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REPORT

ON

OCCUPIERS' LIABILITY

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The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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I. INTRODUCTION

93 The law of occupiers' liability is that branch of
95 tort law which governs the liability of occupiers for damage
99 or injury sustained on their premises. The liability of an occupier is governed by rules unique to the law of torts.
104 Unlike for ordinary negligence liability, our law does not expect an occupier always to act "as a reasonable man of ordinary prudence"[1] towards visitors on his premises. Instead,
107 the standard of care required from an occupier will vary, depending upon the classification the law will ascribe to an entrant
112 on his property. Moreover, no separate issue arises, as in ordinary negligence, on whether the injured party's presence
117 was "reasonably foreseeable" so as to give rise to a duty of care. Rather, under occupiers' liability, the classification the law devises for that visitor will normally determine whether the occupier owes him a duty of care. In short, this branch of tort law is distinguishable from ordinary negligence liability because it resorts to a classification system to determine whether a duty of care exists and to ascertain the appropriate standard of care to govern in each instance.

The classification system and the traditional standard of care corresponding to each category of visitor have become almost proverbial. Where the visitor's entrance is not either expressly or impliedly permitted by the occupier, the visitor is classified as a trespasser. As the entrance is considered unlawful, it has been traditionally said that no duty of care is owed. The only protection conventionally assigned to a trespasser is a negative one: that is, an occupier cannot injure him either intentionally or recklessly. Where a visitor enters land with the permission of the occupier (again, either expressly or impliedly), but confers no economic benefit in so doing, the visitor is said to be a licensee. The standard

of care has been cast slightly higher: the occupier is liable for injuries caused by hidden or concealed dangers on his land of which he is aware. One who enters with the permission of the occupier and whose entrance confers an economic advantage on the occupier is categorized as an invitee. The duty is likewise more onerous and, in its application, is said to resemble closely the negligence standard of "the reasonable prudent man":[2] an invitee, using reasonable care for his own safety, is entitled to assume that the occupier shall use reasonable care to prevent injury to him from unusual dangers of which the occupier knows or ought to know. Finally, a person who comes onto premises by virtue of a contract with the occupier is known as a contractual entrant. Here, the contract governs but, in the absence of a contractual provision, the courts will super-impose their own standard of care through the provision of an implied warranty. Although there is a lack of judicial uniformity in defining the standard owed,[3] in Manitoba, the implied warranty has been cited in its original terms: the premises must be as safe as reasonable care and skill on the part of anyone can make them.[4]

There are few branches of tort law which have been subject to greater criticism than that of occupiers' liability.[5] One of the major concerns expressed, by both academics and practitioners, is the seemingly unwarranted complexity of this classification system and the difficulty experienced in the application of individual claims to it. Indeed, this branch has been cited as being "one of the most confused areas of Canadian negligence"[5a] and Professor A.M. Linden (now Mr. Justice Linden) has rather succinctly referred to it as "a mess".[6] In addition to this allegation, however, many regard this system of determining liability as anachronistic because of the recognition it affords to the occupation

of land and the consequent greater protection it grants to occupiers relative to one's liability under ordinary negligence law. Indeed, one writer has gone as far as suggesting that our law is "Draconian"[7] on this topic.

In one respect these two criticisms are interrelated. That is, because the system is said to embrace outdated principles of social policy, the courts, in their eagerness to achieve just results, have often contorted the law to suit the desired result in each case; to quote Lord Denning, M.R. the courts did "what to justice shall appertain".[8] Unfortunately, this has, in some instances, intensified the vagueness in the system's terminology and aggravated the confusion in determining the appropriate category on a practical application.

From a historical perspective, it is well recognized that this branch of the law was developed in England in the 19th Century when significant importance was ascribed to the ownership of landed property, owing in part to the feudal origin of that society.[9] As Professor James Fleming has noted,

> . . . the special privilege these rules accord to the occupation of land sprang from the high place which land has traditionally held in English and American thought and the still continuing dominance and prestige of the landowning class in England during the formative period of this development. This sanctity of land ownership included notions of its economic importance and the social desirability of the free use and exploitation of land. Probably it also included, especially in England, more intangible overtones bound up with the values of the social system that traced much of its heritage to feudalism.[10]

It should also be acknowledged that these rules governing the liability of occupiers developed when negligence was still an ancillary factor in writs rather than an independent tort,

which developed from the action on the case during the industrial revolution of the 19th century. Accordingly, the value given to protecting members of our society from another's negligence had not, as yet, fully ripened. Nor had the principle that a legal relationship could be created solely by conduct likely to cause injury to another.

Given the allegation of the system's complexity and the significance it attributes to the exclusive use and occupation of land, this branch of the law has been the subject of interminable reform, both of the legislative and judicial variety. In the United States, several jurisdictions have initiated reform through the common law process with the result that liability of an occupier to all visitors is now governed in these areas by ordinary negligence law.[11] As well, the *Restatement on the Law of Torts 2d.(1965)* has assisted in clarifying the rules and standards concerning liability under this heading, in addition to eliminating some of its discrepancies.[12]

England has led the path of statutory reform with the enactment of the *Occupiers' Liability Act*, 5 & 6 Eliz. 2 c. 31, which came into effect on January 1, 1957. This statute closely followed the recommendations of the Law Reform Committee as set forth and published in its report on this subject.[13] Within the Commonwealth, Scotland and New Zealand have since followed suit with the passage of legislation.[14] Indeed, New Zealand's legislation is almost identical to the English statute of 1957.

In Canada, Alberta preceded the other provinces in initiating reform when the Institute of Law Research and Refcrm published its report in 1969.[14a] The majority of its

recommendations were implemented with the enactment of the *"Occupiers' Liability Act"*, S.A. 1973 c. 79, which came into effect on January 1, 1974. Five months later, British Columbia passed legislation which closely resembled the act drafted by the Uniform Law Conference of Canada the previous year.[15] In 1972, the Ontario Law Reform Commission published a report which recommended the enactment of the draft Act contained within its published report.[16] Ontario has recently given Royal Assent to an *Occupiers' Liability Act* which is to come into effect by a date fixed by Proclamation.[17] Nova Scotia published a study report in 1976 which also recommended the adoption of an "Occupiers' Liability Act", although legislation has not, as yet, been enacted.[18] Very recently the Law Reform Commission of Saskatchewan published its report which contains tentative proposals for an Occupiers' Liability Act.[19]

The recommendations of these law reform agencies and the legislation which has been introduced in the various jurisdictions cited have been quite diversified in resolving how this branch of tort law should best be amended. In brief, the major difference has been whether the statute should provide for a duty of care where trespassers are injured and, if so, whether that duty should be defined identically with or more narrowly than the duty for other entrants.

The initial divergence arose between the legislation of England and Scotland: that is, unlike the Scottish statute (which makes provision for a common duty of care to all entrants), the English Act of 1957 does not reform the common law with respect to trespassers. However, this present variance in the approach of these two jurisdictions may disappear, given the recommendation of the Law Reform

Commission (England) in its 75th report that a statutory duty of care be given to "uninvited entrants" as well.[20]

Here in Canada, those legislatures which have reformed the law have given an equal reception to the English and Scottish statutes, as initially adopted. Although the Alberta statute grants a more liberal duty of care to child trespassers, it recites the duty to other trespassers in traditional terms: an occupier's liability should only arise where damage results from his "wilful or reckless conduct".[21] Conversely, the Uniform Act and the British Columbia statute have followed the Scottish approach of enacting legislation which encompasses a common standard of care applicable to all entrants. Although the Ontario Law Reform Commission recommended the adoption of a statute quite similar to the Scottish Act, the present bill is a compromise of the English and Scottish approaches. That is, generally it provides for a common duty of care but exempts certain trespassers from this duty of care and replaces the common duty with a traditional standard of care in those instances.[22] The draft Act tentatively adopted by the Law Reform Commission of Saskatchewan is similar to the Ontario bill in providing for a common duty of care with some limited exceptions.[23]

The majority of these statutes are set forth in our Appendices.

Although jurisdictions have generally differed in the manner of their reform, all which have formally studied this branch of tort law have nevertheless been united in their agreement that reform should be introduced to vary this century-old system of determining liability. Manitoba has,

as yet, given little consideration to this branch of tort law despite the prevalence of reform introduced elsewhere. Given this factor, and the general force of the criticism directed at this branch of tort law, this Commission agreed (pursuant to section 5(1)(d) of *"The Law Reform Commission Act"*, C.C.S.M. L95) to review the law of occupiers' liability in Manitoba, to consider whether statutory reform is required and, if so, to recommend the method and the scope of legislative reform to be introduced.

What follows, therefore, is an account of the law of occupiers' liability relevant in our jurisdiction. In Part III of this Report, this Commission will inquire into the validity of a classification system (and the method of liability based on it) to determine the cogency of the arguments advanced in favour of retaining a classification system. In the penultimate portion of this Report, we shall consider the options for reform and attempt to assess the scope of legislation which we feel is proper. We have, in addition, set forth at the conclusion of our remarks a draft statute with appropriate commentary, explaining the intent of each section of the proposed legislation.

The Commission wishes to acknowledge at this stage of our Report, our indebtedness to the various law reform commissions across Canada who have published reports on occupiers' liability. These reports were of great assistance in providing us with a summary of a rather massive and certainly complex branch of tort law.

II. THE LAW OF OCCUPIERS' LIABILITY IN MANITOBA

It is not the intention of this Commission to provide a thorough and incisive review of the law concerning occupiers' liability. A skilful summary of this law can be obtained from a review of the report issued by the English Law Reform Committee in 1954 on this subject,[24] and from the report published by the Alberta Institute of Law Research and Reform in 1969.[25] In addition, there are numerous Canadian articles on this subject area.[26] Moreoever, Manitoba courts, like those in other Canadian provinces, have closely adhered to English precedent in this branch of tort law. Consequently, a complete summary of this area of study would only result in an unwarranted duplication of these earlier efforts. Instead, our account of the law will focus briefly upon the relevant standards of care our courts have traditionally defined for each classification. In addition, we shall review in greater detail the changes introduced within our common law which have recently reformed these traditional standards of care, especially towards those entrants classified as trespassers and licensees.

In our introduction we briefly summarized the four classifications the law ascribes to entrants (trespassers, licensees, invitees and contractual entrants) and the appropriate standard of care which has been traditionally cited for each category. What follows is a more thorough account of this area of study.

(a) Trespassers

Grand Trunk Railway Co. of Canada v. Barnett[27] is one of the first authoritative decisions[28] to indicate

the presence of a trespasser category within occupiers' liability and to identify the legal standard of care required towards such an entrant. Lord Robson, who delivered the decision of the Council, stated that: "The general rule . . . is that a man trespasses at his own risk".[29] Although the Council acknowledged that liability to a trespasser would result on occasion, it restricted legal accountability to those incidents where an occupier displays "a wilful or a reckless disregard of ordinary humanity rather than mere absence of reasonable care".[30]

The House of Lords reiterated this restrictive standard of care in the well-known (but critically regarded)[31] case of *Robert Addie and Sons (Collieries) Limited v. Dumbreck*.[32] That decision arose from an appeal of the Scottish Court of Session which had (until this decision) applied ordinary negligence law to resolve the issue of an occupier's liability to entrants on his property.[33] The House overturned the decision of the Scottish Court of Session (which had granted relief to the plaintiff for the death of his infant son) apparently being wrongly informed of the Scottish law on this point.[34] In any event, Lord Hailsham made the following statement which has since been widely applied in Manitoba case law as the standard of care owed to a trespasser:[35]

> Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser.[36]

These two decisions have been summarized in some detail for they do provide, as stated, the cornerstone of traditional trespasser law in Manitoba. Although in these formative years, the Supreme Court of Canada expressed on occasion a willingness to depart from the principles pronounced in *Addie* and *Barnett* where children were the victims of injury,[37] a similar tendency has not generally been evidenced in our province.[38] Indeed, whereas the courts in Australia, for instance, were attempting to develop the law from *Addie* to provide for a more humane standard of care,[39] our Manitoba courts, almost without exception,[40] applied the limited duty devised in these two decisions consistently to preclude liability in favour of these uninvited entrants.

Indeed, the English courts proved to be more creative in restricting the effects of *Addie* to narrower confines. For instance, the doctrine of allurement, derived from the decision of *Glasgow Corporation v. Taylor*,[41] was created to modify an infant plaintiff's classification from trespasser to that of licensee. In addition, the courts leaned heavily to find some evidence of the occupier's implied consent to raise, in effect,the standard of care owed to that of a licensee. A further method, developed by Lord Denning, M.R.,[42] was used to confine the law of occupiers' liability to those occasions where injury or damage arose from static conditions on the land, as opposed to activities conducted thereon.

These methods have received a mixed reception in Canada. Although the doctrine of allurement has been successfully applied to some extent in other provinces to raise the entrant's category from trespasser to licensee,[42a] in reported cases in Manitoba it has apparently had little effect in this regard. Conversely, although the active-passive distinction is no longer applicable in either England or Australia,[44] there has

been no indication by the Supreme Court of Canada that this principle is no longer operative here.[45]

The last reported case in Manitoba involving the liability of an occupier to a trespasser was decided over ten years ago. Consequently, to trace the more recent developments in this category, it is necessary to analyze the jurisprudence developed outside of our province.

We indicated that the courts had created certain principles to restrict the effect of *Addie* to narrower confines and that these had, to some extent, been accepted by Canadian courts to varying degrees. In addition to these attempts, efforts were also taken to broaden the scope of the duty defined in *Addie*. For instance, it is clear that the limited duty Lord Hailsham set forth in *Addie* was intended to be confined to instances where an occupier actually knew of the presence of the trespasser. However, this principle was modified in both England and Australia so that by 1974, the Privy Council agreed that a duty of care was created as soon as the occupier "knows facts which show a substantial chance that they [trespassers] may come there".[46] In addition, the lower courts in England were extending the meaning of recklessness to provide essentially for a standard of care similar to that of gross negligence.[47]

This latter device of broadening the definition of "recklessness" was not well received in Canada. As late as 1966, the Supreme Court of Canada affirmed a British Columbia Court of Appeal decision which had held that recklessness means "an indifference to the safety of the trespasser" which "import[s] some moral element going beyond mere heedlessness".[48] The former technique of extending the duty relationship has, however, met with greater success. A minority

of the justices on the Supreme Court have adopted the Privy Council test, as cited above, while others on the court have gone further in providing a broader test to create a duty of care. This latter part is examined in further detail on page 14 of our Report.

Although these methods to modify or avoid the restrictive standard of care received some success, it became evident that the narrow principles enunciated in *Addie* and *Barnett* would have to be reconsidered by both the House of Lords and the Supreme Court of Canada. The opportunity first arrived in England when the House of Lords, challenged by a decision of the English Court of Appeal,[49] agreed to reconsider its previous decision, in the celebrated case of *Herrington v. British Railways Board*.[50]

Unfortunately, all of the five law Lords who heard the decision wrote separate judgments. Consequently, it is difficult to discern a common principle from this decision. However, it is clear that the case has been interpreted to have discarded the traditional standard of care as set forth in *Addie*. Moreover, it is generally conceded that the measure of care intended to replace that of *Addie* is that the occupier must treat the trespasser "with ordinary humanity".[51]

There appears to be a lack of precision on the meaning of this term within the judgments. Lord Pearson indicates that this duty "is a lower and less onerous duty"[52] than the one owed to a lawful visitor under the 1957 statute (". . . what is reasonable to see that the visitor will be reasonably safe . . ."). Lord Morris goes further and

states that the standard of care is "substantially less"[53] than that provided for in that statute. In any event, Lord Diplock provides some guidance in stating that this duty of care would, in most instances, be satisfied if the occupier warned the trespasser of the danger. However, he concedes that more might be required where the entrants are children.[54] In our opinion, Lord Reid provides the most cogent remarks of all of the law lords as he sets forth the following test to determine the issue of liability:

> . . . the question whether or not an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it.[55]

This decision has been examined in some detail for the reason that the majority of the justices on the Supreme Court of Canada have indicated their intent to follow the *Herrington* decision. This resolve appears in the case of *Veinot v. Kerr-Addison Mines Ltd.*[56] The facts of this decision can be stated briefly: the adult plaintiff drove his snowmobile on the defendant company property and sustained injury when he struck a two-inch pole, mounted horizontally on two wooden posts, which had been erected some 20 years earlier on an old logging road located on the property. At trial, the jury found evidence of an implied permission and, in effect, raised the standard of care owed to the plaintiff to that of a licensee. On this basis, the company was held liable. The Ontario Court of Appeal found there to be no evidence of implied permission and reversed judgment on this basis. At the Supreme Court, five justices agreed that the jury verdict should not have been disturbed and, consequently, held the company to be liable. Three justices

in the majority and four who would have affirmed the Court of Appeal decision dealt with the issue of liability on the basis of trespasser law.

Unfortunately the case splits into three separate decisions and consequently it is difficult, once again, to discern a clear and concise statement of the law to provide a reasonable guide in future cases. In very general terms, the decision can be interpreted to mean that occupiers in Manitoba must act with a "common humanity" towards trespassers. As to the creation of this duty, there is no clear consensus from the Supreme Court when it arises. Three of the justices agreed that this issue should be determined by an objective test; that is, the duty will be created if the trespasser's presence is reasonably foreseeable. However, four other members of the Court prefer a less objective test. These latter justices contend that the proper inquiry to create a duty relationship is whether the occupier "knows facts which show a substantial chance"[57] that a trespasser may come on to his property. It may be, as one justice has suggested, that these two tests are "practically indistinguishable" and that "to endeavour to develop fine distinctions would be a futile exercise in legalistic semantics".[58] However, we think the distinction is important to the extent that the objective test is a concept of ordinary negligence law. Its rejection by four justices of the Supreme Court could indicate a general reluctance on their part to apply ordinary negligence principles to determine an occupier's liability towards a trespasser.

Legislative reaction to the *Veinot* case has been much clearer than the decision. That is, in 1976, our legislature in Manitoba passed an amendment to *"The Snowmobile Act"*, C.C.S.M. c. S150,[59] which had the effect of restricting the duty of care owed to snowmobilers on private property to that

set forth by Lord Hailsham in *Addie* (a copy of the relevant portions of this statute is contained in Appendix "A"). Section 25.1 of this Act specifically prohibits the operation of snowmobiles on private land without the express or implied consent of the owner. A review of the Debates and Proceedings suggests that the legislature enacted this provision as it felt it was unfair to command a higher duty from occupiers to individuals where their presence is prohibited by the statute.[60] Notwithstanding this factor, the amendment goes beyond the *Veinot* case as it applies not only to trespassers but also to licensees. A similar legislative provision in Saskatchewan has been criticized for this reason.[61]

In any event, the uncertainties of both the duty and the measure of care owed to trespassers remain with us. There have been no further Supreme Court decisions to clarify the *Veinot* case,[62] nor have there been any subsequent Manitoba cases to shed light on its interpretation. One Ontario Supreme Court decision, *Walker v. Sheffield Bronze Powder Limited*,[63] has interpreted the *Herrington* and *Veinot* decisions to mean that ordinary negligence law should now govern child trespasser cases. This decision has been criticized, however, as stretching the standard of care further than that pronounced in either of these two judgments.[64]

The English Court of Appeal has gone further than *Walker* however in interpreting the authoritative law on this matter. The Court has, in effect, stated that ordinary negligence principles should determine an occupier's liability to all trespassers. The case is *Pannett v. McGuiness Co. Ltd.*[65] Referring to *Herrington*, Lord Denning, M.R., sets forth four factors to determine whether the defendant "ought to have done more than he did".[66] The factors he cites are (1) the

gravity and likelihood of probable injury, (2) the character of the intrusion, (3) the nature of the place where the trespass occurs, and (4) the knowledge which the occupier has, or ought to have, of the likelihood of the trespasser's presence.[67] These factors listed by Lord Denning, M.R., were specifically set forth and adopted by a minority of the judges of the Supreme Court of Canada in the *Veinot* case.

Although these factors provide some assistance, they have only been adopted by a minority of the Supreme Court judges and consequently are not binding on our lower courts. Regardless of their authority, we are of the view that it is difficult at this stage to discern whether the standard of a "conscientious, humane man"[68] differs from the standard of a reasonable man and, if so, in what manner. Similarly, it is unclear when the duty of care towards a trespasser can be said to arise. Although it is generally agreed that neither the duty nor the measure of care due to a trespasser can exceed that owed to a licensee, this fact can only fail to assist us as the law concerning licensees is also in a great state of flux and resultant uncertainty. It is our opinion that individuals are entitled to a reasonably certain guide to the law before cases are actually decided. However, for the foregoing reasons, we think that our law concerning liability to trespassers is presently deficient in this regard. We would concur with the comments of Professor G.H.L. Fridman who remarked that the law concerning trespassers "is much more subtle and complex than it ever has been . . ." such that, "an aura of uncertainty surrounds this whole area of the law".[69]

(b) Licensees

As we mentioned in our introduction, a licensee is a person who has received the express or implied leave

from an occupier to enter onto his property. Consequently, a licensee differs from a trespasser because there is, in this instance, a consent to his entrance. Unlike an invitee, however, no economic benefit accrues to the occupier as a result of a licensee's entrance.

The standard of care traditionally owed to a licensee was described by Lord Hailsham, L.C., in the *Robert Addie and Sons (Collieries) Ltd. v. Dumbreck* decision:

> The gist of the . . . decisions is that the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known- or ought to be known - to the occupier.[70]

Subsequent case law, both in Canada and in England, has narrowed this duty with the result that the foregoing comments made by Lord Hailsham should be read as if the phrase "ought to be known" were eliminated from this passage. The effect of this amendment is that an occupier owes this category of visitor no duty of inspection or investigation.

Although there is no onus on the occupier to examine his premises, the test is not entirely a subjective one. That is, once the occupier has knowledge of the state of affairs existing on his land, he will be liable if a reasonable man with his knowledge would have realized that state of affairs created a concealed danger: *Hansen v. City of St. John.*[71] This principle is similar to the phrase ". . . knows or from the facts within his knowledge should know. . ."[72] adopted by the American Law Institute in section 334 of the *Restatement of the Law of Torts 2d (1965)*. The commentary which is ancillary to this section in the *Restatement* is somewhat helpful in

explaining the distinction between this phrase and the objective test of knowledge found in the phrase "ought to know" or "should know". (The latter phrase is used in determining the liability of an occupier to an invitee.)

> The words "should know". . . imply that the person in question is not only required to draw a correct conclusion from facts known to him, but also to ascertain the data necessary for drawing such a conclusion by a reasonable attention to and appreciation of the surrounding circumstances and, where adequate data cannot be thus obtained, by inspection or investigation. The words "from facts within his knowledge," . . . are inserted to indicate that the possessor [occupier] is required only to draw reasonably correct conclusions from data known to him, and is not required to exercise a reasonable attention to his surroundings or to make any inspection or investigation in regard to them.[73]

The problem with this measure of liability is that the law essentially penalizes the responsible occupier in its attempt to lower the standard of care from that owed to an invitee. Professor John Fleming evinces this dilemma in the following passage:

> Clearly, the test of the licensor's duty puts a premium on negligence, because one who inspects his premises periodically may actually know the dangers of which another, so careless that he never inspects, may remain ignorant. Thus the licensee's prospect of redress is not only contingent on the occupier's habits of inspection, but actually varies in inverse ratio to the latter's sense of social obligation. So startling a conclusion may well be thought to cry out for reform.[74]

Under our "trespasser" category, we traced the common law development which had reformed the standard of care owed to a trespasser to one of "common humanity". A similar evolution has also occurred in the standard of care owed to a licensee. In Canada, our major common law development on this issue took place in the Supreme Court of Canada decision of *Mitchell v. C.N.R.*[75]

Chief Justice Laskin (then Laskin, J.), writing for the majority, overturned the decision of the Nova Scotia Court of Appeal (which had dismissed the action) and held the defendant company 50% accountable for the losses sustained by the 9 year old plaintiff. The boy, while walking on an icy footpath on the defendant's right of way, fell down an embankment and slid underneath the wheels of one of the defendant's passing trains. The trial court had concluded that he was a licensee rather than a trespasser. The Chief Justice, in reviewing the facts, noted the proximity of the path both to the railway tracks and to the embankment, in addition to emphasizing its icy condition. He concluded that the combination of these three elements created ". . . a foreseeable risk of harm, especially to children . . ."[76] and on this basis found liability in favour of the plaintiff, subject to his contributory negligence.

It is not clear from the decision whether the traditional measure of care owed to licensees (limited to traps and concealed dangers) is to be discarded and replaced by the test of "a foreseeable risk of harm". However, this is the interpretation given by the Ontario Court of Appeal. That is, in the case of *Bartlett v. Weiche Apartments Ltd.*[77] the Court reviewed the *Mitchell* judgment and the *Hanson* decision (*supra*) as authority for rejecting the traditional standard of care (limited to hidden dangers known to the occupier) and for establishing the following as the appropriate measure of care due to licensees:

> It is to take reasonable care to avoid foreseeable risk of harm from any unusual danger on the occupier's premises of which the occupier actually has knowledge or of which he ought to have knowledge because he was aware of the circumstances.[78]

It should be noted that the court indicated the standard of reasonable care applies to "*unusual dangers* on the premises", a term traditionally confined to invitees. In our view, this interpretation of the Ontario Court of Appeal is a reasonable one, given the fact that Chief Justice Laskin held that knowledge on the part of the 9 year old plaintiff of the likely danger of the icy path did not exonerate the defendant company from liability but merely went to the issue of contributory negligence. This finding would only be possible if he intended to discard that portion of the traditional test which limits liability to concealed dangers for, if a plaintiff has knowledge of a danger, it surely cannot be said to be "concealed".

The Court of Appeal in Manitoba appears to have extended the test of liability even further than that provided for by the Ontario Court of Appeal. In the unreported decision of *Black v. Torretta*[79] Mr. Justice Hall states that the determinative question of liability towards a licensee is whether "the appellant [occupier] was negligent in relation to this particular respondent [licensee] in the circumstances in which the accident occured".[80] Although the court later refers to the duty in traditional terms, on its examination of liability it is clear the court is applying the ordinary negligence standard and its inter-related concepts of duty, foreseeability and risk.

What confuses this summary of the law is the Supreme Court of Canada decision of *Wade v. C.N.R.*[81] In this decision an 8 year old boy, playing on sand piles located on the defendant's right of way, twice attempted to jump onto a slowly moving train when he slid under its wheels. At trial, the jury found the boy to be a licensee and held that the defendant company breached its duty of care and was consequently liable for his injuries. The Nova Scotia Court of Appeal reversed this

finding, in part, by holding the child contributorily negligent and by reducing the general damages affixed by the jury. At the Supreme Court of Canada, a majority allowed the defendant's cross-appeal and agreed to dismiss the plaintiff's action with costs.

The decision of the majority, written by Mr. Justice de Grandpré, exemplifies the confusion apparent in this branch of tort law and has, consequently, been heavily criticized.[82] A subsequent Supreme Court case has interpreted the majority to have dismissed the action on the basis that the defendant owed the plaintiff no duty of care.[83] Albeit, the judgment is a confusing one, but more importantly it is disappointing for its failure to come to grips with some very pertinent issues. More particularly, the judgment provides no assistance in clarifying when an occupier owes a duty of care to a licensee. In addition, the court failed to enunciate what standard of care is owed to this category of entrant. These two issues are, of course, fundamental questions of liability and it is regrettable that the Court did not use the opportunity it had to clarify these issues.

What is more disheartening is that the *ratio*[84] of the *Mitchell* decision, as interpreted in *Bartlett*, is also thrown into doubt. The Chief Justice, with whom Spence and Dickson, JJ. concurred, dissented from the majority and the following passage is an excerpt from his opinion:

> It was contended by the respondent . . . that the only duty owed to licensees was not to expose them to a concealed danger . . . . What this contention ignores is the respondent's duty here arises not simply from its occupancy of the right of way but its positive activity in carrying on train operations. This is not a case in which the injury arose from the condition of the property but rather from an activity carried on by the respondent on its

> property. In this respect, as was the case in *Mitchell v. C.N.R.*, there is every reason to measure the respondent's liability by ordinary principles of negligence: See Fleming, *Law of Torts*, (4th ed.) 1971 at p. 376.[85]

Although it is difficult to interpret its meaning, this passage would seem to imply that in the *Mitchell* case, the Chief Justice was not creating a new licensee test to determine the liability of the defendant railway company. Instead, he was using a test of ordinary negligence (". . . foreseeable risk of harm. . .") based upon an active-passive distinction developed by Lord Denning, M.R., which we discussed under our trespasser heading. If this interpretation is correct, as it would appear to be, it would mean that *Mitchell* was wrongly interpreted in *Bartlett* as providing a new test of liability towards a licensee. Rather, it can be seen as an instance where the Supreme Court of Canada successfully confined the principles of this branch of tort law to those occasions where injury arises from a static condition on the property, as opposed to an activity conducted thereon.

Unfortunately, there have been no further decisions from either the Manitoba courts or the Supreme Court of Canada which have clarified the *Mitchell* decision. Consequently, this Commission has arrived at the same conclusion as we attained in our discussion of the standard of care within the trespasser category: that is, the law concerning licensees is in an uncertain state and unfortunately cannot presently provide a reasonably certain guide to the determination of future cases for the benefit of lawyers and lay persons alike.

(c) Invitees

Both invitees and licensees have the express or implied permission of the occupier to enter onto his property. The

distinction between the two categories is that, "in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none".[86] The difference is essentially one of a common commercial interest (the licensor has no such commercial interest in the licensee's entrance) and is not based upon whether the entrant is "invited", as the terminology would suggest. Consequently, an invited social guest is a licensee while a customer in a shop, not invited but usually welcome, is classified as an invitee. This confusion prompted the American Law Institute in their *Restatement* (1934) to re-designate the two categories as "gratuitous licensees" and "business visitors".[87]

The problem in designating a "common interest" element as the distinguishing feature between the two categories is in determining when it is present. Law texts and journals are replete with examples where it is difficult to determine which of the two categories should properly apply.[88] Moreover, there are instances where a business element is inappropriate in determining whether the higher duty should be owed. For instance, entrants as of right (firemen, policemen, students, etc.) do not have a "common commercial element" with occupiers although the argument can certainly be advanced that the higher duty owed to the invitee should be granted to these entrants.[89] Children with adult invitees have been held to be invitees[90] and so too a tenant's employee (as against his landlord)[91] although it is difficult to perceive any apparent business interest in either of these cases.

Where an entrant is classified as an invitee, the standard of care is clearly set forth by Mr. Justice Willes in the decision of *Indermaur v. Dames*[92]:

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

Professor Linden (now Mr. Justice Linden) has suggested that this standard of care is, on its surface, merely the ordinary negligence standard of a reasonable prudent man.[93] Certainly the phrase "reasonable care to prevent damage" imparts this meaning. As well, the standard of care has been interpreted to mean that the occupier is not an insurer towards this category of entrants and therefore a constant inspection is not required.[94] This application of the measure of care conveys a meaning similar to the standard of the reasonable man. However, the standard of care cited in *Indermaur* has a distinguishing feature from its ordinary negligence counterpart. That is, the term "unusual danger" was used by Willes,J. in his examination of the appropriate standard. The courts have given much emphasis to its importance such that the initial question for determining liability under this category is enquiring whether it was an "unusual danger" which caused the injury.[95]

In determining this question, it is essential to enquire whether the injured party was a member of a particular class of tradesmen. If so, the test of whether an unusual danger exists becomes an objective one based upon the injured party's membership with that class.[96] There is a further objective test to determine whether the danger was "unusual"; that is, it is necessary to examine whether the danger was unusual in relation to the particular place where the injury

occurred.[97] Finally, the obligation extends to those unusual dangers which the occupier "ought to know". As we pointed out in our discussion under our licensee category,[98] this obliges the occupier to inspect or investigate his premises so that he imparts a reasonable attention to and appreciation of them.[99] Consequently, in this instance as well, the determinative test is an objective one.

It used to be thought that the invitee's knowledge of the danger exonerated the occupier from liability.[100] However, it is now clear that to be "unusual" the danger need not be "unseen or unknown".[101] Indeed, nothing short of *volens* (wilful consent to legal risk) will absolve the occupier from his responsibility.[102] Instead, any question of knowledge on the part of the invitee has now become only a pertinent issue in determining whether the plaintiff used reasonable care for his own safety. It is accordingly dealt with pursuant to our apportionment legislation, *"The Tortfeasors and Contributory Negligence Act"*, C.C.S.M. T90.

With the exception of the immediately preceding issue, the law concerning the invitee has been the subject of little common law reform. Probably, this is due to the fact that the standard of care closely parallels that of ordinary negligence. Consequently, the courts have perceived little need to contort the law to do "what to justice shall appertain".[103] In any event we are of the view that the legal confusion rampant in the previous two categories is not so evident here. Apart from the issue of determining when this category applies (that is, in determining when a "common business element" exists) the principles are able to provide a reasonably certain guide to the law before cases are actually decided.

(d) Contractual entrants

An individual who comes onto premises by virtue of a contract with the occupier is categorized as a contractual entrant. To be included in this category, it would appear that is not essential for a party to be actually privy to the contract of entrance. So long as the visitor enters "under" the contract, he will be entitled to the standard of care owing to a contractual entrant.[104] Although the preceding issue has received a liberal interpretation, the question of whether the occupier received consideration for the visitor's entrance has not. That is, where an individual pays the occupier an admission fee but it is understood that payment is for the sole purpose of insurance, the entrance is not a contractual one but rather is governed by the invitor-invitee relationship.[105]

We indicated at the commencement of our report that under this fourth category of visitor, where the parties expressly agree upon an appropriate standard of care, that provision will govern. Otherwise, the courts will imply a warranty concerning the safety of the occupier's premises. That warranty is described in the decision of *Maclenan v. Segar* in the following terms:[106]

> 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 any one 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 . . . .

This principle has been uniformly applied in Manitoba in several judgments[107] and more recently in the unreported decision of *Sutton v. The City of Winnipeg.*[108]

It has been stated that the standard of care set forth in *Maclenan* is limited to those incidents where the main purpose of the contract is the letting of premises. Where the entrance is incidental to the contract, it is said that the standard is more restrictive such that the occupier is only obliged to take reasonable care to see that the premises are reasonably safe for the purposes for which the injured party is entitled to make use of them.[109] However, this distinction has never been applied in Manitoba and in the case of *McCarthy v. Royal American Shows Inc.,*[110] the court applied the *Maclenan* test to a 16 year old plaintiff who injured herself on a slide on the defendant's recreation site. In this instance, the entrance was surely ancillary to the purpose of the contract although no different standard of care was applied. Moreover, in *Brown v. B.F. Theatres Limited*[111] the Supreme Court of Canada applied the test set forth in *Maclenan* to a theatre patron where the use of the premises would also be considered subordinate to the main purpose of the contract.

The law concerning contractual entrants is unique for its clarity. Unlike that of the other categories, not only is the standard of care clearly definitive but the occasions where the category (and the appropriate standard of care) should apply also appears to be unambiguous.

III. ENQUIRY INTO THE VALIDITY OF THE CLASSIFICATIONS AND THE SYSTEM OF LIABILITY BASED ON THEM

We have now reviewed the relevant law in Manitoba pertaining to the four categories of entrants. In our opinion, it is now necessary to analyze the cogency of the arguments advanced for retaining the classification system and its applicable common law, as just summarized. More particularly, we wish to examine these arguments in light of those advanced by others who favour liability to be governed by a common duty of care comparable to the ordinary negligence standard. The replacement of a common duty of care would, in effect, eliminate the classification system as there would no longer be any need to resort to the categories to determine the applicable standard of care.

(a) Trespassers

We indicated in Part I of our Report that the major difference between the recommendations of the various law reform agencies has been whether to reform the law concerning trespassers. We also stated in the immediately preceding portion of this Report that the law concerning trespassers is in a confused state but that both the Supreme Court of Canada and the House of Lords appeared reticent to adopt the standard of a reasonable prudent man and instead chose the standard of "ordinary humanity" to govern liability. Although the Supreme Court of Canada did not articulate its reasons for preferring this definition, Lord Pearson in the *Herrington* decision formulated several justifications for retaining a quantitative element in both the extent of the duty and when it should arise. We wish to deal with the reasons expressed by Lord Pearson and by others on the subject which are asserted in favour of retaining the classification of

the trespasser with its separate and distinct duty and measure of care.

One of the primary arguments advanced for retention is that the presence of a trespasser is so unpredictable, it is said to be impossible to know when he will come onto the land and what he will do once the trespass has occurred.[112] Consequently, it is alleged that it would be unfair to impose the ordinary negligence standard on the occupier.

Although this Commission does not refute the general accuracy of this statement, it is our opinion that it is not a valid argument for retaining this category as ordinary negligence principles would protect an occupier from liability where damage arose in such a manner. That is, it is a fundamental principle of tort law that negligence *per se* is insufficient to give rise to legal responsibility. There must also be a duty of care owed and this duty is limited to those occasions where the presence of the individual affected by the act is reasonably foreseeable. The law uses the word "neighbour" to describe the group of individuals to whom the duty is owed. Although admittedly there will be occasions where this entry is foreseeable, a trespasser is not normally foreseeable - he is not normally a "neighbour" - and consequently no duty of care will generally arise.

It is also pleaded[113] that even where a trespasser's presence is foreseeable, the extent of the duty should quantitatively differ from that owed to other "neighbours". The rationale advanced for this allegation is that the trespasser is essentially a wrong-doer and consequently deserves a lower standard of care.

No doubt this statement is essentially sound; trespassers are normally wrong-doers although it cannot be disputed that on occasion trespassers may also be children or adults innocently unaware that they have entered onto private property. However, where a trespasser is someone who has knowingly entered another's land or even someone who has failed to take reasonable care for his own safety, he may be held to be partly responsible for his own injuries and thereby made subject to the provisions of *"The Tortfeasors and Contributory Negligence Act"*, C.C.S.M. T90. Consequently, in our view, this argument ignores the presence of our apportionment legislation.

It is also argued that to apply the standard of "reasonable care" would impose an unreasonable burden upon the occupier. This argument is apparently based upon the premise that the standard of ordinary negligence will be higher than that of "common humanity". As we pointed out in Part II of our Report, it is very difficult to discern from the case law whether there is a distinction between these two terms. Moreover, it is beyond doubt that ordinary negligence law only requires one to act reasonably. To quote Professor James Fleming, this measure of care is "only a duty to take *reasonable* precautions against undue risk of harm".[114] In short, the standard of care is entirely flexible; what standard is reasonable towards a trespasser would very well differ, on the facts of a particular case, from what is a reasonable standard of care to an invited guest. Consequently, we do not perceive that the adoption of ordinary negligence principles would impose a heavier burden on the occupier.

Finally, there is a further allegation asserted by those who favour retention of the trespasser category. Quite simply, it is argued that the application of ordinary negligence ignores the social value we attach to the free use of land in our democratic society.

To respond to this argument, we wish to quote Professor James Fleming who offered the following comments concerning this allegation:

> This [ordinary negligence] does not mean that the occupier will be deprived of the right of exclusive possession. He may still exclude the trespasser either by reasonable force or by legal action backed by the force of society. But it does mean that the right of exclusive possession does not carry with it the privilege to engage in conduct fraught with unreasonable probability of harm to the lives and limbs of people merely because there is no consent to their presence.[115]

We would like to point out that there are proceedings still available in Manitoba which serve to protect an occupier's right to exclusive possession of his property. One method is the common law action of trespass based upon one's intentional invasion of another's land. Admittedly, however, this procedure is no longer commonly used to protect one's possessory rights.[116] A more common and effective measure is the remedy available under *"The Petty Trespasses Act"*, C.C.S.M. P50. Under this statute, a person may be liable to a fine on summary conviction proceedings where he enters land which is wholly enclosed or where he has been requested by the occupier not to enter thereon. (A copy of *"The Petty Trespasses Act"* is set forth in Appendix "B".)

In conclusion, we think that the justifications asserted in favour of retaining the separate trespasser category lack validity. The flexibility of the negligence standard, the requirement of foreseeability and the presence of apportionment legislation sufficiently respond to the concerns that the adoption of ordinary negligence principles would impose a more onerous obligation upon occupiers. We wish

to emphasize that we have concluded that the adoption of ordinary negligence principles is preferable to a separate trespasser category only because those principles have sufficiently responded to the concerns so expressed. Quite simply, we do not think that a change in the law should impose more onerous obligations upon occupiers than now exists. Consequently, if we perceived that ordinary negligence principles would create a heavier responsibility upon that sector of society, we would not support their implementation. Rather, we think that the institution of ordinary negligence principles would simplify the law without creating added hardships for occupiers in Manitoba. When one also gives consideration to the vagueness and complexity of the present law towards trespassers, we think the need for and the desirability of a system of liability based upon ordinary negligence principles is very convincing.

(b) Lawful entrants

The arguments in favour of retaining the classification system for lawful entrants are less cogent. Indeed, there appears to be little dissent for the removal of these three categories, to be replaced by a common duty of care. This is particularly due to the fact that the standard of care relevant to the categories of licensees and invitees is closely progressing towards that of the reasonably prudent man. Consequently, the adoption of the common negligence standard would result in little change. In addition, although the contractual warranty owed to the fourth category of entrants appears to be somewhat higher, there does not appear to be any problem in replacing the traditional standard of care owed to this entrant with that of a common duty based upon the standard

of reasonableness.

Moreover, from a policy viewpoint, this Commission takes issue with the rationale advanced for the separate categories of licensee and invitee and their traditionally distinct duties of care. It has been said that the need for the two categories is due to the historical distinction drawn between nonfeasance and acts of misfeasance.[117] That is, the common law was historically reluctant to impose a general duty of care for nonfeasance except where a corresponding material benefit accrued. We think the rationale for retaining the two separate categories is no longer compelling. It ignores the policy objective of tort law which is to impose liability for harm on unreasonably dangerous conduct. The distinction also appears to disregard the fact that it is the occupier who is in control of the land and, consequently, in a position to discover, remedy or warn of relevant dangers.

Finally, although the law concerning invitees and contractual entrants is relatively clear, the principles governing liability towards a licensee are not. We think the need for clarity alone is a compelling reason for the adoption of a common negligence standard to replace the classification system. When one couples this with the foregoing considerations, we are convinced that the institution of ordinary negligence principles to replace the present classifications of lawful entrants is a desirable and necessary reform.

In summary, we are of the view that the arguments advanced for the retention of the classification system within this branch of tort law lack validity. Besides its complexity and resultant confusion, the classification system distorts

the relevant questions which govern the determination of fault. Although the issue of whether a visitor is a trespasser or a lawful entrant is an influencing factor of liability, the appropriate category alone cannot be the only relevant matter to ascertain the appropriate standard of care. The foreseeability of the entry, the likelihood of possible injury and the burden of protecting the entrant from danger are all factors which need to be taken into account in determining whether immunity should be conferred upon the occupier. We would agree with the following comments of Mr. Justice Peters, taken from the California Supreme Court decision of *Rowland v. Christian*[118]

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.[119]

IV. COMMON LAW REFORM - IS IT ENOUGH?

There are learned academics who have advocated common law reform over legislative enactment.[120] Although certainly not unanimous, these individuals have generally advocated that the classification system be replaced by a system in which the liability of an occupier would be governed instead by ordinary negligence principles.

This Commission would certainly support any

common law reform which achieved this objective. However, in our view, ordinary negligence principles cannot be clearly implemented unless the classification system is discarded. Otherwise, the category itself becomes the principle focus in determining liability rather than the foreseeability of the entry.

The possibility of the elimination of the categories through the common law process appears remote. Although our Canadian courts have, on occasion, voiced their dislike of the categories,[121] unlike those in certain jurisdictions of the United States, they seem unable to discard them. Probably this is due to our system of *stare decisis* (our legal system of adhering to decided cases). In any event, our courts have been able to inject more humane standards of care into the present structure. Unfortunately, as we mentioned earlier, this has been done at the expense of creating a high degree of confusion and uncertainty, especially at the lower realm of the spectrum of categories. More particularly, the confusion within the trespasser and licensee classifications has become so rampant that the law cannot presently allow for a reasonably certain guide to future cases before they are actually decided.

Briefly speaking, our courts' creative attempts to introduce more humane principles without discarding the four categories of entrants has resulted in a modernization of this branch of tort law but no simplification. Given these two elements - the law's inability to discard the categories and the resultant confusion - it is this Commission's opinion that to introduce a standard of reasonable care, legislative enactment is essential.

V. PROPOSALS FOR LEGISLATIVE REFORM

We mentioned in Part I of our report that one of the major distinctions in the recommendations of law reform agencies has been whether the legislation should provide for a duty of care where trespassers are injured and, if so, whether that duty should be defined identically with or more narrowly than the duty for other entrants. We also briefly summarized the various approaches adopted by the law reform commissions. Our intent here is to analyze the options for legislative reform in greater detail so as better to compare the relative merits of each.

We wish to state at the outset of this section that we dismiss the legislative options which make no provision for a duty of care to trespassers. Our reasons for so doing are amply set forth in Part III of our Report where we reviewed the merits of the arguments advanced by those who favour retaining the trespasser category. Consequently, we have limited our discussion herein to a review of two legislative options: that is, the uniform Act (which provides a common duty of care to all entrants, without exception) and Ontario's statute and the Law Reform Commission of Saskatchewan's tentatively proposed Act (which provide certain exceptions to the common duty of care).

The statute drafted by the Uniform Law Conference of Canada[122] makes provision for one duty of care commonly defined for all entrants. Section 3 of this Act states that an occupier owes a duty "to take such care as in all the circumstances of the case is reasonable to see that any person . . . will be reasonably safe in using the premises". This

section closely follows the wording of section 2(1) of the *Occupiers' Liability (Scotland) Act*, 1960 (see Appendix "F"). The uniform legislation was drafted by the British Columbia Commissioners in 1973; in 1974, their own legislature enacted a similar statute: S.B.C. 1974, c. 60 (see Appendix "H").

Certainly one of the merits of the definition of this statutory duty of care is its simplicity. The provision states that "all of the circumstances of the case" are to be taken into account in determining whether a duty should be owed. The likelihood of the presence of the entrant, the foreseeability of possible injury and the burden of protecting the entrant from the danger are all factors which, on the facts of a particular case, could be relevant in determining the question of whether a duty of care has been breached. As well, the character of the entrance and the nature of the place where the entrance occurs might also be pertinent issues. The latter two factors were cited by Lord Denning, M.R., in the *Pannett*[123] decision.

The practical result of this section of the Uniform Act is that it eliminates the need to resort to one of the two leading questions of determining liability under ordinary negligence principles. That is, there is no need pursuant to this section to enquire whether the entrant's presence was foreseeable so as to give rise to a duty of care. Instead, the issue of foreseeability would become "an issue of fact in determining whether the duty to take reasonable care had been discharged".[124]

One of the concerns expressed by certain commissions[125] relates to the circumstance that the issue of whether a duty of care exists is considered to be a question of law, unlike the

issue of whether there has been a breach of duty which is said to be a question of fact. As a result of this distinction, the enactment of section 3 in those jurisdictions where civil juries are still used would mean that the entire question of liability would be entrusted within the hands of a sympathetic jury. Consequently, these jurisdictions would lose the protective valve the duty of care issue has provided in taking unwarranted claims out of a jury's custody. In Manitoba, this danger would not be evident as we have only a limited provision under section 66(4) of *"The Queen's Bench Act"*, C.C.S.M. C280, to allow a civil jury by special leave of the Court. To our knowledge, leave has only been granted twice in the last 36 years, although the applications for special leave are certainly more prevalent.[126]

A further concern of the uniform scheme expressed by some is the effect this legislation might have upon public liability insurance. This Commission contacted five of the largest insurance corporations within the province. Of the three who responded[127] none formally opposed this legislation. Indeed, one corporation[128] offered the view that "there would be no significant changes in the rates and/or settlement practices" if legislation similar to the British Columbia scheme was introduced. We were also informed by another corporation[129] that, as yet, the enactment of the legislation in British Columbia has had no effect on insurance costs, although, admittedly, it has only been six years since their legislation was enacted.

The Ontario legislation and the Saskatchewan Law Reform Commission's tentative proposals, like the Uniform Act, make provision for a common duty of care to all entrants.

Consequently, the earlier commentary outlining the uniform statute is also applicable to these two schemes. However, as we previously mentioned, they also provide for certain exceptions to this common duty of care. Those exceptions are in both instances limited to particular trespasser situations where the common duty of care is replaced by one limited to those acts done with "the reckless disregard of the presence of the person or his property". (see s. 4 of the Ontario Act, s. 3(8) of the Saskatchewan Commission's proposed statute, contained in Appendices "I" and "K"). It will be recalled that this was the traditional duty cited for this category of entrants in Part II of our Report.

In Ontario, the more limited duty of care is set forth in three general circumstances. Where an individual enters property with the intent of committing a criminal act, the limited duty applies (section 4(2). The limited duty of care will also govern where the risks are willingly assumed by the entrant. Finally, the statute makes provision for a limited class of premises, set out in section 4(4), and states that the restricted duty will apply where one of three conditions set forth in section 4(3) are met. One of these relates to entries prohibited under their trespass statute[130] (section 4(3)(a)). A second (section 4(3)(b)) is a wider exception as it, in effect, exempts occupiers of these premises from the general duty of care where entry is not expressly permitted. The final provision in section 4(3) meets the situation where entry is permitted for recreational use on these premises and no fee is charged.

The Saskatchewan Commission's tentative proposals are similar to those adopted by Ontario with two modifications. Their scheme does not provide for a limited duty of care where

risks are willingly assumed. Instead, like the uniform Act, it provides for no duty of care in such an instance (section 3(4)). In addition, although it contains a similar provision where a person is on premises for a criminal purpose (section 3(6)), its final exception is limited to persons who enter premises by means of a motor vehicle (including a snowmobile) or for those trespassing in the course of hunting (section 3(8)).

We have carefully reviewed the restrictive provisions of both statutes. It is this Commission's view that the specific provisions governing entrance with a criminal purpose are superfluous. We agree with the comments of Salmond, L.J., in the English Court of Appeal judgment of *Herrington* where he states: "a burglar in your house can hardly be regarded as your 'neighbour' within the meaning of that word. . .".[131] Moreover, we indicated previously in our discussion of section 3 of the uniform Act that the character of the intrusion would be a relevant fact in determining whether a duty is owed. Consequently, this consideration would adequately respond to any concerns that a duty of care would be owed to such an entrant.

The Commission would also support the position adopted by the Uniform Law Conference and by the Law Reform Commission of Saskatchewan which does not make provision for a duty of care where the risk is willingly assumed by the entrant. It is our opinion that their provisions (section 3(3) of the uniform Act; section 3(4) of Saskatchewan's tentatively recommended statute) are sufficient to govern this particular matter.

With respect to the final exclusion we cited for

the Law Reform Commission of Saskatchewan's scheme, we have agreed to retain the lower standard of care owed to snowmobile drivers, as passed by the legislature and contained within section 25.2 of the Act (a copy of this provision is contained within Appendix "A"). This limited duty of care owed to these entrants is incorporated within our draft statute in section 3(4).

We do not wish, however, to adopt the three exceptions contained in section 4(3) of the Ontario statute which, as will be recalled, restrict the duty of care where entrance is made on premises listed in section 4(4) of that Act. With respect to section 4(3)(a) of their legislation, it is our view that entrances prohibited under our trespass statute, *"The Petty Trespasses Act"*, should not be excluded from the common duty of care provision. As we stated in Part III of this Report, the right to one's exclusive possession of property, "should not carry with it the privilege to engage in conduct fraught with the reasonable probability of harm. . ."[132]. It is our view that the privileges attached to the occupation of land and the right to enforce these liberties through trespass legislation are both separate factors from the duty to act reasonably towards others. Consequently, the duty of care issue should be treated independently from these two matters.

Nor are we in favour of adopting the other exceptions contained in section 4(3) of the Ontario statute. It is our view that the exception contained in section 4(3)(b) (where entry is not expressly permitted, by notice or otherwise) is too wide an exception for legislation in Manitoba. As will be seen, section 4 of our proposed legislation allows the

occupier to restrict his duty of care by notice or agreement in accordance with common law principles. We perceive this measure to be adequate protection for occupiers. The final exception, contained in section 4(3)(c), relates, as we mentioned earlier, to the instance where entrance is permitted for recreational use on premises set forth in section 4(4) and no fee is charged. We have agreed, in part, to this exclusion, by virtue of our adoption of section 3(4) in our proposed statute, which concerns snowmobilers. However, we do not perceive the need to extend further the restrictive duty to all recreational activities conducted on a limited group of premises.

In conclusion, this Commission proposes the enactment of a draft statute similar to that adopted by the Uniform Law Conference of Canada in 1973. More particularly, we recommend that the legislature enact a statute like the one set forth at the conclusion of our remarks. Although normally this Commission leaves the implementation of our recommendations to the skill of legislative draftsmen, we felt it would be irresponsible in this instance to recommend the enactment of a statute without supplying further particulars for its provisions. We have indicated in the commentary following each section its intent and, where major amendments to the uniform Act are made, our reasons for any modifications are set forth within our remarks.

VI. THE (PROPOSED) OCCUPIERS' LIABILITY ACT: COMMENTARY BY SECTIONS

1. In this Act

(a) "occupier" means an occupier at common law and may include:

(i) a person who is in physical possession of premises; or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter the premises,

and, for the purposes of this Act, there may be more than one occupier of the same premises;

(b) "premises" includes

(i) water;

(ii) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (iv);

(iii) ships and vessels;

(iv) trailers and portable structures designed or used for a residence, business, or shelter;

(v) railway locomotives, railway cars, vehicles, and aircraft while not in operation;

(c) "snowmobile" means a snowmobile defined under "The Snowmobile Act".

The common law has yet to ascertain clearly the persons on whom the duty is imposed as a result of the occupation or control of premises. This uncertainty in the law was well enunciated by Diplock, L.J., in the case of *Wheat v. Lacon*[133] where at page 367 he states:

> There is a plethora of semantic analysis of particular phrases in precedent authorities descriptive of the nature of the contrasted duties owed by "occupiers" of premises to "invitees" and "licensees" respectively. But there is a dearth of relevant authority about what connection with the premises is required at common law to constitute a person an "occupier" of premises, so as to give rise to a duty of care to persons using them.

This is not to say that some points are not clear. It is beyond question that both owners and tenants in occupation are considered occupiers at common law. However, uncertainty arises where occupation is not exclusive. To meet those occasions, several tests have been devised to determine the issue of on whom the duty of an occupier is imposed.

In *Cavalier v. Pope*[134] the House of Lords had to decide whether a landlord could be held liable as an occupier for injuries sustained by a third party on premises the landlord had demised. The third party argued that, as the landlord was responsible for repairs under the tenancy agreement, he should be held to be an occupier in common law. The court rejected this argument as it thought that something more than merely the responsibility to repair premises should exist to create the duty of an occupier. In its view, the status of occupier would apply only to those who have ". . . the power and the right to admit people to the premises and to exclude people from them . . . ".[135] As the landlord had no control over visitors to his tenants' premises, he lacked the status of an occupier at common law and, consequently, the third party's action failed. It follows that, in these circumstances, it is the tenant who is considered to be, at common law, the occupier of the demised premises.

The decision of *Duncan v. Cammell Laird and Co. Ltd.*[136] clarifies that the key factor in determining whether the duty of occupier has been created is the degree and extent of control an individual has over the particular premises. Actual possession of those premises is not crucial. In that case, the court held that the defendant shipbuilders were occupiers at common law, despite the fact they were not in

actual possession of the premises at the time the accident arose. In determining the issue of occupation, Wrottesley, J., provided the following comments in determining on whom the duty is imposed:

> It seems to me that the importance of establishing that the defendant who invites is the occupier of the premises lies in the fact that with occupation goes control. And the importance of control is that it affords the opportunity to know that the plaintiff is coming on to the premises, to know the premises, and to become aware of dangers whether concealed or not, and to remedy them, or at least to warn those that are invited on to the premises.[137]

The concept that an invitation to premises is sufficient to establish the status of occupier was followed in the Manitoba decision of *Lagasse v. The R.M. of Ritchot*.[138] In that instance, the court concluded the defendant was the occupier of a river on the basis that it had invited the deceased there to do business for its own purpose (to clear snow away from a municipal ferry). Consequently, the court held that the defendant had the necessary degree of control to become an occupier at law.

The judgment of Lord Denning, in the House of Lords decision of *Wheat v. Lacon* clarifies that occupation of premises may be controlled by more than one person. Lord Denning devised the following test to determine on whom the duty of occupier should be imposed:

> . . . wherever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his "visitor": and the "occupier" is under a duty to his "visitor" to use reasonable care. In

> order to be an "occupier" it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control.[139]

Section 1(2) of both the Scottish and English statutes does not provide for any statutory definition of occupier but, in effect, states that this issue is to be governed by reference to the rules of common law and, consequently by the tests devised by the English courts as just summarized. It is this Commission's view that there is a need for a more precise definition of occupier than the rather broad tests cited. Consequently, we prefer the approach adopted by the Uniform Law Conference and by those other provinces whose legislation sets forth a statutory definition of occupier (see section 3(1)(c) of Alberta's statute and section 1 of both Ontario's and British Columbia's Acts, all copied in our Appendices). However, we have some reservations concerning the definition set forth in these statutes and we wish to elaborate briefly on these concerns.

Individuals who are in physical possession of premises need not necessarily be occupiers, as clause (i) of the definition stipulates. For instance, individuals may occupy premises vicariously (on behalf of their master). Although they are in physical possession of these premises, these individuals are not generally considered to be occupiers.[140] In addition, licensees of premises[141] (lodgers and hotel guests) are in possession of certain premises but usually lack sufficient control to be held responsible at common law for injuries arising thereon.

Moreover the definition devised in clause (ii) of this section may be drafted too restrictively. The purpose of

this portion of the definition is to include those individuals who are not in actual possession of premises but are in sufficient control to be held accountable as occupiers for damages sustained thereon. As drafted, the clause would not include the defendant municipality in the *Lagasse* decision (*supra*) as an occupier. Clearly, in that case, the municipality had no control over persons allowed to enter onto the river, which the court held it occupied. Nor would this definition include the defendant brewery company in the *Wheat v. Lacon*[142] decision. In the latter case, Lord Denning, M.R. held the company to be an occupier on the sole basis that it had the express right under a licensing agreement to enter and use the premises where the injury was sustained. In addition, it is our view that there is some doubt as to whether the definition, as drafted, would include landlords. That is, they are generally held to be liable as occupiers of the common elements of a building.[143] It is certainly doubtful, however, that a landlord has the right to control the visitors to his tenants' premises, as the definition specifies.

For the foregoing reasons, this Commission prefers the definition we have set forth in section 1(a) of our draft statute. Although not as precise as the definition contained within other Canadian legislation, it does go further than both the English and Scottish statutes in providing some direction in determining on whom the duty of occupier should be imposed.

The proposed section 1(b) is similar to its counterpart within the uniform statute but we have copied the Ontario Act (also section 1(b)) to the extent of adding paragraph (i) to its provision. Comparable provisions are contained in section 1(3) of both the English and Scottish statutes and in section 1(d) of the Alberta Act.

The proposed section 1(c) is not contained within any other Act and is included for the purposes of section 3(4).

2. Subject to sections 3(5), 4, 8(2) and 9, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which he is in law responsible.

This section closely resembles the uniform Act. Its purpose is to set forth the application of this statute and the consequent parameters of its effect. Comparable provisions are contained in section 2 of both the Ontario statute and the proposed Act tentatively recommended by the Law Reform Commission of Saskatchewan. However, section 2 in both of these jurisdictions states explicitly that the Act governs in place of the rules of the common law. The uniform section, which we have copied, has implicitly a similar effect, in our view.

3(1) 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, and his property, on the premises, and any property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe while on the premises.

(2) The duty of care referred to in subsection (1) applies in relation to

(a) the condition of the premises; or

(b) activities on the premises; or

(c) the conduct of third parties on the premises.

(3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person as his own risks.

(4) Notwithstanding subsection (1), an occupier owes no duty of care towards a person who is driving or riding on a

snowmobile or is being towed by a snowmobile upon the premises without the express or implied consent of the occupier except the duty not to create a danger with the deliberate intent of doing harm or damage to the person or his property and not to act with reckless disregard of the presence of the person or his property.

(5) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent upon him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

This section, with the exception of subsection (4), is very similar to section 3 of the Uniform Act. Comparable provisions are also contained in section 3 in both Ontario's and British Columbia's legislation and in section 3 of the tentatively proposed statute for Saskatchewan.

We have already described the general effect of subsection (1) in Part V of this Report. Like the uniform Act, this subsection extends the potential liability not only to personal injuries sustained by an entrant but, as well, to any damage sustained on the premises to property owned by that entrant or by a third party. In this regard, it also follows the British Columbia (section 3) and the Alberta (section 14(1)) legislation.

Subsection (2) provides that the duty of care extends to conditions on the premises as well as to activities conducted thereon by either the occupier or a third party. It copies the Uniform Act.

Subsections (3) and (4) are exceptions to the general duty of care set forth at the commencement of this section.

The first exclusion refers to "risks willingly assumed" by an entrant as his own. This subsection stipulates an exception similar to the common law defence of *volenti non fit injuria* which literally means "he who consents cannot receive an injury".[144] The wording of the subsection follows section 4(1) of the Ontario statute more closely than section 3(3) of the Uniform statute for the reason that it uses the term "risks willingly *assumed*" rather than *accepted*. This is the more common language adopted in defining the *volenti* defence.

The second exception refers to the provision presently contained in section 25.2 of *"The Snowmobile Act"*. As we explained in Part V of this Report, we are prepared to recommend that this section be retained. We have agreed to its inclusion for reasons earlier expressed: that is, it is not our intention in recommending this proposed statute that we subject occupiers to greater liability in our society. Instead, it is our intent to simplify the law. It will be noticed that section 25.2 excludes "trespassers and licensees" from the common law duty of care. We wished to avoid returning to the traditional terminology in drafting this subsection and, consequently, different wording has been chosen. The wording does, however, follow section 25.1 of *"The Snowmobile Act"* which prohibits entry without the express or implied consent of the owner. It will be recalled that section 25.2 was enacted by reason of the restricted entry provision contained in section 25.1 of that Act (see pp. 14-15 of this Report). In any event, the inclusion of this exception within this statute means that section 25.2 of *"The Snowmobile Act"* is now superfluous and, consequently, we recommend its repeal.

Comparable legislation to subsection (5) is

contained in section 2(2) of the Scottish Act, in section 4(4) of the uniform Act, in section 9(2) of the Saskatchewan Commission's proposal and in section 9(1) of the Ontario statute. The legislation ensures that the higher duty owed by a master to his servant,pursuant either to *"The Workers Compensation Act"*, C.C.S.M. c. W200 or within the common law, will not be affected by this legislation.

4(1) Subject to subsections (2) and (3), where an occupier is free to extend, restrict, modify, or exclude his duty of care to any person by express agreement, or by express stipulation or notice, the occupier shall take reasonable steps to bring such extension, restriction, modification, or exclusion to the attention of the person to whom the duty is owed.

(2) An occupier shall not restrict, modify, or exclude his duty of care under subsection (1) with respect to a person,

(a) who is not privy to the express agreement; or

(b) who is empowered or permitted to enter or use the premises without the consent or permission of the occupier.

(3) This section applies to express contracts entered into before or after the commencement of this section.

This section is similar to section 4 of the uniform Act with one major modification: that is, subsection 3 of the uniform Act is not included in our provision. We are of the view that, having regard to paragraph 2(a), the subsequent provision is redundant.

Comparable provisions to this section are contained in section 8 of the Alberta Act, section 5 of the Ontario Act and within section 4 of the tentatively proposed statute by the Law Reform Commission of Saskatchewan.

This section generally leaves the issue of whether an exemption clause would be effective to exclude a duty of care to the common law. Subsection (1) exacts only one requirement: that is, any modification of the statutory duty is only effective if reasonable steps have been taken to bring it to the attention of the persons it affects. Paragraph (2)(a) merely repeats the common law rule that individuals must be party to an express agreement before they are bound by its terms. The second exception, contained in paragraph (b), refers to entrants as of right, such as policemen and firemen. We agree with the Uniform Law Conference that these individuals should be owed a common duty of care during the course of their duties even if reasonable steps are taken to bring the exclusion to their attention.

This Commission is aware of the report published by the (English) Law Commission concerning exemption clauses. More particularly, we have reviewed the specific provision that Commission has made concerning exemption clauses for occupiers contained in its second report on exemption clauses, published in 1975.[145] We have also read the proposals set forth in the study paper published by the Nova Scotia Law Reform Advisory Commission and those tentatively adopted by the Law Reform Commission of Saskatchewan concerning further restrictions on an occupier's ability to exclude a common duty of care. However, we wish to study the general role exemption clauses should play within the law of torts and contracts before making any specific proposal for further statutory restrictions.

5(1) Notwithstanding section 3(1), where damage is caused by the negligence of an independent contractor engaged by the

occupier, the occupier is not on that account liable under this Act if, in all the circumstances,

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

(2) Subsection (1) shall not be construed as restricting or excluding the liability of an occupier for the negligence of his independent contractor imposed by any other Act.

(3) Where there is damage under the circumstances set out in subsection (1) and there is more than one occupier of the premises, each occupier is entitled to rely on subsection (1).

This section copies the similar section of the uniform statute. Comparable provisions are contained in section 6 of the Ontario Act, in section 5 of the Saskatchewan Commission's proposed statute and section 11 of Alberta's legislation.

Subsection (1) in effect, sets forth three prerequisites for an occupier to avoid personal responbility for a breach of duty sustained by his independent contractor. The occupier must prove that he exercised reasonable care in selecting the contractor. In other words, he must show that he has taken care in determining that the contractor he employed was competent to carry out the particular work in question. Moreover, he must demonstrate that he exercised reasonable care in the supervision of the independent contractor. With respect to the second prerequisite, it has been suggested that what is reasonable supervision will depend upon the nature of the work entrusted to the contractor.[146] Finally, the occupier must establish that it was reasonable that the

work entrusted should have been performed. This requirement is intended to respond to those occasions where the act delegated to the contractor is a tort in itself. In addition, it refers to those occasions where the work is so hazardous that the occupier is negligent in directing it to be performed. In both these instances, the occupier will remain personally liable.

Subsection (2) copies the uniform and British Columbia Acts and is similar to section 6(3) of the Ontario Act, section 11(2) of the Alberta statute and section 5(3) of the Saskatchewan Commission's proposal. The purpose of this subsection is to clarify that this legislation should not affect any other statute which either imposes or excludes the liability of an occupier for the acts of his independent contractors.

Subsection (3) again copies the uniform Act. This provision was initially recommended by the Ontario Law Reform Commission in their 1972 *"Report on Occupiers' Liability"*. That Commission adopted the provision that where one occupier employs an independent contractor and there is more than one occupier of the premises, any other occupier should be entitled to rely upon that delegation to defend his claim. We agree with the intent of this subsection and consequently support its implementation. A similar provision is contained in section 6(2) of the Ontario statute and in section 5(4) of the Saskatchewan Commission's proposal

6(1) Where premises are occupied or used by virtue of a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from any failure on his part in carrying out his responsibility, as is required by virtue of this Act to be shown by an occupier of premises.

(2) Where premises are occupied by virtue of a subtenancy, subsection (1) applies to any landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(3) For the purposes of this section, a landlord shall not be deemed to be in default in his duty under subsection (1) unless his default is such as to be actionable at the suit of the occupier.

(4) Nothing in this section shall be construed as relieving a landlord of any duty he may have apart from this section.

(5) For the purposes of this section, obligations imposed by any enactment in respect of a tenancy shall be deemed to be imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy, and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

(6) This section applies to tenancies created before or after the commencement of this section.

This section is copied from the uniform Act and is consequently similar to section 6 of the British Columbia statute. Comparable provisions are contained within section 8 of the Ontario Act, section 6 of the Law Reform Commission of Saskatchewan's tentatively proposed Act and section 3(1) of the Scottish statute. In England, section 4(1) of the *Defective Premises Act, 1972* was passed by the English Parliament to replace section 4 of the *Occupiers' Liability Act, 1957*. A copy of this 1972 statute is contained in Appendix "D".

It is a well established principle of the common law that a landlord owes no duty of care in tort to individuals who are injured on demised premises.[147] His only responsibility is towards his tenant arising from a breach of one of his contractual obligations. The tortious immunity exists in the

common law notwithstanding the fact that the damage caused to the third party directly arises from the landlord's breach of his covenant to repair. Where the injured third party wishes to seek legal redress for his injuries, he must institute an action against the tenant. The tenant, in turn, would then have the option to seek contribution from the landlord by naming the latter as a third party to the suit. Consequently, through a rather "circuitous route",[148] a landlord may be held legally responsible for damage sustained by his failure to repair.

The sole intent of subsection (1) is to remove this roundabout manner of according the landlord responsibility for his actions. Instead, it would allow the injured party the right to institute an action directly against the defaulting landlord. In proposing this section, we are aware of the developments which have taken place in the common law, especially in Ontario and Nova Scotia. That is,in both of these jurisdictions recent law has held that a landlord is liable in tort to a tenant for damages resulting from a breach of his statutory duty of repair, similar to that imposed by section 98(1) of *"The Landlord and Tenant Act"*, C.C.S.M. c. L70.[149] In Nova Scotia, it has been said that the cause of action in tort extends to members of the tenant's family.[150]

Subsection (3) provides a limitation on the liability of a landlord to an injured party. By virtue of this provision, a landlord will not be held to be accountable to a third party unless, *inter alia*, his default is actionable at the suit of the tenant. This means that for an injured party successfully to sue a landlord, he must prove that the landlord had notice of the defect and reasonable time in which to make the premises safe.[151]

A similar limitation is contained in section 8(2) of the Ontario Act and within the identical section of the uniform Act. However, the limitation is not contained either within the Scottish statute or the English Act pursuant to section 4 of the *Defective Premises Act,1972*. In the Scottish and English legislation, the landlord is under an independent duty of care to third parties entering the premises. Consequently, the injured party need not show that the landlord had notice of the defect from the tenant and a reasonable time to make the premises safe. This Commission does not wish to make a similar recommendation at this time without further study on the matter.

Subsection (4) is copied again from the uniform Act There is an identical section contained in section 3(3) of the Scottish statute. This subsection merely amounts to a saving provision to indicate that the law of landlord and tenant remains paramount. Subsections (5) and (6) are, we think, self-explanatory. They are copied from the uniform statute.

7. The Tortfeasors and Contributory Negligence Act applies to this Act.

This section copies the uniform and British Columbia Acts. Comparable provisions are contained within section 15 of the Alberta Act, section 9(3) of the Ontario Act and section 7 of the Saskatchewan Commission's tentatively proposed Act.

8(1) Except as otherwise provided in subsection (2), the Crown is bound by this Act, and The Proceedings Against the Crown Act applies.

(2) This Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road.

Comparable provisions are contained within section 8 of the uniform Act and the proposed Saskatchewan statute, in sections 4 and 16 of the Alberta Act and in section 10 of Ontario's legislation.

With respect to the Crown in right of the Province of Manitoba, subsection (1) makes explicit what is already implicit within our statutes. Section 5(1)(c) of *"The Proceedings Against the Crown Act"* provides that the Crown is expressly liable for any breach of its duties arising from "the ownership, occupation, possession, or control, of property". Moreover, section 5(1)(d) provides that the Crown is subject to all those liabilities in tort that a private person would be under "any statute, or any regulation or by-law made or passed under the authority of any statute". Although these two legislative provisions already imply that the provincial Crown would be bound by this statute, the Commission felt it appropriate to include an express provision to remove effectively any doubt concerning its applicability. Moreover, section 15 of *"The Interpretation Act"*, C.C.S.M. I80, incorporates the common law principle that the Crown is immune from statutory control unless otherwise expressly stated therein. Given this legislative provision, the inclusion of this subsection is necessary to achieve absolute clarity.

The issue of whether a provincial statute can bind the federal Crown is far more complex. It is clear that provincial statutes passed prior to the enactment of the federal *Crown Liability Act*, R.S.C. 1970 c. C-38, enacted in 1952, are binding on the Crown. With respect to its liability as an occupier under section 3(1)(b) of this federal statute, this principle makes good sense. That is, this federal Act was essentially copied from the *"Crown Proceedings Act, 1947"*,

10 & 11 Geo. 6 c. 44. Our Canadian legislation contains a noteworthy omission from section 2(1)(c) of the English Act in that within our section 3(1)(b), the liability of an occupier is not limited to its responsibilities "at common law" as the English legislation stipulates. This omission would suggest that Parliament intended to make the federal Crown subject to statutes enacted at least prior to 1952, including those passed by provincial legislatures.

Whether provincial statutes passed subsequent to the enactment of section 3(1)(b) of the *Crown Liability Act* are binding upon the federal Crown is a far more controversial issue. The traditional view is that the federal Crown is immune from any provincial legislation passed subsequent to the date in which Parliament accepted liability by statutory enactment.[152] Any attempt by a province to do so has been considered to be an unnecessary interference of the Royal prerogative and *ultra vires* of the provincial legislature.[153] More recent decisions of the Supreme Court of Canada have however, shown a more liberal interpretation towards this issue. In the case of *R. v. Murray*[154] the Supreme Court of Canada held that *"The Tortfeasors and Contributory Negligence Act"* applied to the federal Crown in an action, pursuant to section 50 of the *Exchequer Court Act* R.S.C.1952 c. 98, where it sought compensation for the loss of the services of one of its injured servants. The case is an important one for Martland, J., writing the judgment for the court, stated that the right of the federal Crown, resulting from section 50, "can only be determined by the law in force at the time and the place when and where the injury to the servant occurred".[155]

This remark is a novel one for it can be interpreted

to mean that all Crown rights, including those contained in the federal *Crown Liability Act*, should be judicially interpreted as including provincial statutes from time to time passed by provincial legislatures, regardless of whether the statutes were passed prior to or subsequent to that enactment. This was the broad interpretation given to these remarks by Pigeon, J. in a dissenting judgment in the case of *The Queen v. Nord-Deutsche Versicherungs Gesellschaft*.[156] It was his opinion that section 3(1)(b) of the *Crown Liability Act* should be interpreted so as to incorporate by reference provincial statutes as passed from time to time by the various legislatures. This interpretation certainly appears to reflect the original philosophy of this crown liability legislation which is "to give the subject a complete remedy in tort against the Crown or, to put it another way, to place the Crown in the same position as a private person for the purposes of the law of torts".[157] If the federal Crown is immune from provincial legislation passed subsequent to its acceptance of liability, its legal position would, of course, differ from that of the private individual. However, it is too soon to say whether the position adopted by Mr. Justice Martland, as interpreted by Mr. Justice Pigeon would be accepted by a majority of the court on a direct point of the issue.

Consequently, in order to ensure that the Government of Canada is bound by the proposed statute, we recommend that the Province of Manitoba request the Government of Canada to propose to Parliament an amendment to their *Crown Liability Act* expressly including this proposed statute to apply to the Crown in right of Canada. In making this recommendation, we are aware that the Institute of Law Research and Reform of Alberta made a similar recommendation in its report on occupiers' liability.[158]

Subsection (2) renders the Act inapplicable to either the provincial or federal Crown or to a municipality as the occupier of a public highway or public road. The liability of the provincial Crown is governed by specific provisions in *"The Highways Department Act"*, C.C.S.M. c.H40, *"The Municipal Act"*, C.C.S.M. c. M225 and *"The Proceedings Against the Crown Act"*, C.C.S.M. c. P140.

In addition, it should be noted that, unlike other provinces, we have drafted section 2 of this proposed statute so that, in effect, the liability of the Crown and a municipality as occupiers of public highways and roads *at common law* will be unaffected by this legislation. We have accomplished this by making section 2 subject to section 8(2). We have taken this precaution because of recent case law which has held that a municipality may be liable in ordinary negligence for damage sustained by a state of non-repair on its roads or highways, even where a statutory duty to repair is absent. The decision is *Barratt v. Corporation of the District of North Vancouver.*[159] Although the British Columbia Court of Appeal held in favour of the defendant municipality in that case, it admitted that it was a proper extension of *Donoghue v. Stevenson*[160] (which formulated the principle that a legal relationship would be created by conduct likely to cause injury to another) to state that a municipality may be liable for injury sustained by reason of non-repair of its highways if it is empowered by statute to repair highways and fails to act within the limits of the discretion so conferred. Prior to this decision, it was generally conceded that a municipality could not be liable for injury so caused, unless there was a statutory duty to repair, as opposed to a mere power, and the municipality so breached that duty, as set forth by the

applicable legislation.[160]

As stated, the fact that section 2 is made subject to section 8(2) ensures that the common law liability of both a municipality and the Crown for damage sustained on either a public highway or road will remain unaffected by this proposed legislation. It may well be that this proviso makes explicit what is already implicit within the Act but we have included this provision to ensure that the parameters of this Act are absolutely clear.

9. This Act does not apply to or affect

(a) the liability of an employer in respect of his duties to his employee;

(b) the liability of any person by virtue of a contract for the hire of, or for the carriage for reward of persons or property in, any vehicle, vessel, aircraft, or other means of transport;

(c) the liability of any person under the Hotel Keepers Act; or

(d) the liability of any person by virtue of a bailment.

Comparable provisions are contained in section 9 of the uniform Act, the Ontario statute and the Saskatchewan Commission's proposed statute. The section is also similar to section 14(4) of the Alberta Act and section 2(2) of the Scottish statute.

The purpose of this section is to ensure that the legal obligations existing in the four instances would not be affected by this legislation. Generally, the duty of care owed in these instances is a higher one than that owed by an occupier to entrants on his premises. Due to the distinct difference in the measure of care these relationships should be excluded from the proposed Act.

10. Subject to section 4(3) and section 6(6), this Act applies only in respect of a cause of action arising after this Act comes into force.

This section is similar to section 10 of both the uniform Act and the Saskatchewan Commission's proposed statute. The material time to determine whether this legislation applies to a particular case is when the cause of action arose and not when the action was instituted against the occupier. The two exceptions set forth within this provision ensure that the Act does affect express contracts and tenancies entered into prior to the effective date of this legislation. Comparable provisions are also contained in section 2 of the Alberta Act and in section 11 of the Ontario statute.

VII. THE (PROPOSED) OCCUPIERS' LIABILITY ACT: COMPLETE TEXT

1. In this Act

(a) "occupier" means an occupier at common law and may include:

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter the premises,

and, for the purposes of this Act, there may be more than one occupier of the same premises;

(b) "premises" includes

(i) water;

(ii) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (iv);

(iii) ships and vessels;

(iv) trailers and portable structures designed or used for a residence, business, or shelter;

(v) railway locomotives, railway cars, vehicles, and aircraft while not in operation.

(c) "snowmobile" means a snowmobile defined under *"The Snowmobile Act"*.

2. Subject to sections 3(5), 4, 8(2) and 9, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which he is in law responsible.

3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to any

person, and his property, on the premises, and any property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe while on the premises.

(2) The duty of care referred to in subsection (1) applies in relation to

(a) the condition of the premises; or

(b) activities on the premises; or

(c) the conduct of third parties on the premises.

(3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person as his own risks.

(4) Notwithstanding subsection (1), an occupier owes no duty of care towards a person who is driving or riding on a snowmobile or is being towed by a snowmobile upon the premises without the express or implied consent of the occupier except the duty not to create a danger with the deliberate intent of doing harm or damage to the person or his property and not to act with reckless disregard of the presence of the person or his property.

(5) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent upon him by virtue of an enactment or rule of law imposing special standards of care on particular classes of persons.

4(1) Subject to subsections (2) and (3), where an occupier is free to extend, restrict, modify, or exclude his duty of care to any person by express agreement, or by express stipulation or notice, the occupier shall take reasonable steps to bring such extension, restriction, modification or exclusion to the attention of the person to whom the duty is owed.

(2) An occupier shall not restrict, modify, or exclude his duty of care under subsection (1) with respect to a person

(a) who is not privy to the express agreement; or

(b) who is empowered or permitted to enter or use the premises without the consent or permission of the occupier.

(3) This section applies to express contracts entered into before or after the commencement of this section.

5(1) Notwithstanding section 3(1), where damage is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

(2) Subsection (1) shall not be construed as restricting or excluding the liability of an occupier for the negligence of his independent contractor imposed by any other Act.

(3) Where there is damage under the circumstances set out in subsection (1) and there is more than one occupier of the premises, each occupier is entitled to rely on subsection (1).

6(1) Where premises are occupied or used by virtue of a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from any failure on his part in carrying out his responsibility, as is required by virtue of this Act to be shown by an occupier of premises.

(2) Where premises are occupied by virtue of a subtenancy, subsection (1) applies to any landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(3) For the purposes of this section, a landlord shall not be deemed to be in default in his duty under subsection (1) unless his default is such as to be actionable at the suit of the occupier.

(4) Nothing in this section shall be contrued as relieving a landlord of any duty he may have apart from this section.

(5) For the purposes of this section, obligations imposed by any enactment in respect of a tenancy shall be deemed to be imposed by the tenancy, and "tenancy" includes a statutory tenancy, and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

(6) This section applies to tenancies created before or after the commencement of this section.

7. The *Tortfeasors and Contributory Negligence Act* applies to this Act.

8(1) Except as otherwise provided in subsection (2), the Crown is bound by this Act, and *The Proceedings Against the Crown Act* applies.

(2) This Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road.

9. This Act does not apply to or affect

(a) the liability of an employer in respect of his duties to his employee;

(b) the liability of any person by virtue of a contract for the hire of, or for the carriage for reward of persons or property in, any vehicle, vessel, aircraft, or other means of transport;

(c) the liability of any person under the *Hotel Keepers Act*; or

(d) the liability of any person by virtue of a bailment.

10. Subject to section 4(3) and section 6(6) this Act applies only in respect of a cause of action arising after this Act comes into force.

VIII. CONCLUSION AND SUMMARY OF RECOMMENDATIONS

In conclusion, our recommendations contained within this Report can be summarized as follows:

1. An "Occupiers' Liability Act", similar to the proposed Act set out in this Report, should be enacted.

2. Section 25.2 of *"The Snowmobile Act"*, C.C.S.M. c. S150, should be repealed as it is now contained within our proposed legislation and, consequently, its inclusion within the former statute is unnecessary.

3. The Government of Manitoba should request the Government of Canada to propose to Parliament an amendment to the *Crown Liability Act*, R.S.C. 1970, c. C-38, so as to ensure that the Manitoba Occupiers' Liability Act shall apply to petitions against the Crown in right of Canada under the *Crown Liability Act*.

This is a Report pursuant to section 5(2) of *"The Law Reform Commission Act"* signed this 11th day of August 1980.

Clifford H.C. Edwards, Chairman

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

A. Burton Bass, Commissioner

Beverly-Ann Scott, Commissioner

Knox B. Foster, Commissioner

FOOTNOTES

1. See *Blyth v. Birmingham Water Works Co.* (1856), 11 Ex. 781; 156 E.R. 1047.

2. A.M. Linden, "A Century of Tort Law in Canada" (1967), 45 *Can. Bar Rev.* 831 at 838.

3. See *Sinclair v. Hudson Coal & Fuel Oil Co.* (1966), 56 D.L.R. (2d) 484.

4. See *McCarthy v. Royal American Shows Inc.* (1967), 61 W.W.R. 45 (Man. Q.B.); *Henderson v. Obee's Steam Bath Ltd.*, unreported, April 28, 1976 (Man. Q.B.); *Sutton v. The City of Winnipeg*, unreported, January 26, 1978 (Man. C.C.).

5. McDonald and Leigh, "The Law of Occupiers' Liability and the Need for Reform in Canada" (1965), 16 *U.T.L.J.* 55; A.L. MacDonald, "Invitees" (1930) 8 *Can. Bar Rev.* 344; W.I. Innes, "Recent Development in the Law of Occupiers' Liability to Trespassers" (1975) 24 *U.N.B. L.J.* 39; B.M.E. McMahon, "Occupiers' Liability in Canada" (1973) 22 *Int. & Comp.L.Q.* 515; E.R. Alexander, "Occupiers' Liability: Alberta Proposes Reform" [1970] 9 *Alberta L.Rev.* 89.

5a. Edwin C. Harris, "Occupiers' Liability in Canada", *Studies in Canadian Tort Law*, ed. Allen Linden (1968) 250.

6. *Supra* n. 2, at 836.

7. B.M.E. McMahon, "Occupiers' Liability in Canada" (1973) 22 *Int. & Comp. L.Q.* 515.

8. *Pannett v. McGuiness & Co. Ltd.* [1972] 2 Q.B. 599 at 606 (C.A.).

9. C.E. Edwards and R.J. Jerome, "Comment: The Foreseeable Emergence of the Community Standard" (1974) 51 *Denver L.J.* 145 at 147.

10. James Fleming, "Tort Liability of Occupiers of Land: Duties Owed to Trespassers" (1953) 63 *Yale L.J.* 144 at 146.

11. See *Rowlands v. Christian*, 69 Cal. 2d 108, 443 P. 2d 561, 70 Cal. Rptr. 97 (1968); *Pickard v. City & County of Honolulu*, 51 Hawaii 134; 452 P. 2d 445 (1969); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P. 2d 308 (1971).

12. The *"Restatement, (1934)"* re-designated the categories of "licensee" and "invitee" to "gratuitous licensee" and "business visitor" (§ 331, 332). However, it has since returned to traditional terminology. See *Restatement* 2d, s. 330,332. It has also created additional duty categories, for instance, to entrants as of right. See *Restatement* 2d, s. 345-350.

13. Law Reform Committee, *Third Report: (Occupiers' Liability to Invitees, Licensees and Trespassers)* (1954) Cmd. 9305.

14. See the *Occupiers' Liability (Scotland) Act, 1960*, 8 & 9 Eliz. 2, c. 30 (Appendix "E") and *The Occupiers' Liability Act*, 1962, no. 31 (New Zealand).

14a. Institute of Law Research and Reform, *Report No. 3: Occupiers' Liability* (1969).

15. "The Uniform Occupiers' Liability Act", Conference of Commissioners on Uniformity of Legislation in Canada (1973), amended in 1975 proceedings (Appendix "F").

16. Ontario Law Reform Commission, *Report on Occupiers' Liability* (1972).

17. Bill 202, "The Occupiers' Liability Act, 1980", (Appendix "I").

18. Nova Scotia Law Reform Advisory Commission "Occupiers' Liability Law: A Study Paper", (M.T. Hertz) 1976. And see 1977 S.N.S. c. 12, *An Act Respecting the Liability of Occupiers of Land* which was passed pursuant to the decision of *Auffrey v. Province of New Brunswick, infra*, n. 62.

19. Law Reform Commission of Saskatchewan, "Tentative Proposals for an Occupiers' Liability Act" (June, 1980). See Appendix "K" for a copy of the proposed statute.

20. (1976) Law Com. No. 75.

21. *"The Occupiers' Liability Act"*, S.A. 1973 c. 79 s. 12 (see Appendix "G" for a copy of this Act).

22. *Supra* note 17, s. 4 and see Appendix "I" for a copy of the Act.

23. *Supra* note 19, s. 3(6), s. 3(8), and see Appendix "K" for a copy of the statute.

24. *Supra*, n. 13.

25. *Supra*, n. 14a.

26. *Supra*, n. 5.

27. [1911] A.C. 361 (P.C.).

28. See also *Grand Trunk Rwy Co. of Canada v. Anderson* (1898) 28 S.C.R. 541 wherein the Supreme Court of Canada dismissed an action brought by administrators for damages because deceased was categorized as a trespasser. The case was applied in *DeVries v. C.P.R.* (1916), 27 D.L.R. 20 (Man. C.A.).

29. *Id.*, at 370.

30. *Ibid.*

31. *Supra*, n. 5, and see L.D. Wilkins "The Future of Occupiers' Liability to Trespassers in Canada", *Alberta L.Rev.* 447 and the remarks of Salmond, L.J. in *Herrington v. British Railways Board* [1971] 2 W.L.R. 477 at 481, [1971] 1 All E.R. 897, where he refers to *Addie* as "a case which I confess I am unable to read, 40 years on, without a sense of shock".

32. [1929] A.C. 358, [1929] All E.R. Rep. 1 (H.L.Sc.).

33. See Bryan McMahon, "Occupiers' Liability in Scotland" *Irish Jur.* (1972) 264.

34. *Supra*, n. 32 at 364 and see the comments of Viscount Dunnedin at 370, "On this point Scotch law is the same".

35. See *Perozek v. Sinclair* [1933] 4 D.L.R. 317 (Man. C.A.); *Honke v. Manitoba Eastern Rwy Co.* [1938] 2 W.W.R. 520 (Man. K.B.); *Nelson v. Town of The Pas* (1969) 69 W.W.R. 176 (Man. Q.B.).

36. *Supra*, n. 32 at 365.

37. See *C.P.R. v. Kizlyk* (1944) 41 Man. R. 33, aff'd [1944] S.C.R. 98, where Davis,J. of the Supreme Court of Canada expressly approved a *Restatement* provision which cites a more liberal test to determine an occupier's liability towards a child trespasser.

38. *Supra*, n. 35 and see *Bonne v. Toews* (1968) 64 W.W.R. 1 (Man. Q.B.); *Brisson v. C.P.R.* (1969) 69 W.W.R. 176; aff'd (1969), 70 W.W.R. 479 (Man. C.A.).

39. See *Thompson v. Bankstown Corporation* (1953), 87 C.L.R. 619; *Rich v. Commissioner for Railways* (1959) 101 C.L.R. 135 and *Commissioner for Railways v. Cardy* (1960) 104 C.L.R. 274.

40. See *Lengyel v. Manitoba Power Commission* (1958) 65 Man. R. 321, aff'd (1957-58) 23 W.W.R. 497, 65 Man. R. 321 at 330; *Nixon v. Manitoba Power Commission* (1959) 29 W.W.R. 241 (Man. Q.B.); and *Marion v. Monarch Construction Co.* (1960-61) 33 W.W.R. 24 (Man. C.C.).

41. [1922] 1 A.C. 44, (H.L. Sc.).

42. The active-passive distinction appears to have been first applied by Denning L.J. in the decision of *Dunster v. Abbott* [1953] 2 All E.R. 1572; [1954] 1 W.L.R. 58 (C.A.), a case involving a licensee. He later applied the distinction to a trespasser in *Videan v. British Transport Commission* [1963] 2 Q.B. 650, [1963] 2 All E.R. 860 (C.A.).

42a. See *Chapman v. Ames* (1959), 18 D.L.R. (2d) 140 (N.B. App. Div.); *Van Oudenhove v. D'Aoust* (1970), 8 D.L.R. (3d) 145 at 156, rev'ing (1969), 67 W.W.R. 225 (Alta. App. Div.). But see: *East Crest Oil Ltd. v. The King* [1945] S.C.R. 191; *Wallace v. Petit* (1923) 55 O.L.R. 82 (App. Div.); *McEwen v. C.N.R.* (1962), 38 W.W.R. (N.S.) 76 (Alta. S.C.).

43. *Pinkas v. C.P.R.* [1928] 1 W.W.R. 321 (Man. K.B.); *Nelson v. Town of The Pas* (1969) 69 W.W.R. 176 (Man. Q.B.); *Bonne v. Toews* (1968) 64 W.W.R. 1 (Man. Q.B.).

44. *Herrington v. British Railway Board* [1972] A.C. 877; [1972] 2 W.L.R. 537, [1972] 1 All E.R. 749 (H.L.) and *Southern Portland Cement Ltd. v. Cooper* [1974] A.C. 623 (P.C.).

45. And see *Wade v. C.N.R.* [1978] 1 S.C.R. 1064 at 1073-74, 3 C.C.L.T. 173, rev'ing (1976), 14 N.S.R. (2d) 541 (C.A.).

46. *Southern Portland Cement Ltd. v. Cooper, supra,* n. 44.

47. See *Herrington v. British Railways Board* [1971] 2 W.L.R. 477 at 487, [1971] 1 All E.R. 897, aff'd [1972] A.C. 877 (H.L.) at 921, 928.

48. *Stanton v. Taylor, Pearson and Carson* (1966) 54 W.W.R. 449 at 453, aff'd [1966] S.C.R. 641.

49. *Videan v. British Transport Commission, supra,* n. 42.

50. *Supra,* n. 44.

51. *Pannett v. McGuiness* [1972] 2 Q.B. 599 at 606 and see Michael Green, "Case Comment: British Railways Board v. Herrington" 39 *Man. Bar. News* 131 at 134.

52. *Supra,* n. 44 at 922.

53. *Id.,* at 910.

54. *Id.,* at 941.

55. *Id.,* at 899.

56. [1975] 2 S.C.R. 311, 51 D.L.R. (3d) 533, rev'ing 31 D.L.R. (3d) 275,[1973] 1 O.R. 411.

57. *Id.,* at 341.

58. *Phillips v.C.N.R.* [1975] 4 W.W.R. 135 at 143 (B.C.C.A.).

59. s. 25.2, enacted S.M. 1976 c. 11, s. 10.

60. Legislative Assembly of Manitoba, *Debates and Proceedings,* February 25, 1976 at pp. 330-31.

61. Daniel Ish, "Trespassers: Section 33A of "The Snowmobile Act"" (1977) 42 *Sask. L. Rev.* 115.

62. But see *Auffrey v. Province of New Brunswick* (1976), 70 D.L.R. (3d) 751, 9 N.R. 249 (S.C.C.) and S.N.S. 1977 c. 12, a legislative provision enacted pursuant to that decision. See also *Haynes v. C.P.R.* (1977) 17 N.R. 125 (S.C.C.).

63. (1977), 77 D.L.R. (3d) 377, 2 C.C.L.T. 97 (Ont. S.C.).

64. (1977) 2 C.C.L.T. 97 at 100.

65. *Supra,* n. 8.

66. *Id.,* at 606-607.

67. *Id.,* at 607.

68. *Supra,* n. 44 at 899.

69. G.H.L. Fridman, "The Modern Law as to Trespassers" (1977) 25 *Chitty's L.J.* (No. 1) 28.

70. *Supra,* n. 32 at 365.

71. [1974] S.C.R. 354,(1974) 39 D.L.R. 417, rev'ing, in part, [1971] 3 N.B.R. (2d) 477, 18 D.L.R. (3d) 685.

72. See *Restatement 2d*, Vol. 2, sec. 334 at 186.

73. *Ibid.*

74. John G. **Fleming**, *The Law of Torts*, (4th ed. 1971) 397.

75. [1975] 1 S.C.R. 592; 6 N.S.R. (2d) 440.

76. *Id.*, at 615.

77. (1974), 7 O.R. 263, 55 D.L.R. (3d) 44.

78. *Id.*, at 267.

79. Delivered July 7, 1977.

80. *Id.*, at p. 3 of judgment.

81. [1978] 1 S.C.R. 1064, 3 C.C.L.T. 173.

82. Lewis Klar, "A Comment on *Wade v. C.N.R.*" 3 *C.C.L.T.* 194 and see commentary of Dale Gibson at (1978) 56 *Can. Bar Rev.* 693.

83. *Vincent v. C.N.R.* (1979) 29 N.R. 451 at 471.

84. "Ratio" is an abbreviated term for *ratio decidendi* which means the ground of a legal decision.

85. *Supra*, n. 81 at 1073-74.

86. *Mercy Docks and Harbour Board v. Proctor* [1923] A.C. 253 at 272, 92 L.J. K.B. 479.

87. *Supra*, n. 12.

88. See, for instance, Cecil A. Wright and Allen M. Linden, *The Law of Torts* (5th ed. 1970) 666 and Harris, "Occupiers' Liability in Canada", *supra*, n. 6 at 254.

89. See Paton, "Responsibility for an Occupier to Those Who Enter as of Right" (1941), 19 *Can. Bar Rev.* 357 and Bohlen, "The Duty of a Landowner Towards Those Entering His Premises in Their Own Right" (1921), 69 *Univ. of Penn. L. Rev.* 142, 237, 340.

90. *Gwynne v. Dominion Stores Ltd.* (1964) 43 D.L.R. (2d) 290 (Man. Q.B.).

91. *Bering v. S.S. Stevenson & Co. (1972) Ltd. et al,* unreported November 17, 1976 (Man. Q.B.).

92. L.R. (1866) 1 C.P. 274 at 288.

93. *Supra,* n. 2.

94. *Molish v. Clark's Gamble of Canada Ltd.* [1973] 1 W.W.R. 477 (Man. Q.B.).

95. *Smith v. Provincial Motors Ltd.* (1962), 32 D.L.R. (2d) 405 at 412.

96. *London Graving Dock Co. Ltd. v. Horton* [1951] A.C. 737 (H.L.); *Campbell v. The Royal Bank of Canada* [1964] S.C.R. 85; *City of Brandon v. Farley* (1968) 66 D.L.R. (2d) 289 (S.C.C.); *Bilinsky v. Ukrainian Greek Catholic Parish* [1971] 2 W.W.R. 595 (Man. Q.B.).

97. *Supra,* n. 95.

98. See pages 17-18 of our Report.

99. *Supra,* n. 73.

100. *London Graving Dock Co. Ltd. v. Horton, supra,* n. 96.

101. *Bilinsky v. Ukrainian Greek Catholic Parish* [1971] 2 W.W.R. 595 at 601 (Man. Q.B.).

102. *Supra,* n. 75 at 616-17 and see *Bering v. S.S. Stevenson & Co. (1972) Ltd., supra,* n. 91.

103. *Supra,* n. 8.

104. *Sutton v. The City of Winnipeg,* unreported, January 26, 1978 (Man. C.C.).

105. *Swanson v. Henkel Enterprises Ltd.* [1972] 3 W.W.R. 241, aff'd [1973] 6 W.W.R. 179 (Man. C.A.).

106. [1917] 2 K.B. 325 at 332, 333.

107. *Supra,* n. 4.

108. *Ibid.*

109. *Gillmore v. London County Council* [1938] 4 All E.R. 331; *Sinclair v. Hudson Coal & Fuel Oil Co.* (1966), 56 D.L.R. (2d) 484 (Ont. C.A.).

110. *Supra*, n. 4.

111. [1946] O.R. 454; [1946] 3 D.L.R. 194 (Ont. C.A.); rev'd [1947] S.C.R. 486.

112. *Supra*, n. 44 at 924.

113. *Id.*, at 925.

114. *Supra*, n. 10 at 151.

115. See John G. Fleming, *The Law of Torts* (5th ed. 1977) 37.

116. *Supra*, n. 10 at 182.

117. *Supra*, n. 115 at 433.

118. *Supra*, n. 11.

119. 443 P. 2d 561 at 568 (1968).

120. See Cecil A. Wright, *Cases on the Law of Torts* (4th ed. 1967) 666-667; but see Cecil Wright and Allen Linden, *Canadian Tort Law: Cases, Notes and Materials* (6th ed. 1975) 497-501; E.R.Alexander, "Occupiers' Liability: Alberta Proposes Reform" (1970) 9 *Alberta L. Rev.* 89 at 102; Edwin C. Harris, "Occupiers' Liability in Canada", *Studies in Canadian Tort Law* ed. Allen Linden (1968) 279.

121. See Freedman,J.A. in *Farley v. City of Brandon* (1967) 61 D.L.R. (2d) 155 (Man. C.A.) at 159 and the dissenting judgment of O'Halloran, J.A. in *Crewe v. North American Assurance Co.*, [1942] 3 W.W.R. 193, [1942] 4 D.L.R. 75 (B.C.C.A.).

122. See Appendix "F" for a copy of the statute.

123. *Supra*, n. 51 at 607.

124. The Law Commission, Working Paper No. 52, "Liability for damage or injury to trespassers and related questions of occupiers' liability" at 37.

125. See New Zealand, Torts and General Law Reform Committee, *Occupiers' Liability to Trespassers*, (1970) at 15.

126. See *Russell v. Glassman* (1957) 22 W.W.R. 122 (Man. Q.B.); *Bryce (Administrator of Miller Estates) v. Northland Greyhound Lines Inc. (No. 1)* (1954) 11 W.W.R. (N.S.)113

affirming (1953) 8 W.W.R. (N.S.)202; *Kisiw v. Dietz* (1969) 5 D.L.R. (3d) 764 (Man. Q.B.);*Wilcott v. Canadian Accident & Fire Assur. Co.* (1968) 70 D.L.R. (2d) 8, (1969) 66 W.W.R. 54 (Man. Q.B.); *Commercial Credit Corp. v.Tomalin* (1969) 70 W.W.R. 240 (Man. C.A.).

127. The Wawanesa Mutual Insurance Company, the Manitoba Public Insurance Corporation and Royal Insurance responded.

128. The Wawanesa Mutual Insurance Company.

129. Royal Insurance.

130. See s. 4(3)(a) of the *Occupiers' Liability Act, 1980*. The trespass statute is *"The Trespass to Property Act, 1980"* (Bill 203) which is set forth in Appendix "J".

131. [1971] 2 W.L.R. 477 at 482.

132. *Supra*, n. 116.

133. [1966] A.C. 552 (H.L.).

134. [1906] A.C. 428 (H.L.)

135. *Id.*, at 433.

136. [1943] 2 All E.R. 621 (K.B.).

137. *Id.*, at 627.

138. [1973] 4 W.W.R. 181 (Man. Q.B.).

139. *Supra*, n. 133 at 578.

140. See comments of Viscount Dilhorne in *Wheat v. Lacon, supra*, n. 133 at 574.

141. A licensee of premises has permission to occupy from the owner, but, unlike a tenant, has no estate or interest in the land so possessed. Section 123 of *"The Landlord and Tenant Act"* makes certain licensors and licensees subject to its Part IV provisions which are "reasonably acceptable".

142. *Supra*, n. 133.

143. See *Hillman v. MacIntosh* [1959] S.C.R. 384, affirming [1957] O.R. 284, [1957] O.W.N. 187, 8 D.L.R. (2d) 513.

144. *Black's Law Dictionary* (4th ed.) 1746.

145. (1975) Law Com. No. 69, Scot. Law Com. No. 39, (1974-75) H.C. 605, para. 69 and 94.

146. P.M. North, *Occupiers' Liability* (1971) 140.

147. *Supra*, n. 134 and see *City of Ottawa v. Munroe* [1954] S.C.R. 756 at 760.

148. *Nova Scotial Law Reform Advisory Commission, "Occupiers'* Liability Law: A Study Paper" at 48.

149. See *Fleishmann v. Grossman Holdings Ltd.* (1976) 16 O.R. (2d) 746 (Ont. C.A.); *Lindstrom v. Bassett Realty Ltd.* (1978) 30 N.S.R. (2d) 278, [1979] C.C.L. 4488, varying (in part) (1978) 28 N.S.R. (2d) 616, [1979] C.C.L. 1220, affirmed (1979) 34 N.S.R. (2d) 361, 59 A.P.R. 361 (C.A.).

150. See *Lindstrom v. Bassett Realty Ltd.* (1978) 28 N.S.R. (2d) 616 at 625, per Cowan, C.J.T.D.

151. F.W. Rhodes, *Williams: The Canadian Law of Landlord and Tenant* (4th ed. 1973) §98.1 at 409-410.

152. See *Gauthier v. The King* (1917-18) 56 S.C.R. 176, 40 D.L.R. 353, affirming 15 Ex. C.R. 444; *Sternschein v. Reginam* (1965) 51 W.W.R. 437 (Man. Q.B.) and Dale Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47 *Can. Bar Rev.* 40.

153. *Ibid.*

154. [1967] S.C.R. 262, 60 D.L.R. (2d) 647.

155. *Id.*, at 268.

156. (1971), 20 D.L.R. (3d) 444; varying [1969] 1 Ex.C.R. 117.

157. Colin H.H. McNairn, *Governmental and Inter-governmental Immunity in Australia and Canada* (1977) 78.

158. *Supra*, n. 25 at 99.

159. (1979) 6 M.P.L.R. 80 (B.C.C.A.) rev'ing 79 D.L.R. (3d) 31, 2 C.C.L.T. 157, 2 B.C.L.R. 333. The case was scheduled to be heard by the Supreme Court of Canada last session but, at the date of this publication, no written judgment has yet been rendered.

160. *Id.*, at 82, and authorities cited there.

APPENDIX "A"

"THE SNOWMOBILE ACT", C.C.S.M. c. S150

Certain operations prohibited.

25.1 No person shall operate a snowmobile

(a) on private property without the express or implied consent of the owner or other person having lawful possession or control of the property; or

(b) within one hundred feet of a dwelling between the hours of twelve midnight and seven o'clock in the morning, except within one hundred feet of a dwelling on his own property or property under his control or as an invited guest; or

(c) at a speed greater than five miles an hour when within one hundred feet of a person engaged in ice fishing or a fishing shanty or shelter; or

(d) within one hundred feet of a slide, ski or skating area that is in use at the time, unless the area is enclosed or fenced or unless the snowmobile is required for the maintenance or operation of the ski area.

En. S.M. 1971, c. 34, s. 4.

Occupier's duty of care.

25.2 An occupier of land owes no duty of care toward a person who is driving or riding on a snowmobile or being towed by a snowmobile upon the land and who is a trespasser or licensee except the duty not to create a danger with the deliberate intent of doing harm or damage to the trespasser or licensee or do a wilful act with reckless disregard of the presence of the trespasser or licensee.

En. S.M. 1976, c. 11, s. 10.

APPENDIX "B"

"THE PETTY TRESPASSES ACT", C.C.S.M. c. P50

CHAPTER P50

AN ACT RESPECTING PETTY TRESPASSES.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Short title.

1 This Act may be cited as: "The Petty Trespasses Act" .

R.S.M., c. 197, s. 1.

Unlawful trespass.

2 Any person who unlawfully enters into, comes upon, or passes through, or in any way trespasses upon, any land or premises whatsoever, being the property of another and being wholly enclosed, or upon or through which he has been requested by the owner, tenant or occupier not to enter, come or pass, is guilty of an offence and is liable, on summary conviction, to a fine of not more than twenty-five dollars for any such offence, whether any damage has or has not been occasioned thereby; but nothing herein extends to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the Act of which complaint is made.

R.S.M., c. 197, s. 2; am. S.M., 1956, c. 69, s. 14; am.
Note: Trespass in pursuit of game - See The Wildlife Act.

Trespasser may be arrested without warrant.

3 Any person found committing such a trespass as aforesaid may be apprehended without a warrant by any peace officer, or by the owner of the property on which it is committed, or his servant, or any person authorized by him, and be forthwith taken to the nearest justice, to be dealt with according to law.

R.S.M., c. 197, s. 3; am.

Act not to affect any case involving title to land.

4 Nothing in this Act authorizes any justice to hear and determine any case of trespass in which the title to land, or any interest therein or accruing thereupon, is called in question or affected in any manner howsoever; but every such case of trespass shall be dealt with according to law, in the same manner in all respects as if this Act had not been passed.

R.S.M., c. 197, s. 4.

Where no offence under Act.

5 Any person who, on any walk, driveway, roadway, square or parking area provided outdoors at the site of or in conjunction with the premises in which any business or undertaking is operated and to which the public is normally admitted without fee or charge, communicates true statements, either orally or through printed material or through any other means, is not guilty of an offence under this Act whether the walk, driveway, roadway, square or parking area is owned by the operator of that business or undertaking or by any other person or is publically owned, but nothing in this section relieves the person from liability for damages he causes to the owner or occupier of the property.

En. S.M. 1976, c. 71, s. 2.

APPENDIX "C"

THE OCCUPIERS' LIABILITY ACT 1957 (ENGLAND)

CHAPTER 31

Occupiers' Liability Act, 1957

ARRANGEMENT OF SECTIONS

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 lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there, to make provision as to the operation in relation to the Crown of laws made by the Parliament of Northern Ireland for similar purposes or otherwise amending the law of tort, and for purposes connected therewith.

[6th June, 1957]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Liability in tort

1.—(1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier

and as his visitors are the same (subject to subsection (4) of this section) as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—

(*a*) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft; and

(*b*) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

(4) A person entering any premises in exercise of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949, is not, for the purposes of this Act, a visitor of the occupier of those premises.

2.—(1) An occupier of premises owes the same duty, 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.

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

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

(*a*) an occupier must be prepared for children to be less careful than adults; and

(*b*) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(*a*) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(*b*) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

3.—(1) 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 as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty.

(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due to the faulty execution of any work of construction, maintenance or repair or other like operation by persons other than himself, his servants and persons acting under his direction and control.

(3) In this section " stranger to the contract " means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

(4) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(5) This section, in so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the commencement of this Act, as well as to those entered into or created after its commencement; but, in so far as it enlarges the duty owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken after that commencement or which are renewed by agreement (whether express or implied) after that commencement.

4.—(1) Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission (but without any contract).

(2) Where premises are occupied under a sub-tenancy, the foregoing subsection shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the premises is put by the sub-tenancy, and for that purpose any obligation to the occupier which the sub-tenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated as put by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord.

(3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a *sub-tenancy) are put to a use not permitted* by the tenancy, and *the landlord of whom they are held under the tenancy is not* debarred by his acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord.

(4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord.

(5) This section shall not put a landlord of premises under a greater duty than the occupier to persons who or whose goods

are lawfully on the premises by reason only of the exercise of a right of way or of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949.

(6) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(7) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy, and " tenancy " includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation, and " landlord " shall be construed accordingly.

(8) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

Liability in contract

5.—(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.

(2) The foregoing subsection shall apply to fixed and moveable structures as it applies to premises.

(3) This section does not affect the obligations imposed on a person by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by or by virtue of any contract of bailment.

(4) This section does not apply to contracts entered into before the commencement of this Act.

General

6. This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act, 1947, and that Act and in particular section two of it shall apply in relation to duties under sections two to four of this Act as statutory duties.

7. The limitation imposed by paragraph (1) of section four of the Government of Ireland Act, 1920, precluding the Parliament of Northern Ireland from making laws in respect of the Crown or property of the Crown (including foreshore vested in the

Crown) shall not extend to prevent that Parliament from amending the law of tort, or enacting provisions similar to section five of this Act, so as to bind the Crown in common with private persons; but as regards the Crown's liability in tort, no such amendments shall bind the Crown further than the Crown is made liable in tort under the law of Northern Ireland by Orders in Council under section fifty-three of the Crown Proceedings Act, 1947.

8.—(1) This Act may be cited as the Occupiers' Liability Act, 1957.

(2) This Act shall not extend to Scotland, nor to Northern Ireland except in so far as it extends the powers of the Parliament of Northern Ireland.

(3) This Act shall come into force on the first day of January, nineteen hundred and fifty-eight.

APPENDIX "D"

DEFECTIVE PREMISES ACT 1972 (ENGLAND)

Defective Premises Act 1972

1972 CHAPTER 35

An Act to impose duties in connection with the provision of dwellings and otherwise to amend the law of England and Wales as to liability for injury or damage caused to persons through defects in the state of premises.

[29th June 1972]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—

(*a*) if the dwelling is provided to the order of any person, to that person; and

(*b*) without prejudice to paragraph (*a*) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.

(2) A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for

the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty.

(3) A person shall not be treated for the purposes of subsection (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design.

(4) A person who—

(*a*) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or

(*b*) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;

arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work.

(5) Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished.

2.—(1) Where—

(*a*) in connection with the provision of a dwelling or its first sale or letting for habitation any rights in respect of defects in the state of the dwelling are conferred by an approved scheme to which this section applies on a person having or acquiring an interest in the dwelling; and

(*b*) it is stated in a document of a type approved for the purposes of this section that the requirements as to design or construction imposed by or under the scheme have, or appear to have, been substantially complied with in relation to the dwelling;

no action shall be brought by any person having or acquiring an interest in the dwelling for breach of the duty imposed by section 1 above in relation to the dwelling.

(2) A scheme to which this section applies—

(*a*) may consist of any number of documents and any number of agreements or other transactions between any number of persons; but

(*b*) must confer, by virtue of agreements entered into with persons having or acquiring an interest in the dwellings to which the scheme applies, rights on such persons in respect of defects in the state of the dwellings.

(3) In this section "approved" means approved by the Secretary of State, and the power of the Secretary of State to approve a scheme or document for the purposes of this section shall be exercisable by order, except that any requirements as to construction or design imposed under a scheme to which this section applies may be approved by him without making any order or, if he thinks fit, by order.

(4) The Secretary of State—

(*a*) may approve a scheme or document for the purposes of this section with or without limiting the duration of his approval; and

(*b*) may by order revoke or vary a previous order under this section or, without such an order, revoke or vary a previous approval under this section given otherwise than by order.

(5) The production of a document purporting to be a copy of an approval given by the Secretary of State otherwise than by order and certified by an officer of the Secretary of State to be a true copy of the approval shall be conclusive evidence of the approval, and without proof of the handwriting or official position of the person purporting to sign the certificate.

(6) The power to make an order under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution by either House of Parliament.

(7) Where an interest in a dwelling is compulsorily acquired—

(*a*) no action shall be brought by the acquiring authority for breach of the duty imposed by section 1 above in respect of the dwelling; and

(*b*) if any work for or in connection with the provision of the dwelling was done otherwise than in the course of a business by the person in occupation of the dwelling at the time of the compulsory acquisition, the acquiring authority and not that person shall be treated as the person who took on the work and accordingly as owing that duty.

3.—(1) Where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work shall not be abated by the subsequent disposal of the premises by the person who owed the duty.

(2) This section does not apply—

(*a*) in the case of premises which are let, where the relevant tenancy of the premises commenced, or the relevant tenancy agreement of the premises was entered into, before the commencement of this Act;

(*b*) in the case of premises disposed of in any other way, when the disposal of the premises was completed, or a contract for their disposal was entered into, before the commencement of this Act; or

(*c*) in either case, where the relevant transaction disposing of the premises is entered into in pursuance of an enforceable option by which the consideration for the disposal was fixed before the commencement of this Act.

4.—(1) Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

(2) The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.

(3) In this section "relevant defect" means a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises; and for the purposes of the foregoing provision "the material time" means—

(*a*) where the tenancy commenced before this Act, the commencement of this Act; and

(*b*) in all other cases, the earliest of the following times, that is to say—

(i) the time when the tenancy commences ;

(ii) the time when the tenancy agreement is entered into ;

(iii) the time when possession is taken of the premises in contemplation of the letting.

(4) Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises ; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.

(5) For the purposes of this section obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.

(6) This section applies to a right of occupation given by contract or any enactment and not amounting to a tenancy as if the right were a tenancy, and " tenancy " and cognate expressions shall be construed accordingly.

5. This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947.

6.—(1) In this Act—

" disposal ", in relation to premises, includes a letting, and an assignment or surrender of a tenancy, of the premises and the creation by contract of any other right to occupy the premises, and " dispose " shall be construed accordingly ;

" personal injury " includes any disease and any impairment of a person's physical or mental condition ;

" tenancy " means—

(*a*) a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or under-

lease or by a tenancy agreement, but not including a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his mortgagee; or

(*b*) a tenancy at will or a tenancy on sufferance; or

(*c*) a tenancy, whether or not constituting a tenancy at common law, created by or in pursuance of any enactment;

and cognate expressions shall be construed accordingly.

(2) Any duty imposed by or enforceable by virtue of any provision of this Act is in addition to any duty a person may owe apart from that provision.

(3) Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void.

(4) Section 4 of the Occupiers' Liability Act 1957 (repairing landlords' duty to visitors to premises) is hereby repealed.

7.—(1) This Act may be cited as the Defective Premises Act 1972.

(2) This Act shall come into force on 1st January 1974.

(3) This Act does not extend to Scotland or Northern Ireland.

APPENDIX "E"

OCCUPIERS' LIABILITY (SCOTLAND) ACT, 1960

Occupiers' Liability (Scotland) Act, 1960

ARRANGEMENT OF SECTIONS

Section

An Act to amend the law of Scotland as to the liability of occupiers and others for injury or damage occasioned to persons or property on any land or other premises by reason of the state of the premises or of anything done or omitted to be done thereon; and for purposes connected with the matter aforesaid. [2nd June, 1960]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) The provisions of the next following section of this Act shall 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 (in this Act referred to as an "occupier of premises") is required, by reason of such occupation or control, to show towards persons 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 them and for which he is in law responsible.

(2) Nothing in those provisions 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 care as aforesaid towards persons entering thereon is incumbent.

(3) Those provisions shall apply, in like manner and to the same extent as they do in relation to an occupier of premises and to persons entering thereon,—

(*a*) in relation to a person occupying or having control of any fixed or moveable structure, including any vessel, vehicle or aircraft, and to persons entering thereon; and

(*b*) in relation to an occupier of premises or a person occupying or having control of any such structure and to property thereon, including the property of persons who have not themselves entered on the premises or structure.

2.—(1) The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligations towards that person, 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.

(2) Nothing in the foregoing subsection shall relieve an occupier of premises of any duty to show in any particular case any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.

(3) Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care.

3.—(1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who or whose property may from time to time be on the premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibility aforesaid as is required by virtue of the foregoing provisions of this Act to be shown by an occupier of premises towards persons entering on them.

(2) Where premises are occupied or used by virtue of a sub-tenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the premises comprised in the sub-tenancy.

(3) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(4) For the purposes of this section, any obligation imposed on a landlord by any enactment by reason of the premises being subject to a tenancy shall be treated as if it were an obligation imposed on him by the tenancy; " tenancy " includes a statutory tenancy which does not in law amount to a tenancy and includes also any contract conferring a right of occupation, and " landlord " shall be construed accordingly.

(5) This section shall apply to tenancies created before the commencement of this Act as well as to tenancies created after its commencement.

4. This Act shall bind the Crown, but as regards the liability of the Crown for any wrongful or negligent act or omission giving rise to liability in reparation shall not bind the Crown any further than the Crown is made liable in respect of such acts or omissions by the Crown Proceedings Act, 1947, and that Act and in particular section two thereof shall apply in relation to duties under section two or section three of this Act as statutory duties.

5.—(1) This Act may be cited as the Occupiers' Liability (Scotland) Act, 1960, and shall extend to Scotland only.

(2) This Act shall come into operation at the end of the period of three months beginning with the day on which it is passed.

APPENDIX "F"

THE [UNIFORM] OCCUPIERS' LIABILITY ACT

Occupiers' Liability Act

(as approved at the 1973 meeting)

1. In this Act,

(a) "occupier" means

(i) a person who is in physical possession of premises; or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter the premises,

and, for the purposes of this Act, there may be more than one occupier of the same premises;

(b) "premises" includes

(i) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (iii);

(ii) ships and vessels;

(iii) trailers and portable structures designed or used for a residence, business, or shelter;

(iv) railway locomotives, railway cars, vehicles, and aircraft while not in operation.

2. Subject to subsection (4) of section 3, and sections 4 and 9, the provisions of this Act determine the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which he is in law responsible.

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, and his property, on the premises, and

any property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to

(a) the condition of the premises; or

(b) activities on the premises; or

(c) the conduct of third parties on the premises.

(3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks.

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent upon him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

4. (1) Subject to subsections (2), (3), and (4), where an occupier is permitted by law to extend, restrict, modify, or exclude his duty of care to any person by express agreement, or by express stipulation or notice, the occupier shall take reasonable steps to bring such extension, restriction, modification, or exclusion to the attention of that person.

* (2) Subsection (1) does not apply to a person

(a) who is not privy to the express agreement;

(b) who is empowered or permitted to enter or use the premises without the consent or permission of the occupier.

(3) Where an occupier is bound by contract to permit persons who are not privy to the contract to enter or use the premises, the duty of care of the occupier to such persons shall, notwithstanding anything to the contrary in that contract, not be restricted, modified or excluded thereby.

(4) This section applies to express contracts entered into before or after the commencement of this section.

5. (1) Notwithstanding subsection (1) of section 3, where damage is caused by the negligence of an independent con-

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*In 1975, the Conference on Uniformity of Legislation amended the beginning phrase of s. 4(2) to read as follows:

4(2) An occupier shall not restrict, modify, or exclude his duty of care under subsection (1) with respect to a person

tractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

(2) Subsection (1) shall not be construed as restricting or excluding the liability of an occupier for the negligence of his independent contractor imposed by any other Act.

(3) Where there is damage under the circumstances set out in subsection (1), and there is more than one occupier of the premises, each occupier is entitled to rely on the provisions of subsection (1).

6. (1) Where premises are occupied or used by virtue of a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from any failure on his part in carrying out his responsibility, as is required by virtue of this Act to be shown by an occupier of premises toward persons entering on or using them.

(2) Where premises are occupied by virtue of a sub-tenancy, subsection (1) applies to any landlord who is responsible for the maintenance or repair of the premises comprised in the sub-tenancy.

(3) For the purposes of this section, a landlord shall not be deemed to be in default in his duty under subsection (1) unless his default is such as to be actionable at the suit of the occupier.

(4) Nothing in this section shall be construed as relieving a landlord of any duty he may have apart from this section.

(5) For the purposes of this section, obligations imposed by any enactment in respect of a tenancy shall be deemed to be imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy, and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

amended

(6) This section applies to tenancies created before or after the commencement of this section.

7. The Tortfeasors and Contributory Negligence Act [or the Contributory Negligence Act or Tortfeasors Act] applies to this Act.

8. (1) Except as otherwise provided in subsection (2), the Crown in right of the Province is bound by this Act, and the Proceedings Against the Crown Act applies.

(2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road [or a road under the Forest Act or the Private Roads Act].

9. This Act does not apply to or affect

(a) the liability of an employer in respect of his duties to his employee; or

(b) the liability of any person by virtue of a contract for the hire of, or for the carriage for reward of persons or property in, any vehicle, vessel, aircraft, or other means of transport; or

(c) the liability of any person under the Innkeepers Act [or Hotel-keepers Act]; or

(d) the liability of any person by virtue of a contract of bailment.

10. Subject to subsection (3) of section 4 and subsection (6) of section 6, this Act applies only in respect of a cause of action arising after this Act comes into force.

APPENDIX "G"

THE OCCUPIERS' LIABILITY ACT (ALBERTA)

1973

CHAPTER 79

THE OCCUPIERS' LIABILITY ACT

(Assented to October 30, 1973)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1. In this Act,

(a) "common duty of care" means the duty of care of an occupier of premises to his visitors provided for in section 5;

(b) "entrant as of right" means a person who is empowered or permitted by law to enter premises without the permission of the occupier of those premises;

(c) "occupier" means

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and for the purposes of this Act, there may be more than one occupier of the same premises;

(d) "premises" includes

(i) staging, scaffolding and similar structures erected on land whether affixed to the land or not,

(ii) poles, standards, pylons and wires used for the purpose of transmission of electric power or communications or transportation of passengers, whether or not they are used in conjunction with the supporting land,

(iii) railway locomotives and railway cars,

(iv) ships, and

(v) trailers used for, or designed for use as, residences, shelters or offices,

but does not include aircraft, motor vehicles or other vehicles or vessels except those mentioned in

subclauses (iii) and (iv) or any portable derrick or other equipment or movable things except those mentioned in subclauses (i) and (v);

(e) "visitor" means

(i) an entrant as of right, or

(ii) a person who is lawfully present on premises by virtue of an express or implied term of a contract, or

(iii) any other person whose presence on premises is lawful, or

(iv) a person whose presence on premises becomes unlawful after his entry on those premises and who is taking reasonable steps to leave those premises.

Application of Act

2. This Act applies only in cases where the cause of action arose after the coming into force of this Act.

3. This Act does not apply to or affect the liability of an employer in respect of his duties to his employees.

4. (1) This Act does not apply to highways (other than leased road allowances)

(a) where a Minister of the Crown in right of Alberta has the administration of, or the management, direction and control of, the highway, or

(b) where the Crown in right of Canada has the administration and control of the highway, or

(c) where a municipal corporation has the management, direction and control of the highway.

(2) This Act does not apply to private streets as defined in *The Private Streets Act*.

Liability of Occupier to Visitors

5. An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there.

6. The common duty of care applies in relation to

(a) the condition of the premises,

(b) activities on the premises, and

(c) the conduct of third parties on the premises.

7. An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor as his.

8. (1) The liability of an occupier under this Act may be extended, restricted, modified or excluded by express agreement or express notice but no restriction, modification or exclusion of that liability is effective unless reasonable steps were taken to bring it to the attention of the visitor.

(2) This section does not apply with respect to a visitor who is an entrant as of right.

9. A warning, without more, shall not be treated as absolving an occupier from discharging the common duty of care to his visitor unless in all the circumstances the warning is enough to enable the visitor to be reasonably safe.

10. Where an occupier of premises is bound by a contract to permit strangers to the contract to enter or use the premises, the liability of the occupier under this Act to a stranger to the contract may not be enlarged, restricted or excluded by that contract.

11. (1) An occupier is not liable under this Act where the damage is due to the negligence of an independent contractor engaged by the occupier if

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor, and

(b) it was reasonable in all the circumstances that the work that the independent contractor was engaged to do should have been undertaken.

(2) Subsection (1) does not operate to abrogate or restrict the liability of an occupier for the negligence of his independent contractor imposed by any other Act.

Liability of Occupier to Trespassers

12. (1) Subject to subsection (2) and to section 13, an occupier does not owe a duty of care to a trespasser on his premises.

(2) An occupier is liable to a trespasser for damages for death or of injury to the trespasser that results from the occupier's wilful or reckless conduct.

13. (1) Where an occupier knows or has reason to know

(a) that a child trespasser is on his premises, and

(b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,

the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.

(2) In determining whether the duty of care under subsection (1) has been discharged consideration shall be given to

(a) the age of the child,

(b) the ability of the child to appreciate the danger, and

(c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child.

(3) For the purposes of subsection (1), the occupier has reason to know that child trespassers are on his premises if he has knowledge of facts from which a reasonable man would infer that children are present or that their presence is so probable that the occupier should conduct himself on the assumption that they are present.

General

14. (1) Subject to subsections (2) to (4), the liability of an occupier under this Act to a visitor or trespasser extends to destruction or loss of, or damage to, property brought on to the occupier's premises by the visitor or trespasser, as the case may be, whether or not it is owned by the visitor or trespasser or by any other person.

(2) An occupier is not liable under this Act in respect of a loss of or damage to property of any person resulting by reason of the act of a third party.

(3) Where a person in an action under this Act claims damages in respect of the destruction or loss of, or damage to, property of which he is the owner and which was brought on to the occupier's premises by some other person either as a visitor or trespasser on those premises, the occupier is entitled to raise any defence to the claim that he would be entitled to raise if the claimant were the visitor or trespasser, as the case may be.

(4) This Act does not apply to or affect any liability of an occupier of premises in respect of personal property arising by virtue of

(a) a contract of carriage, or

(b) a bailment, or

(c) *The Innkeepers Act*.

15. (1) Where the occupier does not discharge the common duty of care to a visitor and the visitor suffers damage partly as a result of the fault of the occupier and partly as a result of his own fault, *The Contributory Negligence Act* applies.

(2) Where an occupier is liable under section 12, subsection (2) or section 13, and the trespasser or child trespasser, as the case may be, suffers damage partly as a result of the fault of the occupier and partly as a result of his own fault, *The Contributory Negligence Act* applies.

(3) Where in any action brought under this Act two or more occupiers of the same premises are each found to be at fault, *The Tort-Feasors Act* applies.

16. The Crown in right of Alberta is bound by this Act.

17. This Act comes into force on January 1, 1974.

APPENDIX "H"

OCCUPIERS LIABILITY ACT (BRITISH COLUMBIA)

OCCUPIERS LIABILITY ACT

CHAPTER 303

Interpretation

1. In this Act

"occupier" means a person who

(a) is in physical possession of premises; or

(b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises;

"premises" includes

(a) land and structures or either of them, excepting portable structures and equipment other than those described in paragraph (c);

(b) ships and vessels;

(c) trailers and portable structures designed or used for a residence, business or shelter; and

(d) railway locomotives, railway cars, vehicles and aircraft while not in operation;

"tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

1974-60-1,6(5).

Application of Act

2. Subject to section 3 (4), and sections 4 and 9, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which he is by law responsible.

1974-60-2.

Occupiers' duty of care

3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and his property, on the premises, and property on the premises of a person, whether or not that person himself enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

(a) condition of the premises;

(b) activities on the premises; or

(c) conduct of third parties on the premises.

(3) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly accepted by that person as his own risks.

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on him by virtue of an enactment or rule of law imposing special standards of care on particular classes of person.

1974-60-3.

Contracting out

4. (1) Subject to subsections (2), (3) and (4), where an occupier is permitted by law to extend, restrict, modify or exclude his duty of care to any person by express agreement, or by express stipulation or notice, the occupier shall take reasonable steps to bring that extension, restriction, modification or exclusion to the attention of that person.

(2) An occupier shall not restrict, modify or exclude his duty of care under subsection (1) with respect to a person who is

(a) not privy to the express agreement; or

(b) empowered or permitted to enter or use the premises without the consent or permission of the occupier.

(3) Where an occupier is bound by contract to permit persons who are not privy to the contract to enter or use the premises, the duty of care of the occupier to those persons shall, notwithstanding anything to the contrary in that contract, not be restricted, modified or excluded by it.

(4) This section applies to all express contracts.

1974-60-4; 1975-4-12.

Independent contractors

5. (1) Notwithstanding section 3 (1), where damage is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances,

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been undertaken.

(2) Subsection (1) shall not be construed as restricting or excluding the liability of an occupier for the negligence of his independent contractor imposed by any other Act.

(3) Where there is damage under the circumstances set out in subsection (1), and there is more than one occupier of the premises, each occupier is entitled to rely on subsection (1).

1974-60-5.

Tenancy relationship

6. (1) Where premises are occupied or used by virtue of a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on his part in carrying out his responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using them.

(2) Where premises are occupied by virtue of a subtenancy, subsection (1) applies to a landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(3) In this section

(a) a landlord is not in default of his duty under subsection (1) unless his default would be actionable at the suit of the occupier;

(b) nothing relieves a landlord of a duty he may have apart from this section; and

(c) obligations imposed by an enactment in respect of a tenancy are deemed imposed by the tenancy.

(4) This section applies to all tenancies.

1974-60-6.

Negligence Act

7. The *Negligence Act* applies to this Act.

1974-60-7.

Crown bound

8. (1) Except as otherwise provided in subsection (2), the Crown and its agencies are bound by this Act.

(2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road or a road under the *Forest Act* or the *Private Roads Act, 1963*, or to an industrial road as defined in the *Highway (Industrial) Act.*

1974-60-8; 1977-75-13; 1978-23-166.

Not to affect certain relationships

9. This Act does not apply to or affect the liability of

(a) an employer in respect of his duties to his employee;

(b) a person by virtue of a contract for the hire of, or for the carriage for reward of persons or property in, any vehicle, vessel, aircraft or other means of transport;

(c) a person under the *Hotel Keepers Act*; or

(d) a person by virtue of a contract of bailment.

APPENDIX "I"

BILL 202 " AN ACT RESPECTING OCCUPIERS' LIABILITY" (ONTARIO)

BILL 202 1980

An Act respecting Occupiers' Liability

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act, Interpretation

(*a*) "occupier" includes,

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

notwithstanding that there is more than one occupier of the same premises;

(*b*) "premises" means lands and structures, or either of them, and includes,

(i) water,

(ii) ships and vessels,

(iii) trailers and portable structures designed or used for residence, business or shelter,

(iv) trains, railway cars, vehicles and aircraft, except while in operation.

2. Subject to section 9, the provisions of this Act apply in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining his liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons. Common law duty of care superseded

Occupier's duty

3.—(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Idem

(2) The duty of care provided for in subsection 1 applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

Idem

(3) The duty of care provided for in subsection 1 applies except in so far as the occupier of premises is free to and does restrict, modify or exclude his duty.

Risks willingly assumed

4.—(1) The duty of care provided for in subsection 1 of section 3 does not apply in respect of risks willingly assumed by the person who enters on the premises but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his property and to not act with reckless disregard of the presence of the person or his property.

Criminal activity

(2) A person who is on premises with the intention of committing, or in the commission of, a criminal act shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection 1.

Trespass and permitted recreational activity

1980, c. ...

(3) A person who enters premises described in subsection 4 shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection 1,

(*a*) where the entry is prohibited under *The Trespass to Property Act, 1980*;

(*b*) where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry; or

(*c*) where the entry is for the purpose of a recreational activity and,

(i) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association, and

(ii) the person is not being provided with living accommodation by the occupier.

Premises referred to in subs. 3

(4) The premises referred to in subsection 3 are,

(*a*) a rural premises that is,

(i) used for agricultural purposes, including land under cultivation, orchards, pastures, woodlots and farm ponds,

(ii) vacant or undeveloped premises,

(iii) forested or wilderness premises;

(*b*) golf courses when not open for playing;

(*c*) utility rights-of-way and corridors, excluding structures located thereon;

(*d*) unopened road allowances;

(*e*) private roads reasonably marked by notice as such; and

(*f*) recreational trails reasonably marked by notice as such.

Restriction of duty or liability

5.—(1) The duty of an occupier under this Act, or his liability for breach thereof, shall not be restricted or excluded by the provisions of any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit such person to enter or use the premises.

Extension of liability by contract

(2) A contract shall not by virtue of this Act have the effect, unless it expressly so provides, of making an occupier who has taken reasonable care, liable to any person not a party to the contract, for dangers due to the faulty execution of any work of construction, maintenance or repair, or other like operation by persons other than himself, his servants, and persons acting under his direction and control.

Reasonable steps to inform

(3) Where an occupier is free to restrict, modify or exclude his duty of care or his liability for breach thereof, he shall take reasonable steps to bring such restriction, modification or exclusion to the attention of the person to whom the duty is owed.

Liability where independent contractor

6.—(1) Where damage to any person or his property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances he had acted reasonably in entrusting the work to the independent contractor, if he had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

Idem

(2) Where there is more than one occupier of premises, any benefit accruing by reason of subsection 1 to the occupier who employed the independent contractor shall accrue to all occupiers of the premises.

Idem

(3) Nothing in this section affects any duty of the occupier that is non-delegable at common law or affects any provision in any other Act that provides that an occupier is liable for the negligence of an independent contractor.

Application of ss. 5 (1, 2), 6

7. In so far as subsections 1 and 2 of section 5 prevent the duty of care owed by an occupier, or liability for breach thereof, from being restricted or excluded, they apply to contracts entered into both before and after the commencement of this Act, and in so far as section 6 enlarges the duty of care owed by an occupier, or liability for breach thereof, it applies only in respect of contracts entered into after the commencement of this Act.

Obligations of landlord as occupier

8.—(1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the same duty of care in respect of dangers arising from any failure on his part in carrying out his responsibility as is required by this Act to be shown by an occupier of the premises.

Idem

(2) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to a person unless his default is such as to be actionable at the suit of the person entitled to possession of the premises.

Interpretation

(3) For the purposes of this section, obligations imposed by any enactment by virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

Application of section

(4) This section applies to all tenancies whether created before or after the commencement of this Act.

Preservation of higher obligations

9.—(1) Nothing in this Act relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on him by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of,

(*a*) innkeepers, subject to *The Innkeepers Act*; R.S.O. 1970, c. 223

(*b*) common carriers;

(*c*) bailees.

(2) Nothing in this Act shall be construed to affect the rights, duties and liabilities resulting from a master and servant relationship where it exists. Master and servant relationships

(3) The provisions of *The Negligence Act* apply with respect to causes of action to which this Act applies. Application of R.S.O. 1970, c. 296

10.—(1) This Act binds the Crown, subject to *The Proceedings Against the Crown Act*. Act binds Crown R.S.O. 1970, c. 365

(2) This Act does not apply to the Crown or to any municipal corporation, where the Crown or the municipal corporation is an occupier of a public highway or a public road. Exception

11. This Act does not affect rights and liabilities of persons in respect of causes of action arising before this Act comes into force. Application of Act

12. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor. Commencement

13. The short title of this Act is *The Occupiers' Liability Act, 1980*. Short title

APPENDIX "J"

BILL 203, AN ACT TO PROTECT AGAINST TRESPASS TO PROPERTY (ONTARIO)

BILL 203 1980

An Act to protect against Trespass to Property

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

1.—(1) In this Act,

(*a*) "occupier" includes,

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

notwithstanding that there is more than one occupier of the same premises;

(*b*) "premises" means lands and structures, or either of them, and includes,

(i) water,

(ii) ships and vessels,

(iii) trailers and portable structures designed or used for residence, business or shelter,

(iv) trains, railway cars, vehicles and aircraft, except while in operation.

School boards 1974, c. 109

(2) A school board has all the rights and duties of an occupier in respect of its school sites as defined in *The Education Act, 1974*.

Trespass an offence

2.—(1) Every person who is not acting under a right or authority conferred by law and who,

(ONTARIO)

(*a*) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(*b*) does not leave the premises immediately after he is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

Colour of right as a defence

(2) It is a defence to a charge under subsection 1 in respect of premises that is land that the person charged reasonably believed that he had title to or an interest in the land that entitled him to do the act complained of.

Prohibition of entry

3.—(1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

(*a*) that is a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or

(*b*) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises.

Implied permission to use approach to door

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited.

Limited permission

4.—(1) Where notice is given that one or more particular activities are permitted, all other activities and entry for the purpose are prohibited and any additional notice that entry is prohibited or a particular activity is prohibited on the same premises shall be construed to be for greater certainty only.

Limited prohibition

(2) Where entry on premises is not prohibited under section 3 or by notice that one or more particular activities are permitted under subsection 1, and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited

and all other activities and entry for the purpose are not prohibited.

Method of giving notice

5.—(1) A notice under this Act may be given,

(*a*) orally or in writing;

(*b*) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies; or

(*c*) by means of the marking system set out in section 7.

Substantial compliance

(2) Substantial compliance with clause *b* or *c* of subsection 1 is sufficient notice.

Form of sign

6.—(1) A sign naming an activity or showing a graphic representation of an activity is sufficient for the purpose of giving notice that the activity is permitted.

Idem

(2) A sign naming an activity with an oblique line drawn through the name or showing a graphic representation of an activity with an oblique line drawn through the representation is sufficient for the purpose of giving notice that the activity is prohibited.

Red markings

7.—(1) Red markings made and posted in accordance with subsections 3 and 4 are sufficient for the purpose of giving notice that entry on the premises is prohibited.

Yellow markings

(2) Yellow markings made and posted in accordance with subsections 3 and 4 are sufficient for the purpose of giving notice that entry is prohibited except for the purpose of certain activities and shall be deemed to be notice of the activities permitted.

Size

(3) A marking under this section shall be of such a size that a circle ten centimetres in diameter can be contained wholly within it.

Posting

(4) Markings under this section shall be so placed that a marking is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies.

Notice applicable to part of premises

8. A notice or permission under this Act may be given in respect of any part of the premises of an occupier.

Arrest without warrant on premises

9.—(1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he believes on reasonable and probable grounds to be on the premises in contravention of section 2.

Delivery to police officer

(2) Where the person who makes an arrest under subsection 1 is not a police officer, he shall promptly call for the assistance of a police officer and give the person arrested into the custody of the police officer.

Application of 1979, c. 4

(3) A police officer to whom the custody of a person is given under subsection 2 shall be deemed to have arrested the person for the purposes of the provisions of *The Provincial Offences Act, 1979* applying to his release or continued detention and bail.

Arrest without warrant on premises

10. Where a police officer believes on reasonable and probable grounds that a person has been in contravention of section 2 and has made fresh departure from the premises, and the person refuses to give his name and address, or there are reasonable and probable grounds to believe that the name or address given is false, the police officer may arrest the person without warrant.

Motor vehicles R.S.O. 1970, c. 202

11. Where an offence under this Act is committed by means of a motor vehicle, as defined in *The Highway Traffic Act*, the driver of the motor vehicle is liable to the fine provided under this Act and, where the driver is not the owner, the owner of the motor vehicle is liable to the fine provided under this Act unless the driver is convicted of the offence or, at the time the offence was committed, the motor vehicle was in the possession of a person other than the owner without the owner's consent.

Damage award

12.—(1) Where a person is convicted of an offence under section 2, and a person has suffered damage caused by the person convicted during the commission of the offence, the court shall, on the request of the prosecutor and with the consent of the person who suffered the damage, determine the damages and shall make a judgment for damages against the person convicted in favour of the person who suffered the damage, but no judgment shall be for an amount in excess of $1,000.

Costs of prosecution

(2) Where a prosecution under section 2 is conducted by a private prosecutor, and the defendant is convicted, unless the court is of the opinion that the prosecution was not necessary for the protection of the occupier or his interests, the court shall determine the actual costs reasonably incurred in conducting the prosecution and, notwithstanding section 61 of *The Provincial Offences Act, 1979*, shall order those costs to be paid by the defendant to the prosecutor.

1979, c. 4

(3) A judgment for damages under subsection 1, or an award of costs under subsection 2, shall be in addition to any fine that is imposed under this Act. Damages and costs in addition to fine

(4) A judgment for damages under subsection 1 extinguishes the right of the person in whose favour the judgment is made to bring a civil action for damages against the person convicted arising out of the same facts. Civil action

(5) The failure to request or refusal to grant a judgment for damages under subsection 1 does not affect a right to bring a civil action for damages arising out of the same facts. Idem

(6) The judgment for damages under subsection 1, and the award for costs under subsection 2, may be filed in a small claims court and shall be deemed to be a judgment or order of that court for the purposes of enforcement. Enforcement

13. *The Petty Trespass Act*, being chapter 347 of the Revised Statutes of Ontario, 1970, is repealed. Repeal

14. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor. Commencement

15. The short title of this Act is *The Trespass to Property Act, 1980*. Short title

APPENDIX "K"

THE OCCUPIERS' LIABILITY ACT (LAW REFORM COMMISSION OF SASKATCHEWAN PROPOSAL)

1. In this Act,

(1) "occupier" means

(a) a person who is in possession of premises; or

(b) a person who has responsibility for and control over the condition of premises, the activities conducted on those premises, and the persons allowed to enter the premises,

and for the purposes of this Act, there may be more than one occupier of the same premises.

(2) "premises" includes

(a) land and structures or either of them excepting portable structures and equipment other than those described in paragraph (c);

(b) ships and vessels;

(c) trailers and portable structures designed or used for a residence, business or shelter;

(d) railway locomotives, railway cars, vehicles and aircraft.

(3) "hunting" shall have the meaning attributed to it in *The Wildlife Act*.

(4) "motor vehicle" includes motor cars, locomobiles, power units, motor cycles, pedal bicycles with motor attachments, snowmobiles, snowplanes, tractors, units formed by attaching power units to semi-trailers and all other self-propelled vehicles.

2. The provisions of this Act apply in place of the rules of the common law for the purpose of determining the care that an occupier is required to show towards persons entering on his premises in respect of dangers to them. Subject to subsection 3(9), the rules of common law are not affected by this Act with respect to property of persons on premises.

3.(1) An occupier of premises owes a duty to take such care as in all circumstances of the case is reasonable to see that any person on the premises will be safe in using the premises.

(2) Without restricting the generality of subsection (1), in determining whether the duty of care under subsection (1) has been discharged consideration shall be given to

(a) the gravity and likelihood of the probable injury;

(b) the circumstances of the entry onto the premises;

(c) the nature of the premises;

(d) the knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises;

(e) the age of the person entering the premises;

(f) the ability of the person entering the premises to appreciate the danger;

(g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person.

(3) The duty of care referred to in subsection (1) applies in relation to

(a) the condition of the premises; or

(b) the activities on the premises; or

(c) the conduct of third parties on the premises.

(4) Notwithstanding subsection (1), an occupier has no duty of care to a person in respect of risks willingly

accepted by that person as his own risks.

(5) The knowledge of any person of dangers on the premises, whether because of a warning given by the occupier or otherwise, shall not alone absolve the occupier from discharging his duty under this Act towards that person.

(6) For the purposes of subsection (4), a person who is on premises with the intention of committing, or in the commission of, a criminal act shall be deemed to have willingly assumed all risks except the risk of dangers created and acts done by the occupier with the intent of doing harm or damage to persons or property or with reckless disregard of the presence of the person or his property.

(7) Notwithstanding subsection (6), nothing in this Act shall be construed so as to affect the law with respect to self defence, defence of others and defence of property.

(8) For the purposes of subsection (4), a person who, in the course of hunting, or driving or riding on or in a motor vehicle or being towed by a motor vehicle, enters or uses the premises unconnected with any business or social purpose with respect to the occupier or any other person usually on the premises, shall be deemed to have willingly assumed all risks except the risk of dangers created by the occupier with the intent of doing harm or damage to persons or property and the risk of damage from acts of the occupier done with reckless disregard of the presence of the person or his property.

(9) Where in addition to amounts recoverable for personal injury by any person by virtue of this Act, property damage has been caused to that person by the same act that caused the personal injury, such property damage may be recoverable.

4.(1)(a) Subject to subparagraphs (b) and (c) and subsection (2), insofar as the law permits, the duty of care of an occupier under this Act may be extended, restricted, modified, or excluded by express agreement, stipulation or notice.

(b) No restriction, modification, or exclusion of the occupier's duty of care is effective unless reasonable steps were taken to bring it to the attention of the person affected thereby.

(c) No restriction, modification or exclusion of the occupier's duty of care contained in any agreement, notice or stipulation permitted by subparagraph (a) shall be valid and binding against any person unless in all the circumstances of the case it is reasonable. Circumstances to be considered in determining the reasonableness of the restriction, modification or exclusion of liability shall include (but without limiting consideration of other facts)

(i) the relationship between the occupier and the person affected;

(ii) the injury suffered and the hazard causing it;

(iii) the scope of the purported limitation of liability;

(iv) the steps taken to bring it to the attention of the person affected thereby.

(2)(a) Subparagraph (1)(a) does not apply to restrictions modifications, or exclusions of the occupier's duty of care in an express agreement, stipulation, or notice with respect to a person who is empowered or permitted by law to enter or use the premises without the permission of the occupier. Persons entering or using the premises solely under an easement or right-of-way created by law shall not be deemed to fall within the terms of this subparagraph.

(b) Conditions contained in notices and in tickets, programmes and similar documents of admission which restrict, modify or exclude the occupier's duty of care to the extent that breach of that duty results in death or injury are null and void.

(3) This section applies to express agreements and stipulations entered into or made before or after this Act comes into force.

5.(1) Notwithstanding subsection (1) of section 3, where injury is caused by the negligence of an independent contractor engaged by the occupier, the occupier is not on that account liable under this Act if, in all the circumstances the occupier exercised reasonable care in the selection of the independent contractor.

(2) Notwithstanding subsection (1), the occupier shall owe a duty under subsection (1) of section 3 where he knows or if he ought in all the circumstances to have known of a dangerous situation created on the premises by an independent contractor.

(3) Subsection (1) shall not be construed as restricting or excluding the liability of an occupier for the negligence of his independent contractor imposed by another Act.

(4) Where there is injury under the circumstances set out in subsection (1), and there is more than one occupier of the premises, each occupier is entitled to rely on the provisions of subsection (1).

6.(1) Where premises are occupied or used by virtue of a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person (whether or not entering the premises) who might reasonably be expected to be affected by defects in the state of the premises the same duty of care in respect of risks arising from such defects as is required by virtue of this Act to be shown by an occupier of premises towards such persons entering or using such premises.

(2) The landlord's duty under subsection (1) is owed if the landlord knows (whether as a result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the defect which causes injury to person or property.

(3) Where premises are occupied by virtue of a subtenancy, subsection (1) applies to any landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(4) Nothing in this section shall be construed as relieving a landlord of any duty he may have apart from this section.

(5) For the purposes of this section, obligations imposed by any enactment in respect of a tenancy shall be deemed to be imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy, and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

(6) This section applies to tenancies created before or after the commencement of this section.

7. *The Contributory Negligence Act* applies to this Act.

8.(1) Except as otherwise provided in subsection (2), the Crown in right of the Province is bound by this Act, and the *Proceedings Against the Crown Act* applies. To the extent permitted by federal law, the Crown in right of Canada is bound by this Act.

(2) Notwithstanding subsection 8(1), this Act does not apply to the Crown in right of the Province or in right of Canada or to a municipality where the Crown or the municipality is the occupier of a public highway or public road.

9.(1) This Act does not apply to or affect

(a) the liability of an employer in respect of his duties to his employee; or

(b) the liability of any person by virtue of a contract for the hire of, or for the carriage for reward of persons or property in, any vehicle, vessel, aircraft, or other means of transport; or

(c) the liability of any person under *The Hotel Keepers Act*; or

(d) the liability of any person by virtue of a contract of bailment.

(2) Nothing in this Act relieves an occupier of premises of any higher standard of care which is imposed upon him by virtue of an enactment or rule of law imposing special standards of care on particular classes of persons.

10. Subject to subsections 4(3) and 6(6), this Act applies only in respect of a cause of action arising after this Act comes into force.