**Greens List CPD: the Renaissance of Public Liability Claims**

By P G Hamilton[[1]](#footnote-1)

**BACKGROUND**

1. For as many straightforward public liability claims that come across our desks, we see tricker claims crop up. We see arguments about contractual waivers, warning signs and all manner of sections from consumer law provisions scattered across pleadings.
2. What we don’t see, not yet anyway, are Victorian cases testing the effect of these waivers, those signs or the application of the many sections of the Australian Consumer Law.
3. This is the first time, in a long time, where there is a burgeoning of public liability claims, so it seems to me to be timely to look beneath the surface at some long-forgotten principles or untouched areas in public liability law.

**OCCUPATION**

1. In most, but not all[[2]](#footnote-2), public liability claims, a central feature of the action is whether the defendant was an occupier of the area in which the alleged tort occurred and, as such, owed a duty of care to the plaintiff.

**Duty of care as an occupier**

1. Long before the introduction of Part IIA of the *Wrongs Act 1958 (Vic)* “Occupiers’ Liability” in 1983, the law recognised, in many cases, that occupiers owed a duty of care to those on the premises.
2. The duty of care used to depend on the category of entrant - whether the person injured was an invitee, licensee, trespasser *et. cetera*.
3. In *Australian Safeway Stores Pty Limited v Zaluzna[[3]](#footnote-3)*,the High Court of Australia put to rest the notion that the duty of care owed by occupiers depended on such categories.
4. Occupiers’ liability since then has depended on whether it was reasonably foreseeable that an entrant may face a real risk of injury when on the premises. That, in part, was informed by the relationship or proximity between occupier and entrant. Thus, it might not be foreseeable that injury would occur to a trespasser.
5. *Zaluzna* followed a favourite tort law case, *Hackshaw v Shaw[[4]](#footnote-4)*, in which Deane J said the categories of entrant were redundant. He found that the owner of a property owed a duty of care to a trespasser who was stealing his petrol from his farm. When the owner shot his gun at the direction of the trespasser, ultimately shooting him, he knew or ought to have known he was at risk of shooting the trespasser.

**Who is an occupier?**

1. The definition of ‘occupier’ in the *Wrongs Act*, contained in section 14A, takes us nowhere, apart from elucidating when a landlord may be an occupier of premises.
2. The House of Lords considered this question in detail in *Wheat v E Lacon & Co Ltd[[5]](#footnote-5)*. There, owners of a public house employed a manager to take responsibility for the public house. The owners continued to live at the premises. A guest of the premises fell down an unlit staircase. The owners denied owing a duty of care because they employed the manager.
3. The House of Lords found that the owners were indeed occupiers because of their degree of control over their own premises.
4. In their speeches to the House, Lords Denning, Morris, Pearson and Pearce all held that more than one party may be an occupier of the same premises, each owing a duty of care.
5. In his powerful speech, Lord Denning said:

“In the Occupiers’ Liability Act, 1957, the word ‘occupier’ is used in the same sense as is used in the common law cases on occupiers’ liability for dangerous premises. It was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him [or her or it] under a duty of care towards those who came lawfully on to the premises.”

1. The Law Lord continued:

“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. He may share the control with others. And whatever happens, each is under a duty of care towards persons coming lawfully on to the premises, dependent on his level of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other…”

1. There is no reason to doubt the correctness of these passages in the Australian context, in my view. Indeed, their correctness is strengthened by section 14A, which defines when a landlord may be an occupier, namely when (a) under an obligation to maintain or repair the premises or (b) when it could have exercised a right of entry to maintain or repair the premises. In addition, the High Court of Australia considered the relevance of ‘control’ in *Northern Sandblasting Pty Limited v Harris[[6]](#footnote-6)*.
2. It is, therefore, cringeworthy of one defendant to say to another that it was not an occupier because the other had a greater level of control over the premises.
3. It is also surprising how rarely occupiers’ liability is pleaded against multiple parties who have had an element of control over the premises.

**Can a party discharge its obligations as an occupier?**

1. Of course the answer to this question is yes. Once again, it comes down to the element of control.
2. In *Northern Sandblasting*, the landlord engaged an electrical contractor to do some electrical work. When the nine year old child of the tenants was electrocuted because of the contractor’s work, the landlord accepted it was an ‘occupier’ of the premises. But it argued it discharged its duty by engaging who it believed was a qualified electrician, work it had no qualifications to do or supervise. The High Court accepted the landlord was not liable for the electrician’s negligent work.

**The nature and extent of Part IIA of the *Wrongs Act***

1. Part IIA of the *Wrongs Act* provides that an occupier of premises must take care to ensure that persons coming onto the premises “will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises”.

*Separate cause of action or modification of the common law?*

1. More often than not, plaintiffs will plead that Part IIA of the *Wrongs Act* gives rise to a cause of action against the occupier.
2. However, in the leading decision on Part IIA of the *Wrongs Act*, *Central Goldfields Shire v Haley & Ors[[7]](#footnote-7)*, Neave JA was of the opinion that this Part merely modified the common law, rather than created a separate cause of action. Beach J cited this case with approval in *Victorian WorkCover Authority v Jones Lang Lasalle (Vic) Pty Ltd[[8]](#footnote-8)*.

*The state of the premises*

1. It seems clear enough that Part IIA only applies to the state of the premises itself, not activities on the premises, but unrelated to the premises.
2. While there is little case law on the point in Victoria, Buchanan JA in *Agresta v Agresta[[9]](#footnote-9)* accepted that a worker digging a hole for verandah posts - when injured from a faulty drill bit in the drill he was using - was not injured “by reason of the state of the premises”. Accordingly, the Judge held that Part IIA of the *Wrongs Act* had no application.
3. That, of course, does not mean an occupier could not have a liability at common law because an injury was unrelated to the state of the premises.
4. As we saw from the shot fired at the trespasser in *Hackshaw*, the property owner was liable as occupier for shooting his gun, nothing to do with the state of the premises. And, as noted, Part IIA only modifies the common law to the extent relevant to its application.

*Discharging the duty of care under Part IIA of the Wrongs Act*

1. In addition to discharging an occupier’s duty at common law, the *Wrongs Act* provides a number of factors the Court must use to determine whether an occupier has discharged the duty over the state of the premises.
2. Recently, in *VWA v Monash University*[[10]](#footnote-10), McDonald J went through those factors in holding that Monash Uni was not liable for a worker’s fall on a wet garden path.

*Interaction between Part IIA and Part X of the Wrongs Act*

1. While Part IIA relates exclusively to occupiers’ liability, following the Ipp reforms, Part X (negligence) was inserted into the *Wrongs Act*. Part X includes sections 48 and 49, which modify the common law of negligence e.g. the duty of care.
2. In *Erickson v Bagley*[[11]](#footnote-11), the Court of Appeal ruled that sections 48 and 49 qualify the duties owed by an occupier under section 14B(4) of the *Wrongs Act*.
3. It is therefore important that practitioners turn their minds not only to Part IIA and any common law, but Part X of the *Wrongs Act*, when assessing the potential lability of an occupier.

*Contracting out of Part IIA of the Wrongs Act*

1. This is an interesting area of the law that, to my knowledge, has not been tested in Victoria.
2. It might be possible for a Defendant to contract out of the occupiers’ liability provisions in the *Wrongs Act*.
3. Section 46 of the *Wrongs Act* permits a Defendant to contract out of Part X (negligence) of the *Wrongs Act*. Part IIA (occupiers’ liability), on the other hand, is silent.
4. But section 14B provides that Part IIA only replaces the common law to the extent that it relates to the standard of care of an occupier and the matters referred to in Part IIA.
5. *Ashdown v Samuel Williams & Song Ltd* 1957 1 QB 409 established that, at common law, an occupier can impose conditions on a person’s entry to premises, including by contract.
6. As noted above, the Court of Appeal has held that Part X of the *Wrongs Act* qualifies Part IIA, which may have some bearing on this issue.
7. Moreover, as legal academic Richard Johnstone wrote shortly after Part IIA was enacted[[12]](#footnote-12):

“[w]hen an occupier, by contract, excludes his or her liability, that contractual exclusion will usually be effective to limit, or exempt, the occupier from liability to the entrant…As the Occupiers' Liability Act [which implemented the occupiers’ liability provisions in the Wrongs Act] does not refer to this situation, it is arguable that 'Parliament must be taken to have known the law…and to have decided as a matter of policy not to alter it…”

*Contracting out of Part IIA: the contractual terms*

1. While it seems that it may be possible to contract out of the provisions of Part IIA of the *Wrongs Act*, it would equally seem to require wording to the clearest effect and wording that was brought to the person’s attention.
2. In *Oceanic Sun Line Special Shipping Company Inc v Fay[[13]](#footnote-13)*, for example, the High Court said it was not enough to have an exemption of liability clause for personal injury contained in a brochure before the injured person purchased their ticket.
3. As Brennan J said:

“…where an exemption clause is contained in a ticket or other document intended by the carrier to contain the terms of carriage, yet the other party is not in fact aware when the contract is made that an exemption clause is intended to be a term of the contract, the carrier cannot rely on that clause unless, at the time of the contract, **the carrier had done all that was reasonably necessary to bring the exemption clause to the passenger's notice**."[[14]](#footnote-14) [emphasis added]

1. Are erecting warning signs enough to contract out of Part IIA of the *Wrongs Act*? Probably not, in my view.
2. Lord Denning in *White v Blackmore* [1972] EWCA Civ 11 (15 June 1972)[[15]](#footnote-15) said this about warning signs:

“[there] was the poster at the entrance headed "Warning to the Public". This was clearly no part of the contract. The contract was contained in the programme, which, as I have said, was the contractual document. This warning notice was not incorporated into the programme by reference, or otherwise…

The Courts are very reluctant to hold a person bound by any exemption or condition unless it forms part of the contract between them. If there is a contractual document (as here the programme) the organisers must incorporate it into the document…”

*Whether the warning sign can discharge an occupier’s duty of care*

1. The old common law rule was that, in some cases, an occupier could discharge its common law duty as an occupier by erecting a warning sign purporting to limit its liability, even if it did not form part of a contract with the entrant[[16]](#footnote-16).
2. About the old common law rule and its interaction with Part IIA *Wrongs Act*, Johnstone wrote[[17]](#footnote-17):

“[i]t would appear that section 14B(3) has the effect of overriding this harsh rule [that a warning sign was enough to discharge liability], because that section requires a court to look at 'all the circumstances of the case' in formulating the standard of care. A warning to the entrant may, or may not, on the facts of the particular case, be enough to enable the visitor to be reasonably safe.”

1. With respect, I agree with the author. The warning sign should be but one factor in the analysis of discharge under section 14B of the *Wrongs Act*.
2. What’s more, if importance is attached to the warning sign, then it seems to me that what Brennan J said in *Oceanic Sun* is important. Arguably, any warning sign should be brought to the specific attention of the reader for it to limit an occupier’s liability.
3. Sections 50 and 56 of the *Wrongs Act* are also relevant to warning signs.
4. Section 50 relates to a duty to warn of risk. While usually relevant to medical negligence, there appears no reason it should be limited to such cases.
5. Section 56 relates to allegations by a plaintiff that a defendant failed to warn, or alternatively give information to, the plaintiff of the risk of harm faced by the plaintiff. That section provides that the plaintiff has the burden of proof in establishing that the plaintiff was not aware of the risk or information.

**THE AUSTRALIAN CONSUMER LAW**

1. The Australian Consumer Law is found in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* (‘the CC Act’). The ACL came into force from 1 January 2011[[18]](#footnote-18). The preceding *Trade Practices Act 1974 (Cth)* and State-based consumer laws are beyond the purview of this paper.
2. The ACL is significant to public liability claims for a number of reasons, including:
   1. its wide application, no longer limited in its application to corporate entities;
   2. its restriction on ‘contracting out’ of consumer protections;
   3. the entitlement to damages under the ACL.

**Wide application**

1. The TPA used only to apply to corporate entities because the TPA was enacted pursuant to the corporations’ power granted to the Commonwealth under the Constitution[[19]](#footnote-19).
2. Thanks to an agreement reached among the States, the ACL now applies to people or corporate entities who provide goods and services to consumers.
3. There are obvious cases where the ACL applies in public liability claims, but many other not so obvious cases.
4. A ‘consumer’ is defined in section 3 as someone who acquires goods or services that are $40,000 or less or of a kind ordinarily acquired for personal, domestic or household use or consumption.
5. ‘Services’ is incredibly broadly defined in section 2 to include rights, benefits, privileges or facilities.
6. One could argue, it seems to me, that if someone fell over while walking in a shopping centre on their way to purchase clothing, that the shopping centre provided ‘facilities’ that were for personal, domestic or household use, thus arguably invoking the ACL provisions.

**Contracting out provisions**

1. Section 64 of the ACL provides that any term of a contract purporting to contract out of many provisions of the ACL, including guarantees to provide services with due care and skill, are void.
2. That means that, if a contract contains a waiver or indemnity clause, a plaintiff can usefully plead the claim under the ACL as a way around the contractual terms.
3. There are a few narrow exceptions.
4. The first exception relates to ‘recreational services’ under section 139A of the CC Act (not Schedule 2). The supplier of the recreational services must have been reckless for any contractual terms to be void.
5. But where these clauses often fall foul of the law is that they purport to exclude cover for more than that permitted by section 139A(3) of the CC Act. In two cases where that has occurred, the New South Wales Court of Appeal has held that the contractual waivers were void[[20]](#footnote-20).
6. The second exception is found in section 275 of the ACL. That section provides that, if the law of the contract is the law of the State, any provisions limiting liability within the State law will apply to the contract.
7. But the State law must explicitly limit or exclude liability so as to avoid the ACL applying[[21]](#footnote-21). Thus, I would venture to suggest that section 46 of the *Wrongs Act*, that permits parties to contract out of their obligations under Part X of the *Wrongs Act*, would not be enough to engage section 275 of the ACL.

**Damages**

1. While *Wrongs Act* thresholds have recently been adjusted, there will continue to be a raft of injuries that fail to meet the ‘significant injury’ test.
2. In such cases, Part VIB of the CC Act may come to the aid of plaintiffs.
3. While the ACL provides for compensation orders and damages, sections 137C to 137E of the CC Act specifically state that, for personal injury claims to which section 236 of the ACL would apply, the Court must apply Part VIB of the CC Act.
4. Part VIB appears to permit a plaintiff who has successfully sued under the ACL to seek damages in accordance with Part VIB, regardless of the State provisions limiting damages, subject to the contracting out provisions in section 139A of the CC Act or section 275 of the ACL discussed above.
5. Where damages are available both under relevant State law and under the ACL, the NSW Court of Appeal has held that the plaintiff may make an election, selecting the Act more favourable to the plaintiff[[22]](#footnote-22).
6. Section 87R of the CC Act provides that plaintiffs are entitled to damages for non-economic loss (general damages) if they are assessed between at least 15% of the most extreme case, as assessed by the Court. Judges in NSW follow a similar approach to assessing general damages at trial, with a quadriplegic injury usually regarded as the most extreme case.
7. I am yet to see a case in this State have damages assessed under Part VIB of the CC Act, but this Part could have significant implication for ‘smaller’ public liability claims.
8. I should also point out that Part VIB of the CC Act provides a three year limitation period for personal injury claims brought under the ACL[[23]](#footnote-23).

**TAKE HOME POINTS**

1. Like Captain Cook on his voyages to find ‘new’ lands, the lawyer in all of us can venture to find untouched areas of law.
2. When a public liability claim comes across your desk:
   1. think about the control test to see whether occupation applies;
   2. remember there can be multiple occupiers;
   3. ask,
      1. has an occupier discharged its obligations?
      2. does Part IIA of the *Wrongs Act* really apply?
      3. what is the relevance of the contractual waiver?
      4. do warning signs assist the Defendant?
      5. does the ACL apply?
      6. could the ACL provide an alternative means to access general damages?

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1. LLM (Monash) LLB BA (Dist.) Grad. Dip (Law); barrister, Green’s List. [↑](#footnote-ref-1)
2. A council cannot be an occupier of a footpath, for example: see *Central Goldfields Shire v Haley & Ors [2009] VSCA 101* per Redlich JA and by operation of the *Road Management Act 2004 (Vic)*. [↑](#footnote-ref-2)
3. 162 CLR 479. [↑](#footnote-ref-3)
4. 56 ALR 417. [↑](#footnote-ref-4)
5. [1966] AC 552. [↑](#footnote-ref-5)
6. 188 CLR 313. [↑](#footnote-ref-6)
7. [2009] VSCA 101. [↑](#footnote-ref-7)
8. [2012] VSC 412 at 5. [↑](#footnote-ref-8)
9. & Anor [2002] VSCA 23 at 6. [↑](#footnote-ref-9)
10. [2016] VSC 178. [↑](#footnote-ref-10)
11. [2015] VSCA 220. [↑](#footnote-ref-11)
12. Johnstone, R, *The Occupiers Liability Act 1983 (Vic): Sanity Restored?,* Melbourne University Law Review*,* Vo1. 14, June 1984. [↑](#footnote-ref-12)
13. [1988] HCA 32. [↑](#footnote-ref-13)
14. See also *Pacific Resources International Pty Ltd v UTI (Aust) Pty Ltd; Brackley Industries Pty Ltd v UTI (Aust) Pty Ltd* [2012] NSWSC 1274 (25 October 2012) form paragraph 93, *Thornton v Shoe Lane Parking Ltd*[1971] 2 QB 163, *McCutcheon v. David MacBravne* (1964) 1 WLR 125 and *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26 (26 February 2008) at 91 where the Court referred to the *contra proferentem* rule that should apply to the interpretation of exclusion clauses in a contract. [↑](#footnote-ref-14)
15. His was a dissenting judgment, but the principles he stated were not disputed. [↑](#footnote-ref-15)
16. *London Graving Dock Co Ltd v Horton* [1951] AC 737 and *White v Blackmore* [1972] EWCA Civ 11 (15 June 1972). [↑](#footnote-ref-16)
17. See footnote 12. [↑](#footnote-ref-17)
18. See *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 for discussion on when a cause of action accrues under the TPA. [↑](#footnote-ref-18)
19. Section 51(xx) of the *Commonwealth of Australia Constitution Act*. [↑](#footnote-ref-19)
20. *Motorcycling Events Group Australia Pty Limited v Kelly* [2013] NSWCA 361 and *Alameddine v Glenworth Valley Horse Riding Pty Limited* [2015] NSWCA 219. [↑](#footnote-ref-20)
21. *Insight Vacations Pty Limited v Young* [2011] HCA 16. [↑](#footnote-ref-21)
22. *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219 at [72] – “The *Competition and Consumer Act* provides for compensation in respect of causes of action arising under that Act. It does not purport to, nor have the effect of, excluding recovery of non-economic loss damages under the *Civil Liability Act*, notwithstanding that the causes of action may arise out of the same factual circumstances. On my findings, the appellant’s causes of action are available to her under both Acts. She is entitled to choose that which is more favourable, being that which is available under the *Civil Liability Act*”. [↑](#footnote-ref-22)
23. As it is under Victorian Law: see section 27B(4) of the *Limitation of Actions Act 1958 (Vic).*  [↑](#footnote-ref-23)