statements that the "categories" are mutually exclusive. The plaintiff would not be arguing that he fell into more than one "category" of entrant, but merely that he belonged to that increasing band of plaintiffs who can elect to sue either in tort or contract; and, as is often the case, the tort and contract duties are not identical.

However, Australian High Court authority appears to favour the view that the content of the duty owed to contractual entrants in tort and contract is the same.[74] The objection that this might involve the recognition in a tort action of a duty, deriving from an express or implied term of the contract, which is quite unfamiliar to tort law, could be met by saying that the tort and contract duties are only identical where it is the *Maclenan* duty which is the appropriate standard. This is a duty implied by law and therefore in effect imposed on the occupier in the same way as a tort duty. Where the contractual obligation derives from an express term or a term implied in fact which differs from the *Maclenan* standard, it may be conceded that the tort and contract duties diverge.

We have been assuming that a contractual entrant does indeed have a right to elect whether to sue in contract or tort for damage or injury due to the defective condition of the premises. While this appears to be accepted by most judges and writers[75] it is perhaps not universally acknowledged. In *Bright* v. *Sampson & Duncan Enterprises Pty. Ltd.*[76] Samuels J.A. said that as it was not disputed that the plaintiff had paid to enter the skating rink where he was injured and was clearly therefore a contractual entrant, it was not open to him to assert, in the alternative, breach of a duty owed to him as an invitee. It is not clear however that his Honour considered that the plaintiff's claim rested solely in contract. It is more probable, in view of the dicta to this effect in earlier cases, that he believed that the defendant's obligation, both in tort and in contract, was to observe the *Maclenan* standard of ensuring that the premises were as safe as reasonable care on the part of anyone could make them. Thus the invitee standard had no bearing.

Of course the nature of the tort duty is of less significance in Australia since *Australian Safeway Stores Pty. Ltd.* v. *Zaluzna*.[77] As there is no longer any special formulation of the duty owed to invitees, the question is whether the duty owed in tort to contractual entrants is a simple duty of reasonable care or the *Maclenan* duty to see that care is taken. But if the only possible negligence is that of the occupier or his servants the distinction will be immaterial. However if the plaintiff is arguing that the defendant is liable for the negligence of an independent contractor employed by him then a further question arises about the nature of the tort duty. On the view that the content of the tort duty is distinct and not determined by the content of the contractual duty, then whether the plaintiff can claim in tort as well

[73] (1987) 162 C.L.R. 479.
[74] See fnn.64, 66 supra.
[75] See fn.58 supra.
[76] [1985] 1 N.S.W.L.R. 346, 356.
[77] (1987) 162 C.L.R. 479.

as contract involves consideration of the impact of *Zaluzna's* case on the liability of invitors for the negligence of independent contractors. In some circumstances invitors have been regarded as owing a non-delegable duty, in others not. The criterion seems to be whether the type of work which the contractor was employed to do involved technical expertise not possessed by the invitor, such that he would not be able to do or check the work himself. If it did he would not be liable provided he exercised care in selecting a competent contractor. If the work was not of this kind he would be liable for the contractor's negligence.[78]

If *Zaluzna's* case has not changed the law in this respect then it is necessary to continue to recognize the category of "invitees" since the duty owed to them, being non-delegable in some cases, is higher than that owed to other entrants besides contractual entrants. It also means that the cases will be few where it will be necessary to determine whether a plaintiff is owed the *Maclenan* duty. Assuming that in borderline cases where it is unclear whether the plaintiff qualifies as a contractual entrant, he would clearly at the very least be classified as an invitee, it will only be necessary to determine whether he is entitled to the *Maclenan* duty if either: (1) he was injured by an independent contractor of the occupier who was not performing technical tasks beyond the expertise of the occupier; or (2) he was injured due to the negligence of a previous occupier or of a servant or independent contractor employed by the latter.

Finally it should be remembered that what we have been considering here is the occupancy duty in tort, and that Australian law recognizes the possibility of concurrent or overriding duties being owed by the occupier in another capacity.[79] Thus if there is another specific relationship between the parties which gives rise to a duty of care, such as that of employer and employee, bailee and bailor or an education authority and pupil, or if there is a relationship simply of "proximity"[80] between them, then there is another ground for tortious liability. However since *Zaluzna's* case the need to resort to overriding or concurrent duties would appear to have gone.

[78] The matter is discussed by Fleming, op.cit. p. 434 (who criticizes the distinction as difficult to justify in principle and difficult to apply in practice); Trindade & Cane, op.cit. pp. 603-604 (who consider that if the restriction with respect to non-technical work received full consideration by the High Court it might be jettisoned entirely); *Salmond & Heuston on the Law of Torts* (19th ed., London, Sweet & Maxwell, 1987) pp. 546-547; P.M. North, *Occupiers' Liability* (London, Butterworths, 1971) pp. 135-138. The leading cases are: *Haseldine* v. *C.A. Daw & Son Ltd.* [1941] 2 K.B. 343; *Woodward* v. *Mayor of Hastings* [1945] K.B. 174; *Thomson* v. *Cremin* [1953] 2 All E.R. 1185; *Green* v. *Fibreglass Ltd.* [1958] 2 Q.B. 245; *Voli* v. *Inglewood Shire Council* (1962) 110 C.L.R. 74; *Vial* v. *Housing Commission* [1976] 1 N.S.W.L.R. 388.

[79] *Public Transport Commission* v. *Perry* (1977) 137 C.L.R. 107; *Hackshaw* v. *Shaw* (1984) 155 C.L.R. 614; *Papatonakis* v. *Australian Telecommunications Commission* (1985) 59 A.L.J.R. 201; North, op.cit. Ch.6.

[80] *Bright* v. *Sampson & Duncan Enterprises Pty. Ltd.* [1985] 1 N.S.W.L.R. 346, 359 per Samuels J.A. citing *Public Transport Commission* v. *Perry* (1977) 137 C.L.R. 107.

TO WHOM IS THE CONTRACTUAL DUTY OWED?

It has been suggested that the duty owed to contractual entrants by virtue of an implied term in the contract is also owed to those who have permission to enter the premises under the contract but are not themselves in contractual privity with the occupier. In other words the contractual standard may apply where the plaintiff's entry on the premises is referable to a contract with a third party. So long as the entry is for reward to the occupier it matters not who furnished the reward. This may only be the position however, with respect to premises which are customarily hired out to the public.

This view was expressed, somewhat tentatively, by Windeyer J. (with whom the other judges agreed) in *Voli* v. *Inglewood Shire Council.*[81] In that case the plaintiff was present at a meeting in a hall, occupied by the defendant, which had been hired by an association of which the plaintiff was a member. He was injured when the floor collapsed due to negligence on the part of the architect, an independent contractor, who had designed the hall. Windeyer J. referred to an "ancient principle of the common law concerning things, for example vehicles or boats, kept for hire to the public,"[82] requiring that they should be reasonably safe for the purpose for which they are to be used. The nature of the duty is that which was expounded in *Francis* v. *Cockrell*[83] and *Maclenan* v. *Segar.*[84] That principle was attracted here as the hall was regularly let out to the public for short periods. It made no difference that the plaintiff was not himself the contracting party. It was not necessary to resort to the artificiality of treating the association as having contracted as agent for its members, since the duty was similar to that which is owed by those exercising common callings and was the standard owed to the plaintiff in tort.

However his Honour went on to consider what the plaintiff's position would be if he were owed the invitee duty rather than the *Maclenan* duty, and concluded that the defendant would be liable in any event. This was a situation where the defendant as invitor was under a non-delegable duty and hence liable for the negligence of its independent contractor the architect.

It is apparent that *Voli*'s case is not a conclusive authority for the proposition that the *Maclenan* duty is owed to those who are entitled to enter and

[81] (1962) 110 C.L.R. 74; but cf. *Baar* v. *Snowy Mountains Hydro-Electric Authority* (1970) 92 W.N.(N.S.W.) 472, 482; *Bantoft* v. *Municipality of Clarence* (1977) 36 L.G.R.A. 41, 45; *Lee* v. *City of Perth* (1947) 50 W.A.L.R. 23; *Drive-Yourself Lessey's Pty. Ltd. v. Burnside* (1959) 59 S.R.(N.S.W.) 390; *Rose v. Abbey Orchard Property Investments Pty. Ltd.* (1987) Aust. Torts Rep. 68, 925. The Law Reform Committee, op.cit. said: "It is . . . open to question how far, if at all, the express or implied contractual duty is applicable to third parties entering the premises pursuant to the contract" (para.6).

[82] Id. 91; but at other points in his judgment his Honour does not seem to be confining the principle to property regularly let or hired to the public; e.g. at 93 he questions whether it should matter who paid for a spectator's entry to a grandstand or for a passenger's railway ticket.

[83] (1870) L.R. 5 Q.B. 501.

[84] [1917] 2 K.B. 325.

use the premises by virtue of a contract between the occupier and a third party. As mentioned, Windeyer J. gave an alternative ground for his decision,[85] and he also limited his remarks to premises kept for hire to the public. Moreover his assimiliation of the duty owed by occupiers of premises let to the public and owners of chattels such as vehicles and boats hired to the public may be queried since it would seem that in the case of the latter the duty is stricter, being an implied absolute warranty of fitness for the purpose for which they are to be used.[86]

An argument can be made from the point of view of logic and policy for imposing a higher duty on occupiers towards entrants under contract even though they have not personally paid for the right to enter. If the rationale for conferring greater rights on contractual entrants is that the occupier has been rewarded for his invitation to use the premises, logically it should not matter by whom payment was made. On the assumption that there are sound reasons of policy for continuing to impose a higher duty on occupiers towards contractual entrants, those same considerations should support recognition of the higher duty towards third parties to the contract. Moreover it would often be quite fortuitous, in the case for example of theatregoers and spectators at sporting events, whether the injured person had paid for his own admission or not. Hence it would seem unduly technical to make this issue legally significant. No doubt a plaintiff would sometimes be able to argue that another person had paid for his entry as agent on his behalf, but as Windeyer J. noted in *Voli* v. *Inglewood Shire Council*,[87] there would often be an air of artificiality about the suggestion.

This kind of thinking is reflected in the *Occupiers' Liability Act* 1957 (U.K.) which enacts that "where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them . . . shall include the duty to perform his obligations under the contract . . . in so far as those obligations go beyond the obligations otherwise involved in that duty" (s.3(1)). However this section is not to have the effect, unless the contract so provides, of making the occupier liable for the negligence of independent contractors involved in the construction, maintenance or repair of the premises (s.3(2)).

In determining whether the contractual standard does or should extend to entrants for whose admission another has paid, the question considered in the previous section, namely, the nature of the duty owed to contractual entrants in tort, has some bearing. It was suggested there that there are two possibilities; either the duty in tort is that which is owed to invitees, or, alternatively, the content of the tort duty is the same as the contractual duty. If the former is the better view then it would seem odd that a third party

[85] A third ground was that there was also personal negligence on the part of the defendant's employees who checked the architect's plans.

[86] N.E. Palmer, *Bailment* (Sydney, Law Book Co., 1979) p. 738; Fleming, op.cit. p. 421; K.E. Lindgren, J.W. Carter & D.J.Harland, *Contract Law in Australia* (Sydney, Butterworths, 1986) p. 187-188.

[87] (1962) 110 C.L.R. 74, 94.

to a contract should be owed a higher duty in tort than that which is owed in tort to the contracting party himself. Thus on this approach it would not seem defensible to impose an obligation on the occupier to observe the *Maclenan* duty towards persons not privy to the contract.

But it seems that many Australian judges prefer the second approach.[88] If this is the law then there is no anomaly consisting in a higher duty being owed to third parties than to contractual privies; but the objections, referred to in the previous section, to the approach itself, could be made with added force. It has to be remembered that the *Maclenan* duty is not invariably the standard, since the duty owed to a contracting party depends on the terms, express or implied, of the particular contract, and contracts vary infinitely. Thus if it is the case that an entrant whose permission to use the premises derives from a contract to which he is not privy is always entitled to the contractual standard, the position may be that a duty is owed which is quite specifically formulated in the contract and foreign in nature to the law of tort. It is hard to view such a plaintiff as suing in tort at all. In reality he would be suing for breach of a contract to which he was not a party. Thus while the logic of extending the contractual standard to third parties is appealing, the defiance of the doctrine of privity of contract[89] which may be involved presents a problem. Perhaps the position is that third parties to the contract are only entitled to the contractual standard in their tort actions where the contractual obligation is the *Maclenan* duty deriving from a term implied by law, rather than a standard deriving from an express term or a term implied in fact.

DEFENCES

1. Exclusion Clauses[90]

The occupier can of course, subject to any statutory bar, exclude or limit his liability by taking appropriate steps to incorporate an exempting provision in the contract. Notices on the premises may be sufficient to achieve this if it is considered that reasonable steps have been taken to draw the terms on them to the entrant's attention.

The question arises whether third parties who have permission to enter by virtue of the terms of a contract, would be bound by exempting provisions in the contract. The answer could possibly turn on whether, as discussed in the last section, such persons are owed the contractual duty or just a duty of reasonable care in tort. Conceivably, if the position is that the law of tort

[88] fnn.64, 66 supra.

[89] The strictness of the doctrine has been modified by the High Court in *Trident General Insurance Co. Ltd.* v. *McNiece Bros. Pty. Ltd.* (1988) 62 A.L.J.R. 508; but query to what extent.

[90] As to whether they are appropriately described as "defences" see B. Coote, *Exception Clauses* (London, Sweet & Maxwell, 1964) Ch. 1; D.W. Greig & J.L.R. Davis, *The Law of Contract* (Sydney, Law Book Co., 1987) pp. 596-602; D. Yates, *Exclusion Clauses in Contracts* (2nd ed., London, Sweet & Maxwell, 1982) pp. 123-133.

adopts the contractual standard for such persons, the exempting provisions could apply. But if the contractual standard is not the appropriate one then it would seem that the doctrine of privity of contract must protect the plaintiff against the exempting provisions.

However in *Fosbroke-Hobbes* v. *Airwork Ltd.*,[91] a case decided before the *Occupiers' Liability Act* 1957 (U.K.),[92] Goddard J. said that the guest of the hirer of an aircraft would be bound by exemption clauses in the contract of hire even though he had no actual or constructive knowledge of them. He considered that a guest could not be in a better position than his host and that the obligations of the owner of the aircraft could not be increased because the hirer brought guests. This was not in fact a case where the *Maclenan* duty was involved, even vis-a-vis the hirer, since the accident resulted from the negligence of the pilot rather than the structural condition of the aircraft. Thus the plaintiff's status was irrelevant, though the Judge thought that in all probability he was an invitee. However it is clear that the exempting provisions, if effectively incorporated in the contract (which they were not), and if sufficiently clearly worded, would have operated, in this Judge's view, to exclude the occupancy duty owed to the plaintiff as well as the defendant's vicarious liability for the negligence of the pilot.

This case has been criticized[93] and seems out of line with the established rule that a person cannot be made subject to a burden by a contract to which he is not privy. Moreover it would seem unlikely that a court would accept the argument, mentioned above, that if it is considered that where the plaintiff's entry was paid for by another he is owed the contractual duty, then the terms of the contract, including any exempting provisions, govern his rights. Probably, with respect to all entrants who are not in direct contractual relations with him, an occupier who wishes to exclude his liability will have to establish circumstances which give rise to the tort defences of voluntary assumption of risk or "disclaimer".[94] Steps taken by him to incorporate exempting provisions in the contract under which the plaintiff entered may suffice to give rise to these defences. But the plaintiff's claim in these circumstances would fail, not by virtue of the terms of a contract to which he was not a party, but because of the successful invocation of a tort defence.

2. Voluntary Assumption of Risk

A contractual entrant is sometimes said to be barred by voluntary assumption of risk. This has usually been the case where spectators at sporting events were injured due to risks inherent in the game.[95] Voluntary assumption of risk is not per se a defence in contract as it is in tort; so if the claim

[91] [1937] 1 All E.R. 108.

[92] S.3(1) provides that where an occupier is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract.

[93] Law Reform Committee, op.cit. para. 55; Fleming, op.cit. p. 421.

[94] See infra.

[95] *Murray* v. *Harringay Arena Ltd.* [1951] 2 K.B. 529; *Hall* v. *Brooklands Auto Racing Club* [1933] 1 K.B. 205.

is viewed as one in contract the reason for the plaintiff's failure is attributed to an implied term in the contract whereby he absolves the defendant from liability should the risk eventuate.[96]

It is sometimes said[97] to be artificial to imply such a term if the plaintiff is a child too young to comprehend the risk, or someone who is totally unconversant with the risks involved in a particular sport. However this criticism would not be justified if the term is one implied in law rather than in fact. It would seem that this is so as the courts do not appear to inquire into the plaintiff's subjective knowledge of the risks.[98] He is deemed to know as much about the "inherent" risks as the defendant, which may be unrealistic given that the defendant will normally be more experienced and informed about the hazards. If, as appears to be the case, the term is one which is implied in law, then voluntary assumption of risk as a contract "defence" differs from the tort defence in that it does not require a full subjective appreciation of the risk. It is misleading therefore to use the expression "voluntary assumption of risk" in connection with contractual claims.

There is an even more basic objection to the practice of speaking of voluntary assumption of risk as a "defence" to actions for negligence, whether contractual or tortious. This objection is most forceful in relation to claims by spectators at or participants in, sporting activities. It is frequently said[99] that no action lies where the damage results from risks which are "inherent in" or "incidental to" the sport or activity, since these risks may be taken to have been voluntarily assumed. In cases in which this terminology is used, reference to voluntary assumption of risk is very often redundant. "Inherent" risks or risks "incidental the game" are simply those which due care cannot avoid and against which the occupier cannot reasonably be expected to take precautions. Where a risk "inherent" in a sport or activity eventuates the reality usually is that there is simply no negligence on the part of the person sued, whether it be the occupier of the ground, the organizer of the sport or a player. To say that the plaintiff accepted "inherent" risks just means that he is only entitled to the standard of conduct which the sport or activity permits or involves.[100] Normally a spectator at a sporting event will not be considered willingly to have accepted the risk of injury due to *negligence* on the part of the occupier or a participant.[101] If the term about acceptance of inherent risks is one which is implied in law it is unlikely that the courts intended as a matter of policy in effect to impose an obligation on spectators to absolve occupiers of sporting grounds from liability for negligence.

[96] *Hall* v. *Brooklands Auto Racing Club* [1933] 1 K.B. 205, 224-225 per Greer L.J.; *Wooldridge* v. *Sumner* [1963] 2 Q.B. 43, 66 per Diplock L.J.

[97] G.E. Siskind, "Liability for Injuries to Spectators" (1968) 6 *Osgoode Hall L.J.* 305; (1933) 49 L.Q.R. 156.

[98] Cf. Owen J. in *Australian Racing Drivers' Club* v. *Metcalf* (1961) 106 C.L.R. 177, 184-185.

[99] As in *Rootes* v. *Shelton* (1967) 116 C.L.R. 383.

[100] This was recognized by Sellers & Diplock L.JJ. in *Wooldridge* v. *Sumner* [1963] 2 Q.B. 43; Kitto J. in *Rootes* v. *Shelton* (1967) 116 C.L.R. 383; *Condon* v. *Basi* [1985] 1 W.L.R. 866; G. Dworkin (1962) 25 *Mod.L.Re v.* 738; Fleming, op.cit. pp. 274, 424-425.

[101] A.L. Goodhart (1962) 78 L.Q.R. 490; G. Dworkin (1962) 25 M.L.R. 738; *White* v. *Blackmore* [1972] 2 Q.B. 651, 663 per Lord Denning M.R., 668 per Buckley L.J.; *Chatwood* v. *National Speedway Ltd* [1929] Qd.St.R. 29.

It is submitted therefore that the concept of voluntary assumption of risk, in the sense in which it is understood in tort law has a very limited role to play in actions by contractual entrants against occupiers.[102] Perhaps circumstances could present themselves where a contractual entrant could be said truly to have assumed the risk of injury through negligence. But the situation would have to be an unusual one, such as where the layout of a sporting ground was dangerous to spectators and where the plaintiff, fully aware of this and exercising a free choice, deliberately placed himself in a risky position. Another way in which the defence might conceivably be successfully raised would be if the occupier placed notices on his premises warning of specific dangers or notifying entrants that precautions had not been taken,[103] and the entrant had actual knowledge of these provisions. But in both situations there could be a conflict with technical contract law in that the dangerous state of affairs may have been drawn to the plaintiff's attention after the formation of the contract so that, unless there was a previous course of dealing, it would be difficult to maintain that it was because of the implication of a term that the plaintiff's claim was barred.

3. Disclaimers in Tort[104]

In some circumstances a non-contractual exempting provision can effectively exclude or limit liability in tort, though the extent to which the law permits a tortious duty to be negatived by the act of the tortfeasor is unclear. Presumably, since tort duties are imposed by law, public policy must require some limit.[105] The right to disclaim liability may be restricted to situations where, by agreement, the defendant confers some benefit on the plaintiff.[106] At all events it has been recognized that an occupier of premises can exclude his liability towards a gratuitous licensee by placing notices on the premises.[107] The rationale for this is that as the occupier is under no com-

[102] The argument failed in *Perth* v. *Watson* (1915) 18 W.A.R. 8 where the plaintiff would appear to have been a contractual entrant suing in tort.

[103] Notices would have to be expressed in clear and concise language, warning of the particular danger: *The Cawood III* [1951] P. 270. In some circumstances such warnings could constitute discharge of the duty of care, especially if the defendant was not in a position to eliminate the danger, as in *The Moorcock* (1889) 14 P. 64.

[104] Terminology used by A.P. Dobson, "Non-contractual Exclusion Clauses" (1974) 124 *New L.J.* 249, 273.

[105] See N.C. Seddon, "Fault Without Liability – Exemption Clauses in Tort" (1981) 55 A.L.J. 22, 22 for judicial dicta to this effect.

[106] Dobson, op.cit. p. 274. He submits that there should be no right to disclaim if the disclaiming party has, or should have, liability insurance. Seddon, op.cit. p. 34 advocates legislation to control non-contractual exemption clauses.

[107] *Ashdown* v. *Samuel Williams & Sons Ltd.* [1957] 1 Q.B. 409 (criticized by L.C.B.Gower, "A Tortfeasor's Charter?" (1956) 18 M.L.R. 532, "Tortfeasors' Charter Upheld" (1957) 20 M.L.R. 181; F.J. Odgers, "Occupiers' Liability: A Further Comment" [1957] *Cambridge L.J.* 39; M.C. Atkinson, "Occupiers' Liability Law" (1968-70) 3 *U.Tas.L.Rev.* 82, 91-92); *Wilkie* v. *L.P.T.B.* [1947] 1 All E.R. 258; *White* v. *Blackmore* [1972] 2 Q.B. 651. In *Rose* v. *Abbey Orchard Property Investments Pty. Ltd.* (1987) Aust. Torts Rep. 68, 925 it was considered that the defence would be available to an invitee (though the defence was there described as *volenti non fit injuria*); cf. *White* v. *Blackmore* [1972] 2 Q.B. 651, 666-667 per Lord Denning M.R. It has been suggested that the duty owed to a trespasser may be

pulsion to grant entry to the premises at all, he must be entitled to do so subject to conditions.[108]

The defence of disclaimer is not identical with voluntary assumption of risk because actual notice of the terms of entry is not required; constructive notice will suffice.[109] The courts have applied the rules with respect to contractual exclusion clauses to these non-contractual disclaimers. Thus the degree of notice required is that which would be sufficient to incorporate the exclusion as a contractual term; and the rules of construction regarding exclusion clauses apply equally to non-contractual disclaimers. This being the case, it would not normally be necessary to consider whether a defence of disclaimer could be set up against a contractual entrant. If reasonable steps have been taken to draw his attention to an exclusion of liability it will be incorporated as a contractual term.

However there is one important difference between contractual exclusion clauses and non-contractual disclaimers, namely that the time at which notice is given is not crucial in the case of the latter though it is in the case of the former. Conditions attached to a revocable licence to enter property can be changed at any time, but the terms of a contract cannot be unilaterally changed after formation of the contract. Thus if the contract is made at the point of entry it is not possible for the occupier to introduce further terms into the contract by means of notices on the premises which would only be visible after entry. It seems that no separate defence of "disclaimer" exists with respect to contractual claims. The occupier can only rely on an exclusion of liability in a claim for breach of contract by a contractual entrant if he has taken the steps necessary to incorporate the exclusion as a term of the contract.[110] Thus if notices excluding liability are not exhibited at the point of entry to the premises a contractual entrant who frames his action in contract rather than tort, may be better off than a gratuitous licensee.

4. Contributory Negligence

Whether the plaintiff can avoid having his damages reduced for contributory negligence by framing his action in contract rather than tort remains an open question, the apportionment legislation not having received an authoritative interpretation. The matter was considered by the New South Wales Court of Appeal in *Harper* v. *Ashton's Circus Pty. Ltd.*[111] where the plaintiff was suing for injuries suffered when he fell from the top tier of seats

a minimum unexcludable standard, and that there can be no exclusion of liability to a person entering in exercise of a right conferred by law: Seddon, op.cit. pp. 27-28, 30, 32; Winfield, op.cit. pp. 219-220; Clerk & Lindsell, op.cit. pp. 616, 642.

[108] It seems to follow that a person who is not an occupier, e.g. a contractor or an occupier's servants, could not disclaim; nor could a trespasser be bound: Seddon, op.cit. fn.105 supra, pp. 29, 30; P.M. North, *Occupiers' Liability* (London, Butterworths, 1971) pp. 126-130; Odgers, op.cit. p. 54.

[109] But sometimes the defence is described as *volenti non fit injuria* e.g. *Rose* v. *Abbey Orchard Investments Pty. Ltd.* (1987) Aust. Torts Rep. 68,925.

[110] *White* v. *Blackmore* [1972] 2 Q.B. 651, 666-667 per Lord Denning M.R.

[111] [1972] 2 N.S.W.L.R. 395.

at the defendant's circus. The Court did not examine closely the wording of the apportionment legislation, but appears to have considered that it could not apply to an action for breach of contract. However it was noted that negligence on the part of the plaintiff could be a complete bar to a claim in contract. This would be the case if it was thought that the plaintiff's own negligence was the sole cause of the accident,[112] or if it appeared that the contractual duty was subject to a condition precedent that the plaintiff was taking reasonable care for his own safety. The duty owed by occupiers to contractual entrants was expressed in this conditional way in *Cox* v. *Coulson*[113] where it was said that the owner of a theatre "contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner *and with reasonable care*" (emphasis added).

In the circumstances in *Harper*'s case it was held that there was no negligence on the part of the plaintiff, so the dicta to the effect that contributory negligence was not per se a defence to a contract action were obiter. It may be noted also that the Court deprecated a position where it was possible for an "astute counsel, as was done here, to choose to rely solely on breach of contract and abandon a count of negligence to obtain a real advantage. This permits a battle of wits, and the result may depend, not on truth or justice, but on the ability of counsel."[114]

In other cases the apportionment legislation has been construed to apply to actions for breach of contract, at any rate where the contractual obligation was a duty of care and the plaintiff could have chosen to frame his action in tort.[115] Many writers submit that this is the better view.[116] It is possible that legislation will be introduced to clarify the matter in some jurisdictions, but meanwhile it is to be hoped that, at least in cases where duties of care in tort and contract co-exist, the courts will not permit the plaintiff to defeat the policy of the apportionment legislation by framing his action in contract.

ADVANTAGES OF SUING IN CONTRACT OR TORT

At first glance it would appear that the plaintiff would be in no better position relying on contract rather than tort, since the High Court in *Wat-*

[112] As in *Sole* v. *W.J. Hallt Ltd.* [1973] Q.B. 574.

[113] [1916] 2 K.B. 177, 181 per Swinfen Eady L.J.

[114] [1972] 2 N.S.W.L.R. 395, 402 per Manning J.A., see also per Hope J.A., 404.

[115] e.g. *Smith* v. *Buckley* [1965] Tas. S.R. 210; *Sayers* v. *Harlow Urban District Council* [1958] 1 W.L.R. 623, 625 per Lord Evershed M.R. ("Nothing turns on the foundation of liability . . ."); *Forsikringsaktieselskapet Vesta* v. *Butcher* [1986] 2 All E.R. 488, 510-511.

[116] e.g. Fleming, op.cit. pp. 256, 422; Trindade & Cane, op.cit. p. 429; Salmond & Heuston, op.cit. pp. 301, 578-9. The case law and proposals for reform are discussed by K. Mason, "Contract and Tort: Looking Across the Boundary from the Side of Contract" (1987) 62 A.L.J. 228, 231-234; A.M. Dugdale, "Proposals to Reform the Law of Civil Contribution" (1984) 2 *Canterbury L.Rev.* 171; N.E. Palmer & P.J. Davies, "Contributory Negligence and Breach of Contract — English and Australasian Attitudes Compared" (1980) 29 *Int. & Comp. L.Q.* 415; J. Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract" (1981) 55 A.L.J. 278; R.M. Jackson & J.L. Powell, *Professional Negligence* (2nd ed., London, Sweet & Maxwell, 1987) pp. 20-23; A.S. Burrows, *Remedies for Torts and Breach of Contract* (London, Butterworths, 1987) pp. 73-78.

son v. *George*[117] seems to have thought that the higher *Maclenan*[118] duty is the tort standard no less than the contract standard. However it has been suggested that because the contractual duty is sometimes expressed in terms of a rule, subject to an exception, that there may be a difference in the burden of proof depending whether the plaintiff sues in tort or contract. The implied term was formulated by Kelly C.B. in *Francis* v. *Cockrell*[119] and McCardie J. in *Maclenan* v. *Segar*[120] as a warranty that the premises were reasonably fit for the purpose, subject to a qualification that the warranty only applied to defects which were unseen, unknown and undiscoverable by reasonable care. This gives the impression that in an action for breach of contract the plaintiff has only to prove that he suffered injury or damage due to the defective condition of the premises; thereafter the defendant will have to disprove negligence to avoid liability. This possibility was considered by Fullagar J. in *Watson* v. *George*[121] but rejected on the ground that the burden of proving a breach of contract, no less than breach of a common law duty, is on the plaintiff. However he said that it might be thought that the position *should* be otherwise.

On the view that the tort duty does differ from the contractual duty and depends on the plaintiff's status at common law (which would normally be that of invitee), then since *Australian Safeway Stores Pty. Ltd* v. *Zaluzna*[122] the tort duty will be one of reasonable care. This will be just as advantageous as the contractual duty if the alleged negligence is that of the occupier himself or his servants. Even if the alleged negligence is that of the occupier's independent contractor the tort duty may still be sufficient. If the plaintiff is an invitee, and if the law with respect to the non-delegability of an invitor's duty has not been changed by *Zaluzna*'s case, then the occupier will be liable unless the contractor was employed to do work involving expertise not possessed by the occupier himself. If the work does not involve such expertise then the plaintiff will be better off if he frames his action in contract rather than tort.

Another possible advantage in framing an action in contract rather than tort relates to exclusions of liability. As noted earlier steps taken to give notice of an exclusion of liability to a contractual entrant are ineffective after the time of formation of the contract. But if the plaintiff's only rights are in tort then the time at which notice of a disclaimer of liability is given is not as crucial. Avoidance of the defence of contributory negligence may also, as mentioned above, make a contract action more attractive than a tort claim. Other aspects of the law of tort and contract may require consideration in a given case. Differences between the tort and contract rules with respect to such matters as damages, limitation of actions, contribution, minority,

117 (1953) 89 C.L.R. 409.
118 *Maclenan* v. *Segar* [1917] 2 K.B. 325.
119 (1870) L.R. 5 Q.B. 501, 508.
120 [1917] 2 K.B. 325, 332-333.
121 (1953) 89 C.L.R. 409, 421, 425-426. *Winfield on Tort* (6th ed., London, Sweet & Maxwell, 1954) p.676 states that once the premises were shown not to be safe it was for the defendant to excuse himself; but cf. Fridman, op.cit. p. 24 who thought the point was an open one.
122 (1987) 162 C.L.R. 479.

conflict of laws and bankruptcy may make it more advantageous to frame an action one way or the other.[123]

LEGISLATION

The *Occupiers' Liability Act* 1957 (U.K.)[124] abolished the "categories" except that of trespasser[125] by establishing a common duty of care which was owed to all lawful entrants, including contractual entrants (ss.2(1),5(1)). Because of the wording of the legislation there has been some doubt[126] about whether it applies to activities or operations on the land, but it seems now to be settled that it applies both to the static condition of the premises and to active operations thereon.[127]

The Act deals with the issue of the occupier's liability for the negligence of independent contractors by providing that there is no liability for the negligence of contractors involved in the construction,[128] maintenance or repair of the premises, so long as the occupier acted reasonably in entrusting the work to an independent contractor and took reasonable steps to ascertain that the contractor was competent and the work had been properly done (ss.2(4)(b),3(2)).[129] Thus the *Maclenan* duty is no longer owed to contractual entrants.

The occupier's right to exclude liability by contractual provision or disclaimer in tort is preserved by a provision that the occupier owes the common duty of care to all his visitors "except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise" (s.2(1)). However the decision in *Fosbroke-Hobbes* v. *Airwork Ltd.*[130] is overcome by a provision that where the occupier is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them cannot be restricted or excluded by that contract (s.3(1)). This means that a lessor cannot, by a term in the lease, effectively exclude his liability towards his tenant's visitors in the common areas, even though his liability towards his tenant is excluded. However it would seem that he could do so by means of notices sufficiently drawn to the attention of persons using the common areas, since the law with respect to disclaimers in tort is not affected.[131]

[123] See H. Street, *The Law of Torts* (7th ed., London, Butterworths 1983) pp. 440-441.

[124] Examined by P.M. North, *Occupiers' Liability* (London, Butterworths, 1971).

[125] But trespassers are now owed a duty of reasonable care under the *Occupiers' Liability Act* 1984 (U.K.).

[126] Discussed by North, op.cit. pp. 79-82; Clerk & Lindsell, op.cit. pp. 593-594; Salmond & Heuston, op.cit. pp. 295-296; Odgers, op.cit. pp. 39-40, 49-54; D. Payne, "The Occupiers' Liability Act" (1958) 21 M.L.R. 359, 367-368.

[127] *Ferguson* v. *Welsh* [1987] 1 W.L.R. 1553.

[128] Interpreted to include demolition: ibid.

[129] These provisions are discussed by North, op.cit. Ch. 9; Clerk & Lindsell, op.cit. pp. 621-623; Street, op.cit. p. 181; Winfield, op.cit. pp. 214-216.

[130] [1937] 1 All E.R. 108.

[131] Payne, op.cit. p. 369; Seddon, op.cit. p. 31.

Added protection is given to strangers to the contract whom the occupier is contractually bound to admit, in that their rights are to include the obligations in the contract in so far as those obligations go beyond a duty of care (s.3(1)). Thus a tenant's visitor could claim the benefit of a landlord's covenant to repair the common areas.

Since the *Unfair Contract Terms Act* 1977 (U.K.) the position in England is that contractual exclusions and tort disclaimers of liability are, so far as personal injuries resulting from negligence are concerned, prohibited (s.2(1)). In other cases they are subjected to a test of reasonableness (s.2(2)). But these provisions apply only where liability arises in the course of a business or from the occupation of premises used for business purposes (s.1(3)). The defence of voluntary assumption of risk is not abolished but the Act provides that a person's agreement to or awareness of a notice or term is not of itself to be taken as indicating his voluntary acceptance of any risk (s.2(3)). Thus it has been suggested that it remains open for the validity of a disclaimer (or conditions attached to a licence) to be pleaded on the technically different ground of voluntary assumption of risk.[132]

Legislation governing occupiers' liability has been enacted in Australian jurisdictions only within the last decade. The legislation is not uniform, but in each case it establishes a common duty of care, at any rate towards lawful entrants, preserves the occupier's right to exclude or restrict his obligations by contract or otherwise, and precludes reliance by the occupier on an exempting provision in a contract to which the plaintiff is not a party.[133] The same duty of reasonable care towards entrants is owed by landlords who have obligations to repair or maintain rented premises. Most importantly, each piece of legislation differs from the English Act in that it is stated not to affect the position of contractual entrants.

In Victoria the *Occupiers' Liability Act* 1983 (Vic.) amended the *Wrongs Act* 1958 (Vic.) by inserting provisions overriding the common law in relation to occupiers' liability. The *Wrongs Act* 1958 (Vic.) defines "occupier" of premises to include a landlord with a duty or right to repair or maintain the premises (s.14A(a)), and imposes on occupiers a duty, which is owed to all entrants including trespassers, to take reasonable care to avoid injury or damage resulting from the state of the premises (s.14B(3)). In determining, whether the duty of care has been discharged consideration is to be given to various matters including the gravity and likelihood of the probable injury, the circumstances of the entry, the nature of the premises and the ability of the entrant to appreciate the danger (s.14B(4)). However the law relating to contractual entrants is expressly preserved by a provision that: "Nothing in this section affects any obligation to which an occupier of premises is subject by reason of . . . any contract" (s.14B(5)).

The Western Australian *Occupiers' Liability Act* 1985 (W.A.) also

[132] P. Clark, "Occupiers' Liability After the Unfair Contract Terms Act" (1981) 10 *Anglo-Am.L.Rev.* 11; cf. Seddon, op.cit. p. 29, and Street, op.cit. p. 185 who think that the Act cannot be avoided by raising the separate defence of *volenti non fit injura.*

[133] Except the Victorian legislation.

establishes a common duty of reasonable care to all entrants (s.5(1)), and spells out certain matters to which consideration is to be given in determining whether an occupier has discharged his duty of care (s.5(4)). The duty is owed by occupiers and by landlords who have responsibility for maintenance or repair of tenanted premises (s.9(1)). Though the duty is owed to trespassers as well as lawful entrants, there is a reservation with respect to persons who are on the premises with the intention of committing, or in the course of commission of, an offence punishable by imprisonment. The duty owed by the occupier to such persons is only to refrain from wilfully injuring, or acting with reckless disregard to the presence of, that person (s.5(2),(3)).

The occupier is not to be liable for damage caused by the negligence of independent contractors, in the absence of personal negligence on his part (s.6(1)). He is entitled to extend, restrict, modify or exclude his obligations, by agreement or otherwise (s.5(1)), but his duty is not to be restricted or excluded by the provisions of any contract to which the plaintiff is not a party (s.7(1)). The Act preserves higher obligations by a provision stating that nothing therein is to relieve an occupier from any duty, imposed by any enactment or rule of law, to show a higher standard of care than that which the Act creates (s.8(1)). Presumably this means that the common law rights of a contractual entrant are unaffected.

In South Australia an amendment in 1987[134] to the *Wrongs Act* 1936 (S.A.) established a common duty of care to lawful entrants, which is owed by occupiers and by landlords with an obligation to maintain or repair (ss.17b,17c(1),17d). The Act also specifies certain matters which a court should take into account in determining the standard of care to be exercised by the occupier (s.17c(2)). However no duty of care is owed to a trespasser unless the presence of trespassers and their 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 (s.17c(6)).

The occupier's duty of care may be reduced or excluded by contract, but no contractual reduction or exclusion of the duty affects the rights of any person who is a stranger to the contract (s.17c(4)). There is no specific provision with respect to liability for the negligence of independent contractors, but the Act is not to affect any "higher standard of care" to which the occupier is subject, by contract or by reason of some other Act or law (s.17c(5)). Thus the common law with respect to the rights of entrants under contract is preserved.

CONCLUSION

It seems that the law in this country, even in jurisdictions where there is legislation governing occupiers' liability, does recognize that a somewhat

134 *Wrongs Act Amendment Act* 1987 (S.A.).

higher duty is owed to contractual entrants than to other entrants on property. The duty is one to see that care is taken by anyone involved in the construction, maintenance or repair of the premises, and may involve liability for the negligence of independent contractors, previous occupiers and contractors employed by the latter. The preferred view is that the same duty is owed whether the plaintiff sues in contract or tort. The persons entitled to this higher standard are those who have paid to enter premises under a contract the main object of which is use of the premises for a purpose beneficial to the entrant, and probably also those who have permission to enter the premises under such a contract but who are not parties to it. Possibly however the latter group is only included if the premises are customarily hired out to the public.

Singling out contractual entrants as the beneficiaries of a higher duty[135] can be justified on the basis that the law of contract differs from the law of tort in that it is not considered vital to inquire into the relationship between the person who owes a contractual obligation and the person whom he engages to perform it. Whether the relationship is that of master and servant or employer and independent contractor is not as crucial as it is in the law of tort. Thus if the law regards the occupier as having undertaken that reasonable care has been exercised to make the premises safe for those whom he charges to enter and use them, it is quite in accordance with principle to impose liability wherever negligence contributed to the defective condition of the premises, irrespective of whose negligence it was.

Allowing third parties to the contract to claim the benefit of the higher duty can be justified on the basis that it is sensible for the law to emphasize the issue of whether entry was for reward to the occupier rather than the issue of who paid for it. Any apparent conflict with the doctrine of privity of contract can be resolved by grouping this class with the other categories of case where non-delegable duties are owed in tort. The policy behind the recognition of non-delegable duties in tort has not been clearly formulated and is not always easy to discern. Dicta to the effect that "where a legal duty is incumbent on a person, it is not discharged by employing an independent contractor who imperfectly performs it"[136] are not helpful since they do not

[135] Samuels J.A. in *Calvert* v. *Stollznow* [1982] 1 N.S.W.L.R. 175, 180 thought it "sensible and workable for the law to imply a warranty of structural fitness into a contract, for valuable consideration, to enter premises for a mutually contemplated purpose" (though he noted that the contractual entrant seems unknown in American law). The Law Reform Committee, op.cit. paras. 4, 39, considered it unexceptionable in principle (but without elaboration of their reasons); cf. New South Wales *Law Reform Commission Working Paper on Occupiers' Liability* (1969) pp. 62, 67, where it is suggested that liabilities in tort ought not to be extended or modified by contract unless there was an express or implied provision to that effect, and that no provision should be implied unless it appeared that the parties directed their minds to the matter and intended to agree on the provision. However retention of the stricter duty with respect to premises the subject of short-term hirings was favoured.

[136] *Cox* v. *Coulson* [1916] 2 K.B. 17, 182, 184 per Swinfen Eady L.J.; *Hall* v. *Brooklands Auto Racing Club* [1933] 1 K.B. 205, 215-216 per Scrutton L.J.; *Dalton* v. *Angus* (1881) 6 App. Cas. 740, 829 per Lord Blackburn; S. Chapman, "Liability for the Negligence of Independent Contractors" (1934) 50 L.Q.R. 71, 75-76. Windeyer J. seemed to be acknowledging this when in *Voli* v. *Inglewood Shire Council* (1962) 110 C.L.R. 74, 95 he described the phrase "non-delegable duty" as just a "convenient heading."

explain why an especially onerous "personal" duty is imposed in some circumstances and not others. Probably there is no single rationale for the imposition of non-delegable duties in tort since the categories of case where such a duty is recognized to exist are so diverse that the policy factors at work must differ widely.[137] However the explanation for the imposition of such a duty on occupiers towards persons permitted to enter and use the premises pursuant to a contract between the occupier and another can be found in the different approaches, referred to above, of the law of contract and tort with respect to delegated performance, and the appearance of absurdity and pedantry which would be given by a strict insistence on the requirement of contractual privity in this context.

One point of criticism of the present law is that it sometimes seems unduly technical to regard a plaintiff as entitled to the higher duty only on that part of the premises to which he is entitled to resort by virtue of the contract rather than as a member of the public. It has been suggested[138] that the part of the premises where the damage or injury is suffered should only be relevant to the question of what constitutes breach of the duty rather than the nature of the duty. It may be thought that the law has not drawn the line at the right place and that, provided that the plaintiff's presence in the public areas is attributable to his intention to enter and use or his having used other areas in exercise of his contractual title, the higher duty should be owed throughout the premises.

[137] Mason J. attempted to state a general principle in *Kondis* v. *State Transport Authority* (1984) 154 C.L.R. 672, 687; quoted by Wilson and Dawson JJ. in *Stevens* v. *Brodribb Sawmilling Co. Pty. Ltd.* (1985) 160 C.L.R. 16. 44.

[138] Fridman, op.cit. fn.14; *Winfield on Tort* (6th ed., London, Sweet & Maxwell, 1954) p. 675.