THE OCCUPIERS' LIABILITY ACT OF MANITOBA

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I Introduction

Legislative reform of the common law principles of occupiers' liability began in England in 1957[1] and was followed quickly by similar legislation in Scotland[2] and New Zealand.[3] However, it was not until the 1970's that similar reforms began to take place in Canada. The seminal work in Canada was done by the Institute of Law Research and Reform of the University of Alberta. Many of the proposals for reform contained in its 1969 report, entitled *Occupiers' Liability*,[4] were enacted, and in 1973 Alberta became the first Canadian province to pass an *Occupiers' Liability Act*[5]. This was followed quickly by a British Columbia Act[6] and some years later by *The Occupiers' Liability Act*[7] of Ontario.[8] In 1983, Manitoba became the fourth Canadian province to pass an *Occupiers' Liability Act.*[9] Reform was prompted by the Manitoba Law Reform Commission's *Report on Occupiers' Liability*, published in 1980.[10] To a very large extent, the subsequent *Act* incorporated the Commission's proposals. The purpose of this article is to outline briefly the state of the law which gave rise to this legislative activity, and to consider the Manitoba *Occupiers' Liability Act*[11] in light of other Canadian statutes.

II The Common Law Doctrine of Occupiers' Liability: The Case for Reform

In the late nineteenth and early twentieth centuries, the rules relating to an occupiers' responsibility for the safety of visitors to his premises crystallized and could be stated, if not applied, with a good deal of confidence and clarity. The essence of what one might refer to as the classical doctrine of occupiers' liability was a graduated system of increasing responsibility in accordance with the status of the visitor. The standard approach to an occupiers' liability problem was to categorize the visitor as either a trespasser, licensee, invitee or contractual entrant, and then to apply the

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1. *Occupiers' Liability Act, 1957*, 5 & 6 Eliz. 2, c. 31 (U.K.).
2. *Occupiers' Liability (Scotland) Act, 1960*, 8 & 9 Eliz. 2, c. 30 (U.K.).
3. *Occupiers' Liability Act, 1962*, No. 31 (reprinted 1982, vol. 11, p. 253) (N.Z.).
4. Institute of Law Research and Reform, University of Alberta, *Occupiers' Liability*, Report No. 3 (Edmonton: The Institute, 1969).
5. *The Occupiers' Liability Act*, R.S.A. 1980, c. 0-3.
6. *The Occupiers' Liability Act*, S.B.C. 1974, c. 60.
7. *The Occupiers' Liability Act*, S.O. 1980, c. 14.
8. Other law reform agencies have also been active in the field. In 1973 the Conference of the Commissioners on Uniformity of Legislation in Canada produced *The Uniform Occupiers' Liability Act* (amended during the 1975 proceedings) [1973] Unif. L. Conf. 328, as am. by [1975] Unif. L. Conf. 78. The Nova Scotia Law Reform Advisory Commission published *Occupiers' Liability Law: A Study Paper* prepared by Micheal Terry Hertz in 1976 (Halifax: The Commission, 1976), and the Saskatchewan Law Reform Commission published *Tentative Proposals for an Occupiers' Liability Act* in June 1980 (Saskatoon: The Commission, 1980) and issued a report to the Attorney General entitled *Proposals for an Occupiers' Liability Act* in October 1980 (Saskatoon: The Commission, 1980).
9. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08).
10. Manitoba Law Reform Commission, *Report on Occupiers' Liability*, Report No. 42 (Winnipeg: The Commission, 1980).
11. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08).

correlative standard of care. A 'trespasser' was a person who had no permission to be on the premises. To such a person the occupier owed no duty of care to make the premises safe. Liability could only be imposed where injury to the intruder was caused intentionally or as a consequence of actions displaying a reckless disregard for his safety.[12] A 'licensee' was defined as one who had permission to be on the premises, and the occupier was obliged to ensure that no injury was caused to him by a hidden or concealed danger of which the occupier knew.[13] If the occupier not only gave an entrant permission to be on the premises, but also had some material or economic interest in his presence, the label 'invitee' was attached. The obligation owed to an invitee corresponded closely to the standard of care in negligence. Reasonable care was to be taken to prevent an invitee from being injured by an unusual danger of which the occupier knew or ought to have known.[14] The status of 'contractual entrant' was reserved for those who had entered into a contract, the purpose of which was to gain admission to the premises. In the absence of contractual terms to the contrary, it was held that the contract contained an implied term that the occupier would make the premises as safe as reasonable skill and care could make them.[15]

It is doubtful that this highly structured and formalistic scheme of responsibility ever worked very well. Any attempt to force numerous and divergent entities into a limited number of fixed categories is bound to produce difficulties, anomalies and uncertainties. It did, however, reflect with great sensitivity the prevailing notions of civil liability. The scheme of responsibility reflected the views of a judiciary which was highly protective of property rights and sympathetic to the landowner's interest in maximizing freedom of land use, even at the expense of the entrant's personal safety and security. It reflected the idea that civil obligations ought to flow primarily from contractual relationships (or, as in the case of the invitor-invitee relationship, something resembling a contractual relationship) and that civil responsibility should not be imposed where the plaintiff had some knowledge of risk. Finally, it reflected the traditional common law reluctance to impose liability for nonfeasance.

However, during the twentieth century, the philosophical underpinnings of the classical doctrine of occupiers' liability fell away, leaving an archaic and ritualistic set of rules which was not compatible with modern notions of civil responsibility. Perhaps the most important change was the gradual diminution in the privileged position of land ownership, and, as the social significance of realty declined, so too did the degree of protection and privilege hitherto extended to those who owned or occupied it. Similarly, there was a corresponding increase in the value and protection of personal safety and physical integrity. Under the impetus of *Donoghue* v. *Stevenson*,[16] the tort of negligence extended its reach to virtually all activities and

12. See *Robert Addie and Sons (Collieries), Ltd.* v. *Dumbreck*, [1929] A.C. 358 at 365 (H.L.).

13. See *ibid.*

14. See *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 at 288, [1861-73] All E.R. Rep. 15, 35 L.J.C.P. 184; aff'd (1867) L.R. 2 C.P. 311, [1861-73] All E.R. Rep. 23, 36 L.J.C.P. 181 (Ex. Ch.).

15. See *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501 at 508 (Ex. Ch.) and *Maclenan* v. *Segar*, [1917] 2 K.B. 325 at 332, [1916-17] All E.R. Rep. Ext. 1197, 86 L.J.K.B. 1113.

16. [1932] A.C. 562, 101 L.J.P.C. 119, [1932] All E.R. Rep. 1.

conduct, and imposed a generalized standard of reasonable care for the safety of others. Thus, it became more and more difficult to justify a scheme of responsibility which resisted the imposition of a common standard of care, and continued to place the occupier in a privileged position. *Donoghue* v. *Stevenson*[17] was also of critical importance in ending the notion that civil obligations arose primarily out of contractual relationships. In particular, after 1932, it became difficult to defend the different standards of care owed to the contractual entrant as compared to the licensee. The degree of proximity, which was the touchstone of the obligation of reasonable care under *Donoghue* v. *Stevenson*,[18] did not seem to differ greatly and this clearly created an added pressure on the established doctrine. However, it was not just the reach and scope of the law of negligence which was extended during the twentieth century. The substantive principles of the tort began to be remoulded by the courts and readjusted to provide much greater protection for injured persons. There was also an increasing reluctance to exonerate defendants on the ground that the plaintiff had some knowledge of the danger which caused the injury. The defence of *volenti non fit injuria* was severely restricted, and courts became more comfortable in dealing with such issues on the basis of contributory negligence.[19] The distinction between nonfeasance and misfeasance began to break down and the courts became more willing to impose obligations and to take positive steps for the safety of others[20] especially when the defendent exercised some degree of control over the premises.

On a more practical level, societal changes during the twentieth century increased the difficulty in applying the classical doctrine. The increasing variety of land use created a plethora of problems, both in the definition of 'occupier', and in the classification of visitors into the four categories.

In recent years, activist judges have attempted to bring occupiers' liability law more in line with modern principles of civil liability and to resolve the difficulties inherent in applying outdated doctrine to modern conditions. Judicial activity has been both covert and open. Covert activity has included placing entrants in a higher classification than they rightfully belong and interpreting liberally the corresponding standard of care.[21] These techniques, however, have been restricted within the boundaries of the approved dogma and have depended, to a large extent, on judicial temperament. In the last few years, courts have openly adjusted some of the rules, especially with regard to the minimal obligations owed to licensees and child trespassers. In respect of the former, there has been an attempt to jettison the requirement that the danger causing the injury must be hidden,[22] and, in

17. *Ibid.*

18. *Ibid.*

19. J. Fleming, *Law of Torts* (6th ed. 1983) 268.

20. *Ibid.*, at 136-144.

21. A comment by Dickson J. (as he then was) in *Veinot* v. *Kerr-Addison Mines Ltd.* is illustrative. His lordship stated:

> In some of the cases the landowner's consent was implied or imputed, particularly in 'children cases', the status of the intruder being elevated from that of trespasser, which he clearly was, to that of licensee which he clearly was not. In other cases a generous meaning was given to the phrase 'reckless disregard' . . . .

[1975] 2 S.C.R. 311 at 314, 3 N.R. 94 at 97, 51 D.L.R. (3d) 533 at 549.

22. See *Mitchell* v. *C.N.R.* (1974), 1 N.R. 344, 46 D.L.R. (3d) 363, 6 N.S.R. (2d) 440 (S.C.C.); *Bartlett* v. *Weiche Apartments Ltd.* (1974), 55 D.L.R. (3d) 44, 7 O.R. (2d) 263 (Ont. C.A.); *Alaica* v. *Toronto* (1976), 74 D.L.R. (3d) 502, 14 O.R. (2d) 697, 1 C.C.L.T. 212 (Ont. C.A.); *Wade* v. *C.N.R.* [1978] 1 S.C.R. 1064 at 1073, 17 N.R. 378, 80 D.L.R. (3d) 214.

respect of the latter, progress has been made to ameliorate the plight of child trespassers and other innocent trespassers by increasing the duty owed to them to one of common humanity.[23] The courts have also adjusted the meaning of the term 'occupier' to solve some of the difficulties created by diverse land use patterns.[24] Nevertheless, the basic structure of the classical occupiers' liability doctrine has remained intact, and judicial efforts, while laudable, themselves lead to some uncertainty and unpredictability.[25]

The overall conclusion was inescapable; the case for reform was overwhelming. However, reform through judicial activism was inexplicably delayed. The rising tide of negligence doctrine swept away many historical immunities and privileges, and yet, occupiers' liability law remained largely immune from its challenge. Perhaps the historical longevity of the doctrine, the innate conservatism of many Canadian judges[26] and the compartmentalized nature of the law of torts were all factors. In recent years, however, the most important reason was, arguably, the passage of the English *Occupiers' Liability Act* in 1957.[27] From that time, the common expectation was that the structural change and reform necessary in this area would be made by legislation. If such an expectation did not lead many on the bench to abdicate their role as reformers of the common law, it almost certainly robbed them of any reforming zeal they may otherwise have been able to muster.

III The Manitoba *Occupiers' Liability Act*, 1983

The centrepiece of the Manitoba Law Reform Commission's *Report on Occupiers' Liability*[28] was a recommendation to abolish the common law doctrine of occupiers' liability based on different categories of visitors. In its place, it recommended that occupiers should owe a common duty of care to all visitors. This recommendation was embodied in a "Proposed Act", drafted by the Manitoba Law Reform Commission.[29] To a large extent, it was modelled on the *Uniform Occupiers' Liability Act*,[30] adopted by the Uniform Law Conference of Canada in 1973. The Commission's proposal was changed to some extent in the legislative drafting process, but the primary thrust of the Commission's recommendations survived. It is not the purpose of this article to analyze the legislation word by word but rather to take a number of the problem areas in the classical doctrine of occupiers' liability and to critically appraise the Manitoba solutions in light of other Canadian occupiers' liability legislation.

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23. See *British Railways Board* v. *Herrington*, [1972] A.C. 877, [1972] 1 All E.R. 749, [1972] 2 W.L.R. 537 (H.L.) and *Veinot* v. *Kerr-Addison Mines Ltd.*, *supra* n. 21.

24. See *Wheat* v. *Lacon and Co. Ltd.*, [1966] A.C. 552, [1966] 1 All E.R. 582, [1966] 2 W.L.R. 581 (H.L.).

25. In particular, there is continuing uncertainty over the scope of *British Railways Board* v. *Herrington*, *supra* n. 24 as regards the standard of care owed to children and 'other' innocent trespassers, and as regards the necessity of the danger which causes injury to a licensee to be hidden. *See* also n. 22.

26. See B.M.E. McMahon, "Occupiers' Liability in Canada" (1973), 22 Int. and Comp. L.Q. 515.

27. *Occupiers' Liability Act, 1957*, 5 & 6 Eliz. 2, c. 31 (U.K.).

28. *Supra* n. 10.

29. *Supra* n. 10, at 64.

30. *Supra* n. 8.

A. The Meaning of 'Occupier'

At common law, there was a great deal of uncertainty over the meaning of the term 'occupier'. Originally, it had a narrow meaning and described only the person who had exclusive possession of the premises. Landowners in possession and tenants were the classical examples of an occupier.[31] However, the diversity of modern land use, illustrated by multiple dwelling buildings and time sharing condominiums, led the courts to accept a wider definition of the term. The courts were particularly attracted by the notion of control and began to accept the idea that there could be more than one occupier[32] and that a degree of control was an equally valid basis for the imposition of responsibility.

Prior to the Manitoba *Occupiers' Liability Act*,[33] occupiers' liability legislation had taken two divergent approaches to the question of defining 'occupier'. In England, definitional problems were avoided by leaving the question to common law.[34] It was hoped that this would allow for a gradual evolution of the concept to meet present and future land use patterns. However, the earlier Canadian legislation strove for more certainty and attempted an exhaustive legislative definition of the term. The definition adopted was, to a large extent, a codification of the common law at the time of passage of the legislation. The Alberta,[35] British Columbia[36] and Uniform[37] *Occupiers' Liability Acts* defined occupier as:

> (i) a person who is in physical possession of premises, or
>
> (ii) a person who has responsibility for, and control over, the condition of the premises, the activities conducted on the premises, and the persons allowed to enter the premises.[38]

The Manitoba Law Reform Commission was not happy with either solution.[39] The English solution was criticized as not providing sufficient guidance for the courts, and the definition utilized by the Alberta, British Columbia and Uniform Acts was judged unsatisfactory on two grounds. The first objection was that it might encompass as occupiers persons in possession on behalf of others, such as employees, and also certain licensees, such as lodgers or hotel guests, all of whom had not been held to be occupiers at common law.[40] This objection might be met with two comments. First, courts have always been careful to impose liability on the constructive or vicarious possessor rather than on the person in actual physical possession in employment situations, and secondly, it is arguable that at least in some situations, licensees ought to have some responsibility for the state of the premises. The second objection related to the conjunctive nature of the

31. A useful discussion on the meaning of 'occupier' at common law is found in the Manitoba Law Reform Commission's *Report on Occupiers' Liability*, *supra* n. 10 at 43-48.
32. See *Wheat* v. *Lacon and Co. Ltd.*, *supra* n. 24.
33. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08).
34. See *Occupiers' Liability Act, 1957*, 5 & 6 Eliz. 2, c. 31, s. 1(2) (U.K.).
35. *The Occupiers' Liability Act*, S.A. 1973, c. 79, s. 1.
36. *The Occupiers' Liability Act*, S.B.C. 1974, c. 60, s. 1.
37. *Supra* n. 8.
38. The legislation continued to state that for the purposes of the Act, there could be more than one occupier of the premises.
39. See *supra* n. 10, at 46-48.
40. *Ibid.*, at 46.

second branch of the legislative definition. To be an occupier under this branch, a person must have responsibility for, and control over, the conditions of the premises, the activities conducted on the premises *and* the persons allowed to enter the premises. It was thought that such a definition would exclude some persons who had been held to be occupiers at common law because they would not be able to satisfy all the criteria of the definition.[41] However, this difficulty could be overcome, as it was in the Ontario *Occupiers' Liability Act*,[42] by altering the second branch of the definition to read disjunctively.

However, the solution proposed by the Manitoba Law Reform Commission was, surprisingly, an amalgam of the English and earlier Canadian positions. Section 1 of its *Proposed Occupiers' Liability Act* read:

> an occupier means *an occupier at common law* and *may* include
>
> (i) a person who is in physical possession of the premises; or
>
> (ii) a person who has responsibility for and control over the condition of the premises, the activities conducted on those premises *and* the persons allowed to enter the premises. [emphasis added][43]

This is an unsatisfactory solution. The common law, with all its uncertainties, remains intact, and, moreover, the use of the word 'may' removes any assurance that those persons described in the definition will, in all cases, be regarded as occupiers. In the final drafting of the Manitoba *Act*, branch two of the definition was changed to read disjunctively, but the remainder of the definition was left unchanged.[44]

The legislation would have been much improved if the common law had been replaced with an exhaustive definition similar to that in the Ontario legislation. At the very least, those persons fully within the definition may have been described presumptively to be occupiers. The lack of an exhaustive definition is particularly unfortunate in light of the marginal difference in civil obligations imposed under negligence doctrine and under the *Act*. There is little purpose in maintaining such uncertainty.

B. The Occupiers' Standard of Care

The centrepiece of *The Occupiers' Liability Act*[45] is subsection 3(1). It replaces the common law classification system and its corresponding standards of care with a generalized standard of common care. The occupier owes to persons on the premises and to the owners of property on the premises, such care as in all the circumstances of the case is reasonable to

41. *Lagasse* v. *The Rural Municipality of Richot* (1973), 37 D.L.R. (3d) 392, [1973] 4 W.W.R. 181 (Man. Q.B.) and *Wheat* v. *Lacon and Co. Ltd.*, *supra* n. 25 were cited as examples. In those cases, the defendants, who were held to be occupiers at common law because of the degree of *control* exercised over the *premises*, may not have come within the legislative definition. In the former case, the occupier had no control over persons allowed to enter, and in the latter case, the defendant brewery had nothing more than a right to enter and use the premises. For a recent decision on the interpretation of the term 'occupier' under the Ontario *Occupiers' Liability Act*, see *Turner* v. *City of Windsor* (1984), 9 D.L.R. (4th) 123, 46 O.R. (2d) 174, 25 M.P.L.R. 109 (Co. Ct.).

42. *The Occupiers' Liability Act*, S.O. 1980, c. 14, s. 1. For a recent decision on the interpretation of the term 'occupier' under this Act, see *Turner* v. *City of Windsor*, *supra* n. 41.

43. *Supra* n. 10, at 64.

44. See *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08), s. 1(1).

45. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08).

see that the person or property is reasonably safe. This duty of reasonable care is common to all occupiers' liability legislation.[46] However, unlike some occupiers' liability acts, the general standard of care in the Manitoba *Act* is owed to all visitors, both lawful and unlawful, with the narrow exception of trespassing snowmobilers.[47] The generalized obligation of care under subsection 3(1) of the Act is essentially the same standard of care dictated by negligence doctrine. The effect of imposing this standard is to raise the standard of care owed to entrants who would be treated at common law as licensees and trespassers[48] and to lower the standard of care owed at common law to contractual entrants. In order to remove any doubt that the new legislative standard is to be treated as a *tabula rasa* and to prevent reference back to the common law, the legislature, in section 2, specifically abolished the common law rules as they relate to the duty owed by an occupier to entrants and to the liability of an occupier for breach of that duty.

A survey of the reported cases decided under similar sections of the occupiers' liability acts in other provinces shows that the courts have had little difficulty in applying the statutory standard of care. A wide range of cases have been dealt with. However, the majority have been 'slip and fall cases' which were likewise the typical grist of the common law mill.[49] Another sizeable class of cases involved injuries caused by objects or parts of the premises falling on visitors.[50] Some cases involved injuries caused by walking into objects or buildings,[51] and others have dealt with unusual situations which evidence the broad scope of the Act.[52] In applying the statutory standard, the judiciary, not surprisingly, has given consideration to the widest range of factors and circumstances. An essential condition of liability is

46. See *The Occupiers' Liability Act*, R.S.A. 1980, c. 0-3, s. 5; *The Occupiers' Liability Act*, S.B.C. 1974, c. 60, s. 3; *The Occupiers' Liability Act*, S.O. 1980, c. 14, s. 3.

47. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08), s. 3(4). Separate attention will be paid to the issue of liability to trespassers under the *Act*. At this point it is useful to note that the only Canadian act that applies the common duty of care to all entrants is British Columbia.

48. Except for the trespassers described in *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08), s. 3(4).

49. See *Bossert* v. *Grover Petroleum Ltd.* (1977), 2 Alta. L.R. (2d) 362 (Dist. Ct.) (stairs); *Flint* v. *Edmonton Country Club Ltd.* (1980), 26 A.R. 391 (Q.B.) (low chain fence); *Carstensen* v. *F.J.R. & Associates* (1981), 29 A.R. 411 (Q.B.) (snow and ice); *Preston* v. *Canadian Legion of British Empire Service League, Kingsway Branch No. 175* (1981), 123 D.L.R. (3d) 645, 29 A.R. 532 (C.A.). (ice); *Foremsky* v. *The Queen* (1981), 30 A.R. 62 (Q.B.) (door mat); *Meier* v. *Qualico Developments Ltd.* (1984), 34 Alta. L.R. (2d) 341 (C.A.). (motorcycle driven over embankment); *Choppin* v. *Caouette* (1982), 41 A.R. 32 (Q.B.) (step down from deck of cottage); *Edwards* v. *Tracy Starr's Shows (Edmonton) Ltd.* (1984), 33 Alta. L.R. (2d) 115 (Q.B.) (stairs); *Roberts* v. *255410 Alberta Ltd.* (1984), 53 A.R. 125 (Q.B.) (fall through grating); *Brautigam* v. *Orderly Investment Ltd.* (1985), 58 A.R. 140 (Q.B.) (icy path); *Hutchinson* v. *Woodward Stores* (1977), 4 B.C.L.R. 309 (S.C.) (slippery spot on floor); *Woelbern* v. *Liberty Leasing* (1978), 8 B.C.L.R. 352 (S.C.) (ice); *Thomas* v. *Super-Value Stores Ltd.* (1978), 9 B.C.L.R. 210 (S.C.) (ice-cream on floor); *Wiebe* v. *Funks Super Market Ltd.* (1980), 19 B.C.L.R. 227 (S.C.). (slippery spot on floor); *Niblock* v. *Pac. Nat. Exhibition* (1981), 30 B.C.L.R. 20 (S.C.) (low railing); *Carlson* v. *Canada Safeway Ltd.* (1983), 47 B.C.L.R. 252 (C.A.) (strawberry on floor); *Crerar* v. *Dover*, [1984] 3 W.W.R. 236 (B.C.S.C.). (dangerous stairs and no handrail); *Johnson* v. *Creative Hobby Craft Stores* (1983), 53 B.C.L.R. 265 (C.A.). (stairs); *Turner* v. *City of Windsor* (1984), 46 O.R. (2d) 174 (Co. Ct.) (ice).

50. See *Lyster* v. *Fortress Mountain Resorts Ltd.* (1978), 6 Alta. L.R. (2d) 338 (S.C.). (struck by derailed cable on T-bar lift at ski-resort); *Epp* v. *Ridgetop Builders Ltd.* (1978), 94 D.L.R. (3d) 505, 8 Alta. L.R. (2d) 195 (S.C.) (struck by falling wall of partially completed building); *Roed* v. *Tahsis Co. Ltd.* (1977), 4 B.C.L.R. 176 (S.C.). (collapse of pile of timber).

51. See *Kohler* v. *City of Calgary* (1980), 28 A.R. 190 (Q.B.) (collision with concession cart); *Schwab* v. *Alberta* (1984), 57 A.R. 321 (Q.B.) (swimming into submerged piece of pipe); *Weiss* v. *Greater Vancouver Y.M.C.A.* (1979), 11 B.C.L.R. 112 (C.A.) (plaintiff walking into ground floor window); *Gerak* v. *The Crown in Right of B.C.* (1984), 59 B.C.L.R. 273 (C.A.) (driving into shallow water).

52. Unlike the common law, the general duty of care under the *Act* applies to both an occupiers' activities as well as static defects on the land: see s. 3(2)(b). Therefore, it is no longer necessary to draw that difficult line: *Roed* v. *Tahsis Co., supra* n. 50 (collapse of stacked timber); *Lock* v. *Bouffioux* (1978), 7 B.C.L.R. 184 (S.C.) (six year old injured by burning gasoline when defendant failed to take sufficient care in supervising and controlling the child in dangerous circumstances); *Rheaume* v. *Gowland* (1978) 91 D.L.R. (3d) 223, 8 B.C.L.R. 93 (S.C.) (shooting incident); *Stein* v. *Hudson's Bay Co.* (1976), 70 D.L.R. (3d) 723 (B.C.S.C.) (child injured on escalator); *Rudko* v. *The Queen*, [1984] 1 W.W.R. 741 (Fed. Ct. T.D.). (poor directions causing skiers to become lost). Under s. 3(2)(c) the *Act* also places an obligation on the occupier to control the conduct of third persons on the premises: *Jacobsen* v. *Kinsmen Club of Nanaimo* (1976), 71 D.L.R. (3d) 227 (B.C.S.C.) (patron at beer garden falling from rafter of curling club on to the plaintiff); *Duncan* v. *Braaten* (1980), 21 B.C.L.R. 369 (S.C.) (assault in bar); *Allison* v. *Rank City Wall (Canada) Ltd.* (1984), 6 D.L.R. (4th) 144 (Ont. H.C.) (brutal assault in parking garage of apartment block); *Q.* v. *Minto Management Ltd.* (1984), 49 O.R. (2d) 531 (Ont. H.C.) (tenant raped by employee of landlord). The *Act* has also been applied to injuries caused by animals on the occupier's premises: *Nasser* v. *Rumford* (1977), 83 D.L.R. (3d) 208 (Alta. C.A.) (dog); *Hall* v. *Sorley* (1980), 23 B.C.L.R. 281 (S.C.) (dog); *Scholtes* v. *Stranaghan* (1981), 26 B.C.L.R. 190 (S.C.) (grizzly bears); *Kirk* v. *Trerise* (1981), 28 B.C.L.R. 165 (C.A.) (dog). See also *Schwab* v. *Schaloske* (1982), 37 B.C.L.R. 111 (S.C.) (rescuer killed by silage gas upon entering silo).

a foreseeable risk of injury which is sufficiently significant to prompt action from a reasonably prudent person.[53] In determining whether there is such a risk, the courts have imposed on the occupier a duty to make reasonable inspection of the premises.[54] The sufficiency of the care, in light of such a risk, is determined by a consideration of the kind of premises,[55] the class of visitors,[56] the gravity of the danger,[57] the likelihood of injury or damage,[58] the burden of removing or mitigating the danger,[59] the practice of occupiers in such circumstances,[60] the unexpected nature of the danger,[61] the weather conditions where relevant,[62] the purpose of entry,[63] the degree of warning[64] and, in appropriate cases, special assurances of safety given to the visitor.[65] Considering the judiciary's long experience applying the standard of care in negligence, it is not surprising that the courts have had little difficulty in applying the statutory standard.

While the generalized standard of care under subsection 3(1) is clearly the norm, subsection 3(5) does state that the occupier is subject to any higher standard of care required by any Act or rule of law which imposes a special standard of care on particular classes of occupiers or in respect of particular classes of premises. To the extent that this subsection ensures that legislative duties flowing from a variety of specialized Acts continue to bind occupiers, the subsection plays a useful role. However, a danger of such a generalized provision is that it may encourage arguments that the occupiers' obligations at common law, particularly to contractual entrants and invitees, were higher than the statutory standard and, therefore, should be applied in its stead. The acceptance of such arguments would thrust the law back into the morass of common law occupiers' liability. However, it is

53. See *Nasser* v. *Rumford, supra* n. 52, at 212-214; *Lyster* v. *Fortress Mountain Resorts Ltd., supra* n. 50, at 244; *Flint* v. *Edmonton Country Club Ltd., supra* n. 49, at 395-396; *Choppin* v. *Caouette, supra* n. 49, at 39; *Meier* v. *Qualico Developments Ltd., supra* n. 49, at 353; *Roberts* v. *255410 Alberta Ltd., supra* n. 49, at 128; *Allison* v. *Rank City Wall (Canada) Ltd., supra* n. 52, at 148; *Q.* v. *Minto Management Ltd., supra* n. 52, at 542; *Rudko* v. *The Queen, supra* n. 52, at 761; *Lock* v. *Bouffioux, supra* n. 52, at 187; *Rheaume* v. *Gowland, supra* n. 52, at 99; *Jacobsen* v. *Kinsmen Club of Nanaimo, supra* n. 52, at 231; *Duncan* v. *Braaten, supra* n. 52, at 372; *Niblock* v. *Pacific National Exhibition, supra* n. 49, at 28.

54. See *Preston* v. *Canadian Legion of British Empire Service League, Kingsway Branch No. 175, supra* n. 49, A.R. at 537; *Hutchison* v. *Woodward Stores, supra* n. 49, at 311-312; *Wiebe* v. *Funks Super Market Ltd., supra* n. 49 at 230; *Niblock* v. *Pacific National Exhibition, supra* n. 49 at 537.

55. See *Flint* v. *Edmonton Country Club, supra* n. 49; *Meier* v. *Qualico Developments Ltd., supra* n. 49; *Epp* v. *Ridgetop Builders, supra* n. 50; *Edwards* v. *Tracy Starr's Shows (Edmonton) Ltd., supra* n. 49; *Schwab* v. *Alberta, supra* n. 51; *Wiebe* v. *Funk's Super Market Ltd., supra* n. 49; *Scholtes* v. *Shranaghan, supra* n. 52; *Niblock* v. *Pacific National Exhibition, supra* n. 49; *Gerak* v. *The Queen in Right of B.C., supra* n. 51.

56. See *Flint* v. *Edmonton Country Club, supra* n. 49 (experienced golfer); *Lock* v. *Bouffioux, supra* n. 52 (child); *Niblock* v. *Pacific National Exhibition, supra* n. 49 (visitor to exhibition grounds); *Allison* v. *Rank City Wall (Canada) Ltd., supra* n. 52 (tenant); *Q.* v. *Minto Management Ltd., supra* n. 52 (tenant).

57. See *Meier* v. *Qualico Developments Ltd., supra* n. 49 (motorcyclist riding over fifteen foot embankment); *Lock* v. *Bouffioux, supra* n. 52 (gasoline); *Niblock* v. *Pacific National Exhibition, supra* n. 49 (long drop from insufficiently railed steps).

58. See *Roed* v. *Tahsis Co. Ltd., supra* n. 50, at 178.

59. See *Preston* v. *Canadian Legion of British Empire Service League, Kingsway Branch No. 175, supra* n. 49, A.R. at 537; *Schwab* v. *Alberta, supra* n. 51, at 325; *Lock* v. *Bouffioux, supra* n. 52, at 187; *Jacobsen* v. *Kinsmen Club of Nanaimo, supra* n. 52, at 232; *Scholtes* v. *Stranaghan, supra* n. 52, at 195; *Niblock* v. *Pacific National Exhibition, supra* n. 49, at 537.

60. See *Epp* v. *Ridgetop Builders, supra* n. 50, at 198.

61. See *Meier* v. *Qualico Developments Ltd., supra* n. 49, at 507; *Roed* v. *Tahsis Co. Ltd., supra* n. 50, at 178; *Weiss* v. *Greater Vancouver Y.M.C.A., supra* n. 51, at 119-120; *Kirk* v. *Trerise, supra* n. 52, at 169.

62. See *Lyster* v. *Fortress Mountain Resorts Ltd., supra* n. 50, at 345-348; *Preston* v. *Canadian Legion of British Empire Service League, Kingsway Branch No. 175, supra* n. 49, A.R. at 536-537; *Woelburn* v. *Liberty Leasing, supra* n. 49, at 358; *Carstensen* v. *F.J.R. and Associates, supra* n. 49, at 413.

63. See *Preston* v. *Canadian Legion of British Empire Service League, Kingsway Branch No. 175, supra* n. 49, at 537.

64. See *Roed* v. *Tahsis Co. Ltd., supra* n. 50, at 178; *Lock* v. *Bouffioux, supra* n. 52, at 187.

65. See *Allison* v. *Rank City Wall (Canada) Ltd., supra* n. 52 (the Court was influenced by assurances of security given by the occupier in respect of an underground parking garage of an apartment block).

unlikely that such arguments would be accepted. It is important to note that subsection 3(5) refers to special standards which fall on particular classes of *occupiers* and classes of premises not on classes of visitors. Furthermore, such an interpretation would create an inconsistency with section 2, which abolishes the common law rules. Courts in other provinces with similar legislation have displayed little enthusiasm to preserve common law doctrine,[66] and it is hoped that this back door to the re-emergence of common law doctrine will not be opened.

C. Trespassers

One of the most interesting issues in occupiers' liability law is the question of the appropriate degree of care to be shown to trespassers. As noted earlier, the Manitoba *Act* treats all entrants alike, and the duty of reasonable care is owed to both lawful and unlawful entrants with the exception of trespassing snowmobiliers. In respect of trespassing snowmobiliers, subsection 3(4) of the *Act* states that the occupier must not create a danger with deliberate intent of doing harm or damage to the person or person's property, and must not act with reckless disregard for the safety of the person or person's property. In order to critically evaluate this response of the Manitoba *Act* it is necessary to consider in more detail the common law prior to the passage of the legislation and to review the alternate solutions possible.

In the classical common law doctrine of occupiers' liability, the occupier owed only the most minimal obligation to all trespassers under what became known as the rule in *Addie* v. *Dumbreck*.[67] This rule imposed liability only when injuries were caused intentionally or resulted from actions displaying reckless disregard for the safety of a trespasser known to be present. The primary disadvantage to this rule was that it treated all trespassers alike, irrespective of their age or purpose of entry. Thus, the minimal duty was owed to innocent adults who had lost their way or who had technically exceeded their license and to young children, as it did to armed robbers, rapists and kidnappers. The common law rule was not one which permitted any degree of sensitivity or flexibility to different categories of trespassers. However, from early on, courts were reluctant to apply such a harsh rule to child trespassers. The innate curiosity of children and their lack of understanding of danger can be a tragic combination. The courts, by a variety of devices, mitigated the rigour of the rule.[68] In 1964, a new chapter opened in the common law treatment of trespassers. In *Herrington* v. *British Railways Board*,[69] the House of Lords, in a case involving a child trespasser, adopted the more moderate standard of 'common humanity'. It was not clear if this standard was adopted to ensure that greater care be owed to child trespassers, or whether it was of more general applicability. Unfor-

66. See *Nasser* v. *Rumford*, *supra* n. 52, at 118; *Bossert* v. *Grover Petroleums Ltd.*, *supra* n. 49, at 366; *Weiss* v. *Greater Vancouver Y.M.C.A.*, *supra* n. 51, at 118; *Stein* v. *Hudson's Bay Co.*, *supra* n. 52, at 728; *Niblock* v. *Pacific National Exhibition*, *supra* n. 49, at 26. In *Johnson* v. *Creative Holiday Craft Stores*, *supra* n. 49, the Court of Appeal ordered a new trial when a judge applied common law rules.

67. *Supra* n. 12.

68. *Supra* n. 21.

69. *Supra* n. 23.

tunately, the Supreme Court of Canada did not clarify the scope of the decision when it was adopted by the Court in *Veinot* v. *Kerr Addison Mines Ltd.*.[70] The case involved injuries to an *adult* snowmobiler who was injured when he drove into an unmarked horizontal steel pole which served as a gate across an old logging road. The case was decided on the basis that the plaintiff was a licensee, but the Court also discussed the facts in terms of the plaintiff being a trespasser. There was no consensus in the Court, however, on the scope of the *Herrington*[71] decision or its applicability to the facts. Dickson J., as he then was, held that liability could be imposed even if the plaintiff was a trespasser. The trespassing snowmobiler was foreseeable, and the obligation of common humanity demanded that the occupier warn of, or in some other way neutralize, the danger. Martland J. interpreted the decision much more restrictively. In his view, there would have to be a much greater danger and a much greater likelihood of trespassing before any obligation would arise.

The whole picture was further confused by the swift and hostile reaction of the Manitoba Legislature to the *Veinot*[72] decision. In 1976, the Legislature amended *The Snowmobile Act*[73] to state that the only obligation owed to both *licensees* and trespassing snowmobilers was not to injure them intentionally or act with reckless disregard for their safety. The draconian nature of the legislation was illustrated by the Ontario decision in *Babineau* v. *Babineau*[74], where similar legislation was interpreted. In that case, the plaintiff snowmobiler was on his brother-in-law's property at the latter's express invitation. The plaintiff was injured when he drove into a barbed wire fence. The jury found that the fence was a danger which could have been avoided by reasonable steps. Nevertheless, the legislation was interpreted to deny a remedy. Thus, although the common law had begun to evolve a more humane and flexible response to injured trespassers, one case in this evolution had provoked a limited legislative re-instatement of the rule in *Addie* v. *Dumbreck*.[75] The time was ripe for a fundamental reassessment of the duty of occupiers to trespassers.

The alternative approaches to the problem of trespassers can be broadly grouped into five categories. The first approach is to exclude trespassers from the scope of occupiers' liability legislation completely. This approach was adopted in the English *Occupiers' Liability Act*[76] in 1957 and later in the New Zealand Act.[77] The question of liability to trespassers is left to be resolved by the common law. This permits the law to evolve towards an appropriate solution on a case by case basis. The second approach is to retain the original common law formula in *Addie* v. *Dumbreck*,[78] but to

70. *Supra* n. 21.
71. *Supra* n. 23.
72. *Supra* n. 21.
73. *The Snowmobile Act*, S.M. 1970, c. 59 (S150).
74. (1981), 122 D.L.R (3d) 508, 32 O.R. (2d) 545 (H.C.); aff'd (1982) 133 D.L.R. (3d) 767, 37 O.R. (2d) 527 (C.A.).
75. *Supra* n. 12.
76. *Occupiers' Liability Act, 1957*, 5 & 6 Eliz. 2, c. 31 (U.K.). The position is now changed with the passage of the *Occupiers' Liability Act, 1984*, c. 3 (U.K.).
77. *Occupiers' Liability Act, 1962*, No. 31 (reprinted 1982, vol. 11, p. 253), (N.Z.).
78. *Supra* n. 12.

carve out exceptional categories of trespassers who would be treated more favourably. The Alberta Act[79] favours such an approach. A special duty is owed if the occupier knows or has reason to believe that a child trespasser is on the premises. The occupier must take reasonable care in all the circumstances to see that the child is safe from conditions or activities on the premises which create a danger of death or serious bodily injury.[80] The third approach is to adopt a general duty of care to all entrants and to selectively exclude certain categories of trespassers who are owed the minimal duties outlined in *Addie* v. *Dumbreck*.[81] This approach was adopted by the Ontario *Occupiers' Liability Act*.[82] The general duty of reasonable care is not owed to persons on the premises for the purpose of committing a criminal act, to snowmobilers[83] or to trespassers and bare licensees who enter rural and undeveloped tracts of land for recreational purposes. The fourth approach is to follow the Scottish precedent[84] and to apply the general duty of care to all entrants, lawful and unlawful, and to make no exceptions. This approach was adopted by the *Uniform Act*[85] and by the British Columbia *Act*.[86] The advantage of such an approach is that it avoids the difficulties and anomalies inherent in a classification system.[87] For example, it has been pointed out that the exclusion of a duty of care for those involved in criminal activities might include the unauthorized mushroom picker.[88] The Scottish approach delegates a broad discretion to the courts to find the appropriate balance between the occupier and the trespasser. The final approach is to impose a duty of reasonable care in certain specified situations. This approach has been adopted recently in England and Wales with the passage of the *Occupiers Liability Act, 1984*.[89] The legislation imposes a duty when the occupier is aware of a danger or has reasonable grounds to believe that it exists, when he knows or has resonable grounds to believe that a trespasser is or may be in the vicinity of the danger and when the risk is one against which, in all the circumstances, he may reasonably be expected to offer some protection.[90] If these three criteria are satisfied, the occupier must take such care as is reasonable in all the circumstances of

79. *The Occupiers' Liability Act*, R.S.A. 1980, c. 0-3, s. 12-13.

80. In determining whether the occupier has discharged the requisite standard of care, the court is directed to take into account the child's age and ability to understand the danger, and the burden on the occupier of eliminating the danger or protecting the child: *The Occupiers' Liability Act*, R.S.A. 1980 c. 0-3, s. 13(2). See *Arnold* v. *Gillies* (1978), 93 D.L.R. (3d) 48, 8 Alta. L.R. (2d) 21 (Dist. Ct.); *Cullen* v. *Rice* (1981), 120 D.L.R. (3d) 641, 27 A.R. 361 (C.A.); and *Houle* v. *City of Calgary* (1985), 20 D.L.R. (4th) 15 (C.A.).

81. *Supra* n. 12.

82. *The Occupiers' Liability Act*, S.O. 1980, c. 14.

83. See *The Motorized Snow Vehicles Act*, R.S.O. 1980, c. 301, s. 20 as am. by *The Motorized Snow Vehicles Amendment Act* S.O. 1981, c. 42, s. 6. For an interpretation of this section, see *Onyschuk* v. *Silver Harbour Acres Ltd.* (1984), 49 O.R. (2d) 762 (H.C.).

84. *Occupiers' Liability (Scotland) Act, 1960* 8 & 9 Eliz. 2, c. 30 (U.K.)

85. *Supra* n. 8.

86. *Occupiers' Liability Act*, R.S.B.C. 1979, c. 303.

87. Some signs of this are appearing in the Alberta cases. The trial judge in *Meier* v. *Qualico Developments Ltd.* (1982), 40 A.R. 493 at 506 (Q.B.) had some difficulty in determining whether the plaintiff was a trespasser. Judgement for the plaintiff was imposed on the basis that the plaintiff was a visitor. The decision, however, was reversed on appeal, *supra* n. 49. Furthermore, in *Houle* v. *City of Calgary supra* n. 80, the occupiers' liability legislation was avoided altogether and the liability was determined on negligence principles.

88. Torts and General Law Reform Committee of New Zealand, *Occupiers' Liability To Trespassers, Report* (Wellington: The Committee, 1970) 16.

89. *Occupiers' Liability Act*, c. 3 (U.K.).

90. *Occupiers' Liability Act*, c. 3 (U.K.) s. 3.

the case to see that the trespasser does not suffer injury on the premises by reason of the danger concerned.[91]

Subsection 3(4) of *The Occupiers' Liability Act*[92] of Manitoba follows the recommendations of the Manitoba Law Reform Commission and adopts what is largely the Scottish approach. The general duty of care is owed to all visitors with one exception. The *Act* retains, in a modified form, the reduced standard of care contained in subsection 25(2) of *The Snowmobile Act*.[93] There are few guidelines for the courts in applying the general duty of care to trespassers, but one can speculate that the judicial response will be cautious and hesitant. The courts will be mindful not to place undue burdens on occupiers. Although a duty of care is established by the legislation, a foreseeable risk of injury is a requirement of breach of the standard of care. Many trespassers, especially those involved in reprehensible or criminal conduct, will be regarded as unforeseeable and for this reason no liability will be imposed. Even given a foreseeable risk of injury, a wide range of circumstances will be considered in determining the degree of care required. The degree of danger, the age and understanding of the trespasser, the degree of warning, the risk of injury, the severity of the injury, the burden of preventitive measures and the nature of the intrusion will all be relevant in determining if reasonable care has been taken. In essence, the legislation provides for a flexible case by case evaluation of what is reasonable for the occupier to do in the particular situation in respect of the particular trespasser. If the Scottish experience[94] can be taken as a guide, the Manitoba courts should have little difficulty in finding the appropriate balance between the occupier and the uninvited entrant.

The special exclusion from the general duty of care in respect of trespassing snowmobilers is more difficult to support. In essence, subsection 25(2) of *The Snowmobile Act*[95], which had declared that the *Addie* v. *Dumbreck*[96] rule should apply to trespassing and licensed snowmobilers, has been incorporated into *The Occupiers' Liability Act*.[97] However, it was modified so as to apply only to those who enter on the premises without express or implied consent. This ameliorates the particular harshness of the legislation illustrated by the *Babineau*[98] decision. Nevertheless, it is submitted that retention of the section, even in this form, is unjustified. The Manitoba Law Reform Commission had recommended this course of action, but its reasons for doing so seem more political than substantive. The Commission argued that its primary objective was to simplify the law and not to increase the burden on occupiers,[99] and that therefore, subsection 25(2)

91. *Occupiers' Liability Act*, c. 3 (U.K.) s. 4. Section 5 also rules that warnings and attempts to discourage persons from incurring the risk may be sufficient to discharge the occupiers' liability. Section 6 preserves the defence of *volenti non fit injuria*.

92. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08).

93. *The Snowmobile Act*, S.M. 1970 c. 59 (S150).

94. B. McMahon, "Occupiers' Liability in Scotland" (1972), 7 Irish Jur. 264.

95. *The Snowmobile Act*, S.M. 1970, c. 59 (S150).

96. *Supra* n. 12.

97. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08).

98. *Supra* n. 74.

99. *Supra* n. 9, at 50.

of *The Snowmobile Act*[100] should be maintained. This approach, of course, is inconsistent with the Commission's overall proposals. The *Act* clearly changes the law in a number of ways. It would appear that the Commission did not wish to recommend the change of such a *recent* enactment of the legislature as subsection 25(2) of *The Snowmobile Act*.[101]

If the Commission had addressed itself to the substantive issue it would have discovered cogent objections to the maintenance of a special exclusion for trespassing snowmobilers. First, it is difficult to maintain a rational distinction between snowmobilers and other seemingly analogous classes of trespassers.[102] A snowmobile is defined legislatively as including not only motorized toboggans, but also three wheeled motorcycles.[103] It does not, however, include two wheeled recreational vehicles, such as dirt bikes, nor does it include the vast array of non-motorized recreational trespassers such as cross country skiers, joggers, blueberry pickers and snowshoers. If one wanted to maintain subsection 25(2) of *The Snowmobile Act*,[104] a more rational approach would have been to isolate, for special treatment, the broad class of trespassers of which snowmobilers are but one instance. What appears to lurk behind the snowmobiler exception is the feeling that occupiers of agricultural land or undeveloped tracts of land should be under a minimal duty to recreational trespassers who enter onto their land at unpredictable times, for unpredictable purposes, in an unpredictable manner. Such a concern may be valid given the vast tracts of agricultural and undeveloped land in Manitoba and the ubiquitous nature of recreational trespassers. This kind of generalized exception is incorporated into the Ontario *Act*[105] and the proposed Saskatchewan legislation.[106] Secondly, it is difficult to justify a definitively low standard to trespassing snowmobilers when even trespassers with criminal intentions are not afforded this special treatment. Finally, it is not at all clear that the relationship between an occupier and a trespassing snowmobiler involves issues so different from the relationship of occupiers and other trespassers as to require significantly different treatment. In respect of most trespassers, the courts are directed, by subsection 3(1) of the *Act*, to draw an appropriate balance between the undue burden on occupiers and the safety of trespassers. It is submitted that the courts are equally able to provide that balance in the context of recreational trespassers and that subsection 3(4) maintains a special category for which little justification can be provided other than maintaining the response of the Manitoba legislature to some *obiter* statements in a Supreme Court decision with which it did not agree. Either the category should have been placed on some sound policy footing, or it should have been abolished. On balance, it is submitted that the courts will be sensitive to the dangers of placing undue obligations on the shoulders of occupiers towards trespassers and that special exclusions of any nature are unjustified.

100. *The Snowmobile Act*, S.M. 1970, c. 59 (S150).

101. *The Snowmobile Act*, S.M. 1970, c. 59 (S150).

102. See D. Ish, "Trespassers: Section 33A of The Snowmobile Act" (1977), 42 Sask. L. Rev. 115.

103. *The Snowmobile Act*, S.M. 1970, c. 59 (S150) s. 1.

104. *The Snowmobile Act*, S.M. 1970, c. 59 (S150).

105. *The Occupiers' Liability Act*, R.S.O. 1980, c. 322, s. 4.

106. See Saskatchewan Law Reform Commission, *Proposals for an Occupiers' Liability Act* (Saskatoon: The Commission, 1980) 12-13.

D. The Visitor's Knowledge of the Danger

At common law, the plaintiff's knowledge of the danger was a crucial factor. The classical doctrine of occupiers' liability often denied recovery to a person who had knowledge of the danger.[107] The position was consistent with early negligence principles which held contributory negligence to be a complete bar to recovery[108] and with the view in the late nineteenth century that knowledge of the risk was sufficient to establish the defence of *volenti non fit injuria.*[109] As the law of negligence evolved away from these ideas, the position in occupiers' liability became less and less clear.[110]

The Occupiers' Liability Act[111] would appear to permit a number of approaches to determine the consequences of the injured person's knowledge of the dangerous nature of the property or activities on the property. Subsection 3(3) maintains the defence of *volenti non fit injuria.* The subsection states that an occupier owes "no duty of care to a person . . . in respect of any risks willingly assumed by that person".[112] It is clear that mere knowledge of the risk will not be sufficient to establish this defence. Indeed, it is likely that the courts will adopt the strict test for *volenti* which has been developed by the Supreme Court of Canada in negligence cases.[113] That test demands proof that the plaintiff expressly or impliedly has agreed to accept both the physical and legal risk of injury created by the defendant's conduct.[114] Section 7 makes *The Tortfeasors and Contributory Negligence Act*[115] applicable to the statutory scheme of responsibility and thereby allows some issues of the plaintiff's knowledge of danger to be resolved by an apportionment of liability on the basis of contributory negligence.[116] Finally, the issue may be analyzed in terms of the breach of the standard of care. Subsection 3(1), it will be remembered, does direct that the standard of care must be considered in light of "all the circumstances of the case".[117] A court may consider the knowledge of the plaintiff as one of those circumstances.[118] However, before considering the way in which this issue of knowledge may be handled, it is perhaps useful to analyze a little more closely the different degrees of knowledge a plaintiff may possess and the way in which it can be acquired.

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107. This was particularly so in respect of injured trespassers and licensees.

108. *Supra* n. 19, at 242.

109. *Supra* n. 19, at 268-269.

110. It is not clear, for example, what the position at common law was in respect of licensees injured by patent dangers: see *supra* n. 22.

111. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08).

112. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08), s. 3(3).

113. See *Car and General Insurance Corp.* v. *Seymour and Maloney*, [1956] S.C.R. 322, 2 D.L.R. (2d) 369; *Miller* v. *Decker*, [1957] S.C.R. 624, 9 D.L.R. (2d) 1; *Lehnert* v. *Stein*, [1963] S.C.R. 38; *Eid* v. *Dumas* [1969] S.C.R. 668, 5 D.L.R. (3d) 561.

114. A similarily strict interpretation has been adopted in a number of decisions under the Alberta and British Columbia Acts. See *Epp* v. *Ridgetop Builders Ltd.*, *supra* n. 50, at 201-203; *Preston* v. *Canadian Legion of British Empire Service League, Kingsway Branch No. 175*, *supra* n. 49, A.R. at 537; *Roed* v. *Tahsis Co. Ltd.*, *supra* n. 50, at 179; *Woelbura* v. *Liberty Leasing*, *supra* n. 49, at 356; *Gerak* v. *The Queen in Right of B.C.*, *supra* n. 51, at 297.

115. *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1970, c. T90.

116. See *Choppin* v. *Caouette*, *supra* n. 49, at 39-40; *Weiss* v. *Greater Vancouver Y.M.C.A.*, *supra* n. 51, at 119-120; *Niblock* v. *Pacific National Exhibition*, *supra* n. 49, at 29-30.

117. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08), s. 3(1).

118. See *Epp* v. *Ridgetop Builders Ltd.*, *supra* n. 50, at 202-203; *Brautigam* v. *Orderly Investments Ltd.*, *supra* n. 49, at 145.

The knowledge of danger may be acquired in two distinct ways. The occupier may specifically warn the visitor of dangers on the premises either by direct oral communications, or indirectly by way of notice or sign. 'Tiles slippery when wet' at a swimming pool or 'Beware of the Dog' are examples of the latter. Alternatively, knowledge of the danger may be acquired by the visitors' own observations, or warnings from third persons. Furthermore, the knowledge acquired may be actual or constructive. A person may be consciously aware of the danger because the sign or notice is read and understood or the danger actually seen and appreciated. Constructive knowledge is acquired in a situation where the reasonable person would read the sign or see and appreciate the danger. Finally, it should be noted that the dangers of which one has knowledge may be avoidable or unavoidable. Knowledge that the tiles surrounding a swimming pool are slippery does not permit one to avoid the danger if the premises are to be used for their intended purpose. The notice encourages special care to be taken in walking on them, but does not permit one to avoid the risk totally. On the other hand, knowledge that a dog, which is securely tied up, is dangerous will, in most cases, allow the danger to be avoided. With reference to this framework, we might speculate that the courts will be unlikely to deny liability unless the plaintiff had actual knowledge of a danger that was easily avoided. At the other end of the spectrum, the courts will be unenthusiastic to reduce damages at all when the plaintiff had only constructive knowledge of an unavoidable danger. This appears to be the pattern of decision making under the British Columbia and Alberta Acts.[119] What is not apparent in those decisions, however, is any consistent method of legal analysis underlying the decisions. The courts have utilized, seemingly haphazardly, notions of standard of care,[120] *volenti*,[121] contributory negligence[122] and occasionally have used language reminiscent of the time when contributory negligence was a complete bar to recovery.[123] It is submitted that anlysis of the problem may be assisted by separating situations where knowledge, either actual or constructive, derives from the occupiers' warning, from those situations where it derives from the plaintiff's observation or appreciation of danger. If the warning was provided by the occupier, the issue will most profitably be resolved by considering whether the standard of care has been breached. The occupier will be asserting that *positive* steps were taken for the safety of the visitor, and that the primary issue is whether the steps taken were

119. See *Bossert* v. *Grover Petroleums Ltd.*, *supra* n. 49 (The plaintiff fell down stairs at the rear of store. She was fully aware of the stairs — no liability); *Epp* v. *Ridgetop Builders*, *supra* n. 50 (The plaintiff surveyor was injured when a wall collapsed on the building site. The plaintiff was aware that the high wind on that particular day created a risk of such occurrence. The work could easily have been done at some other time — no liability); *Flint* v. *Edmonton Country Club*, *supra* n. 49 (The plaintiff golfer fell over low fence used to divide off the teeing area. The plaintiff was aware of the fence but nevertheless chose to step over it — no liability); *Hall* v. *Sorley*, *supra* n. 52, (The plaintiff was bitten when she tried to pat a dog she knew to be dangerous); *Meier* v. *Qualico Developments Ltd.*, *supra* n. 49 (The plaintiff fell off a motorcycle while recklessly riding around a dangerous development site of which he had complete knowledge). Compare *Preston* v. *Canadian Legion of British Empire Service League, Kingsway Branch No. 175*, *supra* n. 49 and *Woelburn* v. *Liberty Leasing*, *supra* n. 49. In both cases the plaintiffs slipped on snow and ice in a parking lot. Each had actual knowledge of the dangerous conditions which were, however, unavoidable since the whole lot was in a dangerous condition — liable. See also *Brautigam* v. *Orderly Investments Ltd.*, *supra* n. 49 (plaintiff fell on icy, uneven path leading to apartment block. While the plaintiff knew of the danger, all access ways were unsafe).

120. *Supra* n. 118.

121. *Supra* n. 114.

122. *Supra* n. 116.

123. See *Bossert* v. *Grover Petroleum Ltd.*, *supra* n. 49, at 368; *Flint* v. *Edmonton Country Club*, *supra* n. 49, at 396.

sufficient to discharge the occupier's obligation of care under subsection 3(1). If the warning was such to permit the entrant to be reasonably safe while on the premises, where, for example, there was actual knowledge of clearly avoidable dangers, the conclusion reached should be that all due care had been taken. If the warning was insufficient or the danger was nevertheless unavoidable, the conclusion may be that further steps should have been taken to discharge the occupier's obligations. It is also likely, in this context, that the court will take into account any unlawful nature of the entry. Warnings will almost always be sufficient to discharge obligations to adult trespassers. When the knowledge is acquired by the plaintiff, without assistance from the occupier, the analysis is likely to change. There is likely to be less sympathy for the occupier who is trying to excuse his or her lack of reasonable care on the basis of the visitor's self-acquired knowledge. Here, the concepts of *volenti* and contributory negligence will most profitably be invoked. There seems to be no reason to exonerate the negligent occupier unless the entrant, with complete and actual knowledge of an avoidable danger, has rashly or recklessly exposed himself to the danger in such a manner as to lead to the conclusion that the visitor is agreeing that no claim shall be made against the occupier for any injury incurred. Less extreme behaviour, where a plaintiff has mere knowledge of the risk or where the risk is unavoidable can be dealt with flexibly, sensitively and justly by the concept of contributory negligence. Again, the position will be different if the entry is unlawful. The courts will likely deny all liability if a trespasser has knowledge and understanding of the danger on the land. If this framework is utlized in interpreting the *Act*, the difficult questions relating to the visitor's knowledge may be analyzed more clearly.

E. Occupiers' Exemptions from Responsibility

At common law, it was clear that an occupier could reduce or avoid his obligations of care by entering into a contract with the visitor which contained a suitably drawn exemption clause. Of course, the law of contracts contains certain controls on the enforceability of such clauses. Among the more important of these are the strict rules of construction, notice requirements and the privity rules which restrict the applicability of the exemptions to those who are a party to the contract. However, in 1956 the English decision of *Ashdown* v. *Williams*[124] made it clear that non-contractual exemptions were effective in protecting an occupier from liability. In that case, a plaintiff licensee was injured when trains were shunted negligently on the defendant occupiers' property. An appropriately placed notice declared that persons entered the property at their own risk and that the occupier was not liable for his own negligence or that of its employees. The plaintiff had read part of the notice, was aware of its contents and was held to be bound by it. Indeed, the decision probably goes beyond this to the extent that constructive notice of the sign would likely have been sufficient. This extension of contractual principles to non-contractual notices and signs has been the subject of severe criticism.[125] It was suggested that the decision

124. [1957] 1 Q.B. 409, [1957] 1 All E.R. 35.

125. See L.C.B. Gower, "A Tortfeaser's Charter" (1956), 19 Mod. L. Rev. 532; E.R. Alexander, "Occupiers' Liability: Alberta Proposes Reform" (1970), 9 Alta. L. Rev. 89.

was inconsistent with tort principles in that it permitted a defendant to gain immunity from civil liability by means of a unilateral declaration that he did not intend to carry out his legal responsibilities. Professor Alexander summed up the opinion of many when he wrote that such an exclusionary clause was "neither necessary nor justifiable" and that "general exclusionary notices . . . should be ineffective."[126]

The Manitoba Law Reform Commission, nevertheless, proposed that the issue of exclusions of responsibility be left to the common law.[127] It supported its view with a claim that any specific statutory controls should not be instituted until a study had been made on the general role that exemption clauses should play within the law of torts.[128] This opinion may have been influenced by a comment contained in the Institute of Law Research and Reform of the University of Alberta's *Report on Occupiers' Liability* that there was "no evidence of widespread use of exculpatory clauses."[129] Fortunately, the legislature did not accept the Commission's proposals and the legislation contains greater controls.

Section 4 permits an occupier by express agreement, stipulation or notice to restrict, modify or deny the common duty of care so long as reasonable steps are taken to bring the restriction, modification or denial to the attention of the visitor and such change is not prohibited by legislation. Furthermore, subsection 4(2) states that such an exemption is not binding unless in all the circumstances of the case it is *reasonable*. Such reasonableness is to be judged by a consideration of, *inter alia*, the relationship between the occupier and the entrant, the injury or damage caused and the hazard, the scope of the restriction and the steps taken to give notice of the exemption to the entrant. In adopting this reasonableness test, the legislature followed the recommendation of the English Law Commission.[130] The reasonableness test was also recommended in the Nova Scotia Law Reform Advisory Committee's study paper entitled *Occupiers' Liability Law*[131] and in the Saskatchewan Law Reform Commission's *Proposals for an Occupiers' Liability Act*.[132] The Manitoba *Act* did not, however, adopt the recommendations in the Nova Scotia study paper[133] and the Saskatchewan proposals[134] which went even further in controlling exemptions. They proposed additional controls in respect of exemptions contained in tickets, programmes and similar documents of admission. To the extent that a breach of the common duty of care caused death or injury, exemptions in such documents would be null and void. This proposal involves drawing a difficult distinction between carefully negotiated agreements limiting

126. *Ibid.*, at 100.

127. *Supra* n. 9, at 52.

128. *Ibid.*

129. Institute of Law Research and Reform, University of Alberta, *Occupiers' Liability*, Report No. 3 (Edmonton: The Institute, 1969) 75.

130. The Law Commission, *Report on Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability*, Law Com. No. 75 (London: Her Majesty's Stationery Office, 1976) 28-29.

131. *Supra* n. 8, at 43-44.

132. *Supra* n. 8, at 9.

133. *Supra* n. 8, at 43.

134. *Supra* n. 8, at 9.

responsibility on the one hand, and signs, notices and tickets which technically may be contractual or non-contractual but which collectively do not indicate a negotiated consent to the provision.

However, it is submitted that the provisions in the Manitoba *Act* are sufficient to control the abuses of exemption clauses. The reasonableness test has an inherent flexibility which is a great advantage considering the number and variety of situations where exemption clauses may apply. Categorical rules dictating either the enforceability or unenforceability of exemption clauses are almost certain to produce anomalies and inconsistencies. Demanding reasonable notice of reasonable clauses would seem to be a fair compromise between competing interests.[135]

F. Independent Contractors

There was neither certainty nor consistency in the common law's approach to liability of an occupier for the acts of an independent contractor. The position in respect of licensors and occupiers permitting visitors to enter under a contract was reasonably clear. A licensor was permitted to delegate his duties of care and an injured plaintiff had to seek recourse against the contractor alone.[136] The position in respect of contractual entrants was quite different. The occupiers' duties were not delegable.[137] However, with respect to the invitors' duties, there was a good deal of uncertainty. In *Haseldine* v. *Daw*[138], the occupier had used reasonable care in the selection of competent independent contractors to inspect, maintain and repair an elevator. The English Court of Appeal held that the occupier was not liable to an invitee injured by the contractor's negligence. However, an opposing view was championed by the House of Lords in *Thomson* v. *Cremin*.[139] The occupier of a ship had employed reputable contractors to install a heavy wooden brace in the hold. The brace fell on the plaintiff's head because it had been installed negligently. It was held that the invitor's duty was personal and could not be delegated to independent contractors. Unfortunately, the Supreme Court of Canada did not clearly resolve the question for Canada when it had an opportunity to do so in *Hillman* v. *McIntosh*.[140] In that case, a defective elevator repaired by an independent contractor, caused the death of an invitee. Martland J. writing for the majority of the Court distinguished *Haseldine* v. *Daw*[141] and imposed liability on the defendant occupier. He noted that in *Hillman* v. *McIntosh*,[142] there was no "standing arrangement"[143] for the repair and maintenance of the elevator, as there was in *Haseldine*.[144] His Lordship also proferred the comment that the

135. Exemptions will continue to be construed strictly: *Lyster* v. *Fortress Mountain Resorts Ltd.*, *supra* n. 50, at 348-350.
136. See *Morgan* v. *Girl's Friendly Society (Unincorporated Central Council)*, [1936] 1 All E.R. 404 (K.B.).
137. See *Francis* v. *Cockrell*, *supra* n. 15; *Maclenan* v. *Segar*, *supra* n. 15.
138. [1941] 2 K.B. 343, [1941] 3 All E.R. 156, 111 L.J.K.B. 45.
139. [1956] 1 W.L.R. 103.
140. [1959] S.C.R. 384, 17 D.L.R. (2d) 705.
141. *Supra* n. 138.
142. *Supra* n. 140.
143. *Ibid.*, at 393.
144. *Supra* n. 138.

authority of *Haseldine* v. *Daw*[145] was somewhat shaken by the House of Lords decision in *Thomson* v. *Cremin*.[146]

The Manitoba *Act* resolves this inconsistency and uncertainty and, like the prior Canadian legislation,[147] adopts the view that the occupiers' duties under subsection 3(1) are delegable. Section 5 states that, if certain conditions are met, an occupier is not liable for damage caused by an independent contractor engaged by him. The conditions imposed are that the damage must be caused *solely* by the independent contractor, that the occupier used reasonable care in the selection of the independent contractor, that the occupier used reasonable care to supervise the independent contractor and that it was reasonable that the work should have been undertaken. These conditions substantially qualify the delegable nature of the duty. Two common situations may clarify the situation. Engaging an independent contractor to clear snow and ice when conditions demand it, represents a situation where the task is mundane and non-technical. Engaging an independent contractor to inspect, repair and maintain an elevator represents a situation where technical expertise is essential. In the former case it would be very difficult for the occupier to exonerate himself on the basis of section 5. The situation is one where the occupier has the ability to know if the independent contractor has discharged his duties. If the independent contractor has not discharged his duties, it seems likely that the occupier will remain liable either on the basis of a failure to supervise, or on the basis that the damage was not caused *solely* by the independent contractor's negligence. Indeed, in three cases involving this kind of situation, the equivalent of section 5 in Alberta and British Columbia does not appear to have been argued.[148] The section is more likely to be applied in relation to technical tasks where the occupier is really forced to engage an expert. Even in this situation questions will arise. They will include whether or not reasonable care was taken in the selection of the independent contractor and whether it was necessary to employ an expert to supervise the independent contractor.

In light of these kinds of uncertainties and difficulties, it may have been better to state that the occupiers' responsibilities are not delegable and to permit actions to be brought against both occupier and independent contractor. It does not seem objectionable to hold occupiers responsible for those involved in maintaining the safety of the premises. Occupiers take the benefits and advantages derived from the control of land, and it seems reasonable that they should carry the burden of compensating visitors injured by a lack of care. Moreover, they are in the best position to evaluate risk and place appropriate insurance coverage. Such a change would enhance the position of the plaintiff by providing a greater number of avenues of recourse and lessen the risk of no recovery from a fly by night, financially unstable or inadequately insured contractor.

145. *Ibid.*

146. *Supra* n. 139.

147. *The Occupiers' Liability Act*, R.S.A. 1980, c. 0-3, s. 11; *The Occupiers' Liability Act*, R.S.B.C. 1979, c. 303, s. 5; *The Occupiers' Liability Act*, R.S.O. 1980, c. 322, s. 6.

148. See *Foremsky* v. *The Queen*, *supra* n. 49 (defendant's post office cleaned by third party); *Preston* v. *Canadian Legion of British Empire Service League, Kingsway Branch No. 175*, *supra* n. 49 (defendant's parking lot cleared of snow and ice by independant contractor); *Woelburn* v. *Liberty Leasing*, *supra* n. 49 (snow clearing services by independant contractor).

G. Landlord's Obligations

At common law, the occupier of demised premises was the tenant, since under the lease it was the tenant who held control and exclusive possession of the premises. Furthermore, the landlord owed no duty of care in negligence to visitors to the demised premises. This was so even if the injuries were caused by dangers arising from a failure of the landlord to perform a covenant of repair.[149] The landlord's only responsibilities were those owed to the tenant under the lease.[150] Some Canadian occupiers' liability legislation has sought to change this and to increase the landlord's responsibilities to visitors of the leased premises.[151]

The Occupiers' Liability Act[152] removes the landlord's immunity to the extent of imposing liability to third persons to the extent of his contractual responsibilities to the tenant. Subsection 6(1) states that where a landlord is responsible for the maintenance or repair of premises the landlord owes the same duties to persons coming on the property as is owed by the occupier of premises. This broad statement, however, is restricted by subsection 6(3) which declares that the landlord is only responsible to third persons when the default is such as to be actionable by the occupier. Thus, the duty to visitors of the demised premises is a derivative duty. The effect is to remove the strictures of privity and extend the contractual responsibilities of the landlord to the third parties. As a general rule, this means that landlords will not be liable to third parties until reasonable notice of the defect in the property has been given to the landlord by the tenant and a reasonable time has elapsed for the condition to be corrected.

It is perhaps unfortunate that the legislature did not see fit to impose an independent duty in favour of third parties. Such a view has been proposed by the Nova Scotia Law Reform Advisory Commission's *Occupiers' Liability Law: A Study Paper*[153] and by the Saskatchewan Law Reform Commission's *Proposals for an Occupiers' Liability Act*.[154] One way to expand the landlord's duty to third parties would be to impose the common duty of care on landlords when they 'know or ought to know of the defect.' Such a provision may be criticized on the basis that it gives third parties greater rights than tenants. However, it has been noted that tenants are more likely to be aware of defects than third parties, and the purpose of occupiers' liability legislation is not to reform the law of landlord and tenant.[155] Furthermore, in Manitoba, section 98 of *The Landlord and Tenant Act*[156] imposes similar standards in all residential tenancies. The Manitoba Law Reform Commission was aware of this alternative, but nevertheless refused to recommend an independent duty claiming that further study was necessary.[157]

149. See *Cavalier* v. *Pope*, [1906] A.C. 428 (H.L.).

150. It is pointed out in the Manitoba Law Reform Commission's *Report on Occupiers' Liability*, *supra* n. 10, at 55-56 that the tortious immunity can be circumvented, if the injury is caused by the landlord's failure to repair. The plaintiff must first bring an action against the tenant who in turn must seek contribution by third partying the landlord.

151. *The Occupiers' Liability Act*, R.S.B.C. 1979, c. 303, s. 6; *The Occupiers' Liability Act*, R.S.O. 1980, c. 322, s. 8.

152. *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08).

153. *Supra* n. 8, at 48-50.

154. *Supra* n. 8, at 14.

155. See Nova Scotia Reform Advisory Commission, *Occupiers' Liability Law: A Study Paper*, *supra* n. 8, at 50.

156. *The Landlord and Tenant Act*, R.S.M. 1970, c. L70.

157. *Supra* n. 10, at 57.

IV Conclusion

In spite of the foregoing criticisms, it cannot be doubted that *The Occupiers' Liability Act*[158] is a major improvement in the area of occupiers' liability law. The abandonment of the classification of entrants and the ritualized statements of the corresponding standards of care is a major reform. The courts will be freed from technical arguments on formalistic rules and will be permitted to apply the free flowing and sensitive concept of reasonable care in all circumstances. Technical difficulties, such as the distinction between static defects and activities, have been overcome. Areas of uncertainty, such as the position of the independent contractor, have been dealt with. Some reform in the control of exemption clauses and landlord's liability has been achieved. In other areas, such as the definition of occupier, the *Act* has been less successful. However, on balance, the legislation is a useful and welcome reform in tort law.

While the legislation marks a major step forward in occupiers' liability law, it also marks a failure in the common law process. Limerick J.A., in a different context, has spoken eloquently of the judicial role in the development of the legal system. His Lordship stated:

> It is the duty of the Court to see that the law expands with the growth and development of the country, and changing conditions should lead to co-extensive changes in the application of the law. If the Courts continue to follow decisions made 20, 50 or 100 years ago without reference to changing conditions, moral standards, economic and social developments, justice will be ill served.[159]

Clearly, the occupiers' liability legislation has resulted from a failure of the custodians of the common law to adjust and adapt its principles in step with the evolution of negligence doctrine. If the Supreme Court of Canada had acted boldly to incorporate occupiers' liability principles within negligence doctrine, legislative reform would have been unnecessary.

The consequence of the common law being superseded by legislation may be serious. The common law, at its best, is progressive, dynamic and inherently able to adjust to changing circumstances, changes in society and changing public expectations. Legislation, even when it contains provisions of wide generality such as the common duty of care, is to a greater extent static and entrenched in the time frame of its passage. This is particularly serious in legislation which is unlikely to receive regular review and amendment. The evolution in the drafting of occupiers' liability legislation over as short a period as 20 years points to the problem.[160] Legislation is inherently incapable of responding to the changing tide of community values and expectations. Only time will tell the cost of the failure of the common law system in occupiers' liability law.

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158. *The Occupiers' Liability Act*, R.S.M. 1982-83-84, c. 29 (08).

159. *Subsurface Surveys Ltd.* v. *John Burrows Ltd.* (1967), 62 D.L.R. (2d) 700 at 723 (N.B. S.C. Appeal Div.).

160. The treatment of trespassers is illustrative. Compare *The Occupiers' Liability Act*, R.S.A. 1980, c. 0-3 and *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29 (08). See *Houle* v. *City of Calgary*, *supra* n. 87 where Medhurst J. applied negligence principles rather than the restrictive terms of the Alberta Act in respect of a child trespasser. In an accompanying annotation, Professor Klar concludes that "this decision is now of no precedental value since it was made *per incuriam* of relevant statutory authority." (Alta. L.R. at 36, C.C.L.T. at 278). The conclusion is correct but the decision nevertheless indicates dissatisfaction with the legislature's approach to child trespassers after only twenty years. Recently, the Alberta Court of Appeal was able to uphold the learned trial judge's decision in favour of the child trespasser by means of a liberal interpretation of the *Occupiers' Liability Act*. See *Houle* v. *City of Calgary* (1985), 20 D.L.R. (4th) 15.