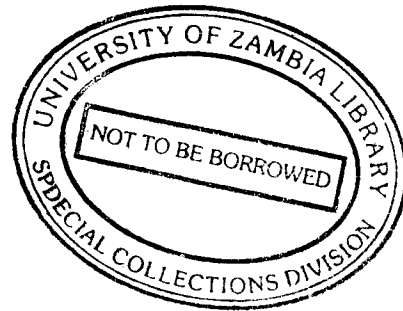


**“ THE LAW OF OCCUPIERS OF PREMISES LIABILITY IN AN ERA OF
DYNAMIC GROWTH: AN ANALYSIS OF THE LAW APPLICABLE TO
COMMERCIAL PREMISES IN ZAMBIA.”**



BY
SIACHITEMA BRIGADIER

An Obligatory Essay submitted to the University of Zambia, Law Faculty, in partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws (LLB)

University of Zambia

Faculty of Law

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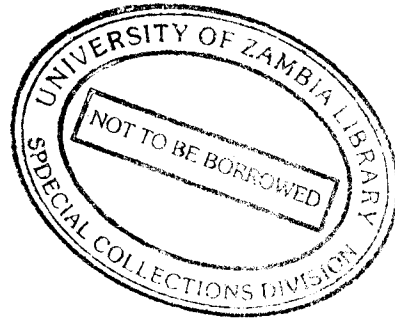
THE UNIVERSITY OF ZAMBIA

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By

SIACHITEMA BRIGADIER

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**BEING A PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF
LAWS (LLB) OF THE UNIVERSITY OF ZAMBIA.**

UNZA- FACULTY OF LAW

DECEMBER 2005

DECLARATION

I, Siachitema Brigadier, Computer No.20064756, do hereby solemnly declare that I am the bona fide writer of this Essay entitled “the Law of Occupiers of Premises Liability in an Era of Dynamic Growth: An Analysis of the Law Applicable to Commercial Premises in Zambia.” I therefore, declare that this work is a candid representation of my own ideas and is not a reproduction of any other work produced or submitted by any other person to the University of Zambia or to any other institution. In this regard, due acknowledgement has been given where other scholarly work has been cited.

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Signature:.....

Date:.....

DEDICATION

May the fruits of my mind be to the glory of the almighty God, my creator.

To my Mum who has ceased to be, you will never see this difficult work but it is wholly dedicated to you from my bereaved heart. You had always wanted me to have the highest level of education and this difficult work is a partial fulfilment of what you had always desired for me.

To my dearest Father, Mr Ackson Siandwazi, dearest Stepmothers, and Auntie, Jean Munkombwe Siandwazi. To you all, I owe what I will never be able to repay. I say, thank you very much for your unfailing love, moral, material and spiritual support and encouragement when all hope was lost.

To my brothers, sisters, cousins, nieces, nephews, aunties, uncles, and grandparents, I thank you all for helping me in my dreams and ambitions. Your patience, unfettered love and affection were all I needed to come this far. Please keep on keeping on. With all of you by my side, the sky is the limit.

PREFACE

This essay consists of four chapters. Chapter one of this essay is devoted to giving a summary of the general principles of occupiers' liability law and is intended to cover major substantive issues likely to be encountered in any occupiers' liability case. It will also give a historical background to occupiers' liability in an endeavour to help appreciate the changes and modifications taking place in this field of the law.

Part one of chapter two discusses the duty of care (i.e. common law and statutory). In discussing this, it will look at the duty of care for specific types of commercial premises including: retail shopping establishments, hotels and motels, restaurants and taverns, public transport terminus, and other commercial premises. This will be achieved by looking at how courts in jurisdictions that have made significant development in this field of the law have applied the concept of the duty of care in commercial premises. Much reliance will be on the British and some jurisdictions in the USA. Part two of chapter two will analyse the law on occupiers' liability in Zambia. It will analyse statutory provisions relevant to the topic, comparing and or contrasting it with the existing law in countries that have made significant developments in this field of the law, notably the USA, Canada, Britain and any other modern societies.

Chapter three will look at common commercial premises defects in Zambia and injuries resulting from such defects. Using statutory and case law, both Zambian and comparable and persuasive foreign authorities, this part of the chapter will discuss the position of the law in relation to these defects and resulting injury and will make an evaluation of what

the position would have been had the same defects and all facts existed in other jurisdictions, particularly the American and British.

Chapter four consists of the general conclusion. Here, a summery of important points in this essay will be given. Further, some recommendations where necessary in this area of law in Zambia will be given.

The justification for this study is that it will be of great assistance not only to the bench, the trial bar and the student of tort law, but also to occupiers of various premises and visitors generally. It addresses such issues as how far a person in possession or occupation of premises is under a duty to avoid bringing situations that give others an opportunity to harm themselves (or indeed third parties) while on the premises? What right does someone who suffers injury while on another's premises have? The Essay identifies most of the contentious issues in the law in force in this country and gives recommendations on how such issues may be addressed. The work is not exhaustive and as such, there is still plenty of space for more research in this field of law.

SIACHITEMA BRIGADIER

SCHOOL OF LAW

DECEMBER 2005

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I'm especially grateful to the Jones family, Bob Custard, Edward B., Doug and Karen Brown, Fritz Boothe, Charles Lumsden, Jerry Beal, TB, Alma, Pastor Billy Rutledge and all the members of Hitteras Christian Fellowship. It would have been virtually impossible for me to complete my academic journey at UNZA without their financial, spiritual and moral support. Their much-desired encouragements turned me into a person who does not just try but do things when they need to be done. I thank you all for being so good to me in various ways.

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It would be ungrateful of me if I did not extend my wholehearted appreciation to the Management staff at U.T.H that assisted me with the research.

I must admit that my stay at UNZA would have been hazardous and scandalous if the following people were not at my disposal, Clifford Moonga, Philemon Tembo, Mateyo Kamanga, Zimba Gamaliel, Mupenda Benaiah, Pengela Everisto, Waluzimba Ian Katongo, Chola Mwewa , and those whom I have not mentioned due to limited space. To you all, I say thank you very much for your relentless support and inspiration in my academic pursuit. You are friends indeed as you were friends in need. Thank you for the advice and support you rendered to me, I love you all and may God bless and keep you under His pavilion.

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INTRODUCTION

In many modern societies that hold the concept of “human safety” in high esteem, possession or occupation of premises is increasingly becoming a source of liability rather than exemptions. Consequently, occupiers’ liability have developed to such an extent that it is among the most easily asserted theories of recovery in the field of tort law. It addresses such questions as how far is a person in possession or occupation of premises under a duty to avoid bringing situations that give others an opportunity to harm themselves (or indeed third parties) while on the premises? What right does someone who suffers injury while on another’s premises have? Its scope is so broad that in dealing with various liabilities imposed on occupiers due to the conditions of the premises and activities conducted thereon, it does not restrict itself to the ubiquitous “slip and fall” case but extends to even include more complex activities such as those brought against architects and engineers for allegedly defective design. As such, it is among the largest subcategories within the broad spectrum of the law of tort in which there has been much litigation and most of these cases are as result of judicial decision settling personal injury action commenced by entrants against occupiers of premises, as a notable American authority emphasis.¹

¹ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) p3

Although it is generally accepted in different societies that freedom of use and or exploitation of ‘real property’, is one of the incidents to ownership, limitations on the owner’s freedom, are obviously essential to the existence of an orderly community, for, without them ‘ownership’ would be a destructive force. Thus **Paulson J**, when delivering judgment for the Supreme Court of North Dakota in the case **O’ Leary v. Coenen** ² observed that “human safety is of great importance than a land occupier’s unrestricted freedom.” Many courts in modern societies have been, and some are still, re-examining their allegiances to the English system of rigid classification of entrants upon land as trespassers, licensees and invitees . Statutes have been enacted to replace the common law rules in many modern societies, even in England where they originated. Thus one can reasonably aver that in modern society, premises liability has moved from a seemingly settled body of jurisprudence to an area of law that is changing and developing to conform to the challenges and demands of modern society.

This essay seeks to depict the law of occupier’s liability in an era of dynamic growth and to analyse the law applicable to occupiers of commercial premises in Zambia. The traditional and existing rules or principles of occupier’s liability will be analysed and significant departures outlined. In analysing the law applicable to occupiers of commercial premises in Zambia, the relevant provisions of the law in force will be analysed and then compared and or contrasted with the existing law in countries that have made significant development in this field of the law, notably the USA, Canada, Britain

²(1977) 251 N.W.2d, 746, per Paulson J ; <http://www.Ndcourts.com/court.htm>, accessed on 14th September,2005)

and any other modern society. Where reference is made to common law rules and principles, this essay will not only confine itself to the British jurisdiction since common law is a system of principles which crosses national boundaries, as **Professor Peter Birks**³ in **Oxford Private Law**, emphasis, American, Irish, Australia and Canadian authorities may all be relevant to an English and, indeed to a Zambian case.

For the purposes of this essay, occupier's liability law embraces the liability of occupiers of commercial premises for personal injury sustained by entrants upon the land. The liability of owners or occupiers of commercial premises for harm caused to persons outside the premises will not be discussed. Further, specific premises such as: undeveloped land; residential property, recreation premises; elevators and escalators; construction sites, and streets and sidewalks will not be discussed.

ORGANIZATION

This essay consists of four chapters. Chapter one is devoted to giving a summary of the general principles of occupiers' liability law and is intended to cover major substantive issues likely to be encountered in any occupiers' liability case. It will also give a historical background to occupiers' liability in an endeavour to help appreciate the changes and modifications taking place in this field of the law.

Part One of chapter two will look at the duty of care (i.e. common law and statutory). It will look the duty of care for specific types of commercial premises including: retail shopping establishments, hotels and motels, restaurants and taverns, public transport terminus and other commercial premises. This will be achieved by looking at how courts in jurisdictions that have made significant development in this field of law have applied

³ Peter Birks, English Private Law (Oxford: Oxford University Press, 2000) P 13

the concept of the duty of care in commercial premises. Much reliance will be on the British and some jurisdictions in the USA. Part Two of chapter two will be devoted to the analyses of occupier's liability law in Zambia. It will analyse statutory provisions relevant to the topic and will compare and or contrast it with the existing law in countries that have made significant developments in this field of law, notably the USA, Canada, Britain and any other modern societies.

Chapter three will look at common commercial premises defects in Zambia and injuries resulting from such defects. Using Statutory and case law, both Zambian and comparable and persuasive foreign authorities, this part of the chapter will discuss the position of the law in relation to these defects and resulting injury and will make an evaluation of what the position would have been had the same defects and all facts existed in other jurisdictions, particularly the American and British.

Chapter four consists of the general conclusion. Here, a summery of important points in this essay will be given. Further, some recommendations where necessary in this area of the law in Zambia will be given.

CHAPTER ONE

PRINCIPLES OF OCCUPIERS' LIABILITY

1.1 INTRODUCTION

Occupiers' Liability, being one of the largest subcategories within the broad spectrum of the 'law of tort', deals with the liability of an occupier of land or premises for harm inflicted upon persons on the premises as result of the condition of the premises and things done there. The general principles of occupiers' liability discussed in this chapter and the subsequent ones apply only to persons who suffer injury while on another's premises. Injury suffered as a result of the dangerous state of another's premises by persons who have not entered thereon is not within the ambit of this discussion or study. This chapter deals with the general principles of occupiers' liability law likely to be encountered in any occupier's liability case. It starts with a historical background in an endeavour to help appreciate the changes and modifications taking place in this field of the law.

1.2 HISTORICAL BACKGROUND AND DEVELOPMENT

Historically, the common law system of jurisprudence had placed the general concepts of land ownership in very high esteem. This in part can be attributed to the political, social and economic influences, which the English feudal system exerted on the law of torts throughout its period of formative developments. The concept of land ownership has always held a somewhat unique position in tort jurisprudence.¹ The USA Supreme Court in the case of Humphrey v. Twin State CAS & Elec.Co.,² discussed the origins of the landowners' duty of care as related to English feudal concepts. **Powers, J**³ when delivering judgment for that Court said:

“The rule exempting a landowner from liability to a trespasser injured through the condition of the premises is found to have originated in an overzealous desire to safe guard the rights of land ownership as it was regarded under a system of land estate, long since abandoned, under which the law ascribed a peculiar sanctity to rights therein.”

¹ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Bender &Co., INC, 1988) p3

² (1959) 100 Vt.414, 139A.440, 442

³ I bid

Harper, James and Gray⁴ also commented in the following way:

“This sanctity of land ownership included notions of economic importance and social desirability of free use and exploitation of land. Probably it also included, especially in England, more tangible overtones bound up with values of a social system that traced much of its heritage to feudalism.”

Under the English feudal system as it existed in Western Europe during the Middle Ages, as **Powell J.**,⁵ noted, the act of breaking into a man's ‘close’ was an invasion of exaggerated importance and gravity and was promptly resented. It was under this system that the action of *trespass quod clausum* developed- beginning as a penal process, and so criminal in essence, and finally becoming a means of redressing a private wrong. The object of the law was to safeguard and protect various rights in land. Accompanying the aphorism ‘an Englishman's home is his castle’ was the view that what he did on his land was his business.⁶ Thus an early statement of the rule that an occupier is under no duty to exercise care for trespassers is to be found in the judgment of **Chief Justice Gibbs** in **Deane v. Clayton**,⁷ in which he said:

“I know it is a rule of law that I must occupy my own so as to do no harm to others but it is their legal rights only that I am bound not to disturb. Subject to that qualification, I may use my own as I please.”

Thus, at common law, the extent of the occupier's liability varied according to whether the person on the land entered under a contract as an invitee, as a licensee, or as a trespasser.⁸ This classification based upon the legal status of persons on the land as trespassers, licensees, or invitees contributed to the development of specialized duties and liability with respect to the owners and occupiers of real property.⁹ In view of this, **The Law Reform Commission of South Wales Cap and Territory** in discussing ownership of property as the rationale for the development of occupier liability rules gave the following summary:

⁴ Harper, James, F, & Gray, The Law of Torts, (Boston: Little, Brown and Co., 1886) P132

⁵ *Humphrey v. Twin State Cas & Elec.Co*, (1959) 100 Vt.414, 139A.440, 442

⁶ ⁶ Para 10 of The law Reform Commission Report No.42, of Australian Capital Territory (Cambala: Australian Government, 1988)

⁷ (1817) 7 Taunt. 489 at 553

⁸ Martin A. Elizabeth, Oxford Dictionary of Law (Oxford: Oxford University Press, 2002) p339

⁹ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, VI, (New York: Mathew Bender &Co., INC, 1988) p3

“The law of occupiers’ liability was developed in the nineteenth century and reflected traditional attitudes about ownership of property. Accompanying the aphorism ‘an Englishman’s home is his castle’ was the view that what he did on his land was his business. Visitors should take the land or premises as they find them. Thus no duty of care was traditionally owed to trespassers, though the law did place limits on dangerous and intentional infliction of harm, such as setting traps for trespassers. A very low standard of care was owed to licensees because it was thought that such visitors were there by way of indulgence and it would have been an imposition on the landholder to do more than to remove ‘concealed traps.’ The paradigm for a licensee was the person permitted to take a short cut across the occupier’s land. Only if there were some benefit to the landholder arising out of the visit would the law impose a higher standard of care. Thus the person who paid to enter the premises, the contractual entrant, or the person who came to do business, the invitee, was owed higher (and different) standards of care. The rationale for these higher standards was that the occupier was no longer merely granting an indulgence but was materially gaining from the visit. That gain had to be ‘paid for’ by the imposition of a more stringent standard of safety. Something in the nature of a contractual exchange seems to have been behind the standard of care owed to invitees and contractual entrants.”¹⁰

3.3 DISSATISFACTION WITH COMMON LAW-CATEGORIES

The common law rules limiting the duties owed by owners and occupiers of land reflected a policy-based preference for private use and enjoyment of property, at least when balanced against the safety concerns of entrants.¹¹ This position led to overwhelming dissatisfaction with common law categories as it amounted to a departure from the fundamental principle of negligence law that:

“Whenever one person is by circumstance placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to person or property of another, a duty arises to use ordinary care and skill to avoid such danger.”¹²

A good example of an expression of a spirited dissatisfaction with the common law categorization was given by **North Dakota Supreme Court, in O’ Leary v. Coenen.**¹³ In that persuasive case, **Paulson J.**, gave a summary of the rationale for abolishing the common law categories in the following manner:

¹⁰ ¹⁰ Para 10 of The law Reform Commission Report No.42, of Australian Capital Territory (Cambala: Australian Government, 1988)

¹¹ Harper, James, F, & Gray, “The Law of Torts”, In Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 1988) P 192

¹² Heaven v. Pender, 11 QBD.503, 509(1883)

¹³ 251 N.W.2d 746(N.D.1977)

“The common law categories have no logical relationship to the exercise of reasonable care for the safety of others; human safety is of great importance than the land occupier’s unrestricted freedom; common law distinctions are difficult to apply to specific factual situations; the use of the common law categories forecloses a jury from applying changing community standards to duty owed by an occupier of premises to entrants thereon; the common law categories can mislead a jury; and common law category distinctions and exceptions make the use of common law categories complex, confusing, and inequitable.”¹⁴

Another good example of this dissatisfaction was the case of **Kermarec v. Compagnie**¹⁵ in which the United States Supreme Court declined to apply the common law distinctions between licensee and invitee in an admiralty case contending, *inter alia* that:

“...the classifications and sub classifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, old ones have become obscured. Through this semantic morass the common law has moved towards imposing on owners and occupiers a single duty of reasonable care in all the circumstances.”

In Scotland, the dissatisfaction and condemnation of the common law categorization extended to the rules relating to trespassers and is reflected in the provisions of the Scottish Occupiers' Liability Act, 1960, which apply the test of reasonable care to all person, including trespassers. The main reason behind that was the dissatisfaction felt in Scotland at the imposition upon that country of the English category rules by the House of Lords’ decision in **Robert Addie & Sons Ltd. v. Dumbreck**¹⁶. Speaking of the results of that case, a notable Scottish writer says:

“Not merely was this a subversion of the common law of Scotland but it gave rise to many narrow and difficult arguments on categorization, particularly as between invitee and licensee. The insistence on labels, categories and rigidly distinct compartmentation obscured fundamental principles and produced results exhibiting the worst characteristics of purely mechanical jurisprudence. The categories, in later cases, showed a great tendency to shade into one another and similar facts were sometimes differently categorised as between Scotland and England at different times. There was also a noticeable tendency to treat judicial formulations of a duty of care as canonical and to accord them the deference, and the casuistic interpretation, usually reserved for statutes.”¹⁷

251 N.W.2d 746(N.D.1977

358 US .625,630-31(1959)

(1929) A.C. 358 at 360the condition of liability was stated to be some wilful act involving something more than absence of reasonable care - some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser

D.M. Walker, 2 Law of Delict in Scotland (1966) 588) quoted in New South Wales Law Reform Commission Working paper No. 3 (1969) on Occupiers’ Liability, Para 40.<http://www.graffit.gov.au/lawlink>

1.4 DEPARTURES FROM COMMON-LAW RULES (MODERN TREND)

In 1957, the British Parliament abolished the distinction between the duties of care owed by occupier of premises to licensees and those owed to invitees. The occupiers' Liability Act 1957(UK) imposes upon an occupier a 'common duty of care' to all his visitors, that is, those who enter by his invitation or with his permission to see that they will be reasonably safe in using premises for the purpose for which they were invited or permitted to be there¹⁸. The common duty of care is not owed to trespassers under the 1957 Act, but a somewhat analogous duty has in effect been extended to them by the occupier's liability Act of 1984¹⁹ that makes the duty owed to persons "other than visitors." This undoubtedly includes trespassers, persons exercising private rights of way and entrants to National Parks. In Scotland, the Occupiers' Liability (Scotland) Act 1960²⁰ requires an occupier to show to all persons entering the premises such care as is reasonable in all circumstances of the case.

In the United States, Connecticut was the first jurisdiction to change the classification system by legislation. A Connecticut statute provided that a social guest was to enjoy the same duty of care that owed by the possessor to invitees.²¹ It was not until 1968, however that a frontal attack was launched upon the classification system. In a landmark decision of **Rowland v. Christian**,²² the California Supreme Court adopted a straight negligence test for premises liability. The conclusion the Court reached was that:

"The proper test to be applied to the liability of possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to suit, his status have some bearing on the question of liability, the status is not determinative."

¹⁸ Section 2(1) of The Occupiers Liability (England) Act (1957), Also Section 3 (1), (2) of Chapter 70 of the Laws of Zambia

¹⁹ Section 1(1)(a) Occupiers Liability (England) Act 1985

²⁰ 8 & 9 Eliz, 2, C.30

²¹ Conn. Gen. Stat.s 52-559a (Supp. 1971)

²² 69 Cal.2d 108,443 P.2d 561,70 Cal. Rptr. 97(1968)

In this regard, under the reasonable care standard, the entrant's status as a trespasser, licensee, or invitee is only one factor to be considered in determining whether the defendant have met the requisite standard of duty of care. Despite the fact that recent judicial and legislative developments in many modern societies have made significant modification to traditional occupiers' liability doctrines, much of modern tort jurisprudence continues to reflect these specialized legal principles and terminologies which have been developed in response to unique situations created by ownership and occupancy of land.

1.5 OCCUPIER'S LIABILITY.

The Oxford Dictionary of Law²³ defines occupier's liability as "the liability of an occupier of land or premises to persons on the land for the condition of the premises and things done there." In other words, it is that part of the law which sets the safety standards which householders, farmers, tenants, companies and anyone else in control of land or buildings should observe to safeguard those who come onto the premises.

1.6 PREMISES

In the context of occupier's liability, premises may include: land and structures or either of them, water, ships and vessels, trailers and portable structures designed or used for a residence, business shelter, and railway locomotives, railway cars, vehicles and aircraft in so far as the injury complained of has arisen from the dangerous structural condition of the conveyance.²⁴ This position has to some extent been confirmed by the British Occupiers' Liability Act 1957, s.1 (3), which provides that:

"The rules thereby enacted in relation to an occupier of premises and to his visitors shall apply, in like manner and to the like extent as the principles applicable to an occupier of premises and his invitees and licensees would apply, to regulate the obligations of a person occupying or having control over any fixed or moveable structure, including, any vessel, vehicle or aircraft".

²³ Martin A. Elizabeth, Oxford Dictionary of Law (Oxford: Oxford University Press, 2002) P 339

²⁴ Heuston R.F.V and Buckley R.A, Salmond & Heuston on The Law of Torts, 20 ed (Delhi: Universal Law Publishing Co, 2004) P 263,

1.7 THE ENTITY BEARING LIABILITY OR RESPONSIBILITY

Generally speaking, liability is based on occupancy and control, not on ownership. The person responsible for the condition of the premises is the one in actual occupation or possession of the premises for the time being, whether he is the owner or not. Such an emphasis seems reasonable since it is he who has the immediate supervision and control and the power of permitting or prohibiting entry of other persons. Besides, he is generally in the best position to discover an existing danger and to control it. However, land ownership cannot be ignored as at times liability may be imposed on the owner who no longer retains control over it, as where he leases or sells property in a dangerous condition.²⁶

1.8. DUTY TO PERSONS INJURED ON THE PREMISES

Under the traditional common law principles, when a plaintiff is injured on the premises, the defendant's duty is delineated according to the legal status of the entrant as a trespasser, licensee or invitee. This common law approach to landowner liability, though unique and quite rigid, has continued to survive, and even today, it remains firmly entrenched in many jurisdictions, despite serious criticism and growing rejection not only in America and other modern societies, but also in England, where the doctrine originated.²⁷ Even in jurisdictions, which have totally rejected the common law categories, the classification of entrants remains a relevant factor in determining the landowner's liability. It is important to note that the Occupiers' Liability Act 1957 (England), which provides in like terms with Chapter 70 of the Laws of Zambia (Occupiers' Liability), does not alter the common law as to the person on whom such a duty is imposed on or to whom it is owed; and

²⁵ Holden v White (1982) QB.679, 687

²⁶ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) p37

²⁷ Ibid, Volume 2, p 9-2

accordingly, the persons who are to be treated as an occupier and as his visitors are the same as the person who would at common law be treated as an occupier and his invitees or licensees.²⁸

1.8.1 TRESPASSER

A trespasser is a person unlawfully upon the land of another to whom the occupant, under the traditional common law categorization, owes no duty except to refrain from wilfully and wantonly harming the trespasser.²⁹ Thus Chief **Justice Gibbs**, as we noted earlier, in the case of **Dane v. Clayton**³⁰, said:

“I know it is a rule of law that I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb. Subject to this qualification, I may use my own as I please.”

It is worth noting that more exceptions than rules have been created due to reluctance among many courts to impose this harsh “no duty” rule based solely on the entrant’s legal status as a trespasser. In some jurisdictions, although the landowner is not liable for his failure to discover the presence of a trespasser, once actual presence of the intruder become known, the status of the entrant improves, so much that the landowner must exercise reasonable care to avoid injuring him. This duty has been extended in situations where the trespasser’s presence is unknown but it should have been anticipated, as with trespassing children or constant or continuing trespassers. In some American jurisdictions, the landowner now have an affirmative duty to render aid and assistance to a trespasser found in distress.

1.8.2 LICENSEE

A licensee has been generally defined as any person who enters land with the bare permission or consent of the owner. He is therefore not a trespasser because he enjoys at least the implied permission of the owner to enter. However, since his presence serves his own purposes, divorced from any economic benefit to the owner, he cannot be deemed an invitee and therefore, languishes in

²⁸ Section 1(2) of The Occupiers’ Liability Act 1957(England), Section 2(2) of Chapter 70 of the Laws of Zambia

²⁹ Kirk Drussel and Margaret E.Swenson, Plaintiff’s Proof of a Prima Facie Case (Illinois: Callaghan & Company, 1983) P208

³⁰ (1817) 7 Taunt. 489 at 553

a vaguely defined legal limbo, somewhere between a trespasser and an invitee.³¹ Early English cases treated the licensee like a trespasser, except that the licensee might be anticipated on the land in the exercise of his license.³² The occupier had no duty to repair the condition on his premises for the licensee's safety but rather, his only obligation was to warn the licensee of traps or conditions which had the deceptive appearance of safety.³³ As an early English Court noted in the cases of **Gautret v Elberton**³⁴, since the permission to use the land is in a nature of a gift:

The giver is not responsible for the damage resulting from the insecurity of the thing, unless he knew of the evil character at the time, and omitted to caution the donee.

The modern rules in a large number of jurisdiction require the landowner to warn the licensees of any unreasonably dangerous conditions, hidden conditions known to the possessor but unknown to the licensee, or to exercise reasonable care not to injure a known licensee, or one who is reasonably to be anticipated. Liability is not based upon failure to keep the premises in a safe condition, but rather, upon the breach of a duty to warn of dangerous conditions known to the possessor.

Thus **Joseph A. Page**³⁵ put the position as follows:

“The licensee is entitled to the same knowledge of hidden perils that the licensor possesses, so that the licensee can intelligently decide whether his purpose for entering is important enough to justify incurring the risk he faces by entering. Therefore the licensee should not be held to assume such peril in the absence of a warning.”

1.8.3 INVITEE

The **Oxford Dictionary of Law**³⁶ defines an invitee as “a person permitted to enter land or premises for a purpose in which the occupier of that land has a material interest. An example of an

³¹ Page A. Joseph, The Law of Premises Liability (Washington, O.K.: Anderson Publishing Co. 1988) p33

³² The Position of a licensee was Distinguished by Mr. Justice Willes following the precedent of *Southcote v. Stanley* (1856) 1 H. & N. 247 in *Gautret v. Egerton* ((1867) L.R. 2 C.P. 371). There he said that for recovery "something like fraud must be shown" (Id. at 375), the case being treated as analogous to that of a gift of chattels.

³³ In those days, Norman S. Marsh has suggested ("The History and Comparative Law of Invitees, Licensees and Trespassers" (1953) 69 *L.Q.R.* 182 at 192) , licensees and trespassers were more or less lumped together. Only gradually the rule emerged that the duty to a licensee was to give warning of known but concealed hazards, or "traps". In Para 3 of the Law Reform Commission Paper No.3(1969)-Occupiers' Liability, accessed 21 November, 2005

³⁴ (1867) LR .2 C.P371,at374, 36 L.J.CP 191

³⁵ Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 1988) p 44

³⁶Martin A. Elizabeth, Oxford Dictionary of Law (Oxford: Oxford University Press,2002)p 265

invitee is a customer in a shop". The Second Edition of The Restatement of Torts³⁷ defines the term 'invitee' as follows:

1. An invitee is either a public invitee or a business invitee
2. A public invitee is a person who is invited to enter or to remain on the land as a member of the public for the purpose for which the land is held open to the public
3. A business invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor's land.

Further, the Restatement (second) of Torts provides that:

"[w] here land is held open to the public, it is immaterial that the visitor does not pay for his admission, or that the possessor's purpose in opening the land is not a business purpose, or that the visitor's presence is in no way related to the business dealings with the possessor, or that there is any possibility of benefit or advantage, present or prospective, pecuniary or otherwise, to the possessor."³⁸

In a seminal article **Dean William L. Prosser**³⁹ examined the early English case law and concluded that a possessor's duty towards an invitee was not premised upon the economic benefit conferred by the visit, but rather upon an implied representation for safety, a holding out of the premises as being suitable for the purpose for which the visitor came. He concluded that:

"What is required is something in the way of an appearance of offering to the public [an] inducement to enter, [and] preparation or assurance that the premises are provided and intended for public use—that the public will not merely be tolerated, but is welcomed, encouraged and desired to come. It is in this essence that "invitation" is used properly."⁴⁰

A classical formulation of duty of care was established in **Indermaur v. Dames**⁴¹ where **Justice Willes** said that the invitee:

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

Therefore, an occupier of premises owes an invitee a duty to exercise reasonable care in maintaining the premises. This duty includes not only the requirement to warn of known or hidden dangers existing on the premises, but the duty to exercise reasonable care in inspecting the premises

³⁷ American Law Institute "Restatement [second] of Torts". In Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 1988)P68

³⁸ Ibid

³⁹ Dean William L. Prosser, quoted In Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 1988) p67

⁴⁰ I bid

⁴¹ ((1866) L.R. 1 C.P, 274 at p 288

to discover such hazards which do in fact exist or may be reasonably foreseeable.⁴² Thus the mere warning if it is likely to be unnoticed or otherwise ineffective is not sufficient. Similarly, the affirmative duty to act may even require the owner or occupant to render emergency assistance to an invitee discovered to be in peril while on the premises, or to control the actions of certain third persons on the premises.

However, a visitor enjoying invitee status must remain within the scope of the invitation if the person is to continue to be classified as an invitee. If the person exceeds the scope of the invitation she or he may become a trespasser or a licensee depending on whether or not the possessor has acquiesced. When an invitee enters upon a premises held open to the general public, the terms of the public invitation determines the physical area within the scope of invitation. The crucial factor here is whether a reasonable person, viewing the arrangement of the premises would believe that he or she is invited to go.⁴³ Thus if the general public reasonably thinks that the entire premises is within the public invitation, as in the case of recreation centres or public parks, the visitor will remain an invitee on all portions of the premises, absent of notices to the contrary.⁴⁴

1.9 THIRD PARTIES

Since the occupier of premises has the immediate supervision and control and the power of permitting or prohibiting entry of other persons upon the premises, he is under a duty to take reasonable care to prevent damage, at least from unusual danger, arising from such acts of third parties as could be reasonably be foreseen.⁴⁵ Hence, the occupier of a theatre has been held liable at common law for a dangerous show put on by an independent contractor,⁴⁶ and the occupier of a vehicle, club or restaurant for assaults committed by intoxicated passengers, or guests.

⁴² Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) P 6

⁴³ American Law Institute “ Restatement [second] of Torts”. In Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 1988) P74

⁴⁴ Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 1988) P74

⁴⁵ *Simons v Winslade* (1938) 1 ALL ER .774

⁴⁶ *Cox v Coulson* (1916) 2KB 177

⁴⁷ *Adderley v. Great North Ry* (1905) 2 IR. 378(assault by drunken fellow passenger)

Commenting on this position, a notable authority,⁴⁸ said “ there is no reason to suppose that these cases would be decided any differently under the Act”.

1.10 INDEPENDENT CONTRACTOR

The position of the law in Britain⁴⁹ and Zambia⁵⁰ is to the effect that where injury is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier will not be answerable for the danger if in all the circumstances he acted reasonably in entrusting the work to an independent contractor and took such steps (if any) as he reasonably ought to in order to satisfy himself that the contractor was competent and the work was properly done.

1.11 CHILDREN

The Occupiers’ Liability Act,1957 (UK), in similar terms to section 3(3) of the Occupier’ Liability Act in force in Zambia, provides that in assessing the common duty of care, an occupier must be prepared for children to be less careful than adults.⁵¹ In essence, this does no more than re- enact the common law.⁵² Many dangers that would be open and obvious to the adult may be concealed and secret traps for a child. In the case of an infant, there may be a duty, for example, not only to avoid digging pitfalls for them, but also not to lead them into temptation.⁵³

1.12 PERSONS ENTERING AS OF RIGHT

According to **Salmond &Heuston on The Law of Torts**,⁵⁴ people entering as of right but not in pursuance of any contract, between the parties are a separate category. This refers to common law where they were either invitees or licensee and so classified as lawful visitors since 1957 and hence

⁴⁸ Heuston R.F.V and Buckley R.A, Salmond & Heuston on The Law of Torts, 20 ed(Delhi: Universal Law Publishing Co,2004)P 275

⁴⁹ Section2(4)(b) of the Occupier’s(England) liability Act 1957

⁵⁰ Section 3 (4) b of Chapter 70 of the Laws of Zambia

⁵¹ Section 2(3) of The Occupiers’ Liability Act 1957 [England], Section 3 (3) b of Chapter 70 of the Laws of Zambia

⁵² Martin v. Middlesborough Corporation (1968) 63 L.G.R 385,386

⁵³ Latham v. Johnston (1913) KB .398,415, per Hamilton

⁵⁴ Heuston R.F.V and Buckley R.A, Salmond & Heuston on The Law of Torts, 20 ed(Delhi: Universal Law Publishing Co,2004)P

owed the common duty of care. This covered a heterogeneous group of people who had a right to go onto the occupier's land, including visitors to public facilities such as parks and playgrounds, the person who came to read the meter and the fireman who came to extinguish a fire.

1.13 SUMMARY OF AVAILABLE DEFENCES

The commonly asserted defence in occupier's liability cases is contributory negligence.⁵⁵ The plaintiff may be contributorily negligent in initially entering the defendant's premises or in failing to exercise reasonable care to avoid a risk after entering the premises. Assumption of the risk is another commonly asserted defence. Unlike contributory negligence, assumption of risk is consensual in nature and depends upon the entrant's knowledge or awareness of the danger⁵⁶. Assumption of risk is discussed in great depth in the second part of chapter two.⁵⁷

1.14 CONCLUSION

This chapter was devoted to a thorough summary of the general principles of occupiers' liability law. These principles are cardinal because they cover the major substantive issues likely to be encountered in any occupiers' liability. The essay established that although recent judicial and legislative developments in many modern societies have made significant modification to traditional occupiers' liability doctrines, much of modern tort jurisprudence continues to reflect specialized legal principles and terminologies which have been developed in response to unique situations created by the ownership and occupancy of land. The first part of the next chapter looks at duty of care while the second part of chapter two analyses and examines the law on occupiers' liability in Zambia.

⁵⁶ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, VI, (New York: Mathew Brenda &Co., INC, 1988) P 86

⁵⁷ Post Para 2.2.8(b) analysing section 3(5) which provides that "The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor"

CHAPTER TWO (PART I)

2.1 DUTY OF CARE FOR OCCUPIERS OF COMMERCIAL PREMISES.

2.1.1 INTRODUCTION

Occupation of a premise is one of the endless situations under which a duty of care may arise. One can go so far as to say a hermit can be careless about the maintenance of his cave but the same is not true of the householder who can reasonably expect his house to be visited by friends and children of friends, by mail couriers and meter readers, and in many cases, by clients or patients.⁵⁸

This part of chapter two is devoted to duty of care, that is, common law and statutory. Since the duty of care of the commercial property owner or possessor may depend upon the specific type of commercial premises in question, this chapter will look at what the duty of care would be in such commercial premises as: retail shopping establishments; hotels and motels; restaurants and taverns, public transportation terminals, and other commercial establishment.

2.1.2 DUTY OF CARE

The Oxford Dictionary of law⁵⁹ defines duty of care as “the legal obligation to take reasonable care to avoid causing damage.” In the law of ‘Occupiers’ Liability’, duty of care is a very crucial factor because it is upon it that the tort liability of the occupier of premises for harm inflicted upon persons while on the premises is based. In the previous chapter, we observed that the defendant’s duty when a plaintiff is injured on the premises, at common law, is delineated according to the legal status of the entrant as a trespasser licensee or invitee⁶⁰ and the various duties owed at common law have been discussed accordingly.

⁵⁸ Kirk Drussel and Margaret E.Swenson, Plaintiff’s Proof of a Prima facie Case (Illinois: Calling ham & Co, 1983) P 206

⁵⁹ Martin A. Elizabeth, Oxford Dictionary of Law (Oxford: Oxford University Press, 2002) P 165

⁶⁰ I bid p 9 Para. 1.8.3

To just reiterate, the classical formulation of the duty of care to an invitee was in the leading case of **Indermaur v. Dames**⁶¹ where **Mr. Justice Willes** said that the invitee:

“Using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.”⁶²

Meanwhile Master of the Rolls Brett had asserted the comprehensive principle in **Heaven v. Pender**⁶³ that:

“Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the property or person of another, a duty arises to use ordinary care and skill to avoid such danger.”⁶⁴

The Master of the Rolls described the duty of an occupier to invitees as one “of using reasonable care so as to keep his house or warehouse that it may not endanger the person or property of the person invited”⁶⁵ and to the licensee “a duty not to lay a trap for him.”⁶⁶

2.1.3. STATUTORY DUTY

In the first chapter, this paper suggested that there was wide spread dissatisfaction with common law principles regarding occupiers liability. This situation reached its culminating point after the House of Lords decision in **London Graving Dock Co. Ltd. V. Horton**⁶⁷ in which the invitee’s knowledge of a danger was treated as a conclusive answer to his claim against the occupier. Widespread condemnation of this kind of formalistic approach led to the third report of the

⁶¹ (1866) L.R. 1 C.P, 274

⁶² I bid, at 288

⁶³ (1883) 11 Q.B.D. 503

⁶⁴ Ibid, at 509

⁶⁵ I bid p 508

⁶⁶ Ibid p 509

⁶⁷ (1951) A.C 737

English Law Reform Committee in 1954.⁶⁸The central recommendation of this Committee was that the distinction between invitees and licensees should be abolished and that, with regard to lawful but non-contractual visitors, “the occupier of premises should owe a duty (‘the common duty of care’) to every person coming upon the premises at his invitation or by his permission, express or implied, to take such care as in all the circumstances of the case is reasonable to see that the premises are reasonably safe for use by the visitor for the purpose to which the invitation or permission relates.”⁶⁹ A separate provision was made for contractual entrants but to similar effect in the absence of express contractual provision on the matter.⁷⁰Clearly, this was the birth of the concept of the “common duty of care” found in many legislations on Occupiers’ Liability. The Occupiers’ Liability Act, 1957(UK)⁷¹, which was passed by the British Parliament, substantially adopted the committee’s recommendations.⁷² The intention of the Act was to replace, refine and harmonize the common law duty of care owed by occupiers of premises to visitors on those premises. That much seems evident from the wording of s. 1(1) of the Act:

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

The English Occupiers' Liability Act, 1957 provides by the first two subsections of s. 2:

“(1) An occupier of premises owes the same duty, the “common duty of care”, to all his visitors, [the term “visitors” is elaborated in the Act in such a way as to exclude trespassers] except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

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

⁶⁸ New South Wales Law Reform commission Working Paper 3(1969)-Occupiers’ Liability Para 4

⁶⁹ English Law Reform Committee, 1954 Para 78 in New South Wales Law Reform commission Working Paper 3(1969)-Occupiers’ Liability Para 4

⁷⁰ New South Wales Law Reform commission Working Paper 3(1969)-Occupiers’ Liability Para 4

⁷¹ 5 & 6 Eliz. 2, c. 31

⁷² New South Wales Law Reform commission Working Paper 3(1969)-Occupiers’ Liability Para

The pattern of the English legislation was followed by a number of jurisdictions. For example, the New Zealand Occupiers' Liability Act ⁷³, is in terms virtually identical with those of the English Act in the present respects. Pioneered by the English legislation, Scotland adopted a more radical approach when it legislated on the subject three years after the English Occupiers' Liability Act, 1957, by bringing trespassers within the scope of the Occupier's duty of care⁷⁴. Section 2(1) of the Occupiers' Liability (Scotland) Act, ⁷⁵ provides that:

“The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.”

Both the Ontario Occupiers' Liability Act, 1980⁷⁶ and Manitoba Occupiers' Liability Act, 1983⁷⁷ followed the Scottish rather than the English model. There the duty of care applies to all entrants including trespassers.

The duty which an occupier of premises owes to persons other than his visitor under English Law is governed by the Occupiers' Liability Act 1984.⁷⁸ Under this Act, an occupier only owes a duty to other persons, that is, trespassers and other persons who enter lawfully but without the occupier's permission, if the occupier is aware of or has reasonable grounds to know of the

⁷³ No. 31 of 1962 s. 4 subs. (1) and (2).

⁷⁴ Ireland Law Reform Commission Consultation Paper on Occupiers' Liability (1993) Para 3.15

⁷⁵ 1960 (8 & 9 Eliz, 2, c. 30)

⁷⁶ Section 3(1) provides that the occupier of premises owes a duty to take “Such care as in all the circumstances of the case is reasonable to see that the person entering on the premises and the property brought on the premises by those persons are reasonably safe while on the premises.

⁷⁷ Section 3(1) of the Occupiers Liability, 1983 provides that” An occupier of premises owes a duty to persons entering on the premises and to any person, whether on or off the premises, whose property is on the premises, to take such care as, in all circumstances of the case, is reasonable to see that the person or property, as the case may be, will be reasonably safe while on the premises”.

⁷⁸ Section 1 of the Occupiers' Liability [England] Act 1984

danger on the premises⁷⁹ and that a person may be in the vicinity of danger and the risk is one against which he may reasonably be expected to offer protection.⁸⁰ However, this duty, if any is confined to taking such care as is reasonable in all the circumstances to see that the danger does not cause death or personal injury to the person concerned.⁸¹ Taking such steps as are reasonable to give warning of danger or to discourage persons from incurring the risk may discharge the duty.⁸²

From the foregoing discussion of duty of care, a common trend cutting across all jurisdictions is that the duty is to take reasonable care in the circumstances to make the premises safe, in simple terms. Depending on the jurisdiction in question, the duty may be owed to all entrants, including trespassers. In some jurisdictions such as the English, it is only owed to visitors, that is to say those who enter under invitation or by permission⁸³ (implied or express).

2.1.4. DUTY OF CARE FOR SPECIFIC TYPES COMMERCIAL PREMISE.

The duty to take reasonable care in all the circumstances to make the premises safe does not change but the factors that are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each factual situation, thus the proviso "such care as in all circumstances of the case is reasonable." One such circumstance is the nature of the premises.⁸⁴ Thus the owners of shopping centres, department stores, grocery stores [retail shopping establishments), hotels and motels, restaurants and taverns, public transport terminals, and other commercial properties must meet these requirements.

2.1.4(a) HOTELS AND MOTELS

Under the "reasonable care", that is, "duty to take such care as is in all the circumstances of the case is reasonable", the innkeeper must exercise reasonable care to avoid exposing his guest and

⁷⁹ Section 1[3][a] of the Occupiers' Liability Act of 1984

⁸⁰ Section 1[3][b] of the Occupiers liability Act of 1984

⁸¹ Ibid Section 1[4]

⁸² Ibid Section 1[5]

⁸³ Section 1(2) of the Occupiers Liability Act, 1957(UK)

⁸⁴ *Waldwick v. Malcolm*, [1991] 2 S.C.R. 456, 1991 CanLII 71 (S.C.C.) (1991), 3 O.R. (3d) 471; (1991), 83 D.L.R. (4th) 114; (1991), 47 O.A.C. 2

other visitors to unreasonable risk and to protect them and their property against injury.⁸⁵ The duty extends to both the parts of the premises and articles of furniture, which the guest may use during his stay.

2.1.4(b) RESTAURANTS AND TAVERNS

Many cases grow out of the very nature of the activities typically conducted on the premises, which are: ordering, serving, and eating food.⁸⁶ This is so as most restaurant related injuries occur when a patron suffers some physical harm caused by the food or beverage item that was prepared or consumed on the premises, in which case, liability is based upon a theory of negligence in the preparation of the food or beverage as well as theories of implied warranty and strict liability.⁸⁷ However, some cases involving restaurant related injuries arise from some conditions existing on the premises. The occupier is required to exercise reasonable care in all the circumstances to insure his visitor does not suffer harm either as a result of the food, spillage food substances or the conditions on the premises. Another theory that has been asserted with increasing frequency against restaurants and tavern owners or occupiers, in some jurisdictions is that of a drum shop liability. Under this theory, operators of drum shops,⁸⁸ like any other occupiers, owe to their visitors a general duty of reasonable care, which may extend to safeguarding them from the foreseeable intentional or negligent acts of third parties.⁸⁹ Stated in broad terms, the common law duty of drumshop liability is to use due care in dispensing alcoholic beverages so as not to subject foreseeable victims of intoxicated patrons to unreasonable risk of harm.⁹⁰

⁸⁵ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) P -45

⁸⁶ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) P 48

⁸⁷ Ibid

⁸⁸ A drum shop is defined as a bar or saloon by Webster's New World Dictionary 424(2nd college ed .1980)

⁸⁹ Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 1988) p 329

⁹⁰ Ibid p

2.1.4(c) PUBLIC TRANSPORTATION TERMINALS

The carrier must exercise reasonable care to protect from harm of the public who are on the premises to transact legitimate business, as well as those who are accompanying departing passengers or coming passengers.⁹¹ Clearly, this duty to take reasonable care with regard to injuries in terminals extends to certain categories of non-passengers as well as to passengers. A unique question regarding the defendant's duty that may arise is how to hold the government liable, since public transportation facilities are owned or operated by governmental entities. This will very much depend on whether or not the government enjoys any immunity. For example, in a Michigan case of **Johnson v. Detroit Metropolitan Airport**⁹² an injured patron brought an action against a municipal air port authority for injuries sustained when she slipped and fell on ice cream that was on the floor of the air port terminal building .The court addressed a Michigan Statute which waived immunity against municipalities engaged in proprietary functions, and construed the operation of a municipal airport for profit as a non immune proprietary function for which the city could be held liable.

2.1.4(d) OTHER COMMERCIAL ESTABLISHMENTS

Tort claims can be brought against the occupiers of every type of commercial premises including banks, colleges and universities, gasoline stations, hospitals and nursing homes and libraries and museums. The legal principles relating to the occupant's duty of care are the same as those, which generally pertain to occupants of other commercial premises.⁹³ Under certain circumstances, however, the duty of care may be enlarged or limited due to unusual nature of the premises or activities conducted on the particular premises. For instance, the owner or possessor of bank premises is generally not liable for injuries sustained by customers during the course of bank robberies, since such events do not regularly occur on the premises.⁹⁴ Conversely, the operator of a tavern situated in a high – crime neighbourhood or known of its rowdy patrons may

⁹¹ *ibid* p

⁹² *Johnson v. Detroit Metropolitan Airport*, 133 Mich, App. 603, 350 N. 2d 295 (1984)

⁹³ Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 19884-60

⁹⁴ *Ibid* p

be required to provide protection to its customers, even though the injured plaintiff may have foreseen the possibility of a criminal attack.⁹⁵

2.1.4(e) RETAIL SHOPPING ESTABLISHMENT

The occupier is under a duty to exercise reasonable care in all the circumstance so as to avoid injury to entrants. This duty of care may be in relation to how he maintains the floor, the displays, entryways and approaches, stairways and steps and even a parking lot where he provides one for customers. The fact that the injured entrant has not actually made a purchase at the time of the injury, or had not even entered the premises with a definite intention of making a retail purchase, does not affect the entrant's status as a visitor.⁹⁶

2.1.5 CONCLUSION

It has been established that the duty of an occupier is to exercise reasonable care in all the circumstances. This therefore means that an occupier of premises must exercise reasonable care to avoid injury to entrants upon his premises. Accordingly, an occupier of commercial premises must warn entrants of all known dangers existing on the premises and must, in the exercise of reasonable care, inspect the premises in order to discover any hidden dangers. Once he has discovered or reasonably should have discovered the existence of a latent danger on the premises, a further duty arises to either provide a proper warning, or to remove the danger entirely, there by making the premises safe for the entrants.⁹⁷ The second part of this Chapter analyses the law applicable to commercial premises in Zambia.

⁹⁵ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) P 4- 59

⁹⁶Ibid p 4-16

⁹⁷ I bid p 4-7

PART II

2.2 THE LAW ON OCCUPIERS' LIABILITY IN ZAMBIA.

2.2.1 INTRODUCTION

In this part of chapter two, we analyse that part of the law in Zambia that determines whether, and to what extent, occupiers of property are to be liable for damage or injury caused to visitors to their property. The Occupiers' Liability Act (Chapter 70 of the Laws of Zambia) will be examined, analysed, compared and or contrasted with the law in foreign jurisdictions.

2.2.2 SOURCES OF OCCUPIERS' LIABILITY LAW IN ZAMBIA

There are indeed a number of statutes that set the safety standards which householders, farmers, tenants, companies and anyone else in control of land or buildings should observe to safeguard those who come onto the premises. These include, among others: the Factories Act,⁹⁸ the Hotel Act⁹⁹. Further, just like most other countries formerly tied to England, Zambia is recognised as a common law jurisdiction. This description is supported by the history of the country as well as _____ent statutory guidelines and judicial declarations. For example, common law is applicable to Zambia by virtue of The English Law (Extent of Application) Act.¹⁰⁰ Besides, Section 2(2) of the Occupiers' Liability Act is to the effect that we must go back to common law in order to determine whether a person is a "visitor", or an "occupier."

2.2.3 OCCUPIERS' LIABILITY ACT

This Act is substantially the same as the Occupiers' Liability, Act 1957(UK). This is evident from the speech of Mr. Mitchely, (Lusaka West Member of Northern Rhodesia Legislative Council) as he them was, during the second reading debate of The Occupiers' Liability Bill, 1963, in which he said:

“Mr. Speaker , we on this side of the House welcome this particular Bill, particularly because it will keep the law of tort as it applies in England the same here. The significance of this Bill is not its real need or necessity in northern Rhodesia at present but the fact that it has been passed in England and it is vital for us to be able to use the legal authorities which are heard in England...and be able to apply them here.. . The Bill

⁹⁸Section 36 (1)-(5) of Chapter 441 of the Laws of Zambia, Section-

⁹⁹ Chapter 153 of the Laws of Zambia, section

¹⁰⁰ Section 2 (a) of Chapter 11 of the Laws of Zambia (As amended by Acts No. 24 of 1973 and 1 of 1991)

was drafted by the Hon. Minister and I hope he will be able to say in reply that in fact the effect of this Bill is to make certain that the law as regards occupiers here will be the same as in England.”¹⁰¹

The then Minister of Legal Affairs, Mr. Doyle affirmed that the Bill was substantially, though not exactly the same because there are certain provisions in the English Act relating to national parks, which have no application in Zambia.¹⁰² This Bill went through all the three stages of reading between 18th June to 23rd August, then adopted by the Northern Rhodesia Legislative Council in 1963, repealed two years later (i.e. 1965) but without any substantial amendments and it is the Occupiers Liability Act in force in Zambia today. Therefore it owes its historical background to the original English Occupiers Liability Act, 1957 referred to already.¹⁰³

The effect of the Act is twofold. Firstly, it does away with the difference between invitees and licensees and puts both invitees and licensees into the common defined class of visitor.¹⁰⁴ Secondly, and more importantly for our purpose, the statute now imposes an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises. This change is most marked because it does away with the old common law position that an occupier was only liable for unusual dangers of which he was aware of or ought to have been aware, as Austin J observed while delivering judgment for the Supreme Court of Ontario in the persuasive case of **Waldwick v. Malcolm**.¹⁰⁵ Under the old law the occupier could escape liability by giving notice¹⁰⁶. Now, the occupier has to make the premises reasonably safe. Therefore, the central feature of success brought by this Act in this field of law was to abandon the timorous distinction between categories of entrants and subsume the law of occupier's liability to the unifying principle of a "common duty of care" The Act replaces common rule by providing under Section 2(2) that:

¹⁰¹ Northern Rhodesia Hansard No. 108. Official Verbatim Report of The Debates of the First Session of the Twelfth Legislative Council, 1963, p 318

¹⁰² Ibid p 319-320

¹⁰³ supra 2.1.3

¹⁰⁴ Section 1 (2) of the Occupiers' Liability Act, 1957(UK)

¹⁰⁵ [1991] 2 S.C.R. 456, 1991 CanLII 71 (S.C.C)

¹⁰⁶ London Graving Dock Co. Ltd. V. Horton (1951) A.C 737

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

The Act unifies the principles of common law under section 3 by providing that:

“(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

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

From section 3 just quoted above, it is clear that the existence of the duty of care is left to be established by simple proof of occupier and visitor relationship. The reasonableness of the defendant's behaviour is in this respect made a matter going exclusively to the question of whether or not there was a breach of the duty. The Occupiers' Liability Act in force in Zambia is in this respect virtually identical to the English Occupiers' Liability Act,¹⁰⁷ and the New Zealand Act¹⁰⁸. The provisions of the Occupiers' Liability (Scotland) Act¹⁰⁹ covers the occupier's duty of care, to all visitors, lawful or not, but the duty of care, except its scope, is similar to one provided for under the Zambian Legislation.

2.2.4 SCOPE

The hazards to which the provisions of the Zambian Occupiers' Liability Act apply to are “dangers due to the state of the premises or to things done or omitted to be done on them and not activities carried out on the premises. The scope of the words relating to things done or omitted to be done on the premises does not seem to have any bearing on current operations. The words “anything done or omitted to be done on the premises”, in the Occupiers Liability Act, 1957(UK) were discussed by the Law Reform Commission 1976¹¹⁰ which concluded that the words have the effect

¹⁰⁷ (5&6 Eliz. 2,31) Section 2

¹⁰⁸ (No.31 of 1962) Section 4 sub (1) and (2)

¹⁰⁹ (8&9 Eliz,2,c.30) Section 2(1)

¹¹⁰ Report on Liability for Damages or Injury to Trespassers and Related Questions of Occupiers Liability Law commission ,no 75 Para 23 in the case of *Reville V. Newberry* (1995) AC .per Neill L J .[http:// www](http://www).

of bringing within the scope of the Act of 1957 all claims for injuries on the occupier's premises arising from every kind of activity or omission on them irrespective of whether they are connected with safety of these premises as such. Consequently, any case in which the danger arises from some activity for which the person sought to be made liable is not responsible in his capacity as occupier of premises will continue to be treated in accordance with the ordinary principles of negligence at common law.

In terms of the scope, the Occupiers' Liability Act in force in Zambia can be contrasted with subsection 2 of section 3 of Ontario Occupiers' Liability Act, 1980 that provides that the duty of care applies whether the danger is caused by the condition of the premises or by an activity on the premise. However, section 2 (3) (a) (b) which extends the main operative provisions of the Act beyond premises in the ordinary sense to apply also to "structures" and beyond injury to the person of entrants to the case of damage to property, including the property of persons not themselves entrants on the land is virtually in similar terms with the English Occupiers' Liability Act, 1957¹¹¹, New Zealand Occupiers' Liability Act, 1962,¹¹² and the Occupiers' Liability (Scotland) Act, 1960.¹¹³

2.2.5 OCCUPIER

The Act does not define the term, but allows common law rules to continue determining who is an occupier. In **Wheat v. E. Lacon & Co. Ltd.**,¹¹⁴ Lord Denning laid down that "whenever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier'." In certain instances however, occupation may exist without possession in the

¹¹¹ Section 1(3)

¹¹² Section 3(3)

¹¹³ Section 1(3)

¹¹⁴ (1966) A.C. 552

ordinary legal sense.¹¹⁵ In short, exclusive occupation is not required, and the test is whether a person has some degree of control associated with and arising from his presence in and use of or activity in the premises. This position is similar to those of other jurisdictions.

2.2.6 VISITOR

The term visitor for the purposes of the Occupiers liability Act in force in Zambia,¹¹⁶ which is virtually similar, in this respect, to the Occupiers' Liability Act, 1957(UK),¹¹⁷ embraces those persons who are invitees or licensees at common law, that is, anyone to whom the occupier gives any invitation or permission to enter the premises. Subsection 2 of section 2 when read together with subsection 1 of section 3 shows that trespassers are not within the scope of the Act. Common law principles therefore continue to govern the duty, if any, owed to the trespassers. In this regard, the developments of the law have been left to the courts. This was the intention of the Northern Rhodesia Legislative Council when they were debating on the Occupiers' Liability Bill, 1963, as it appears from **Mr. Doyle's** emphasis that:

“...the duty to trespasser remains unchanged. There is generally no duty to take care in relation to trespassers but one is obliged first of all not to deliberately injure him and secondly not to recklessly disregard his safety.”¹¹⁸

This is similar to the original English Act, the Occupiers' Liability Act, 1957(UK) in which trespassers were not included. But it is worth noting that the position of the law at common law has always been dynamic. In **Herrington V British Railway Board**,¹¹⁹ the House Lords restated the duty of care an occupier owes to a trespasser, and after reconsidering the decision in **Addie's** case,¹²⁰ **Lord Diplock** observed:

¹¹⁵) A.M.F. International Ltd. v. Magnet Bowling Ltd 1968) 2 All E.R. 789, Mr. Justice Mocatta held that the building owner and the builder were both occupiers in relation to a subcontractor

¹¹⁶ Section 2(2) & Section 3 (6) of Chapter 70 of the Laws of Zambia

¹¹⁷ Section 1 (2)

¹¹⁸ Northern Rhodesia Hansard No. 108. Official Verbatim Report of The Debates of the First Session of the Twelfth Legislative Council, 1963, p 319

¹¹⁹ (1972)A.C.877 at 941

¹²⁰ (1929)AC 358

“The duty[to a trespasser]does not arise until the occupier has actual knowledge either of the presence of the trespasser upon his land or facts which makes it likely that the trespasser will come on his land: and has actual knowledge of facts as the condition of his land ;or activities carried out upon it which are likely to cause personal injury to a trespasser who is unaware of the danger....Once the occupier has actual knowledge, of such facts, his own failure to appreciate the likelihood of the trespasser’s presence or the risk to him involved does not absolve the occupier from his duty to the trespasser if a reasonable man possessed of the actual knowledge of the Occupier would recognise that likelihood and risk.”¹²¹

In England, the position has since changed, for the Occupiers’ Liability Act, 1984 replaces with statutory rules the rules of common law governing the duty of an occupier as to the safety of persons who are outside the scope of the occupiers’ liability Act, 1957, that is, persons who are on his land without his permission, either with lawful authority or without. The Act provides under Section 1(3) that an occupier owes a duty to trespassers in respect of any risk of their suffering injury by reason of any danger on the premises if:

- (a) he [the occupier]is aware of the danger or has reasonable grounds to believe that it exists;
- (b) he knows or has reasonable grounds to believe that the other [the trespasser] is in the vicinity of the danger concerned or that he may come into the Vicinity of the danger (in either case, whether the other has lawful authority for being in the vicinity or not); and
- (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

The Act then goes on to specify the standard of care, if it is found that a duty is owed. The occupier is further expected ‘to take such care as is reasonable in all the circumstances of the case to see that he [the trespasser] does not suffer injury on the premises by reason of the danger concerned.’¹²²

It must be borne in mind, however, that the fact that the Occupiers’ Liability Act in Zambia makes no provision for a trespasser does not mean that a trespasser is without any statutory

¹²¹ Ibid p 941

¹²² Section 1(4) of the Occupiers’ Liability Act ,1984(UK)

protection. This is a default in the law and by virtue of section 10 of the High Court Act,¹²³ we follow the law and practice for the time being observed in England in the High Court of Justice. This implies that the provisions of the Occupiers' Liability Act, 1984 (UK) may be applicable to Zambia by virtue of section 10 of the High Court Act. However, even this Act fails to make any definitive position on the eligibility of a claim by a child trespasser or a criminal trespasser. More to the point, the Act overlooks that trespassers come in many forms, ranging from the innocent such as a person on errand for mercy, to the guilty, such as a burglar who comes at night.¹²⁴ This position can be contrasted with that obtaining in other jurisdictions such as Manitoba, which have adopted pure negligence principle without further elaboration. Such legislation makes no specific provision for trespassers, leaving it to the courts to determine what amounts to such "care as in all the circumstances of the case is reasonable". Thus the Occupiers Liability Act of Manitoba, provides that:

"An occupier of premises owes a duty to persons entering on the premises and to any person, whether on or off the premises, whose property is on the premises, to take such care as, in all circumstances of the case, is reasonable to see that the person or property, as the case may be, will be reasonably safe while on the premises."¹²⁵

2.2.7 EXCLUDING LIABILITY

Under section 3. (1):

"An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise."

On the one hand, this section imposes on occupiers a "common duty of care" to all his visitors.

On the other hand, it makes him free to restrict, modify or exclude the duty of care to a visitor

"by an agreement or otherwise". The use of the word "or otherwise" allows for legal effect to be

given to any representation or condition, express or implied, attached to the invitation or

permission to enter, as was observed in **Ashdown v. Samuel Williams & sons**,¹²⁶ This in

¹²³ Chapter 27 of the Laws of Zambia

¹²⁴ Australian Capital Territory Law Reform Commission Report No. 42 on Occupiers' Liability(Canberra: Australian Government Publishing Services,1988) Par 34-35

¹²⁵ 3(1) of the Occupiers' Liability Act ,<http://web2.gov.mb.ca/laws/statutesccsm/ooo8f.ph#3> , Updated to: May 26, 2005

¹²⁶ (1957)1 ALL ER 35

essence means that a notice may suffice, for as long as it can be seen and be read by an entrant. The agreement may be secured by contract or otherwise. It is interesting to note that this position was found wanting by the country of its own birth, England, and was thus transformed by the Unfair Contract Terms Act, 1977. In this regard, where premises are occupied for business purposes, any attempt to exclude liability for personal injury caused by negligence, including breach of the common duty of care under the Occupiers' Liability Act, 1957, is void.¹²⁷ Further, any attempt to exclude liability for damage to property is subjected to the reasonable test.¹²⁸ The only inhibition on the occupier's liberty in the Zambian Occupiers' Liability Act is section 4 (1), which deals only with contractual provisions purporting to affect strangers to the contract.

The position of the Zambian Occupiers' Liability Act, can be compared and contrasted with Manitoba Occupiers' Liability Act. That Act, just like the Zambian Act expressly authorises the occupier to restrict or modify his liability. However, unlike the Zambian Occupiers Liability Act, it proceeds to specify restrictions. In a nutshell therefore, after prescribing the general entitlement, the Manitoba Occupiers' Liability Act proceeds to delimiting its scope. For our present purpose, Subsection 2, 3 and 4 of Section 4 are the salient provisions and provide as follows:

“(2) No restriction, modification or denial of the duty referred to ... whether by agreement, stipulation or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in any case, in determining the reasonableness of any restriction, modification or denial of the duty, the circumstances to be considered shall include:

- (a) the relationship between the occupier and the person affected by the restriction, modification or denial;
- (b) the injury or damage suffered and the hazard causing it;

¹²⁷ (Unfair Contract Terms Act 1977, 2(1)).

¹²⁸ Unfair Contract Terms Act 1977, s2(2)).

(c) the scope of the purported restriction, modification or denial; and

(d) the steps taken to bring the restriction, modification or denial to the attention of the persons affected thereby.

(3) Subject to subsections (4) and (5), where an occupier restricts, modifies or denies the duty referred to in subsection 3(1), the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed.

(4) an occupier of premises shall not restrict, modify or deny the duty referred to in subsection 3(1) with respect to a person who is empowered or permitted under the law to enter or use the premises without the consent or permission of the occupier.”

The above provision is a clear safe guard, which make sure that the statutory duty imposed on occupiers is not rendered meaningless by unbridled modifications or restrictions.

2.2.8. EFFECT OF KNOWLEDGE OF DANGER

Even if the occupier has not exempted himself from liability by means of “ an agreement or otherwise” as provided for in section 3(1) of the Occupiers’ Liability Act,¹²⁹ he may still be exonerated from liability in whole or in part by reasons of the visitor’s knowledge. This may happen in the following ways.

2.2.8(a) WARNING

Section 3(4) provides that:

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

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

It is apparent from the section just quoted that the Act recognizes the common law principle that a danger may cease to be a danger to those with knowledge about it, though it is a question of fact whether the visitor’s knowledge of the danger relieves the occupier from liability.¹³⁰ In **Tomlinson v. Congleton Borough Council and others**,¹³¹ the House of Lords noted that the

¹²⁹ Chapter 70 of The Laws of Zambia

¹³⁰ Heuston R.F.V and Buckley R.A, Salmond & Heuston on The Law of Torts, 20 ed(Delhi: Universal Law Publishing Co,2004)P 263 ?

¹³¹ (2004) HL , <http://mondap.Com> ,accessed 10th September 10, 2005

“fact that such people take no notice of warnings cannot create a duty to take other steps to protect them”. However, as is required by the Act, the warning must inform the visitor of the full extent of the risk. This therefore means that an ‘ ENTER AT YOU OWN RISK ’ sign will not discharge the occupier’s duty if the danger of entering is not apparent from the nature of the land itself. Similarly, a warning, which the visitor cannot hear, will not constitute reasonable care on the part of the occupier.¹³²

2.2.8(b) ASSUMPTION OF RISK

The effect of this concept is that an entrant may not be able to claim for his or her injuries if the risk of those injuries was known about and the entrant freely assumed the risk.

The Act¹³³ recognizes this and in section 3(5) provides that:

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

Assumption of risk is a very contentious issue. Many modern jurisdictions have a provision to that effect. For example, English Act, s.2 (5); Scottish Act, s.2(3); New Zealand Act,s.4(7) and section 3(3) of Manitoba Occupiers’ Liability Act, are similar to section 3(5) of the Zambian Occupiers’ Liability Act . In relation to section 4 (1) of the Ontario Occupiers’ Liability Act, R.S.O. 1980, which is to the same effect as section3 (5) of the Zambian Occupiers’ Liability Act, Austin J, when delivering judgment for the Supreme Court of Ontario in the case **Waldwick v. Malcolm**¹³⁴ referred to the words of Dupont J. in **Beatty v. Brad-Lea Meadows Ltd**,¹³⁵ in which he said, [at p. 8,] that if the courts interpret s. 4(1) as requiring only knowledge of the risk on the part of the victim:

“It would seem to follow that if such contention is correct, occupiers would always escape liability whenever a risk of any sort is apparent or known to an injured party, even

¹³² Premises Liability p 87

¹³³ Occupiers Liability Act , Chapter 70, The Occupiers’ Liability Act, 1957(UK)

¹³⁴ (1991)2S.CR.456,1991 Can Il 71(S.C.C), <http://www.Canlii.org/ca/cas/scc/1991/> .accessed on September 17,

2005

¹³⁵ ¹³⁵ . (1986), 39 A.C.W.S. (2d) 334

where the occupier has failed to take any reasonable steps to render the property reasonably safe for use.... Such an interpretation would nullify much of the intent of s. 3(1) of the Act that specifically creates a duty of care upon the occupier to take reasonable steps to maintain the property in a reasonably safe condition.... Usually more than mere knowledge of the risk is required to invoke s. 4(1) of the Act in the sense suggested. The risks willingly assumed must be known to the plaintiff and from the plaintiff's conduct and circumstances revealed, the plaintiff must have assumed it in the sense of being prepared to accept the entire risk of injury that may result without recourse to any contribution or liability from or of any other party. [Emphasis added.]”

Section 2(5) of the of the Occupiers Liability Act, 1957(UK), which is to the same effect with 3(5) of the *Zambian Occupiers Liability* was held to require more than mere knowledge of the risk by the plaintiff¹³⁶. Where the circumstances are to show that the plaintiff does not only have mere knowledge but rather has assumed the risk, the position has been well settled by a millstone decision of the House of Lords in the case of *Tomlinson v. Congleton Borough Council and others*¹³⁷ in which **Lord Hoffman** observed that where a person of full capacity voluntarily and without any pressure or inducement engaged in an activity which had inherent risk, the risk cannot be attributed to the state of the premises but to what such a person choose to do, and that any premises can be said to be dangerous to those who choose to use them in some dangerous activity .If the risk arises not out of the dangerous condition of the premises but due to a dangerous activity one chooses to do, the occupier will not be held liable.

2.2.9 EFFECT OF CONTRACT ON OCCUPIER'S LIABILITY TO THIRD PARTY

The relevant section for our purpose is subsection 1 of section 4 which provides that:

“ (1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty”.

The effect of this section is that an occupier cannot by contract effectively exclude or restrict his liability under the Act so far as strangers to the contract are concerned. This is a characteristic feature of many occupiers liability Legislation¹³⁸. However, unlike legislation on occupiers' liability in many jurisdictions, the *Zambian Occupiers Liability Act* is so generous to strangers to

¹³⁶ *Bunker v. Charles Brand and Sons Ltd.* (1969)2 ALL ER.59 at P.65,per O' Conner J, *White v.Blackmore*(1972)3 ALL ER 158,atp 164, per Denning MR.

¹³⁷ (2004) HL , <http://mondap. Com> ,accessed 10th September 10, 2005

¹³⁸ Ireland Law Reform Consultation Paper on Occupiers' Liability,1993, Para 4.166

the contract that it even goes so far as to permit them to avail themselves of an occupier's contractual obligation, which is in excess of his statutory duty of care relative to them. This is the effect of section 4 subsection 1 which provides that the occupiers duty of care to strangers:

“...shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty”.

This can be contrasted with what obtains in other jurisdictions. For example, section 5(1) of the Ontario Occupiers' Liability, Act¹³⁹ provides that:

“The duty of care under this Act ...shall not be restricted or excluded by any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by contract to permit such person to enter or use the premises.”

Clearly the section just quoted does not confer the generosity to strangers in excess of the statutory duty of care relating to strangers. One critical issue still calling for adequate attention here is how to reconcile section 4(1) rendering an occupier incapable of excluding liability by contract to strangers to the contract and section 3 (1) which by use of the expression “ or otherwise” permits the occupier to exclude or restrict his liability to the stranger by an adequate non- contractual notice. On the one hand, allowing the occupier to avoid his contractual liability imposed by section 4(1) of the Act by means of a notice would amount to subverting the policy of protecting strangers, yet, on other hand, the strangers should not be allowed to avail themselves of the danger if they have been made aware,(actually or constructively) through reading a notice , of the diminution or restriction of their rights. Section 6 subsection 1 of the Act provides an answer to this issue, and provides that:

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

¹³⁹ R.S.O. 1980, c. 322

The effect of this section is that in the absence of express terms dealing with the matter, the occupier is under a “common duty of care”.¹⁴⁰ But where this duty is owed, the Act permits the occupier to extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise. This therefore means that although an occupier is incapable of excluding or restricting by contract his liability to a stranger to the contract, he can achieve the same goal by a reasonable notice.

2.2.10 INDEPENDENT CONTRACTORS

Section 3 (4) provides that in determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)-

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

Although this section is to the effect that where an accident have arisen through the defective work of an independent contractor, the occupier can avoid liability by showing that he behaved reasonably in the selection of the contractor, it can criticised for uncertainty or rather vagueness. One would enquire as to whether work not involving construction, maintenance or repair is excluded. In **Ferguson v. Welsh**,¹⁴¹ Lord Keith considered that the provision should be given “a broad and purposive interpretation” so that the word ‘Construction’ should be held to include demolition. Further, in **AMF International v. Magnet Bowling Ltd**,¹⁴² Mocatta J said of a builder’s failure to take adequate precaution against flooding which caused damage to the visitor’s property that “it would be altogether too technical to hold this not within the true

¹⁴⁰ Section 3(2) of Chapter 70 of the Laws of Zambia

¹⁴¹ (1987)1 WLR 1553 at P 15580

¹⁴² (1988) 1 WLR 1028 at 1043

construction of the word a danger due the faulty execution of any work of construction, maintenance or repair.” Section 3(4) of the Occupiers’ Liability in force in Zambia can be somehow contrasted with section 6(1) of Ontario’s Occupiers’ Liability Act which in clear language, is free from ambiguity provides that:

“Where damage to any person or his property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not to on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to independent contractor , if the occupier had had taken such steps ,if any as the occupier reasonably ought in order to be satisfied that the contractor was competent and the work had been properly done , and if it was reasonable that work performed by the independent contractor should have been undertake.”

2.2.11 COMMON CALLING

The Act recognizes under section 3(4)(b) that an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so. In other words, a person possessing certain professional skills is expected to exercise those, which are ordinarily expected to be possessed by a man of his skills. Thus in **Salmon v Seafarer Restaurant**¹⁴³ it was held that:

“an occupier of premises owed same duty of care to fireman attending premises to extinguish a fire, as he owed to other visitors under s.2 (a)of the Occupiers’ Liability Act,1957, subject to the fact that in determining whether the occupier was in breach of that duty fireman was expected to exercise those skills which were ordinarily expected to be shown by firemen.”

2.2.12 CHILDREN

According to subsection 3(a) of section 3, of Chapter 70 of the Laws of Zambia, an occupier is required to take greater care in relation to a child than is required in relation to an adult under similar circumstances, if an occupier was to be deemed as having been prepared for children to be less careful than adults. As such, an occupier must always keep in mind, for example, their age, immaturity, natural curiosity and tendency to get into mischief. Because of these additional

¹⁴³ [1983] 3 All ER 729

factors inherent in children, what would constitute due care under particular circumstances, toward an adult may not amount to due care toward a child.¹⁴⁴

2.2.13 APPLICATION OF THE ACT TO THE REPUBLIC

Section 7 of Chapter 70 of the Laws of Zambia, but subject to section 4 of the State Proceedings Act (Chapter 71 of the Laws of Zambia), makes the Act binding to the Republic. By virtue of section 4(1) (a) of the State Proceedings Act¹⁴⁵ which provides that the Republic shall be subject to all those liabilities in tort which, if it were a person of full age and capacity, it would be subject in respect of any breach of duties attaching at common law to ownership, occupation, possession or control property, the Republic owes the same duties to visitors as any other occupier. Further, section 4(2) of the State proceedings Act is to the effect that Republic is bound by a statutory duty which is binding also upon persons other than the Republic and its officers and that in case of failure to comply with that duty, the Republic shall be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age. These provisions are crucial in Zambia since they determine the extent of Government immunity to actions by entrants who suffer injury while on Government premises, such as transport terminals, which virtually are controlled by Government.

CONCLUSION

In this part of chapter two, the relevant law on occupiers' liability, particularly the Occupies Liability Act (Chapter 70 of the Laws of Zambia) have been examined and analysed in light of the law on the subject in other jurisdiction and it has been established that there are some similarities in many respects as well as there are some differences in the law. The next chapter will be devoted to defects inherent in most commercial premises in Zambia and common injuries sustained as a result of these defects.

¹⁴⁴ Page A. Joseph, The Law of Premises Liability (Washington, D.C: Anderson Publishing Co. 1988) P94

¹⁴⁵ Chapter 71 of the Laws of Zambia

CHAPTER III

COMMON DEFECTS AND INJURIES IN COMMERCIAL PREMISES IN ZAMBIA

3.1 INTRODUCTION

Having analysed the law on Occupier's Liability in Zambia, this chapter is devoted to defects inherent in commercial premises in Zambia and injuries resulting from those defects. The author of this paper toured different commercial premises in Zambia, surveying and observing defects in commercial premises that are either actual or potential sources of injury to entrants upon premises. There are numerous commercial premises defects, which are sources of injuries and these include but not limited to: floors, entryways and approaches, stairways and steps, dangerous displays and, escalators and elevators.

3.2 INADEQUATE MAINTENANCE OF FLOORS

By far, the most common defect in commercial premises in Zambia is the actual condition of the floor where some floors are very slippery while others have obstructions or irregularity in the actual walking surfaces. From the tours conducted, it was observed that floors in a number of premises have been eroded. There are ditches and potholes in some floors, which are as a result of poor maintenance, so much that some highways are even in a better condition. In some premises, the floors are made dangerous by the occupier's attempt to clean and maintain the floor, notably by mopping or waxing. In all these circumstances, no adequate warning whatsoever is given thereby customers or invitees seem to be entering at their own peril. Where attempts are made to warn, it is when the occupier is carrying out some renovation and even then, they do not warn but just tie a single string across so as to block visitor from passing through. This is done so as to ensure that visitors do not messy up with the floor under construction before it is dry enough, and not to ensure that they do not suffer injury. When mopping or waxing, it equally appears that where a string is used, though rarely, is merely to ensure that customers do not messy up the floor by leaving behind

footprints before it gets dry and not to help them avoid the dangerous condition being created. This amounts to a breach of the duty of care that an occupier owes to his lawful visitor contrary to subsection 2 of section 3 of the Chapter 70 of the Laws of Zambia which demands that an occupier should take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.¹⁴⁶

The effect of subsection 2 of section 3 of Chapter 70 of the Laws of Zambia is that every occupier of premises inviting the public to enter, is required to exercise reasonable care to make the premises reasonably safe, or, pursuant to subsection 4(a) to give such person adequate warning of any dangerous condition so as to enable them avoid harm. Accordingly, the occupier is supposed to be held liable for injury sustained by reason of a dangerous condition of which the occupier was, or should have been aware of. Specifically, with respect to floors of such premises, the occupier has a duty to maintain the floor in a reasonably safe condition and to provide adequate warning of any danger of which his visitors would not, in the exercise of reasonable care for their own safety, become aware.¹⁴⁷

Because of these defects, slip and fall cases are ever present in Zambia. This has become a notorious fact that one need not necessarily prove that it happens. Almost everyone that the author interviewed had to some extent experienced this either directly as a victim or as a close spectator. General statistics obtained from The University Teaching Hospital (UTH)¹⁴⁸ reveals that at UTH alone, a total of 1,794 accidental slip and fall cases were reported in 2003. Out of this number, 1,786 were discharged and 8 died. In 2004, 1,505 accidental slip and fall cases were reported of which 21 died and 1,484 were discharged. Most of those

¹⁴⁶ Section 3(2) of Chapter 70 of the Laws of Zambia

¹⁴⁷ Kirk Drussel and Margaret E Swenson, Plaintiff's Proof of a Prima Facie Case (Illinois: Callaghan & Co, 1983) P311

¹⁴⁸ Date obtained from UTH Board of Management Health Information Systems Departments Statistics Unit.

interviewed at UTH¹⁴⁹ who were undergoing treatment for fractures and related injuries revealed that they sustained injuries as a result of a slip and fall case. One patient explained that she got injured when she slipped and fell in a clear liquid substance, which had been spilled, on the floor of the store where she had gone shopping.¹⁵⁰ Another patient responded that, "I slipped and fell on a wet spot on the floor which had just been mopped".¹⁵¹ Furthermore, one revealed that he sustained injuries when he striped over a box in the passageway of a self service store,¹⁵² while another explained how he got injured when he slipped and fell in a supermarket due to the presence of a small amount of water that has been allowed to collect on the floor in front of the meat counter.¹⁵³ Further, one explained how she sustained injuries at Manda Hill Shopping Complex when she slipped and fell on a highly waxed and polished floor.¹⁵⁴ These are not the only first and hard cases in point as there are numerous incidences of similar nature throughout the country. Many people interviewed reported that they did sustain injuries due to slippery floors, obstructions or irregularity in the actual walking surfaces and due to the presence of debris on the floor. This is contrary to section 3 of Chapter 70 of the Laws of Zambia, which requires an occupier of premises to exercise reasonable care for the safety of his visitors under all the circumstances of the case.

3.3 ENTRYWAYS AND APPROACHES

Entryways and approaches are not in the least maintained for the safety of entrants in most commercial premises in Zambia. Steps, irregularity in the floor surfaces and the ever-present changes in elevation of the floor at the point of entry are defects from which many people sustain injuries in most commercial premises in Zambia. Further, there are doormats and carpets at most commercial premises entry point which are furnished in an attempt to

¹⁴⁹ Interviews carried out at UTH in Ward G (casualties Ward) from 10th October to 2 November 2005

¹⁵⁰ Random interviews conducted at UTH on 12th October 2005

¹⁵¹ I bid

¹⁵² Ibid

¹⁵³ Ibid 16th October 2005

¹⁵⁴ Ibid 2nd November 2005

eliminate the danger of slipping which in the long run provides additional obstacles and debris over which unwary entrants do trip and fall. In some premises, ridges have been built at the entrance so as to stop water from flowing inside the premises. Consequently, many people stumble and fall on those ridges. To make things even worse, there are a lot of signs and other destruction at the entrances of some premises that diverts the attentions of entrants thereby rendering them incapable of exercising ordinary care for their own safety. In some retail establishment, entryways and approaches have been turned into space for displaying merchandise. To further worsen the situation, hardware articles such as iron sheets and pipes are dangerously stuck at the entry points. Manhole covers are also another menace which do protrude with a good inches or centimetres above the floor surfaces and are installed along the entryways in some premises. This coupled with street vending along the corridors makes the situation becoming very bleak.

Further, in some premise, there are revolving doors without signs showing the inlet and outlet. Some people crush themselves against these doors especially when they use an outlet as an inlet while another customer is already revolving the door to get out. Granted that there are not many such doors in this country, it is reasonably foreseeable that many people would face such problems when using the premises for the very first time, without adequate warning and signs to direct them. Some premises have unmarked plate glass window located in close proximity to an open entryways with the consequence that one may mistake it to be a door. The common duty of care requires an occupier of premises, in his exercise of reasonable care in all the circumstances of the case, to provide a reasonable means of ingress and egress from the premises.¹⁵⁵ Specifically with doors, the owner of premises to which the public is invited does owe such customers a duty to exercise reasonable care pursuant to

¹⁵⁵ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) 66

subsection 2 of section 3 of Chapter 70 of the Laws of Zambia,¹⁵⁶ in the maintenance, equipping, construction, design, placement, inspection, and repair of hinges, braking devices, folding wings or other parts of the door, whether swinging or revolving, and to avoid subjecting visitors to dangerous situations.¹⁵⁷

There are numerous injuries resulting from defects on entryways and approaches in most commercial premises in Zambia. A 60 years old Livingstone General Hospital visitor recounted in an interview of how she got injured when she slipped and fell due to changes in elevation of the floor at the point of entry.¹⁵⁸ This was a clear breach of the duty of exercising reasonable care under the circumstance of the case in that an occupier of a premises, especially a hospital, ought to always bear in mind that the hospital facility by its very nature is always visited by the feeble, infirm and elderly, and therefore owe a duty to warn such person of the existence of any changes in elevation which may present a hazard to them. One patient explained that she got injured when she slipped and fell just inside a shop entrance when she stepped off a rubber mat at the entrance of the premises, which had been placed at the doorway because of rainwater, which had been tracked into the shop by other customers.¹⁵⁹ Another Lusaka resident recounted how he got injured when he attempted to enter the defendant premises by passing in front of an electrically –operated door which swung out when it became activated by another customer who was exiting the premises.¹⁶⁰ Further, interviews conducted in different parts of the country revealed some visitors who sustained injuries when they walked into unmarked glass walls directly adjacent

¹⁵⁶ Which provides that: “The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there”

¹⁵⁷ Kirk Drussel and Margaret E Swenson, Plaintiff’s Proof of a Prima Facie Case(Illinois: Callaghan & Co, 1983) P328

¹⁵⁸ Random Interview Conducted in Livingstone on 27th July 2005

¹⁵⁹ Interview with patient at UTH on 9th November 2005

¹⁶⁰ Random interview conducted in Kitwe on 2nd August 2005

to the doorways while others sustained injuries when they walked into glass ways in different retail shops.¹⁶¹ This is just illustrative for there are numerous accidents in point.

3.4 STAIRWAYS AND STEPS

After touring a number of commercial premises in this country, it was observed that stairways and steps are one of the major sources of injuries in most commercial premises. Many premises providing stairs are tall building and do not receive adequate natural lightening. There is generally lack of adequate lightening in hallways, stairways and many other areas of common passage. It is a notorious fact that such places even in good condition become dangerous if not illuminated. Entrants using due care on their part using their own sense of sight are bound to slip, miss a step and fall where the stairway is not adequately illuminated. Some steps are too smooth while others are worn out through constant use. Worse, many others are littered with debris. Further, in a few premises that provides, stair skids, mates and runners, the same are poorly installed. This is contrary to section 3 of Chapter 70 of the Laws of Zambia, which impose a duty of care upon every occupier of premises to take reasonable care in all the circumstances. Thus, a notable authority when commenting on the occupier's duty of care in connection with stairways and steps observed that:

“The occupier of premises must exercise reasonable care in maintaining stairways and steps in a safe condition for all persons invited to enter the premises. The duty pertains not only to those stairways actually located on the premises, but to stairways actually located in common areas under the owner's control; the rule even applies to areas located outside the property exclusively owned or occupied by the defendant”¹⁶²

Of two hundred (200) people interview in different parts of the country, one hundred and eighty nine (189) affirmed that they had on several occasions experienced slip and fall

¹⁶¹ Random interview conducted between 16th to 17 July 2005

¹⁶² Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) 68

accidents while descending a flight of stairs.¹⁶³ A good number of students have sustained serious injuries, some of permanent nature while descending a flight of stairs at the University of Zambia.¹⁶⁴ This is also the case with other institutions that make use of stairs to get to other parts of the building.¹⁶⁵

3.5 DANGEROUS DISPLAYS

In some self-service retail shops, merchandise are stuck or placed at a particular height, width, depth or location, which makes them susceptible to falling. Some objects are let to project while trolleys and shopping baskets are left in the passageway notwithstanding the fact that customers' attentions are normally distracted by attractive displays. Despite these attractive displays that are so designed to attract a shopper's attention, there are generally no warnings regarding openings or other obstruction in close proximity to the displayed merchandise. There is negligent stacking of displays such that when one item is removed, others will fall, and can fall on the customer. Further, some bottle are stack on shelves in such a manner that the merchandise cannot easily be reached by customers without the risk of other bottles dropping on the customer. Thus one Livingstone resident was gauge in the eye by a projecting rode of razor blades, which had been displayed in a store.¹⁶⁶ Another Lusaka resident when interviewed responded " I caught my nose on a hook which projected from the store display while attempting to reach for a bottle near a top shelve".¹⁶⁷ Another customer was struck on the foot by a bottle which fell as he was reaching for another one in a supermarket,¹⁶⁸ while another customer fell over a trolley, provided by the shop owner which

¹⁶³ Random interviews conducted between 10th October 1st November 2005

¹⁶⁴ Random interviews conducted from 16th August to 16th October at the University of Zambia.

¹⁶⁵ Random interviews conducted in Lusaka between 10th to 1st November 2005

¹⁶⁶ I bid conducted in Livingstone in July 2005

¹⁶⁷ Random interviews conducted on 1st November 2005

¹⁶⁸ Ibid

was abandoned by another customer, because she could not see it as her attention was focused on the merchandise displayed and not the floor.¹⁶⁹

Proper interpretation of section 3 of the Occupiers' Liability Act,¹⁷⁰ in relation to displays would be that the merchant must use reasonable care in placing his goods on the store shelves. Consequently, he may not stack or place them at a particular height, width, depth, or location as to make them susceptible to falling.¹⁷¹

3.6 ELEVATORS AND ESCALATORS

It has been further observed from the tour conducted that some commercial premises have devices designed to convey visitors from one portion of the building to another, such as escalators. Most of these devices are not just old and based on outdated technology but are also poorly constructed and maintained. Some fail to level with the floor when they stop. This is so as there has been no repair work carried out on them. Besides, there are no warnings of inherent dangers. One Lusaka resident recounted how a sudden jerking of the escalator he was using to get to the 15th floor at Fin deco House injured him¹⁷². Interviews with workers from different premises¹⁷³ revealed that numerous injuries are caused by the slipping or stripping of passengers, by the entanglement of various portions of the passenger's body or clothing within moving parts of the escalator structure. Some injuries result from failure to rescue persons in peril. One Lusaka resident recounted how she was locked inside the escalator for over an hour, and suffocated as a consequence.¹⁷⁴ Most of those interviewed responded that they also sustain injuries as they struggle or rush in or out

¹⁶⁹ Ibid

¹⁷⁰ subsection 2 of section 3 of Chapter 70 of the Laws of Zambia provides that: "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there".

¹⁷¹ ¹⁷¹ Landau J.N, Martin C and Thomas R .M (Ed) Premises Liability Law and Practice, V1, (New York: Mathew Brenda &Co., INC, 1988) 78

¹⁷² Random interview conducted on 3rd November at Findeco House.

¹⁷³ Random interviews conducted between 2nd to 4th November 2005

¹⁷⁴ Ibid

of the device, as they fear that it might close on them since many such devices have malfunctions.¹⁷⁵

3.7 GLASS-ALLUSION OF SPACE

In some premises, glass doors, walls, and panels are constructed in such a manner, and also at such an angle that they give an illusion of unobstructed space. Despite the proposition of the law that a person is required to see what is there to be seen by the ordinary use of his senses, and that, if it is there to be seen, it is deemed in law to have been seen,¹⁷⁶ it becomes a defect if the construction or election is such that the visitor in the exercise of due care for his own safety, cannot reasonably be expected to observe the presence of the glass wall, panel or door. A good number of those randomly interview recounted of how they sustained injuries when they walked into glass wall in different retail shops, especially those selling some shoes.¹⁷⁷

3.8 MISCELLANEOUS DEFECTS

Commercial premises such as public transport terminals in Zambia are one of the most crowded places where it is virtually difficult for a visitor to see where he or she steps. There are all kinds of debris in these premises due to visitors throwing disposable food containers almost everywhere. These premises are commonly used as a selling place where people sell different food staffs and other merchandise. Fruit peels, notably bananas, empty containers and some wrappers are almost everywhere. There are a lot of oil and grease spilled on the floor from wrecking vehicles. Not only that, the floor surfaces is wet as a result of water used for cleaning cars. Random interviews conducted at City Market and Intercity Bus Terminal all collaborated the notorious fact that many visitors slip and fall while on these premises due to the presence of defects just alluded to.

¹⁷⁵ *Ibid*

¹⁷⁶ Kirk Drussel and Margaret E. Swenson, Plaintiff's Proof of a Prima Facie Case (Illinois: Calling ham, 1983) p 3

¹⁷⁷ Random interview conducted between 16th to 17 July 2005

Besides, there are a number of tall incomplete structures in highly populated areas from which debris fall and injure, at times even killing people. One Lusaka resident who does business along Freedom Way recounted of how his friend sustained serious injuries after being hit by the debris that fell from the tall building near Stanley Bar between Freedom Way and Chachacha Road.¹⁷⁸ Interviews conducted in different parts of the country revealed that many people have sustained injuries due to falling objects of different types under the control of some property owner.¹⁷⁹ Section 3(2) of the Occupiers' Liability Act,¹⁸⁰ places the owner or occupier of premises under a duty to use reasonable and proper care to prevent injuries to others by falling objects from whatever cause except for those events which he has no control.

3.9 CONCLUSION

In the preceding discussion, the essay has shown that there are numerous defects in most commercial premises in Zambia. Such defects referred to are inadequate maintenance of floors, inadequate lightening, poor maintenance of stairways and steps, approaches and entryways including doors, escalators, glass illusion of space and falling objects. Slip and fall cases are everywhere and experienced on a daily basis, and this just call for judicial notice. All this is contrary to the spirit of the Occupiers' Liability Act, which impose a duty of care under section 3 on occupiers of premises. The next Chapter will make a general conclusion of what has been discussed in this paper and will make appropriate recommendations where necessary.

¹⁷⁸ Ibid on 1st November 2005 in Lusaka

¹⁷⁹ Opcit

¹⁸⁰ which provides that: "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there".

CHAPTER FOUR

4. CONCLUSION AND RECOMMENDATIONS

4.1 SUMMARY

In this paper, that part of the law that sets the safety standards which householders, farmers, tenants, companies and anyone else in control of land or buildings should observe to safeguard those who come onto the land or building have been discussed. In the first chapter, the paper discussed the historical background of occupiers' liability law and established that it developed during the nineteenth century and reflected traditional attitudes about ownership of property. Under traditional common law principles, when a plaintiff is injured on the premises, the defendants' duty of care is delineated according to the legal status of the entrant as a trespasser, licensee or invitee. Thus each class is owed a different standard of care. It has been established further that the distinctions between trespasser, licensee and invitee has been abolished by several jurisdictions in favour of a single duty of reasonable care under all the circumstances. Other jurisdiction, such as Zambia and Britain, for example, has abolished the distinction between a licensee and an invitee but has retained that of trespassers.

Despite the fact that recent judicial and legislative developments in many modern societies have made significant modification to traditional occupiers' liability doctrines, it has been further observed that much of modern tort jurisprudence continues to reflect these specialized legal principles and terminologies which have been developed in response to unique situations created by the land ownership and occupancy of land.

Specifically with respect to Zambia, it has been observed in Part Two of the second chapter that the main source of the law of occupiers' liability is Chapter 70 of the Laws of Zambia. The main effect of this legislation was to abolish the distinction between an invitee and a licensee by

subsuming the class of visitors to two namely; lawful visitors and trespassers. The duty of care is owed to all lawful visitors and this duty of care is to take such care as in all circumstances of the case is reasonable. However, it varies in relation to the class of the visitor, such that, for example, an occupier is required to take greater care with respect to children than is required for adults under similar circumstances.

It has been demonstrated further that the Act did not change the common law position in relation to trespassers. Consequently, an occupier of premises in Zambia is generally under no duty to take reasonable care for the safety of a trespasser, except that an occupier is obliged not to deliberately injure and disregard the trespasser's safety. The Act, with respect to trespasser makes no distinctions between children, criminal or indeed one on an errand of mercy. The Act further leaves it open, without safeguards, for an occupier to restrict his duty of care by contract, agreement or otherwise. The power to restrict or abolish the duty of care is subject to only one restriction; being that, where one allows third parties who are strangers to the contract to be on the premises, one cannot restrict the duty of care, which is laid down in the Act. However, the occupier can discharge his duty of care by reasonable notice. Besides, the occupier is not liable for risks willingly accepted by the entrant upon his land.

The first part of chapter two (II) extensively discussed duty of care by considering the position of the law on the subject in different jurisdictions. It has been further demonstrated how such duty manifest in any given situation or circumstance where the relationship of visitor and occupier exists. An occupier of premises must exercise reasonable care in all the circumstances of the case to ensure visitors are reasonably safe while on the premises. Accordingly, an occupier of commercial premises must warn entrants of all known dangers existing on the premises and must, in the exercise of reasonable care, inspect the premises in order to discover any hidden dangers. Once he has discovered or reasonably should have discovered the existence of a latent

danger on the premises, a further duty arises to either provide a proper warning, or to remove the danger entirely, there by making the premises safe for the entrants. In chapter three, numerous defects inherent in most commercial premises in Zambia have been established and common injuries resulting from those defects have been revealed from random interviews conducted in different parts of this country. From this, it is clear that although it has been established that the law in Zambia in many respect is on all fours with what is obtaining in England, save for provisions relating to trespassers, the situation seem so bleak that it is very difficult to reasonably content that the law on occupiers liability in this country is developing and changing so as to meet the needs and challenges of the society it was created to serve.

4.2 RECOMMENDATION

4.2.1 DUTY OF CARE

It is therefore recommended that the duty of care should be applicable to all persons. It should not just be restricted to lawful visitors. Thus a provision along the Scottish¹⁸¹ model would be ideal. The duty should be extended to trespassers as well because trespassers are not always burglars or poachers. Some trespassers are quite innocent. A trespasser may be a burglar, a traveller in difficulty, an innocent person on an errand of mercy, person who walks into another's land believing it to be his own, person who honesty follow a mistaken direction or accept an unauthorized invitation, person who cannot see or such other relative innocents as children who disobeys a neighbour's injunction not to come over the way in pursuant for a ball or cannot simply understand. It would be wrong, especially in our society, to place the trespasser beyond

¹⁸¹ The provisions of the Occupiers' Liability (Scotland) Act, 1960 (8 & 9 Eliz, 2, c. 30) cover the occupier's liability to all visitors, lawful or not, and in the present respect state the liability as follows in s. 2(1):

“The care which an occupier of premises is required, by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is in law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement his obligation towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger”

Zambia, it is recommended that this must be subject to a condition that an occupier must not create the dangerous condition with a deliberate intention of doing harm or damage to an entrant or to act with reckless disregard of the presence of the entrant.

4.2.4 REDUCED LIABILITY TO CRIMINAL TRESPASSERS.

Since it has been recommended that the duty of care should apply to trespassers as well so as to allow innocent trespassers benefit from the protection of the law, it is recommended that the liability of an occupier to criminal trespassers should be reduced. This can be achieved by making a provision to the effect that those entering the premises with an intention of committing, or in the course of committing a crime should be treated as having willingly assumed all the risks on the premises and as such, the occupier should only owe them a duty of not creating the dangerous condition with a deliberate intention of doing harm or damage or to act with reckless disregard of their presence. This will help prevent them from benefiting from their wrong doing.

Bearing also in mind the escalating incidences of burglary, armed robbery and the situation of National Parks and Reserves where many Guards are oftentimes short to dearth by poachers, it is further recommended that nothing in the recommendations dealing with criminal trespassers should operate to oust the law with respect to self defence, defence of others and property .

4.2.5 WARNING OF DANGEROUS CONDITIONS

From the previous chapter, it has been established that there are numerous defects in most commercial premises in Zambia, yet no warning of the defects or inherent danger is given in most cases to entrants. The failure by occupiers of premises to give adequate warning is a clear and outright disregard for human safety. The customers enter at their own peril. An occupier, who is aware of a defect but does nothing, as is often the case in most commercial premises in

Zambia, to help entrants avoid harm in the exercise of reasonable care on their part, is no different from the one who goes about setting spring guns for trespassers. The fact that he is not an insurer of the absolute safety of people coming onto his premises and that he cannot insure against the whole world does not mean that entrants should enter his premises at their own peril.

Since it is also incumbent to have in regard the difficulties involved in removing certain dangerous condition in certain premises, especially that most premises have so many defects that to demand them to be removed would be nothing short of commanding them not to be open to the public, it is recommended that the law should expressly, precisely and in a clear language free from uncertainty or ambiguity require an occupier of premises to warn entrants of all known dangers existing on the premises and that he must, in the exercise of reasonable care, inspect the premises in order to discover any hidden dangers. Once he have discovered or reasonably should have discovered the existence of a latent danger on the premises, a further duty should arise of either providing a proper or adequate warning that can allow the entrant to avoid dangers in the exercise of reasonable care for his or her own safety, or to remove the danger entirely, there by making the premises safe for the entrants. In a nutshell, it is recommended that the legislation in this country should provide for a theory of liability based upon the occupier of premises' failure to warn. A duty should be imposed upon every occupier and the Act should proceed to require, as is the position of the law apparently, that when such a warning is given, it should be reasonable or rather allow the entrant appreciate the dangerous condition he is about to encounter. Section 3(4) (a) in its present form is not enough because it does not impose liability on occupiers for failing to give adequate warning but only require that where warning is relied upon by an occupier as a defence, it should be a reasonable warning, yet an occupier is at liberty to either give warning or not.

Giving adequate warning is not difficult, it is less costly if any, and can help many suffering injuries avoid injuries despite the existence of defects. Besides, where entrants are given adequate warning, injuries whether as a result of the ubiquitous slip and fall case or other related accidents will be minimized, with a desired consequence that the law of occupiers liability will not become litigious since there will be less accident, rather than the current situation where it is the least litigious despite the Act having been on records since 1963 and the notorious fact that a good number of people suffer injuries as a result of defect on premises on a daily basis .

4.2.6 INDEPENDENT CONTACTOR

Section 3(4), which refers to faulty execution of any work of construction, maintenance or repair by an independent contractor, creates uncertainty and ambiguity. In this regard, it is recommended that the Act should adopt a provision phrased in the language of section 6(1) of Ontario's Occupiers' Liability Act, 1980 which in clear language, which is free from ambiguity provide that:

“Where damage to any person or his property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to an independent contractor, if the occupier had had taken such steps, if any as the occupier reasonably ought in order to be satisfied that the contractor was competent and the work had been properly done, and if it was reasonable that the work performed by an independent contractor should have been undertake.”

It is highly recommended that the weakness of the position of the law observed in this paper should be addressed by adopting the necessary recommendation outlined in this chapter so as to make the Occupiers' Liability Act in force in Zambia respond effectively to the unique challenges this country is facing.

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