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CASE COMMENTARY
SRI INAI (PULAU PINANG) SDN BHD v YONG YIT SWEE: THE DUTY OF CARE OWED BY A LANDLORD TO THE LAWFUL VISITORS OF A TENANT

by DR IRWIN UJ OOI *

Introduction

The case of *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors*[1] would have gone largely unnoticed as a routine appeal on the duties owed by a landlord to lawful visitors of his/her tenant if one had not taken note of one of the submissions put forward for consideration before the High Court. The fact that this submission was actually made by counsel was due either to an ignorance of one of the fundamentals of the law on negligence, or a very audacious attempt at changing the law that has stood since *Donoghue v Stevenson*.[2] Ever since the groundbreaking efforts of Lord Atkin and the majority of the House of Lords[3] more than 70 years ago, there was no requirement in negligence that a claimant had to have a pre-existing contractual relationship with the defendant to establish a duty of care. The High Court's application of an even older English authority opened up the possibility of a revival of the pre-*Donoghue* common law position in Malaysian law. The Court of Appeal consisting of Gopal Sri Ram JCA, Abdul Kadir Sulaiman JCA and Alauddin JCA in *Sri Inai (Pulau Pinang) Sdn Bhd* was therefore presented with an opportunity to either reaffirm the well-established rule in *Donoghue* or regressing to the dark ages of the common law.

The Events that Led to the Litigation

In *Sri Inai (Pulau Pinang) Sdn Bhd*, a local authority, the Penang Municipal Council, which was the second defendant, let a building that it owned to Sri Inai (Pulau Pinang) Sdn Bhd, the first defendant and appellant before the Court of Appeal. This building was described by the Court of Appeal as a "very old dwelling house" that "had been

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1 [1995] MLJ LEXIS 1220, [2003] 1 MLJ 290 (Sessions Court); [1998] 3 AMR 2847 (High Court); [2002] MLJ LEXIS 650; [2003] 1 MLJ 273 (Court of Appeal).

2 [1932] AC 562.

3 Lord Thankerton and Lord Macmillan concurred, while Lord Buckmaster and Lord Tomlin led the dissent.

in existence even before 1922".[4] It was used by the first defendant as a hostel for its Penang school campus, to accommodate students who were very young children. A fire broke out in the building and several children lost their lives, while others suffered severe injuries. The plaintiffs, led by Yong Yit Swee, sued both Sri Inai (Pulau Pinang) Sdn Bhd and the Penang Municipal Council, alleging that the negligence of both these defendants led to the injury and death of the children.

The Judgment of the Sessions Court[5]

The Sessions Court judge, Ho Mooi Cheng J, held both the first and second defendants, Sri Inai (Pulau Pinang) Sdn Bhd and the Penang Municipal Council respectively, equally liable for the injury and deaths. She found the testimony of the plaintiffs' third expert witness particularly compelling[6] and came to the conclusion that the premises was unsafe when the fire occurred.[7] The Sessions Court judge found Sri Inai (Pulau Pinang) Sdn Bhd liable for a breach of the duty of care it owed to its students for failure to take reasonable care for their safety on the basis of *Government of Malaysia & Ors v Jumat bin Mahmud & Anor*.[8] The Penang Municipal Council was found negligent in failing to upgrade the building to ensure that it was safe for its tenants and users in compliance with the Uniform Building By-Laws 1986.[9] As no upgrade "works" were done to the building, the Council could not claim the protection of section 95(2) of the Street, Drainage and Building Act 1974 for works carried out under the Act.[10] Liability was apportioned equally between the two defendants, as both Sri Inai (Pulau Pinang) Sdn Bhd and the Penang Municipal Council were equally to blame.[11] No contributory negligence could be inferred from the circumstances.[12]

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4 [2002] MLJ LEXIS 650 at 17.

5 [1995] MLJ LEXIS 1220; [2003] 1 MLJ 290.

6 See [1995] MLJ LEXIS 1220 at 5. Her Lordship noted that in *Polyviite Ltd v Commercial Union Assurance Co plc* [1987] 1 Lloyd's Rep 379, Garland J found this expert witness to be a "careful and reliable witness, who gave his evidence with restraint and consistency". She concurred, stating that she "came to the same conclusion after hearing his evidence in this case. Not only was he unshaken in cross-examination, more importantly, he was able to give reasons for the theories advanced by him after taking into account the physical evidence. His findings were consistent with the accounts of witnesses who were at the scene at the time of the fire".

7 [2002] MLJ LEXIS 650 at 18.

8 [1977] 2 MLJ 103, *per* Raja Azlan Shah FJ (as he then was) at 104, "It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must [be] commensurate with his / her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take care of his own children (see *Ricketts v Erith Borough Council* [1943] 2 All ER 629, 631). It is not a duty of insurance against harm but *only a duty to take reasonable care of the pupil*".

9 [1995] MLJ LEXIS 1220 at 16-27 In particular, there were no emergency exit signs (see by-law 172), no means of detecting fire (see by-law 225(1)), no fire extinguishers in prominent positions on exit routes (see by-law 227), no emergency power system (see by-law 253) no hose reel and the water pressure was inadequate to fight a fire (see Tenth Schedule).

10 Ibid at 28-29 For the immunity to apply, plans of such works had to be submitted and the works carried out in accordance with the approved plans.

11 [1995] MLJ LEXIS 1220 at 30-31.

12 Ibid.

The Judgment of the High Court[13]

The first defendant, Sri Inai (Pulau Pinang) Sdn Bhd appealed to the High Court in respect of the finding made by the Sessions Court against it, arguing that the second defendant, the Penang Municipal Council, bore sole liability for the negligence. The Penang Municipal Council filed a cross-appeal that was allowed by the High Court because although the finding of the Sessions Court was accepted, as a matter of law, the local authority owed no duty of care to the plaintiffs. That meant that Sri Inai (Pulau Pinang) Sdn Bhd was solely responsible for the negligence that led to the injury and death as their appeal was rejected. The basis for the High Court's decision was the pre-independence case of *Cavalier v Pope* [14] as the general rule appears to be that a:

> landlord is under no duty to his tenant or any person who enters the demised premises during the tenancy, to take care that the premises are safe, whether at the commencement of the tenancy or during its continuance. The lease transfers all obligations towards third parties from the landlord to the tenant. As a result, the landlord, who can no longer be regarded as the occupier of the demised premises is exempt from liability for any dangers existing on them.[15]

The High Court chose not to apply the later House of Lords decision in *AC Billings & Sons Ltd v Riden* [16] that had made inroads into the rather harsh principle enunciated in *Cavalier*. There were two reasons why this position was adopted by the High Court. First, only English law as of 7 April 1956 is applicable in Malaysia by virtue of section 3 of the Civil Law Act 1956. As *AC Billings & Sons Ltd* was decided after that date, it was not applicable in Malaysia and the pre-1956 decision of *Cavalier* was adopted by the High Court.[17] Second, both the Occupiers Liability Act 1957 and the Defective Premises Act 1972 have removed the immunity enjoyed by landlords as a result of *Cavalier*. But the facts of *Cavalier* still fell outside the ambit of legislative protection In the light of this the High Court judge had every reason to tread very carefully when applying English common law. His Lordship issued the following words of advice:

> In England today, the immunity has largely disappeared, *principally in consequence of legislation* ... However the decision in *Cavalier v Pope* is still the law in England, where the facts fall outside the scope of the said legislation. This reminds us of the danger of following post-1956 English cases *which were in fact based on new legislation there.*[18]

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13 See *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors* [1998] 3 AMR 2847.
14 [1906] AC 428.
15 [1998] 3 AMR 2847 at 2866.
16 [1958] AC 240.
17 [1998] 3 AMR 2847 at 2866.
18 Ibid, emphasis added by the High Court judge.

In addition to owing no duty of care to the plaintiffs, the High Court also held that the second defendant, the Penang Municipal Council, was not in a contractual relationship with the plaintiffs, as neither was there an express contractual undertaking, nor could an implied undertaking be inferred from the circumstances.[19] As a result of this finding, the court also came to the conclusion that this "negatived the second defendant's liability in tort in its capacity as a local authority for failing to enforce the relevant building by-laws in respect of its building".[20]

The Judgment of the Court of Appeal [21]

1. The doctrine of precedent issue

In delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA ruled that the High Court judge was wrong in failing to apply the decision of the House of Lords in *AC Billings & Sons Ltd v Riden* [22] as that case was already binding by virtue of it being applied by the Federal Court in *Lembaga Kemajuan Tanah Persekutuan v Mariam*.[23] In the words of Gopal Sri Ram JCA:

> That court erred in important respects ... it refused to apply *AC Billings v Riden*, apparently on the ground that it was a case decided after the coming into force of the Civil Law Act 1956. The High Court appears to have overlooked the decision of the Federal Court in *Lembaga Kemajuan Tanah Persekutuan v Mariam* which applied *AC Billings v Riden* and was a decision that was plainly binding upon it. Accordingly, in our respectful view, the High Court acted contrary to the doctrine of precedent.[24]

This approach by the Court of Appeal to the doctrine of precedent is controversial. It raises the question whether the paramount duty of a judge is to follow the lead of their senior colleagues in the appellate courts under the doctrine of binding precedent, or instead give effect to the express will of the Malaysian Parliament. If the doctrine of precedent were applied in such a manner, it would mean that lower echelons of the judiciary have their hands tied by their senior brethren, regardless of the provision of statutory law. It would be difficult, in this particular case to see how *AC Billings & Sons Ltd* could be applied as it was decided in 1958, whereas section 3 of the Civil Law Act 1956 very clearly states that the applicable date is 7 April 1956. If the High Court were to apply *AC Billings & Sons Ltd* it would clearly be in contravention of what parliament had expressly enacted in legislation.[25] In this context, there would be

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19 [2002] MLJ LEXIS 650 at 25-26.
20 Ibid.
21 [2003] 1 MLJ 273; [2002] MLJ LEXIS 650.
22 [1958] AC 240.
23 [1984] 1 MLJ 283.
24 [2002] MLJ LEXIS 650 at 39.
25 For an example where developments in English common law after 7 April 1956 was disregarded by the Malaysian judiciary, see *Lee Kee Choong v Empat Nombor Ekor* [1976] 2 MLJ 93. See also Rutter, *The Applicable Law in Singapore and Malaysia* (Malayan Law Journal Sdn Bhd 1st Ed 1989) at 462.

no difficulty applying *Cavalier* as it was decided in 1909, well before the stipulated statutory date. However, the application of *Cavalier* does pose additional difficulties, and, this was also highlighted by the Court of Appeal in its judgement.[26] There is possibly a policy reason for the application of *AC Billings & Sons Ltd* in preference to *Cavalier*. This is a point that will be discussed later in the commentary when an analysis is made on why there was such eagerness to maintain the status quo on the law on negligence reflected in *Donoghue v Stevenson*.

In all fairness to the Court of Appeal, the approach adopted by their Lordships is nothing new. For example, in cases such as *Lian Keow Sdn Bhd v C Paramjothy*[27] and *Zainal Abidin v Century Hotel Sdn Bhd,*[28] the Malaysian Courts have shown a willingness to embrace developments in English common law after 7 April 1956.[29] This though, sits uneasily with the judicial guidelines given in *Nepline Sdn Bhd v Jones Lang Wootton*[30] on the application of section 3 of the Civil Law Act 1956. The Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd* was right to rebuff the High Court judge for his misinterpretation of the proviso to section 3 of the Civil Law Act 1956. In the High Court, the judge believed that after applying English common law as is stated on 7 April 1956, only then should a judge examine the possibility whether he should make qualification to that English law principle as local circumstances render necessary. This clearly is not in line with the approach advocated in *Nepline*, where the judge stressed that only if local circumstances permit, then English law prior to 7 of April 1956 is applicable in Malaysia. Gopal Sri Ram JCA[31] also reminded the High Court judge that in the previous Supreme Court decision of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang*,[32] Hashim Yeop Sani CJ made it very clear that "section 3 of the Civil Law Act 1956 direct the courts to apply the common law of England in so far as the circumstances permit and save where no provision has been made by statute law".[33] Hence, it is the existence of the right local circumstances that allow the application of English law as of 7 April 1956 via section 3 of the Civil Law Act 1956 and not the reverse process adopted by the High Court judge in *Sri Inai (Pulau Pinang) Sdn Bhd* that English law as of that cut-off date applied in Malaysia, subject to judicial embellishment to suit local circumstances.

2. The duty of care owed by landlords to the lawful visitors of the tenants

a. The misapplication of Cavalier v Pope

In addition to the High Court judge ignoring the doctrine of precedent, the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd* was clearly of the view that *Cavalier* was

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26 See discussion that immediately follows this paragraph.
27 [1982] 1 MLJ 217 (HC).
28 [1982] 1 MLJ 260 (FC).
29 See Rutter, n 25 at 462.
30 [1995] 1 CLJ 865.
31 [2002] MLJ LEXIS 650 at 32 and 39.
32 [1990] 1 MLJ 356.
33 Ibid at 361.

a case that had nothing to do with negligence.[34] The Lordships took a closer look at the decision of the House of Lords in *Cavalier* and held that "[a]n examination of the speeches of the Law Lords reveal[ed] no reference whatsoever to negligence" and the decision was "merely an illustration of the application of the doctrine of privity of contract".[35] Therefore, even if the Court of Appeal adopted a questionable point of view concerning the doctrine of precedent issue, their Lordships were spot on in their dismissal of *Cavalier*. This is a more elegant means of chiding the High Court judge for his errors rather than resorting to the technical ground of failing to adhere to the doctrine of precedent. Distinguishing *Cavalier* on its facts would have been so much simpler but perhaps the Court of Appeal felt compelled to act in that manner to keep in check one of the more exuberant of High Court judges.

b. The importance of AC Billings & Sons Ltd v Riden and its application in Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors

According to the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd*, the High Court judge, by applying *Cavalier* had erred by ignoring the fact that he was bound by the doctrine of precedent. The Court of Appeal held that the High Court judge had no choice but to apply the decision of the House of Lords in *AC Billings & Sons v Riden*[36] regardless of whether he agreed with that decision.[37] The House of Lords had held in *AC Billings & Sons Ltd* that contractors working on premises owed a duty of care to lawful visitors even if such visitors were warned of the dangers and had an appreciation of the danger they faced. The Federal Court case of *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors*,[38] that applied *AC Billings & Sons Ltd*, concerned a slightly different factual situation.

In *Lembaga Kemajuan Tanah Persekutuan*,[39] a statutory authority, Felda, created by the Land Development Ordinance 1956, whose object was "to open and carry out projects for land development and settlement" was held liable in negligence for a death caused by the collapse of a "kongsi-house" on its land scheme at Sungai Retang, Jerantut, Pahang. The building in question was, built by the employees of an unauthorised sub-contractor. If negligence could be established in a relationship that is less proximate as that in *AC Billings & Sons Ltd* where the contractor occupying the premises incurred liability, it was not a surprise that the statutory owner and

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34 [2002] MLJ LEXIS 650 at 27.

35 Ibid. The Court of Appeal also expressed the view that *Cavalier* was "not laying down any new rule" but "merely affirming the decision in *Robbins v Jones* (1863) 143 ER 768" where Erle CJ said "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any".

36 [1958] AC 240.

37 See *PP v Datuk Tan Cheng Swee* [1980] 2 MLJ 276, where Chang Ming Tat FJ at 277 reminded the lower courts of the application of this doctrine: "It is ... necessary of reaffirm the doctrine of stare decisis which the Federal Court accepts unreservedly and which it expects the High and other inferior Courts in a common law system such as ours, to follow similarly".

38 [1984] 1 MLJ 283.

39 This case has been distinguished by the Singapore Court of Appeal in *Mohd. Sainudin bin Ahmad v Consolidate Hotels Ltd & Anor* [1990] SLR 154; [1991] 1 MLJ 271.

occupier of the premises, ie, Felda, in *Lembaga Kemajuan Tanah Persekutuan*, owed a duty of care to the sub-contractor's employee who perished in the collapse of the "kongsi-house" as there was greater proximity between the tortfeasor and the claimant in this relationship. No expansion of the principle in *AC Billings & Sons Ltd* was required as the facts of *Lembaga Kemajuan Tanah Persekutuan* fell well within the boundaries of application of the rule. In the words of Gopal Sri Ram JCA in *Sri Inai (Pulau Pinang) Sdn Bhd*:

> [f]ollowing the jurisprudence encapsulated in *Lembaga Kemajuan Tanah Persekutuan v Mariam*, in our judgment, a landlord of premises stands in sufficiently close proximity to the lawful visitors of his tenant. And the latter is certainly someone whom the former ought to have in his contemplation when letting out his building. In short, the relationship under discussion falls squarely within the Atkinian formula [in *Donoghue v Stevenson*].[40]

Proximity was not the only test applied by the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd*, to determine whether or not a duty of care was owed by the landlord to the lawful visitor of a tenant. Foreseeability of the claimant, who is described in Atkinian judicial language as one's "neighbour", appears to have played a significant role. Gopal Sri Ram JCA expressed the view that, "like the manufacturer of the product in *Donoghue*, the second defendant [ie, the Penang Municipal Council] here knew the purpose for which his property was to be used. Equally, it was well aware of the harm that would ensue to the children by reason of the absence or inadequacy of fire exits".[41] These words are clearly an example of his Lordship alluding to the concept of foreseeability, although not referring to it expressly.

The judgment of the Federal Court in *Lembaga Kemajuan Tanah Persekutuan* is noted for its rejection of an attempt by counsel for Felda, the appellant, to reintroduce into Malaysian law, the pre-*Donoghue v Stevenson* English law position for the law of negligence. Counsel for Felda argued that as the sub-contract was unauthorised, the sub-contractor's employee must in the circumstances of the case be a trespasser, and as such Felda owed him no duty of care whatsoever. In his celebrated judgment, Salleh Abas CJ said:

> [w]ith respect, we disagree. The submission seems to us to be an attempt to revive a notion which had long been discarded in that tortious liability depends upon contractual relationship and that since Felda and the deceased had no contractual relationship with each other, Felda, therefore, owed no duty of care to him at all. This notion was abandoned in England by the House of Lords in *Donoghue v Stevenson*.[42]

40 [2002] MLJ LEXIS 650 at 33.
41 [2002] MLJ LEXIS 650 at 38.
42 [2002] MLJ LEXIS 650 at 29-30.

This judgment has been cited with approval by Gopal Sri Ram JCA in *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors.*[43] This is perhaps the underlying reason why the Court of Appeal were so eager to reprimand the High Court judge in *Sri Inai (Pulau Pinang) Sdn Bhd* for applying *Cavalier*. Although the courts in England and Wales regard *Cavalier* as being "unaffected by the Delphic pronouncement of Lord Atkin in *Donoghue*", Gopal Sri Ram JCA intended to ensure that the pre-*Donoghue* position did not creep back into Malaysian law via the back door with the High Courts acceptance of *Cavalier* and its rejection of *AC Billings & Sons Ltd.*[44] There was perhaps some concern that a rejection of *AC Billings & Sons Ltd* also meant an indirect rejection of *Lembaga Kemajuan Tanah Persekutuan*. As Gopal Sri Ram had pointed out in *Sri Inai (Pulau Pinang) Sdn Bhd*:

> [t]he importance of the decision of the Federal Court in *Lembaga Kemajuan Tanah Persekutuan v Mariam* lies in the acceptance in Malaysia of the proposition that *Donoghue v Stevenson* has an overriding effect upon cases that preceded it where courts insisted upon a pre-existing contractual relationship in order for a duty of care to arise. *Cavalier v Pope* is one such case.[45]

The scapegoat that bore the brunt of criticism for the pre-*Donoghue* position is Baron Alderson's judgment in *Winterbottom v Wright.*[46] His Lordship held that a third party injured by the non-performance of a contract could not sue in tort as that meant benefiting from a contract to which he/she was not privy to. This was the "privity of contract" fallacy that was dismissed by the majority of the Law Lords in *Donoghue*. The misapprehension is lucidly explained by Jones who rightfully points out that "[t]he fallacy lay in the fact that the third party's claim is in tort, not contract, and there is no reason why a contractual relationship between A and B should preclude a tortious duty of care as to C's safety in carrying out the contract".[47] The end result of the Court of Appeal's approach in *Sri Inai* is that the status quo in the law of negligence is ensured, ie, the legal proposition reflected in *Donoghue v Stevenson*, that a contractual relationship is not a prerequisite for the existence of a duty of care, still remains the applicable law in Malaysia.

i. The burial by the Privy Council in Grant v Australian Knitting Mills Ltd

The attempts in *Lembaga Kemajuan Tanah Persekutuan* and *Sri Inai (Pulau Pinang) Sdn Bhd* to revive the pre-*Donoghue* position that there ought to be a pre-existing contractual relationship between the tortfeasor and claimant for there to be a duty of care, does not earn the distinction of being ground-breaking effort in the Commonwealth. More than half a century ago, an appeal from Australia that was brought

43 Ibid.
44 [2002] MLJ LEXIS 650 at 31.
45 Ibid.
46 (1842) 10 M & W 109.
47 Jones, *Textbook on Tort* (Oxford University Press 8th Ed 2002) at 33.

before the Privy Council, in *Grant v Australian Knitting Mills Ltd*,[48] also witnessed a similar argument being raised before the highest appellate court of the Commonwealth.

In *Grant*, the claimant suffered from dermatitis as a result of the manufacturer's negligence in leaving behind a residue of free sulphite, an irritating chemical, in his underpants. The Supreme Court of South Australia[49] found the manufacturer liable on the basis of tortious liability established in *Donoghue v Stevenson*. However, a majority of the High Court of Australia reversed that decision and applied the pre-*Donoghue* common law position represented in *Winterbottom v Wright*. In a comprehensive judgment on the subject, Lord Wright, in the leading Privy Council judgment, laid to rest any hopes of reviving the pre-*Donoghue* position in Australia. His Lordship held that a duty of care:

> was deduced simply from the facts relied on ... , but though the duty is personal, because it is inter partes, it needs no interchange of words, spoken or written, or signs of offer or assent; it is thus different in character from any contractual relationship; no question of consideration between the parties is relevant; for these reasons the use of the word "privity" in this connection is apt to mislead because of the suggestion of some overt relationship like that in contract.[50]

It is, therefore, not surprising that in *Sri Inai (Pulau Pinang) Sdn Bhd*, Gopal Sri Ram JCA agreed with Professor Winfield's assessment that the pre-*Donoghue* position was indeed given a "decent burial".[51]

ii. Quashing the English revival in Greene v Chelsea Borough Council

The principle in *Winterbottom* may have been given a "decent burial" by the Privy Council in *Grant*, but that did not discourage the point from being raised again almost 20 years later in *Greene v Chelsea Borough Council*[52] before the Court of Appeal of England and Wales. The proposition that was raised before the appellate court in *Greene* was that an owner who was still the occupier of premises when the tenant was merely licensed to occupy the property, on terms which did not amount to a demise, did not owe a duty of care to the tenant's wife, who was lawfully on the premises as there was no pre-existing contractual relationship between those two individuals. The owner of the premises was still the occupier as control was retained over the property for purposes of repair, and on this basis, the tenant's wife who was injured by the ceiling falling on her, sued the owner. Denning LJ as he then was, rejected the submission, repelling the attempt to revive the pre-*Donoghue* position with the following judgment that is now renowned in common law jurisdictions:

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48 [1936] AC 85.
49 Judgment delivered by Murray CJ.
50 [1936] AC 85 at 103-105.
51 [2002] MLJ LEXIS 650 at 30.
52 [1954] 2 All ER 318.

> [d]uring the nineteenth century a doctrine was current in the law which I will call the "privity of contract" doctrine. It was thought that, if a defendant became connected with the matter because of a contract he had made, his obligations were to be measured by the contract and by nothing else. It was said that he owed no duty of care to anyone who was not a party to the contract. This doctrine received its quietus by the decision of the House of Lords in *Donoghue v Stevenson*, but it has been asserted again before us today. We must, I think, firmly resist the revival of this worn out fallacy. The duty of the defendants here arose, not out of contract, but because, as the requisitioning authority, they were in law in possession of the house, and were in practice responsible for repairs. This practical responsibility meant that they had control of the house for the purpose of repairs, and this control imposed on them a duty to every person lawfully on the premises to take reasonable care to prevent damage through want of repair. What is reasonable care depends on all the circumstances of the case.[53]

Morris LJ concurred with the views of Denning LJ. The remaining Lord Justice reached the same conclusion, ie, that a landlord owner owed a duty of care to the lawful visitors of his tenants, but did not deal with the attempt of reviving the pre-*Donoghue* position.

iii. A re-affirmation of Donoghue v Stevenson in Malaysia

In the light of the Privy Council decision in *Grant* and the judicial pronouncement of the Court of Appeal in *Greene*, when Salleh Abas CJ delivered his judgment in *Lembaga Kemajuan Tanah Persekutuan*, he concluded that "these cases establish that a person owes a duty of care even to persons who have no contractual relationship with him, and that his liability to an injured person depends upon whether the injury was caused by his act or omission. It is the nature of his act or omission that makes him liable".[54] This passage was cited with approval by Gopal Sri Ram JCA in *Sri Inai (Pulau Pinang) Sdn Bhd*,[55] thus re-affirming the application of *Donoghue v Stevenson* in Malaysia, and in tandem, rejecting the previous position exemplified by *Winterbottom v Wright*. Hence, it is still the law in Malaysia that there is no requirement that there be a pre-existing contractual relationship for there to be a duty of care. This is indeed a relief as it would have been an embarrassment if the decision of the High Court in *Sri Inai (Pulau Pinang) Sdn Bhd* had been confirmed by Court of Appeal, thus resulting in the adoption of a legal position that is contrary to one of the fundamental doctrines of the law of negligence in common law. It is, therefore, not surprising that Gopal Sri Ram JCA tactfully chose not to name the High Court judge while delivering the judgment of the Court of Appeal, but instead chose to highlight the good work of the Sessions Court judge, Ms Ho Mooi Ching.[56]

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53 Ibid at 138.

54 [1984] 1 MLJ 283 at 284-285.

55 [2002] MLJ LEXIS 650 at 30.

56 Unfortunately for the Sessions Court judge, her name is not spelt correctly in the report of the Court of Appeal's judgment, see [2002] MLJ LEXIS 650 at 18, where she is recorded as "Ms Ho Mooi Cheng", the spelling error is italicised.

iv. Where the tortfeasor has a pre-existing contractual relationship with the claimant

Some legal systems have a doctrine that is known in French Law as *non cumul des obligations*, ie, it is not possible for a defendant to owe concurrent duties in contract and tort to the same person.[57] There were some attempts to establish that principle in the legal system of England and Wales,[58] but the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd*[59] laid to rest such hopes and established that a defendant could owe a claimant concurrent duties in both contract and tort. The Lords ruled that the claimant had the choice of taking advantage of whichever cause of action that was advantageous to him/her.[60] A brief reference was made to *Hendersen* in the judgment of the Sessions Court judge, Ms Ho Mooi Ching, but the Court of Appeal did not express their view on the matter.[61] The appellate justices could have used this occasion to express their views on whether *Hendersen* applied in Malaysia, or alternatively, the pre-*Hendersen* decision of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*[62] was to be preferred. It is understandable that no effort was spared in this direction as any judicial comment on this point would have been strictly *obiter* as the Court of Appeal had already decided that a lawful visitor of the tenant could sue the landlord for harm suffered via the tort of negligence as a duty of care was owed. Further, there was no contractual relationship between the lawful visitor and the landlord, hence, no possibility of the occurrence of a concurrent duty in both contract and tort. The issue of concurrent duties, if it were to arise at all, would do so in the context of the landlord-tenant relationship, where there's already a pre-existing tenancy agreement.

In *Tai Hing Cotton Mill Ltd*, the Privy Council was reluctant to allow a claimant to proceed in tort via negligence, as there was already a concurrent contractual relationship with the defendant bank. Lord Scarman made it clear that this reluctance was particularly great where there was a "commercial relationship" between the parties, because the parties to a contract have "the right to determine their obligations to each other".[63] In the context of *Sri Inai (Pulau Pinang) Sdn Bhd*, the commercial relationship was between the Penang Municipal Council and its tenant, there was no such relationship between the Council and a lawful visitor of the tenant. Lord Scarman was also convinced that adhering to a contractual analysis of the relationship was necessary for the "avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg, in the limitation of action".[64] This concern is perhaps of less relevance in Malaysia as the time limit for bringing actions in contract and tort are the same, ie, six years.[65] In England, this

57 See Rogers, *Winfield & Jolowicz on Tort* (Sweet & Maxwell 16th Ed 2002) 9.
58 For example, see *Groom v Crocker* [1939] 1 KB 194 and *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197 See also Rogers, n 57 at 9 fn 40.
59 [1995] 2 AC 145.
60 *Per* Lord Goff, ibid at 194.
61 [2002] MLJ LEXIS 650 at 22.
62 [1986] AC 80.
63 Ibid at 107.
64 Ibid.
65 See s 6 of the Limitation Act 1953 (Act 254).

factor was crucial in *Hendersen* as there was a longer time in which to file a claim under the Latent Damages Act 1986. Malaysia has not enacted a local equivalent of this legislation.

Relatively recently in *Sunrise Bhd & Anor v L & M Agencies Sdn Bhd,* [66] counsel for the defence argued before Kamalanathan Ratnam J in the High Court that on the basis of *Tai Hing Cotton Mil Ltd,* "it would be wrong for the second plaintiff to mix its causes of action with tort when what the second plaintiff essentially is seeking is a contractual remedy", and to his Lordship's amazement, counsel for the second plaintiff conceded to that submission. [67] Commenting on *Tai Hing Cotton Mill Ltd,* his Lordship said:

> I do not think that Lord Scarman intended to state that where there is a contractual relationship existing between two parties, their respective remedies lie in contract and not in tort. It is just that as a point of avoiding confusion the Privy Council did not wish to embark upon an investigation as to whether there can also be a cause of action in tort when the relationship seems clearly indicative of a contractual liability. That there can also be consideration towards obligations similarly arising in tort is shown by the readiness of their Lordships to confine the mutual obligations arising in tort, to be no 'greater than those to be found expressly or by necessary implication in their contract".[68]

This latter observation is indeed accurate as Jones points out:

> [t]he courts have demonstrated an increasing reluctance to impose a duty in tort where this would be wider than the parties' contractual obligations, on the basis that the parties had the opportunity to define the extent of their liability in the contract and did just that by entering into the contract. They cannot rely on the law of tort to provide greater protection than that for which, either expressly or impliedly, they have contracted.[69]

If the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd* had expressed its view on whether the concept of concurrent obligations in tort and contract to the same person was applicable in Malaysia, the legal local fraternity would not have to grope around in the dark on this particular point in law. Both *Hendersen* and *Tai Hing Cotton Mill Ltd* are post-1956 decisions, hence, in accordance with Hashim Yeop A Sani CJ's interpretation of section 3 of the Civil Law Act 1956 in *Chung Kiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [70], "[t]he development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the court of this country".[71]

66 [1999] 3 MLJ 544.
67 Ibid at 560.
68 *Ibid.*
69 See Jones, n 47 at 4. For judicial support of this view, see *Pacific Associates Inc v Baxter* [1989] 2 All ER 159 (CA) *per* Purchas LJ at 170.
70 [1990] 1 MLJ 356.
71 *Ibid* at 361. Cited and applied by Gopal Sri Ram JCA in *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee* [2002] MLJ LEXIS 650 at 32-33.

That means, any Malaysian court in the future can freely choose either *Hendersen* or *Tai Hing Cotton Mill Ltd*, when deciding whether a commercial relationship could be subject to concurrent liabilities in tort and contract. The issue has only been raised once by defence counsel before the Malaysian judiciary in *Sunrise Bhd*, and this was followed by a meek surrender by counsel for the plaintiff who conceded this point, probably in ignorance of the decision in *Hendersen*. If a court in Malaysia had to choose between *Hendersen* and *Tai Hing Cotton Mill Ltd*, it is submitted that the latter case would probably be preferred as the former was decided on the basis of the Latent Damages Act 1986, whereas Malaysia, not having its own equivalent Act, applies the pre-1986 common law position exemplified by the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[72] which is totally in contrast to that legislative provision. Any future Malaysian court should not fear adopting a view that is contrary to English Law as Gopal Sri Ram JCA himself pointed out in *Sri Inai (Pulau Pinang) Sdn Bhd* that it was "entirely up to our courts to develop our common law jurisprudence according to the needs of our local circumstances",[73] taking note of the fact that this had the blessings of the Privy Council as it was "in keeping with the common law tradition".[74] Lord Lloyd reminded members of the Commonwealth judiciary in *Invercargill City Council v Hamlin*[75] that the "ability of the common law to adapt itself to differing circumstances of the countries in which it has taken root is not a weakness, but one of its greatest strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other".[76]

c. The nature, scope and extent of the duty owed by the landlord

In *Sri Inai (Pulau Pinang) Sdn Bhd*, Gopal Sri Ram JCA held that "the duty owed by a landlord to the lawful visitors of his tenant is to ensure that the premises that are let out are safe for the purposes for which they are meant to be used and the defect complained of by the entrant must be a defect of which the landlord had knowledge or means of knowledge".[77] In arriving at this legal position, his Lordship first dealt with the landlord tenant relationship, before extending his analysis to the relationship between the landlord and the lawful visitors of the tenant. In order to determine the nature, scope and extent of the duty owed by a landlord to lawful visitors of the tenant, Gopal Sri Ram JCA referred to two judgments in the Australian case of *Jones v Barlett*.[78]

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72 [1983] 1 All ER 65 Applied by the High Courts in *Bank Bumiputra Malaysia Bhd v Tetuan Wan Marican Hamzah & Shaik* [1994] 1 MLJ 124 and *Kuala Lumpur Finance Bhd v KGV Associates Sdn Bhd* [1995] 1 MLJ 504.

73 [2002] MLJ LEXIS 650 at 31-32.

74 Ibid. See *Travers v Gloucester Corporation* [1947] 1 KB 71.

75 [1996] 1 All ER 756. Cited by Gopal Sri Ram JCA in *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors* [2002] MLJ LEXIS 650 at 32.

76 Ibid at 764.

77 [2002] MLJ LEXIS 650 at 36.

78 [2000] HCA 56.

One of the judges of the Australian High Court, Gummow J, took note of the proximity of the relationship between the landlord and the tenant, observing that it "is so close and direct that the landlord is obliged to take reasonable care that the tenant not suffer injury" and this could be achieved by complying with the "requirement that the premises be reasonably fit for the purposes for which they are let, namely habitation as a domestic residence".[79] This duty also extends to lawful visitors of the tenants, as another judge of the Australian High Court, Haynes J, pointed out that the landlord's liability extends to "letting out of premises as safe for purposes for which they are not safe" because "dangerous defects are unlikely to discriminate between tenants and those on the premises whether as an incident of a familial or other personal relationship".[80] Hence it was not difficult for his Lordship to conclude that the "landlord's duty to take reasonable care that the premises contained no dangerous defects" also extended "to those other entrants".[81]

It is also important to note that the duty of care that a landlord owes to his/her tenant could not be the same in comparison to that owed to the lawful visitor of his/her tenant. Haynes J expressed the view that "the duty of the landlord owed to these third parties, in many cases, will be narrower than that owed to them by an occupier such as a tenant".[82] His Lordship explained that in the context of a lawful visitor of the tenant, the landlord is only liable for a dangerous defect he/she "knew or ought to have known", for example, no duty would be placed on a landlord for a "slippery floor" or "an unsecured gate to a fenced swimming pool".[83] Presumably, if a landlord knows or ought to know of the danger through regular maintenance inspections, action could be taken to rectify the defect/s, thus neutralising the danger.

Similarly, the duty of care also differs depending on the degree of control a landlord has over the premises. In *Jones*, Gummow J reminds us that, "ordinarily the landlord will surrender occupation of the premises to the tenant".[84] In the light of this, his Lordship took the view that "the content of any duty is likely to be less than that owed by an owner-occupier who retains the ability to direct what is done upon, with and to the premises".[85] As to specifics of how much less the content of the duty was, no judicial guidance was forthcoming, and though Gopal Sri Ram JCA cites Gummow J's judgment with approval in *Sri Inai (Pulau Pinang) Sdn Bhd*, the learned judge of the Court of Appeal does not provide any further clarification on the matter.

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79 Cited by Gopal Sri Ram in *Sri Inai (Pulau Pinang) Sdn Bhd* at [2002] MLJ LEXIS 650 at 34-35.
80 Ibid at 35-36. His lordship cited *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 as supporting his observations.
81 [2002] MLJ LEXIS 650 at 35.
82 Ibid at 35-36.
83 [2002] MLJ LEXIS 650 at 35.
84 Ibid at 34.
85 Ibid.

d. A landlord's liability in negligence for omissions

A distinction has always existed in common law between a positive act that results in damage, traditionally labelled as misfeasance, and the simple act of allowing the infliction of damage by not taking preventive steps, customarily known as nonfeasance. The rationale for the distinction, explains Jones, is "partly historical, partly practical" as the "early common law was hard put to deal with the intentional infliction of harm, and sins of omission are popularly regarded as less culpable than sins of commission".[86] This difference is also renowned as one of the more tortuous distinctions among the various concepts of tortious liability. For example, a negligent act could easily be reclassified as an omission to implement the necessary precautions.[87]

The rule governing the tort of negligence is that, generally, there is no liability for omissions at common law. The authors of a leading practitioner's reference explain that, "a failure to act is only actionable in tort if there is a prior duty to act to safeguard the relevant interest of the claimant".[88] The distinguished academics illustrate this point with the following example:

> A local authority failing to fence a deep pool in a pleasure park may be liable in negligence if a child falls in and drowns. A stranger, unrelated to the child, may stand by with impunity and watch the child drown, even though she be a strong swimmer who could have rescued the child with ease. She owes no duty to that child to act on her behalf.[89]

It is clear from the example above that only "pure omissions" are subject to that general rule. In *Sri Inai (Pulau Pinang) Sdn Bhd*, Gopal Sri Ram JCA points out that the general rule does not apply "where a defendant creates a danger, eg, by leaving an unlit vehicle on the highway. In such a case, the defendant would be under a duty to warn others of the danger he has created".[90] In the context of *Sri Inai (Pulau Pinang) Sdn Bhd*, the failure of the Penang Municipal Council to upgrade the premises was not a "pure omission". His Lordship held that there was duty to act on the part of the Council, in particular, "enforce compliance of the Uniform Building By-Laws 1986" and there was a breach of this duty by failing to make available "a safe exit for the occupants in the event of a fire".[91]

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86 See Jones, n 45 at 50.

87 Ibid.

88 See Dugdale (ed), *Clerk and Lindsell on Torts* (Sweet & Maxwell 18th Ed 2000) vol 1 at 26. Later at 306, the authors examine the justification for the principle of protecting "pure omissions". Apparently, priority is given by the common law to the autonomy of the individual, and hence, the reluctance to require an individual to act as if he or she were "my brother's keeper". See also *Stovin v Wise* [1996] AC 923 *per* Lord Hoffman at 943-944 for the justification from a political as well as from an economic point of view. Jones, n 47 at 50 offers an alternative analysis, explaining that "there is no general obligation to take positive steps to confer a benefit on others, by preventing harm befalling them. The conferment of benefits, it is said, lies in the realm of contract whereas tortious obligations are limited to not worsening someone's position".

89 Ibid.

90 [2002] MLJ LEXIS 650 at 37. His Lordship probably had in mind *Lee v Lever* [1974] RTR 35 when he used that example.

91 Ibid.

The general rule protecting "pure omissions" in negligence has been applied in numerous cases decided by courts in England and Wales, and Gopal Sri Ram JCA probably felt that the principle was so ingrained in common law, that there was no need to examine the authorities.[92] This was indeed an opportunity missed, as his Lordship overlooked a well-known illustration based on a biblical tale in *Home Office v Dorset Yacht Co Ltd*[93] that is frequently used by legal educators to illustrate the general exemption of liability in negligence for pure omissions.[94] In his celebrated speech, Lord Diplock made the following observation:

> The parable of the Good Samaritan which was evoked by Lord Atkin in *Donoghue v Stevenson* illustrates, in the conduct of the priest and Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English Law.[95]

One point that Gopal Sri Ram JCA did not deal with is the possibility that "pure omissions" do attract liability, albeit in rare instances. In the words of Rogers, "even when there is a 'true' omission the law may impose a duty to act and not infrequently does so".[96] There are two circumstances where such liability is imposed, first, where the claimant is in a relationship of dependence with the defendant, and second, where the defendant is under a duty of affirmative action to perform for the benefit of the claimant.[97] An example of the former situation would be the failure of a parent to prevent injury to his/her child,[98] and an illustration of the latter is an employer who does not attend to the welfare of an employee who is injured or ill at work.[99] The case of *Sri Inai (Pulau Pinang) Sdn Bhd* is a good example of this latter category as there was a failure by the Penang Municipal Council to comply with the duties imposed on it by the Uniform Building By-Laws 1986, ie, to take remedial steps to ensure that the premises were safe for occupation.

e. Liability of the landlord in the capacity as a local authority

The High Court judge in *Sri Inai (Pulau Pinang) Sdn Bhd* held that as a matter of law, the Penang Municipal Council could not be found liable in its capacity as a local

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92 See *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, *per* Lord Goff at 247; *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 111; *E Hobbs Farms Ltd v Baxandale Chemcical Co Ltd* [1992] 1 Lloyd's Rep 55, *per* Deputy Judge Ogden QC at 65; *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 and the relatively recent decision of *Capital & Counties plc v Hampshire CC* [1997] QB 1004 (CA) where Stuart Smith LJ at 1035 said "... a doctor who happens to witness a road accident will very likely go to the assistance of anyone injured, but he is not under any legal obligation to do so (save in limited circumstances) ... if he volunteers assistance, his only duty as a matter of law is not to make the victim's condition worse".

93 [1970] AC 1004.

94 This example is used in Rogers, *Windfield & Jolowicz on Tort* (Sweet & Maxwell 16th Ed 2002) 134.

95 [1970] AC 1004 at 1060.

96 See Rogers, n 57 at 137.

97 Ibid.

98 See *Surtees v Kingston on Thames BC* [1992] PIQR 101.

99 See *Kasapis v Laimos* [1959] 2 Lloyd's Rep 378 See also Rogers, n 57 at 138.

authority for the harm suffered by a lawful visitor of its tenant.[100] The are no Malaysian authorities on this point of law, and in an effort to determine whether the High Court judge was justified in reaching that conclusion, reference has to be made to the decision of the House of Lords in *Stovin v Wise*.[101] The claimant in *Stovin* sued the local authority in negligence for its failure to remove an obstruction that made a road junction dangerous. Lord Hoffman, who delivered the leading speech of the majority, held that the allegation of negligence was in actual fact a pure omission, for which there was no recognised liability in negligence at common law. His Lordship expounded the view that a public authority with the power to act, is not responsible in negligence simply because a claimant is foreseeably harmed when the public authority chooses not to exercise the power.[102] If the statutory power is discretionary, then a failure to act should not attract tortious liability, as the authors of a leading practitioner's reference point out, by its very nature, "a discretion (statutory or otherwise) authorises but does not compel".[103]

This argument, however, it is submitted, has no application in *Sri Inai (Pulau Pinang) Sdn Bhd* as the duties imposed by Uniform Building By-Laws 1986 are mandatory and the Penang Municipal Council is compelled by statute to ensure that premises under its care are safe, taking positive steps, if necessary to achieve this end. Therefore, *Stovin*, could be distinguished from the factual circumstance put before the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd*. The Court of Appeal, though, refrained from making a ruling on this point. Gopal Sri Ram JCA merely pointed to the fact that the powerful dissenting speeches of Lord Slynn and Lord Nicholls inspired some courts in the Commonwealth to rebel against the approach of the majority in *Stovin*, and the Court of Appeal in Malaysia was similarly invited to do the same.[104] As for the cases of *Pyrenees Shire Council v Day*[105] and *Union of India v United India Assurance Co Ltd*,[106] both the Court of Appeal of Australia and the Supreme Court of India respectively, rejected the views of the majority in *Stovin*. In *Sri Inai (Pulau Pinang) Sdn Bhd*, Gopal Sri Ram JCA fleetingly hinted that he preferred this point of view as well, in particular describing Jagannadha Rao J as a "most learned and eminent judge" who, in *Union of India*, had "developed jurisprudence in keeping with the views of the minority in *Stovin*'s case".[107] For the present moment, at least, the Court of Appeal merely found this point of law "to be of much interest", and left the point open for decision by another court in the future.[108] As the Court of Appeal had decided that the Penang Municipal Council was liable in its capacity as landlord to the lawful visitors of its tenants, Gopal Sri Ram JCA rightly

100 See [2002] MLJ LEXIS 650 at 23.
101 [1996] AC 923.
102 Ibid at 950.
103 Dugdale (ed), n 88 at 656.
104 [2002] MLJ LEXIS 650 at 40.
105 [1996] VIC LEXIS 731; [1997] 1 VR 218; (1998) 151 ALR 147 Other actions consolidated and heard before the court were *Nakos & Anor v Pyrenees Shire Council* and *Eskimo Amber Pty Ltd & Ors v Pyrenees Shire Council*
106 (1998) AIR 640.
107 [2002] MLJ LEXIS 650 at 40.
108 Ibid.

pointed out that any views expressed on this matter by the appellate court would have been strictly obiter.[109]

f. Expansion of the existing categories of negligences

When the Court of Appeal delivered its judgment in *Sri Inai (Pulau Pinang) Sdn Bhd*, the leading appellate justice, Gopal Sri Ram JCA, was at pains to convey the message to that the duty of care owed by a landlord to the lawful visitors of its tenants was merely a straightforward application of the Atkinian blueprint in *Donoghue v Stevenson*.[110] Although in that historic case, Lord Macmillan said that "the categories of negligence are never closed',[111] this is not a licence for an unrestricted expansion of the tort of negligence into new categories of liability. The Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd* stressed that their decision was "entirely in keeping with the common law philosophy in relation to the tort of negligence",[112] adopting the philosophy of Brennan J in the Australian case of *Sutherland Shire Council v Heyman*[113] that "the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty".[114] This is also the approach preferred by Lord Keith in *Murphy v Brentwood DC*,[115] and, the highest echelons of the judiciary in England and Wales, believe that there is a clear advantage with adopting this philosophy. For example, in *Caparo v Dickman*,[116] Lord Roskill criticised wide generalisations as it led to practical matters of difficulty and uncertainty.[117] This cautious approach is probably a reaction to the developments in the 1960s and 1970s that had the effect of expanding the tort of negligence into areas of loss that were traditionally regarded as either a ground of immunity or subject only to a limited duty.[118]

Conclusion

The law on occupiers' liability has remained the preserve of common law principle ever since independence. Singapore, our immediate common law neighbour, also adopts a similar legal position, and cases such as *AC Billings & Sons Ltd* was recently cited before the Singapore High Court in *Wong Jin Fah (Suing By His Next Friend Ho Chia Hao) v L & M Prestressing Pte Ltd & Ors (Liberty Citystate Insurance Pte Ltd*

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109 [2002] MLJ LEXIS 650 at 40. For a more detailed exposition on the liability of local authorities for negligence in Malaysia, see the judgment of Gopal Sri Ram JCA in *Arab Malaysia Finance Bhd v Steven Phoa Cheng Loon and Others and Other Appeals* [2003] 1 MLJ 567 at 590-595.

110 Ibid at 33.

111 [1932] AC 562 at 619.

112 [2002] MLJ LEXIS 650 at 33

113 (1985) 157 CLR 424

114 Ibid at 481.

115 [1990] 2 All ER 908 at 915.

116 [1990] 1 All ER 568.

117 Ibid at 582.

118 Jones, n 47 at 37.

(FKA City State Insurance Pte Ltd) & Anor, Third Parties.[119] Putting an end to legal controversies such as making a choice between *Cavalier* and *AC Billings & Sons Ltd*, as well as suffering the consequence of the legal fallout from either choice, only requires the drafting and the enactment of a Malaysian version of the Occupiers' Liability Act 1957. After all, if the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd* and the Federal Court in *Lembaga Kemajuan Tanah Persekutuan* were bold enough to apply *AC Billings & Sons Ltd*, Parliament could follow that judicial lead by making legislative provision to govern the legal relationship between and occupier and a visitor to the premises. After all, judicial attempts to improve upon the position in *Cavalier*, such as those made by the House of Lords in *AC Billings & Sons Ltd*, did inspire a radical change in English law via the Occupiers' Liability Act 1956, and it is not inconceivable that the Court of Appeal in *Sri Inai (Pulau Pinang) Sdn Bhd* could also have a corresponding effect on our Parliament.

119 [2001] 4 SLR 429.