HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MARC JARRAD JONES APPELLANT

AND

GRAHAM BARTLETT & ANOR RESPONDENTS

Jones v Bartlett [2000] HCA 56
16 November 2000
P59/1999

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation:

E M Heenan QC with C P Shanahan for the appellant (instructed by Butcher Paull & Calder)

M W Odes QC with S H Hay for the respondents (instructed by Phillips Fox)

CATCHWORDS

Jones v Bartlett & Anor

Negligence – Duty of care – Person lawfully on premises injured by glass door – Scope of landlord's duty of care to a person who resides on premises – Scope of landlord's duty of care in respect of state of premises – Whether duty to have premises inspected by expert.

Contracts – Tenancy agreement – Whether s 11 of the *Property Law Act* 1969 (WA) allows a third party to sue for breach of tenancy agreement.

Statutory liability – Occupiers' liability – Whether landlord was an "occupier of premises" under s 5(1) of the *Occupiers' Liability Act* 1985 (WA) – Duty of landlord under s 9(1) of the *Occupiers' Liability Act* 1985 (WA).

Residential Tenancies Act 1987 (WA), s 42.
Property Law Act 1969 (WA), s 11.
Occupiers' Liability Act 1985 (WA), ss 5(1), 9(1).

Words and phrases – "occupier of premises".

1 GLEESON CJ. The question in this appeal is whether the respondents, the owners of a dwelling house at Mt Pleasant in Western Australia, are liable to the appellant, the son of the tenants of the house, who injured himself by carelessly putting his knee through a glass door in the house.

2 Damages were agreed in the sum of $75,000. At the trial in the District Court, the issue was liability.

3 At first instance, Commissioner Reynolds found in favour of the appellant[1]. The decision was based upon the *Occupiers' Liability Act* 1985 (WA). A finding of contributory negligence was made against the appellant, and damages were reduced by fifty per cent. Judgment was entered for $37,500. An appeal to the Full Court of the Supreme Court of Western Australia (Murray, White and Scott JJ) was allowed[2]. The Full Court ordered that the appellant's claim be dismissed. By special leave, the appellant appeals to this Court.

The facts

4 The appellant suffered his injury when, on the evening of 27 November 1993, he walked into a glass door which separated the dining room and the games room of the house which his parents were renting from the respondents.

5 Commissioner Reynolds made the following findings about the circumstances of the accident.

6 The house was built in the late 1950s or early 1960s. Originally, it consisted of three bedrooms, a bathroom, a toilet, a laundry, a kitchen, a lounge room and a dining room. Some time later, a games room was added at the rear of the house. The door in question, which was made of glass in a timber frame, connected the dining room to the games room.

7 The parents of the appellant took a lease of the house from the respondents in November 1992. The lease expired on 6 November 1993. They remained in the premises thereafter, on a fortnightly basis, on the terms of the original lease.

8 The accident occurred because the appellant, who had been living in the house with his parents for about four months, walked into the door without looking to see whether it was open or closed. On the view I take of the case, it is

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1 *Jones v Bartlett* unreported, District Court of Western Australia, 4 February 1998.

2 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999.

unnecessary to pursue the matter of contributory negligence. It may be noted, however, that the Full Court of the Supreme Court, although it was strictly unnecessary to decide the point, went further than Commissioner Reynolds, and found that the appellant's carelessness was the sole cause of his injury.

9 The alleged negligence, or breach of contractual duty, on the part of the respondents, consisted in failing to have an expert inspect the premises before they were let to the parents of the appellant, and in failing to have the glass in the door in question replaced with thicker glass which would comply with the safety standards that would have applied had the building been newly constructed, or had the glass in the door been replaced, at that time.

10 The appellant called, as a witness, Mr Fryer, who was a consultant in matters concerning the use of glass. Commissioner Reynolds summarised the evidence of Mr Fryer as follows:

> "He examined a piece of glass from the glass door and found it to be annealed glass of 4 mm thickness. It was not laminated or strengthened. He gave evidence about the Australian Standards for glass.
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> The first Australian Standard was CA26-1957. It did not prescribe any mandatory requirements for fitting glass panes. It was only concerned with wind loads and not human impact. It recommended annealed glass of 4 mm thickness. The glass is called annealed because of the cooling process it goes through when it comes out of a furnace.
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> The relevant standard was later upgraded in 1973, 1979 and 1989. I accept that there was no statutory duty to upgrade the glass in the glass door as standards changed and no evidence that the defendants knew of the standards. The 1989 standard required replacement glass in such a door or a new door in new premises, if the glass was annealed glass, to be 10 mm thickness. The 1989 standard also provided for toughened safety glass and laminated safety glass.
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> Mr Fryer said that he would charge about $130 to do an inspection and report on the suitability of glass in premises such as the premises. He added that he has not carried out such an inspection on residential premises."

11 In brief, the evidence showed that the glass door complied with the building standards and regulations applicable at the time the house was constructed. The annealed glass in the door was 4 mm thick, which was what the Australian Standard recommended. The glass in the door did not comply with the standards that would have been applicable had the house been constructed immediately before the lease was entered into. If the glass in the door had been replaced immediately before that time, replacement glass would have had to be a

thickness of 10 mm, unless it was toughened safety glass, laminated glass, or safety organic coated glass.

12 Commissioner Reynolds also made the following finding, which was challenged in argument. He said:

> "I find that if the premises were inspected on or before 6 November 1992 by a person with building qualifications to assess safety then it is likely that comment would have been made that the glass in the door fell a long way short of the then current standard with a recommendation that it be replaced."

13 There was no evidence to support that finding. In particular, Mr Fryer was not asked whether he would have made such a recommendation. There is nothing in his evidence to support the inference that he would have made such a recommendation.

14 A related finding that was also the subject of criticism was expressed by Commissioner Reynolds as follows:

> "There is no evidence on the cost of a glass door that complied with the standard at the time but I think it fair to conclude that the cost of such a door would be cheap relative to the risk of the danger and the potential gravity of injury."

15 The criticism of that finding was that it concentrated exclusively on the cost of replacement of the particular glass door in question. If an expert in glass had been engaged to inspect the premises at the time of the lease, there is no reason to think that attention would have been concentrated solely upon the glass door through which the appellant put his knee. Furthermore, if the premises had been inspected at the time of the lease for the purpose of considering any and all respects in which they might not have complied with current building standards if they had been newly built, then there is no reason why attention would have been limited to the subject of glass. The circumstance that, with the benefit of hindsight, it is known that it was a particular glass door that caused injury to the appellant, provides no justification for restricting consideration of compliance with current building standards, or the cost of replacement of articles not complying with current building standards, to the glass door.

16 The critical finding of Commissioner Reynolds, which led to the imposition of liability under the *Occupiers' Liability Act*, and which is also relied upon to support a case based on the common law tort of negligence, was as follows:

> "I find that the defendants were negligent by failing to have the premises adequately inspected for safety prior to allowing the plaintiff's

parents into possession. It is likely that such an inspection would have resulted in the state of the glass door being brought to their attention. They should have known the state of the door gave rise to serious danger and replaced it with a door that complied with the safety standard at the time."

17 That finding was reversed by the Full Court, which decided against the appellant, insofar as his case was based on negligence, on the facts. In that connection, it should be noted that, at all stages of the litigation, the respondents have conceded that they owed a duty of care to the appellant, although there was a dispute as to the content of that duty.

18 The leading judgment in the Full Court was written by Murray J, with whom the other members of the Court agreed. His Honour said[3]:

"As I have mentioned, [Commissioner Reynolds] found the breach of duty in the failure to have the premises adequately inspected for safety. With respect I find myself unable to agree. I have expressed the view that in the circumstances of this case as they were established at trial, there was a very remote prospect of a collision between a person and the glass in the door. Once that occurred, of course, the risk of injury was substantial if the collision was with sufficient force to cause the glass to break, but there was no danger that that would occur without such a collision, or when the door was used normally. Certainly it was, on the evidence, a well trafficked area allowing access between the interior of the house and the backyard, but the door was positioned so that it could be clearly seen and the fact that it was made of glass in a wide wooden frame clearly observed. The handle was readily accessible. It formed no trap to the ordinary user of the door, particularly not to an adult.

When the lease was entered into in November 1992 the respondent's parents inspected the premises and found no fault with them. For the appellants the inspection was carried out by their agent, Mr Henley. His evidence was that although he was primarily concerned to make an inventory of the contents of the premises, he would have brought to the appellants' attention and have them deal with any matter concerned with the safety of the premises to which the respondent's parents objected, or which he noticed himself. The evidence did not deal with whether the state of the glass would have been discoverable upon reasonable inspection by a qualified builder or some person of that kind.

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3 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 24-25.

> Mr Fryer, the expert glazier, gave evidence that he would readily have been able to detect that the glass in the door was not of the required Australian Standard by a relatively simple inspection, but he also said that he had never been called upon to do such an inspection of a domestic residence for safety purposes and he had never heard of such an inspection being carried out by any other of his expert colleagues. He conceded that while he could identify the type of glass, 'not too many people' would be able to do so and 'the general public would not know.' The evidence was that to the casual observer the door appeared to be, as it was, in a state of good repair, and it operated quite normally.
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> In those circumstances I am unable to conclude that any reasonable requirement to have the door expertly assessed arose."

19 The conclusion that the respondents were not negligent in failing to have the door expertly assessed at the time of the lease, is, in one respect, expressed in terms which are unduly favourable to the appellant. As was noted above, if there were to be an expert assessment at the time of the lease, there is no reason why it would have been restricted to an assessment of the glass door in question. Implicit in the proposition that reasonable care required that there should have been an expert assessment is the idea that all features of the premises potentially capable of harming someone who came onto the premises, or, at least, the prospective tenants and members of their households, should have been the subject of expert assessment. The glass door had been there for thirty years without causing any harm. It was an ordinary door, constructed in accordance with building practice and standards of the time when the house was built. There was no reason why it would have been the focus of special attention.

20 Having reached that conclusion, it was unnecessary for Murray J to go on to deal with the finding at first instance that, if there had been such an assessment, there would have been a recommendation to replace the glass in the door. It has already been pointed out that there was no evidence to justify that finding. It also suffers from the defect of involving unjustifiable ex post facto concentration on the door.

"Defects"

21 For most of this century, the common law in Australia was taken to be as stated by the House of Lords in *Cavalier v Pope*[4]. That was a case about a lease of a dilapidated house. The tenant's wife was injured when she fell through the

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4 [1906] AC 428.

floor. Lord Macnaghten[5] referred to a statement made in *Robbins v Jones*[6] in 1863 that "there is no law against letting a tumble-down house". In *Northern Sandblasting Pty Ltd v Harris*[7], this Court decided that the common law in Australia is different. (How different was not made completely clear). That was a case in which principles were stated in relation to "defects". The premises in that case were undoubtedly defective. The electrical wiring had been left in a highly dangerous condition as the result of the negligence of an electrical contractor.

22 In the present case, we are not concerned with a dwelling house that was dilapidated or tumble-down, or that contained negligently installed and dangerous electrical wiring. There was nothing about the premises that alerted, or should have alerted, the owners to any unusual danger. The premises were constructed in accordance with the standards prevailing at the time, and, so far as appears from the evidence, were adequately maintained.

23 There is no such thing as absolute safety. All residential premises contain hazards to their occupants and to visitors. Most dwelling houses could be made safer, if safety were the only consideration. The fact that a house could be made safer does not mean it is dangerous or defective. Safety standards imposed by legislation or regulation recognise a need to balance safety with other factors, including cost, convenience, aesthetics and practicality. The standards in force at the time of the lease reflect this. They did not require thicker or tougher glass to be put into the door that caused the injury unless, for some reason, the glass had to be replaced. That, it is true, is merely the way the standards were framed, and it does not pre-empt the common law. But it reflects common sense.

24 In *Phillis v Daly*[8], Mahoney JA said:

> "There are dangers on any premises. A room may have a desk or a table. There is a danger that, if I fall, I will hit my head on it and my skull will be fractured. If the desk or table were not there, I would suffer little or no harm. And the danger is obvious: people do slip and fall. And the injury may be serious. But the obvious foreseeability of such an injury and its seriousness does not involve that, if a person falls and hits his head on a table, there must have been a breach of duty by the occupier of the

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5 [1906] AC 428 at 430.

6 (1863) 15 CB (NS) 221 at 240 [143 ER 768 at 776].

7 (1997) 188 CLR 313.

8 (1988) 15 NSWLR 65 at 74.

room. And this notwithstanding that people may live without tables and that tables may be easily removed."

25 It is interesting, and not without relevance, to speculate about how many objects in and around an ordinary dwelling house would constitute a potential hazard to a person who behaved as carelessly as the appellant.

26 I do not accept that the condition of the respondents' premises was shown to be defective in any relevant sense.

The claim in contract

27 The appellant claimed that the respondents were in breach of their contractual obligations under the lease, as extended by the *Residential Tenancies Act* 1987 (WA). He also claimed that, by reason of s 11 of the *Property Law Act* 1969 (WA), he was entitled to sue for such breach even though he was not a party to the contract.

28 The first of those two propositions was rejected both by Commissioner Reynolds and the Full Court. On that basis, the second proposition did not require determination, although views adverse to the appellant were expressed about it.

29 The lease obliged the tenants to keep the premises in good working order, fair wear and tear excepted, and to keep (amongst other things) all doors, including glass doors, in the same condition as they were at the commencement of the tenancy, fair wear and tear excepted. Commissioner Reynolds found that, at the time of the accident, there was nothing about the condition of the door that required repair. "It was essentially as good as a new door of its type."

30 Section 42 (1) of the *Residential Tenancies Act* provides:

"42 (1) It is a term of every agreement that the owner –

(a) shall provide the premises in a reasonable state of cleanliness;

(b) shall provide and maintain the premises in a reasonable state of repair having regard to their age, character and prospective life; and

(c) shall comply with all requirements in respect of buildings, health and safety under any other written law in so far as they apply to the premises."

31 The lease did not contain any provision which excluded, modified or restricted the operation of s 42.

32 It has already been noted that there was no legislative or regulatory requirement that the glass in the door in question had to be thicker or tougher than it was. If it were being replaced, the new glass would have to be thicker or tougher, but, unless and until that occurred, there was no requirement of the kind referred to in s 42(1)(c) of potential relevance. There was no failure to comply with any such requirement.

33 As to s 42(1)(b), Commissioner Reynolds held that the premises were at all material times in a reasonable state of repair having regard to their age, character and prospective life. It was found that, by ordinary use of the glass door, (which did not include attempting to walk through it when it was closed), personal injury would not be caused, and that the premises were reasonably fit for human habitation[9]. The Full Court agreed[10].

34 No successful challenge to those findings has been made on this appeal.

35 In this Court, it was also argued that the lease contained an implied warranty that reasonable care had been taken to make and keep the premises reasonably fit and safe for the purposes for which they were to be used. This proposition was based upon common law principles concerning the liability of occupiers of premises for injuries suffered by persons entering pursuant to contract on the premises through defects or dangers existing in the premises. Cases such as *Francis v Cockrell*[11], *Maclenan v Segar*[12] and *Watson v George*[13] were relied upon.

36 The first thing to be said about this suggested implication is that it does not add anything, on the facts of the present case, to what was included in the contract by s 42 of the *Residential Tenancies Act.* If it imposed upon the respondents an obligation more onerous than that imposed by the terms of the

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9 *Jones v Bartlett* unreported, District Court of Western Australia, 4 February 1998 at 14.

10 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 17.

11 (1870) LR 5 QB 184.

12 [1917] 2 KB 325.

13 (1953) 89 CLR 409.

contract, as affected by the statute, then it may be doubted whether the implication could be made. There was no argument addressed to this point, and I express no concluded view upon it.

37 Secondly, the findings of fact made by Commissioner Reynolds and the Full Court in dealing with the argument based upon s 42 apply also to the suggested implication. The premises were reasonably fit and safe for ordinary use as a dwelling house. Their condition was not defective.

38 Thirdly, both as to this aspect of the case in contract and as to s 42 of the *Residential Tenancies Act*, as was held at first instance and in the Full Court, the appellant was not a party to the tenancy agreement and s 11 of the *Property Law Act* does not enable him to sue for breach of the agreement. That section provides:

> "11. (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.
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> (2) Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but –
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> (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
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> (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
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> (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.
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> (3) Unless the contract referred to in subsection (2) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the person referred to in that subsection has adopted it either expressly or by conduct."

39 There is nothing in the lease which purports to confer a right, interest or benefit upon the appellant. There was nothing to which s 11 could attach.

40 Reliance was placed upon a clause in the lease which stated that the purpose for which the premises were to be used was "a PRIVATE DWELLING to be occupied by not more than THREE persons". It was found as a fact that, at the time of the negotiations for lease, the agent for the respondents was informed that the tenants expected their son to come to live with them at a future time. That no doubt explains why it was agreed that up to three persons could occupy the house. However, the third person could have been anybody chosen by the tenants. If they had decided to invite someone to live with them other than their son, that would have been permissible under the lease. Their son could not have complained. The clauses conferred no benefit on the appellant.

41 The appellant's case in contract must fail.

Occupiers' Liability Act

42 This Act is described in its long title as an Act prescribing the standard of care owed by occupiers and landlords of premises to persons and property on the premises.

43 Section 4 of the Act, so far as presently relevant, provides that ss 5 to 7 are to have effect in place of the rules of common law for the purpose of determining the care which an occupier of the premises is required, by reason of the occupation or control of the premises, to show towards a person entering on the premises in respect, amongst other things, of dangers which are due to the state of the premises.

44 Section 5 provides:

> "5. (1) Subject to subsections (2) and (3) the care which an occupier of premises is required by reason of the occupation or control of the premises to show towards a person entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier is by law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement or otherwise, his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.
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> (2) The duty of care referred to in subsection (1) does not apply in respect of risks willingly assumed by the person entering on the premises but in that case the occupier of premises owes a duty to the

person not to create a danger with the deliberate intent of doing harm or damage to the person or his property and not to act with reckless disregard of the presence of the person or his property.

(3) A person who is on premises with the intention of committing, or in the commission of, an offence punishable by imprisonment is owed only the duty of care referred to in subsection (2).

(4) Without restricting the generality of subsection (1), in determining whether an occupier of premises has discharged his duty of care, consideration shall be given to –

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

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

(c) the nature of the premises;

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

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

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

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

45 Whilst it is true that more than one person may be in occupation of premises at any given time, ordinarily, when premises are subject to a lease, during the term of the lease, by virtue of the right of exclusive possession, the tenant is the occupier of the premises and the landlord is not. That accounts for the presence in the Act of s 9, which provides:

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

(2) Where premises are occupied or used by virtue of a sub-tenancy, subsection (1) shall apply to any landlord who is responsible

for the maintenance or repair of the premises comprised in the sub-tenancy.

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

(4) This section applies to tenancies created before the commencement of this Act as well as to tenancies created after its commencement."

46 As to s 9, the finding made by Commissioner Reynolds, in connection with the case based on contract, was that there was no failure on the part of the respondents to carry out their responsibilities of maintenance and repair. Therefore, no dangers arose from any such failure. Accordingly, and correctly, he did not pursue that topic.

47 Commissioner Reynolds held[14], and the Full Court agreed[15] that, because the lease prohibited the tenants from altering the premises without the prior consent of the respondents, and because the respondents were obliged to keep the premises in a good state of repair, then to that extent the respondents shared control of the premises with the tenants. Therefore, having regard to s 2 of the Act, and the definition of occupier of premises as meaning a person occupying or having control of premises, the respondents, as well as the tenants, were occupiers for the purposes of s 5 of the Act. That conclusion was challenged by the respondents, and I will return to it. However, it is from this point that the reasoning of the Full Court differed from that of Commissioner Reynolds. The key findings of Commissioner Reynolds as to breach of a duty of care are set out above. Murray J, with whom the other members of the Full Court agreed, accepting that the respondents were subject to the duty expressed in s 5, concluded that there was no breach of the duty. His Honour said that, if it was right to regard the state of the door as constituting a dangerous part of the premises, the respondents were under a duty to the appellant, imposed by s 5, to take such care as in all the circumstances of the case was reasonable to see that the appellant would not suffer injury or damage by reason of such danger[16]. He pointed out, correctly, that the present is not a case where issues as to

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14 *Jones v Bartlett* unreported, District Court of Western Australia, 4 February 1998 at 23-24.

15 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 20.

16 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 20-21.

non-delegability of a duty arise. He also expressed the view that the duty owed to the appellant at common law would not be materially different from that imposed by s 5.

48 The findings of Murray J, agreed in by the other members of the Full Court, have also been set out above, in dealing with the facts of the case.

49 On this aspect of the case, I prefer the reasoning of the Full Court to that of Commissioner Reynolds. The argument that reasonable care required the respondents, prior to the commencement of the lease, to have the premises expertly assessed to see whether, and in what respects, their construction fell short of current building standards, or whether, and in what respects, they could be made safer, is unconvincing. It has not been shown to be usual practice. The evidence indicates that it is not usual practice. There was nothing to suggest to the respondents that the house was defective or dangerous, or that, by reason of its age, or condition, it was hazardous to occupy. If, every time a lease is entered into, the landlord must have an expert assessment of the premises, it will ordinarily be the tenant who has to pay. That may be one reason why it is not common practice. Equally unconvincing, and unsupported by the evidence, is the assertion that, if an expert had assessed the premises, there would have been a recommendation to replace the glass in the door. Mr Fryer did not say he would have made such a recommendation. He was never asked that question; possibly for good reason.

50 Although the appellant's case on the Act failed on the facts, the proposition that the respondents were occupiers for the purposes of s 5 was contested. It may be accepted that the respondents were occupiers immediately before the commencement of the lease, and, in so far as their alleged negligence consisted of a failure to arrange for an expert assessment of the premises at that stage, then it could be related to their occupancy. However, ss 4 and 5 of the Act assume a temporal relationship between a defendant's status as occupier and a plaintiff's entering upon the subject premises. The proposition that the respondents retained the status of occupiers throughout the term of the lease, jointly with the tenants, by reason of their control over repairs and alterations, is unacceptable. The right to exclusive possession of the premises was in the tenants. The respondents did not have control of the premises, within the meaning of s 2, merely because they alone had the right to effect, or approve, repairs and alterations. Murray J said that "the learned Commissioner was right to regard the appellants as occupiers in respect of the condition of the door"[17]. The question is whether they were occupiers of the premises, not the door. During the term of the lease, they did not occupy or control the premises. In this respect, the reasoning of the Full Court was unduly favourable to the appellant.

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17 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 20.

Liability in tort at common law

51 It was submitted for the appellant that, even if he could not rely upon s 5 of the *Occupiers' Liability Act*, because the respondents were not occupiers, and even if s 9 of that Act did not assist in the circumstances of the case, there was a common law duty of care owed to him by the respondents, and his injury resulted from a breach of that duty.

52 It was conceded by the respondents that there was a duty owed. However, the Full Court held that the content of that duty was not materially different from the duty upon an occupier imposed by s 5 of the *Occupiers' Liability Act*. Since they held that there was no failure to take the care which they held s 5 required, they also held there was no breach of a common law duty that would have existed apart from the Act. Thus, the factual basis upon which they decided against the appellant would have applied equally had they considered that the duty was imposed, not by statute, but by the common law.

53 In order to escape this conclusion, upon the assumption that the factual reasoning of the Full Court was not displaced, senior counsel for the appellant argued for a higher common law duty than one corresponding to s 5. That made it necessary to consider the judgments in *Northern Sandblasting Pty Ltd v Harris*[18]. That case is authority for no principle which assists the appellant, except that it establishes that *Cavalier v Pope*[19] no longer represents the common law in Australia.

54 The alleged negligence of the respondents was said to consist of an omission, rather than an act. The omission was said to be the failure to have an expert assessment of the premises at the time of the lease, in circumstances where it was supposed that such an assessment would, in turn, have resulted in a recommendation to replace the glass in the door (an unwarranted supposition). That occurred before the lease was entered into. Consequently, attention was directed to those parts of the judgments in *Northern Sandblasting* which dealt with a duty to arrange for an inspection before lease.

55 The question of non-delegability of a duty was important in *Northern Sandblasting*, where the negligence of an electrical contractor was responsible for the condition of the premises. Its significance in the present case is merely

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18 (1997) 188 CLR 313.

19 [1906] AC 428.

rhetorical. It might have become important if, for example, Mr Fryer had been engaged to inspect the premises and he had carelessly failed to notice the thickness of the glass in the door, although even then there would have been an issue as to whether he would or should have recommended its replacement.

56 The rejection of *Cavalier v Pope* was anticipated by King CJ, in the Supreme Court of South Australia, in *Parker v South Australian Housing Trust*[20], who said that it was inconsistent with the modern doctrine of liability for negligence as it has developed since *Donoghue v Stevenson*[21]. As Dawson J pointed out in *Northern Sandblasting*[22], under the ordinary principles of the modern law of negligence, the duty was a duty to take reasonable care to avoid foreseeable risk of injury to the appellant; the practical extent of the duty was governed by the circumstances of the case.

57 There is no ground in principle for imposing upon the respondents an obligation greater than an obligation to take reasonable care to avoid foreseeable risk of injury to their prospective tenants and members of their household. The critical question is as to what is reasonable. The judgment of the Full Court, with which I agree, to the effect that there was no failure to take reasonable care, was a judgment of fact. It cannot be circumvented by an attempt to formulate the legal duty with greater particularity, in a manner which seeks to pre-empt the decision as to reasonableness.

58 Lord Macmillan observed in *Donoghue v Stevenson*[23] that the law can only refer to the standards of the reasonable person to determine whether a duty of care exists. The same standards determine whether the duty has been broken. "The criterion of judgment must adjust and adapt itself to the changing circumstances of life."[24] The capacity to adjust and adapt, which is inherent in the test of reasonableness, would be diminished if a more particular test were formulated. There is no reason to seek to do so. Whether it is reasonable to require an owner of the premises to have them inspected by an expert before letting depends upon the circumstances of the case. There is no answer which is of universal application. Deciding what the answer should be in a particular case involves a factual judgment, and does not provide the occasion for the imposition of a requirement of the law.

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20 (1986) 41 SASR 493 at 516-517.

21 [1932] AC 562.

22 (1997) 188 CLR 313 at 343.

23 [1932] AC 562 at 619.

24 [1932] AC 562 at 619.

59 The claim in negligence must fail.

Conclusion

60 The appeal should be dismissed with costs.

61 GAUDRON J. The facts and the history of these proceedings are set out in the judgment of Callinan J. I shall repeat them only to the extent necessary to make clear my reasons for concluding that this appeal should be dismissed.

62 The primary issue in the appeal is whether the respondents, the owners of residential premises ("the premises") which were leased to the appellant's parents and in which the appellant resided, are liable to the appellant for injuries sustained by him when he walked through a glass door in those premises. If they are, there is a further question whether their liability is to be reduced by reason of the appellant's contributory negligence.

63 It is not in issue that the premises were constructed some years prior to the lease between the respondents and the appellant's parents ("the lease"). Nor is it in issue that, when installed, the 4 mm annealed glass[25] door, which is at the centre of these proceedings, complied with the relevant building standard. New standards were later introduced. When the lease was entered into in November 1992, the relevant standard required that glass in a new residential building and, also, replacement glass be either 10 mm thick or be laminated safety glass. Glass of that kind does not shatter or break as easily as 4 mm annealed glass.

64 The appellant contends that, before the premises were leased to his parents, the respondents owed him a duty to have the premises inspected by an expert glazier capable of recognising that the glass door contained 4 mm annealed glass and to replace that glass with 10 mm glass or laminated safety glass in accordance with the then current standard. He asserts that, in accordance with the *Residential Tenancies Act* 1987 (WA), that duty was owed as a matter of contract law. Alternatively, he asserts that that duty arose under the *Occupiers' Liability Act* 1985 (WA) or, in the further alternative, as part of the general law of negligence.

The *Residential Tenancies Act* 1987 (WA) and s 11(1) of the *Property Law Act* 1969 (WA)

65 Section 42(1) of the *Residential Tenancies Act* relevantly provides:

> " It is a term of every agreement that the owner –
>
> ...
>
> (b) shall provide and maintain the premises in a reasonable state of repair having regard to their age, character and prospective life; and

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25 The glass is called "annealed" because of the cooling process it goes through when it comes out of a furnace.

(c) shall comply with all requirements in respect of buildings, health and safety under any other written law in so far as they apply to the premises."

It is convenient to proceed on the basis that those terms were imported into the lease, notwithstanding an ambiguous endorsement at the bottom of one of the pages of the lease suggesting that they may have been excluded under s 82(3) of that Act[26].

66 The appellant claims that, by reason of s 11 of the *Property Law Act* 1969 (WA), he is entitled to the benefit of the terms imported into the lease by ss 42(1)(b) and (c) of the *Residential Tenancies Act*. The appellant contends that he has the benefit of those terms because, by cl 1 of the lease, the premises were leased for "use as a PRIVATE DWELLING to be occupied by not more than THREE persons". And at all relevant times, the appellant was the third person in occupation of the premises.

67 In brief, s 11(1) of the *Property Law Act* allows that a person may take an immediate or other interest in land or other property, or the benefit of a condition or agreement respecting land or other property, although he or she is not named as a party to the conveyance or other instrument. And s 11(2) allows that, except in the case of a conveyance or instrument to which sub-s (1) applies, a contract may be enforced by a person not named as a party if it "expressly in its terms purports to confer a benefit directly on [that] person".

68 Section 11(1) of the *Property Law Act* is modelled on s 56(1) of the *Law of Property Act* 1925 (UK), a provision which has not been definitively construed but which has generally been viewed as having limited effect. In *Beswick v Beswick*[27], for example, it was construed as not applicable to personal property, notwithstanding that "property" was expressly defined in that Act to include property of that kind[28]. That was because the words "other property" were

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26 Section 82(3) provides that a residential tenancy agreement may contain a provision by which s 42, amongst other sections, is excluded, modified or restricted, if the agreement is in writing and signed by the owner and the tenant. The lease in this case, which was in writing and was signed by the respondents' agent and the tenants, stated that "[t]he signatory/ies must be aware that in accordance with section 82.3 of the Residential Tenancies Act 1987 … [s 42] may been [sic] excluded, modified or restricted in this document and the terms and conditions set out herein are those which will apply during this tenancy or any subsequent extension".

27 [1968] AC 58.

28 Section 205(i)(xx).

inserted into s 56(1) by a consolidating statute and it was, thus, presumed that the legislature had not intended to alter the law[29]. It is by no means clear that s 11(1) of the *Property Law Act* should be construed in the same manner.

69 What is clear, however, is that s 11(1) of the *Property Law Act* must be construed in its particular context. In particular, it must be construed in the light of s 11(2) which is expressed to apply "[e]xcept in the case of a conveyance or other instrument to which subsection (1) applies". And the right of a third party to enforce a contract under s 11(2) is subject to conditions which do not apply to s 11(1). In particular, the right under s 11(2) is subject to the same defences that would have been available in an action by the parties to the contract[30]. Moreover, each person named as a party to the contract must be joined in the action[31] and the defendant is entitled to enforce against the plaintiff all obligations that "in the terms of the contract are imposed on the plaintiff for the benefit of the defendant"[32].

70 If s 11(1) of the *Property Law Act* stood alone, there would be much to commend the view that it should be construed as applying to any contract expressed in terms that confer a benefit on a person not named as a party to that contract. That was the view taken with respect to s 56(1) of the *Law of Property Act* 1925 (UK) by Denning LJ in *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board*[33]. However, it must be taken, by reason of the enactment of s 11(2), that s 11(1) was intended to have a more limited operation.

71 Although s 11(2) of the *Property Law Act* indicates that s 11(1) was intended to have a more limited operation than its terms suggest, neither the terms of s 11(1), itself, nor those of s 11(2) provide any definitive basis upon which s 11(1) can be read down. However, because s 11(2) allows for defences which would have been available in an action by parties to the contract and

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29 [1968] AC 58 at 73, 76-77 per Lord Reid, 79-81 per Lord Hodson, 87 per Lord Guest, 93-94 per Lord Pearce; cf 105-106 per Lord Upjohn.

30 Section 11(2)(a).

31 Section 11(2)(b).

32 Section 11(2)(c).

33 [1949] 2 KB 500 at 517. See also *Stromdale & Ball Ltd v Burden* [1952] Ch 223; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 at 274-275 per Denning LJ; *Beswick v Beswick* [1966] Ch 538 at 556-557 per Lord Denning MR, 562-563 per Danckwerts LJ. Note the rejection of this line of authority by the House of Lords in *Beswick v Beswick* [1968] AC 58 at 75-76 per Lord Reid, 79 per Lord Hodson, 85-87 per Lord Guest.

s 11(1) does not, it may be taken that s 11(1) was intended to have a narrow field of operation.

72 In *Beswick v Beswick*, Lord Upjohn expressed the view, albeit by way of obiter, that s 56(1) of the *Law of Property Act* 1925 (UK) "was only intended to sweep away the old common law rule that in an indenture inter partes the covenantee must be named as a party to the indenture to take the benefit of an immediate grant or the benefit of a covenant"[34]. On that basis, his Lordship adopted the observation of Simonds J in *White v Bijou Mansions Ltd* that:

> "under s 56 ... only that person can call it in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant some thing or with which some agreement or covenant is purported to be made."[35]

73 There is, to my mind, no rational basis for reading down s 11(1) of the *Property Law Act* other than by reference to the common law rule identified by Lord Upjohn in *Beswick v Beswick*. That being so, and because the presence of s 11(2) dictates that it be read down, s 11(1) should be taken to have the limited operation described by Simonds J in *White v Bijou Mansions Ltd*.

74 The lease in the present case purports neither to be made with the appellant nor to grant anything to him. Accordingly, he cannot rely on s 11(1) of the *Property Law Act*. And not having joined his parents to the action, he is not able to rely on s 11(2).

75 Quite apart from his inability to rely on s 11 of the *Property Law Act*, the appellant's claim in contract fails because, contrary to his argument, the presence of the 4 mm annealed glass door in the leased premises in which he resided does not constitute a breach of the terms imported into the lease by ss 42(1)(b) and (c) of the *Residential Tenancies Act*. A term requiring a lessee "to provide and maintain the premises in a reasonable state of repair", as imported by s 42(1)(b) of that Act, does not require a lessee to replace items which are undamaged and in good working order, as was the glass door involved in this case. And so far as concerns the term imported into the lease by s 42(1)(c), there was no building, health or safety requirement that the 4 mm annealed glass be replaced with 10 mm glass or laminated safety glass. There was simply a requirement that, if the 4 mm annealed glass were to be replaced, it be replaced with glass of that kind.

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34 [1968] AC 58 at 106.

35 [1937] Ch 610 at 625.

The *Occupiers' Liability Act*

76 The appellant's claim for damages for breach of statutory duty is asserted under s 5 or, alternatively, under s 9 of the *Occupiers' Liability Act*, the long title of which is "AN ACT prescribing the standard of care owed by occupiers and landlords of premises to persons and property on the premises".

77 By s 5(1) of the *Occupiers' Liability Act* a duty is cast upon "an occupier of premises" to take reasonable care for the safety of persons entering those premises. And in addition to any other duty owed by a landlord at common law, s 9(1) imposes a duty in these terms:

> " Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who may from time to time be on the premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibilities of maintenance and repair of the premises as is required under this Act to be shown by an occupier of premises towards persons entering on those premises."

78 The duty which the appellant asserts against the respondents was to have the glass door inspected prior to entering into the lease with his parents and to replace the glass with 10 mm glass or laminated safety glass. As already mentioned, the glass door was, at that stage, undamaged and in proper working order. The duty which is thus asserted is not one relating to maintenance and repair. Accordingly, it is not a duty arising under s 9 of the Act.

79 Nor, in my view, did the respondents owe a duty of care to the appellant as "an occupier of the premises" under s 5(1) of the *Occupiers' Liability Act*. "Occupier of premises" is defined in s 2 of that Act to mean a "person occupying or having control of land or other premises". And "premises" is defined by that section to include "any fixed or movable structure, including any vessel, vehicle or aircraft".

80 It is trite law that different persons may occupy the same premises at the same time[36]. Once a lessee has entered into possession of premises, however, the lessor no longer occupies those premises[37]. And the lessor has only such control

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36 *Wheat v E Lacon & Co Ltd* [1966] AC 552 at 578, 581 per Lord Denning, 585 per Lord Morris of Borth-y-Gest, 587 per Lord Pearce, 588-591 per Lord Pearson.

37 See *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 89 per Windeyer J; *Wheat v E Lacon & Co Ltd* [1966] AC 552 at 579 per Lord Denning.

over the premises as is reserved by the lease. In the present case, the lessees were obliged by cl 2.11 of the lease:

> "to keep all floors, floor coverings, walls, ceilings, windows (including glass), window treatments, doors (including glass, if any) light fittings, fixtures and fittings, furniture, and all household effects in the same condition as they were at the commencement of [the] tenancy".

And by cl 2.12, the lessees agreed "not to undertake or authorise any repairs without prior written consent of the [lessors] or [their] Agent".

81 Clause 2.11 of the lease did not, in my view, reserve control over the items therein specified to the respondents as lessors. Rather, it proceeded on the basis that control would pass to the lessees and, that being so, it required them to keep those items in the same condition as at the commencement of the tenancy. Similarly, in my view, cl 2.12 proceeded on the basis that control over the premises would pass to the lessees.

82 Moreover, even if cll 2.11 and 2.12 were to be read as reserving control to the respondents as lessors with respect to the items therein mentioned, that would not constitute a reservation of control of the premises. At most, it would constitute reservation of control over some parts of the structure constituting the house in which the appellant resided with his parents, not the house itself. The definition of "premises" cannot, in my view, be read as relating to items forming part of a structure, as distinct from the structure as a single unit comprised of its parts[38].

83 It follows that, for the purposes of s 5(1) of the *Occupiers' Liability Act*, once they entered into the lease with the appellant's parents, the respondents were no longer occupants of the premises in question in this appeal. That does not mean that they were not occupants immediately prior to the granting of the lease[39]. That, however, is not sufficient to establish a duty to the appellant under s 5(1) for it was not until some time after the tenancy came into existence that the appellant commenced to reside in the premises with his parents. Thus, for the purposes of that sub-section, he was not a "person entering on the premises" at any time during which the respondents were occupiers of them.

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38 cf *Wheat v E Lacon & Co Ltd* [1966] AC 552 at 579 per Lord Denning.

39 See *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 334 per Brennan CJ, 359-360 per Gaudron J.

Landlord's duty of care under the general law

84 The question whether, contract and statute aside, a landlord is under a duty of care was considered by this Court in *Northern Sandblasting Pty Ltd v Harris*[40]. Although no clear ratio emerges, it was decided in that case that a landlord was liable to the daughter of its tenants when she suffered injury as the result of defective electrical wiring in the leased premises in which she lived. It, thus, follows from that case that, under the general law, a landlord of residential premises owes a duty of care to the members of his or her tenant's household. What cannot be extracted from the reasons for decision in that case is the precise content of that duty.

85 The injuries sustained by the tenants' daughter in *Northern Sandblasting* were the result of the combination of two electrical defects. One, a defective connection of the earth wire at the power box, was present at the beginning of the tenancy and would have been discovered if an inspection had been undertaken by an electrician before the tenancy commenced[41]. The other was defective wiring associated with the kitchen stove[42]. The landlord had arranged for the stove to be repaired by an apparently competent electrician, but the repairs were done negligently[43].

86 In *Northern Sandblasting*, Dawson, Gummow and Kirby JJ each held that the landlord did not owe the tenants' daughter a duty of care with respect to either one of the electrical defects which combined to cause her injuries[44]. Toohey and McHugh JJ held that the landlord had a non-delegable duty with respect to the stove repairs which it had undertaken to have carried out[45]. Brennan CJ and I each held that there was a more general duty of care.

87 Brennan CJ expressed the view in *Northern Sandblasting* that the duty owed by a landlord to his or her tenants and to those who occupy premises under

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40 (1997) 188 CLR 313.

41 (1997) 188 CLR 313 at 323 per Brennan CJ, 360 per Gaudron J.

42 (1997) 188 CLR 313 at 323 per Brennan CJ, 348 per Toohey J, 355 per Gaudron J, 364 per McHugh J.

43 (1997) 188 CLR 313 at 323 per Brennan CJ, 340-341 per Dawson J, 348 per Toohey J, 355-356 per Gaudron J, 364 per McHugh J, 387-388 per Kirby J.

44 (1997) 188 CLR 313 at 344, 347 per Dawson J, 382-383, 385 per Gummow J, 394, 399 per Kirby J.

45 (1997) 188 CLR 313 at 349-355 per Toohey J, 363, 368-370 per McHugh J.

and for the purposes of the tenancy is of the same standard as that identified by McCardie J in *Maclenan v Segar*[46]. *Maclenan v Segar* concerned the duty of an occupier to those who enter upon premises with consent and for reward. And in that case, an occupier was held to be under a duty of care to see that the premises are as safe for the contemplated purpose of the entry as reasonable care and skill on the part of anyone can make them[47]. However, in the view taken by Brennan CJ in *Northern Sandblasting*, the duty of a landlord is confined to "defects in the premises at the time when the tenant is let into possession" and does "not extend to defects in the premises ... discoverable only after the landlord parts with possession"[48].

88 In *Northern Sandblasting*, I was of the view that the duty owed by a landlord is a duty "to take reasonable care for [the] safety [of those who constitute the tenant's household] by putting and keeping the premises in a safe state of repair"[49]. The duty was not, in my view, confined to defects existing at the commencement of the tenancy. However, what was reasonable would vary according to whether or not the tenants were in possession. Thus, before the tenancy commenced, it was reasonable both to inspect the premises and to remedy existing defects that gave rise to a foreseeable risk of injury. And in the case of defects or potential defects which posed special dangers (for example, electrical wiring and gas connections), it was reasonable to have an inspection carried out by persons skilled or expert in that regard[50]. So far as concerns defects which were not present at the commencement of the lease, reasonable care required only the remedying of those defects of which the landlord was or ought to have been aware[51].

89 Neither the duty of care recognised by Brennan CJ in *Northern Sandblasting* nor that which I considered should be recognised in that case avails the appellant in this case. That is because the duty identified by Brennan CJ was confined to defects. And that which I thought should be recognised was simply a duty to put and keep the premises in a state of safe repair. The glass door in issue in this case was not defective and, not being defective, was not in need of repair.

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46 [1917] 2 KB 325.

47 [1917] 2 KB 325 at 332-333.

48 (1997) 188 CLR 313 at 340.

49 (1997) 188 CLR 313 at 358.

50 (1997) 188 CLR 313 at 360.

51 (1997) 188 CLR 313 at 360.

90 For the appellant to succeed in this case, there must now be recognised a duty on the part of a landlord of residential premises to ensure that those premises are as safe for residential use as reasonable care and skill on the part of anyone can make them. And it must also be held that it is reasonable, at least in the circumstances of this case, to replace items which, though not defective, involve a foreseeable risk of injury if safer items are available.

91 The nature of the relationship between a landlord and the members of his or her tenant's household is not such, in my view, as to require the imposition of a higher duty of care than that which I thought should be recognised in *Northern Sandblasting*. That relationship is contractual. Moreover it is a relationship that involves an element of choice. As the relationship is contractual, the parties can either stipulate as to the terms of the tenancy or elect not to enter into that relationship. Moreover, it will ordinarily be the case that the relationship between a tenant and the members of his or her household involves a greater degree of control and dependence than does the relationship between a landlord and the members of his or her tenant's household.

92 Given that the relationship between a tenant and the members of his or her household involves a greater degree of control and dependence than does the relationship between a landlord and the members of his or her tenant's household, there is no basis for the imposition of a higher duty of care on a landlord than is cast on an occupier of premises. As the occupier of premises is only required to take such care as is reasonable in the circumstances[52], a landlord should not be subjected to a higher duty to make premises as safe for residential use as reasonable care and skill on the part of anyone can make them. And given that the parties to a tenancy can stipulate as to its terms, there is no reason, in my view, why the duty of landlord should extend beyond a duty to put and keep the premises in safe repair.

93 Were I of the view that a landlord's general duty of care is to make residential premises as safe as reasonable care and skill on the part of anyone can make them, I would have concluded that it was reasonable, in the circumstances of this case, to replace the 4 mm annealed glass with 10 mm glass or laminated safety glass. However, as I am of the view that the duty is simply to take reasonable care to put and keep premises in a safe state of repair, that is not a question that I need consider. Nor need I consider the question of contributory negligence.

Conclusion and orders

94 The appeal should be dismissed with costs.

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52 See *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

95 McHUGH J. Because of the risk of injury from the use of glass doors, since 1973 the Australian Standards for glass have required that glass doors in houses built after that date be fitted with toughened safety glass, laminated glass or wired glass. So far as glass doors in houses constructed before that date are concerned, the Standards recommend that, when the glass in the door breaks, it be replaced with glass conforming to the Standards.

96 The appellant lived with his parents who leased a house from the respondents in 1992. The house, which had been built before 1973, contained a full-length glass door, the glass being annealed and 4mm thick. It was below the standard for glass specified in 1973 by the Australian Standards. The respondents ("the landlords") had not had the premises inspected by a person with building qualifications before leasing the premises to the appellant's parents. The appellant sustained serious injury in 1993 when the glass broke in the door after he inadvertently walked into it. Are the landlords liable to the appellant for the injuries which he sustained?

97 The appeal is brought by Marc Jarrad Jones against an order of the Full Court of the Supreme Court of Western Australia which allowed an appeal from a decision of Commissioner Reynolds in the District Court of Western Australia. The learned Commissioner held that the respondents were "negligent by failing to have the premises adequately inspected for safety prior to allowing the [appellant's] parents into possession."

98 At the trial, the appellant had relied on four separate causes of action:

1. breach of an implied contractual term;

2. breach of a statutory duty arising from s 5(1) of the *Occupiers' Liability Act* 1985 (WA) on the ground that the landlords were "occupier[s] of premises" within the meaning of s 2 of that Act;

3. breach of a statutory duty arising from s 9(1) of the *Occupiers' Liability Act* on the ground that the landlords were "responsible for the maintenance or repair of the premises"; and for

4. breach of common law duty of care.

99 For the reasons given by Gummow and Hayne JJ, the appellant could not succeed in respect of his claims of breach of implied contractual term and breaches of statutory duty. But he was entitled to succeed in respect of his claim for breach of common law duty of care.

100 The common law duty of care owed by a landlord to a tenant and other members of the tenant's household is to take reasonable care to avoid foreseeable risks of harm to those persons having regard to all the circumstances of the

case[53]. The duty extends to dangerous defects but is not limited to them. To limit the duty to "dangerous defects", "ordinary use of the premises" or "unusual dangers" would reintroduce into the law the categories expelled by this Court in *Australian Safeway Stores Pty Ltd v Zaluzna*[54]. Reasonable care in all the circumstances of the case is the benchmark of negligence law. No exception to it should or need be made for landlords' liability.

101 Among the relevant circumstances that generate the standard of care owed by the landlord are the right or capacity of the landlord to inspect the premises, the age and condition of the premises, the ages and the physical and mental capacities of persons who will use them, the use to which they will be put, the nature and degree of the risk of injury and the cost or inconvenience of eliminating that risk. As in other areas of the law of negligence, the relevant circumstances will include both those of which the landlord knew and those of which the landlord ought reasonably to have known.

102 In determining what the landlord ought to have known, the knowledge of experts will often be relevant. That is because the exercise of reasonable care will often require the landlord to obtain the services of experts to inspect the premises. Whether an expert inspection is needed will depend on factors such as the age of the premises, the known or suspected risks, and the time that has elapsed since there has been a previous inspection by a professionally competent person.

103 When domestic premises are the subject of a new letting, reasonable care requires that they be reasonably fit for habitation by those who will reside in the premises. That will ordinarily require an inspection by the landlord or an agent immediately before the commencement of the letting. It may also require inspection by a person with building qualifications who has the capacity to assess the safety of the premises. Whether it does will depend on the age of the premises, its general condition and the time since the last inspection by a professionally competent person.

104 In earlier times, reasonable care may not have required a landlord to do more than make his or her own inspections. But as Mason, Wilson and Dawson JJ pointed out in *Bankstown Foundry Pty Ltd v Braistina*[55], "what reasonable care requires will vary with the advent of new methods and machines and with changing ideas of justice and increasing concern with safety in the

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53 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 343 per Dawson J.

54 (1987) 162 CLR 479.

55 (1986) 160 CLR 301 at 308-309.

community." Their Honours went on to say that "[w]hat is considered to be reasonable in the circumstances of the case must be influenced by current community standards"[56].

105 *Braistina* was concerned with an action between employer and employee. But it would be a serious mistake in principle to regard their Honours' remarks as not having general application in the field of negligence law. The general comments of Brennan and Deane JJ in that case concerning the duties of care owed by an employer to an employee also apply to the general law of negligence and particularly to the letting of premises for profit. Their Honours said[57]:

> "Contemporary decisions about what constitutes reasonable care on the part of an employer towards an employee in the running of a modern factory are in sharp conflict with what would have been considered reasonable care in a nineteenth century workshop and, for that matter, reflect more demanding standards than those of twenty or thirty years ago. While it is true that that has, in part, been the consequence of the elucidation and development of legal principle, it has, to a greater extent, reflected the impact, upon decisions of fact, of increased appreciation of the likely causes of injury to the human body, of the more general availability of the means and methods of avoiding such injury and of the contemporary tendency to reject the discounting of any real risk of injury to an employee in the assessment of what is reasonable in the pursuit by an employer of pecuniary profit."

106 The materials, machines and equipment used or that can be used in building and fitting out premises, including residential premises, have reached a level of sophistication and technological achievement unthinkable in earlier times. The risks inherent in or which can arise from the use of these materials, machines and equipment are often unknown or unobservable to the ordinary landlord or householder. Furthermore, many materials, machines, equipment and building techniques can give rise to risks of injury beyond the comprehension of the ordinary householder or landlord[58]. Not so very long ago, for example, householders, landlords and even experts did not appreciate the harm that could

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56 (1986) 160 CLR 301 at 309.

57 (1986) 160 CLR 301 at 314.

58 "The home is usually seen as a safe and secure haven. Such a perception leads us to expect that there will be no hazards. Despite this expectation, there is much evidence that shows we are subjected to an extensive range of hazards in the home and that some of these hazards, such as injury, are very important compared to other risks in our lives." Langley et al (eds), *Environmental Health in the Home*, (1996) at 1.

be caused by asbestos fibres, a material commonly used as insulation in walls and ceilings[59]. Nor were they aware of the dangers inherent in using lead-based paints[60]. The inability of the ordinary landlord and householder to identify risks, which can have serious and sometimes fatal consequences, makes it imperative that residential premises let for rental should be inspected regularly by those capable of identifying such risks. In the last decade of the 20th century, discharge of the duty of reasonable care requires no less. Findings of fact in cases such as *Watson v George*[61], decided nearly 50 years ago, provide no guidance as to what constitutes the exercise of reasonable care on the part of landlords at the present time or, for that matter, in 1992.

107 In the present case, the premises were leased for twelve months commencing on 7 November 1992. The exercise of reasonable care by the landlords in this case required that, either immediately before the letting to the appellant's parents or, at some reasonable period before that time, the house should have been inspected by a person with building qualifications to assess its safety. Since 1973, the existence of the Australian Standards for glass demonstrated, if it needed demonstration, that persons are at risk if they reside in premises with internal glass doors which are not fitted with safety, laminated or wired glass. If the premises in this case had been inspected, the risk of injury and the means of avoiding it would probably have been pointed out to the landlords.

108 The learned Commissioner said that:

> "if the premises were inspected on or before 6 November 1992 by a person with building qualifications to assess safety then it is likely that comment would have been made that the glass in the door fell a long way short of the then current standard with a recommendation that it be replaced. The fact that the door was located in the main access way between the inside and outside of the premises increased the likelihood of such a recommendation."

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59 See Fitzgerald, "Asbestos exposure in the home", in Langley et al (eds), *Environmental Health in the Home*, (1996) 61 at 61-63.

60 One author states that paints used in Australian houses constructed before 1970 are likely to contain high lead concentrations. Before 1950, certain paints contained as much as 50 percent lead. From December 1997, the recommended maximum amount of lead allowed in domestic paints is 0.1 percent. Turczynowicz, "Miscellaneous chemicals", in Langley et al (eds), *Environmental Health in the Home*, (1996) 92 at 96.

61 (1953) 89 CLR 409.

This was a finding open to the Commissioner. I would not disturb it. Nor should the Full Court have disturbed it.

109 It follows then that there was present in the premises a reasonably foreseeable risk of injury to persons such as the appellant of which the landlords ought to have known. The means of avoiding the risk of harm were also something that they ought to have known. The learned Commissioner said that it would be "fair to conclude that the cost of such a door would be cheap relative to the risk of the danger and the potential gravity of the injury." I see no reason to disagree with the learned Commissioner's finding on the issue of preventability, which seems to me to be correct.

110 I do not think that it is a relevant answer to the appellant's case that the Australian Standards merely recommended that, for houses built before 1973, glass to the required standard should be installed in doors only after the glass needed to be replaced. The Standards are of general application. They are a guide to, but they cannot dictate, the standard of reasonable care required in the circumstances of individual cases. This door was located in the main access way between the inside and the outside of premises *let for rental*. In determining what reasonable care required, the consequence of inadvertence or thoughtlessness on the part of the residents was a variable factor which must be taken into account by the landlords[62]. It carried a risk of injury to the careless or inadvertent resident that a reasonable person, conscious of the risk, would not ignore.

111 Although the risk of injury may have been slight, the consequences of walking into the glass could be grave[63]. That being so, and because the cost and inconvenience of eliminating the risk were modest, the standard of reasonable care required of landlords in the last decade of the 20th century required that the glass in this door conform to at least the 1973 Australian Standards for glass. As the Judicial Committee pointed out in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty*[64], a reasonable person would disregard a risk that was likely to happen even once in a very long period only if he or she "had some valid reason

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62 cf *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 343.

63 See Cassell and Ozanne-Smith (Monash University Accident Research Centre), *Women's Injury in the Home in Victoria*, (1999) at xxx, which states that in a four-year period in Victoria there were two deaths of adult women from broken glass injury, one of them and between 25% to 33% of glass-related injuries treated in hospital emergency departments having resulted from broken glass from windows and doors.

64 [1967] 1 AC 617 at 642.

for doing so, eg, that it would involve considerable expense to eliminate the risk."

112 The appellant was entitled to succeed in the action, but the Commissioner was correct in holding the appellant guilty of contributory negligence.

113 I would allow the appeal and restore the Commissioner's verdict for the appellant.

114 GUMMOW AND HAYNE JJ. This is an appeal from a decision of the Full Court of the Supreme Court of Western Australia (Murray, White and Scott JJ). The Full Court allowed an appeal from a decision of Commissioner Reynolds in the District Court of Western Australia, in which Mr Jones ("the appellant") was the plaintiff and Mr and Mrs Bartlett ("the respondents") were the defendants.

115 The appellant walked into a full length glass door which separated the dining room from the games room in the house where he lived with his parents. The parents leased the house from the respondents. The appellant brought an action for damages for personal injury which was sustained allegedly by the negligence of the respondents. His parents were not parties to the litigation. The appellant obtained a verdict for $37,500, which represented an award of $75,000 reduced by 50 per cent for contributory negligence.

116 The Full Court set aside the orders of the Commissioner and dismissed the appellant's action. The Full Court also dismissed a cross-appeal by the appellant in which he sought to set aside the finding in respect of contributory negligence. Before this Court, the appellant seeks orders that would reinstate the Commissioner's judgment in favour of the appellant, modified in various ways set out below, including the removal of any finding of contributory negligence.

117 The issues which arise on this appeal fall for consideration in the light of what the appellant identifies as two salient features of the common law as it developed in England. First, the general principles of negligence did not apply to landlords because it was the tenant not the landlord who had exclusive occupation of the demised premises and therefore was "the true occupier". Secondly, contractual obligations under the lease apart, the landlord owed no common law duty either towards the tenant or any entrant of residential premises to take care that the premises were safe either at the commencement of the tenancy or during its continuance. The appellant then submits that the decision in *Northern Sandblasting Pty Ltd v Harris*[65] left the landlord with common law duties to tenants, occupiers and other entrants which are of uncertain content. This appeal, it is submitted, provides the occasion to end that uncertainty by supporting the liability to the appellant of the respondents.

The facts

118 The respondents jointly owned land in Gunbower Road, Mt Pleasant, Perth, on which was situated a house built in about the late 1950s or early 1960s. On 6 November 1992, the appellant's parents entered into a written tenancy agreement with the respondents to lease the premises for a term of 12 months,

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65 (1997) 188 CLR 313.

commencing on 7 November 1992 and expiring on 6 November 1993. The document was in standard form ("the Lease"). While it was headed "AGREEMENT TO TAKE RESIDENTIAL PREMISES" , cl 1 stated that "THE OWNER LETS and the Tenant takes the premises … [f]or a term …". The Lease thus operated as more than an agreement to lease. The document stated that the premises were to be used as a private dwelling "to be occupied by not more than THREE persons". The word "three" was typed into a blank space. The appellant's parents were identified as "the Tenant".

119 The Lease contained a number of printed terms and several special conditions. It stated that various sections of the *Residential Tenancies Act* 1987 (WA) ("the Residential Tenancies Act"), including s 42, "may [have] been excluded, modified or restricted in this document". Section 82(3) of that statute permitted a residential tenancy agreement such as that involved here to contain a provision by which s 42 was excluded, modified or restricted. Clause 2.11, which appeared in the section styled "2 THE TENANT" and was headed "Maintenance and movement [of] chattels", read:

> "The Tenant agrees to keep all floors, floor coverings, walls, ceilings, windows (including glass), window treatments, *doors (including glass if any)*, light fittings, fixtures and fittings, furniture, and all household effects in the same condition as they were at the commencement of this Tenancy and in accordance with the Property Condition Report (fair wear and tear excepted), and if any of such shall be moved during the tenancy the Tenant agrees to replace all items in the positions set out on the Schedule/Inventory as at the commencement of the tenancy." (emphasis added)

Clause 2.12, headed "Repairs", read:

> "The Tenant shall not undertake or authorise any repairs without prior written consent of the Owner or the Owner's Agent."

Clause 2.13 required the tenant not to make any alterations or additions to the premises or to any fixtures or fittings. Clause 2.9.2 stated:

> "The Schedule and/or Inventory and/or Property Condition Report when signed by the parties shall be deemed to be a true and correct description of the property and/or its contents."

120 The evidence included a document headed "PROPERTY CONDITION REPORT", dated 6 November 1992 – that is, the date of the tenancy agreement – and signed by the appellant's parents on 18 November 1992. The report was prepared by the respondents' real estate agent after he conducted an inspection of the premises and was used in connection with the provision of a security bond.

Under the sub-heading of "ENCLOSED PATIO", the report included an item reading "DOORS – Intact".

121 The appellant arrived at the premises to stay with his parents some time in July 1993. He was then aged 23 and had been living in Bunbury and working as a bricklayer. The appellant's parents remained in occupation after 6 November 1993, and he remained living with them. The effect of a holding-over provision of the Lease was that the tenants remained as periodic tenants but on the same terms and conditions as were specified in the Lease.

122 At trial, the appellant gave evidence that, at about 6.00 pm on 27 November 1993, he was standing in the dining room, which abutted onto a room referred to by all the parties as the "games room". This was accepted by the appellant to be the "Enclosed Patio" referred to in the Property Condition Report. Access between the two rooms was by means of a wooden door containing a pane of glass ("the glass door"). The Commissioner found that "[a]t the time of the accident, there was nothing about the condition of the glass door that required repair. It was essentially as good as a new door of its type." It appears that the glass door was originally a door from the interior to the exterior of the house. It only became, in effect, an interior door when, at some unspecified time before the Lease, the portion of the patio outside was enclosed to create the games room.

123 The Commissioner accepted the appellant's evidence, the effect of which he summarised as follows:

> "[The appellant] said that he was standing in the dining room with his back to the games room and the glass door behind him and just to his left. When he was in that position, his mother walked [past] him, through the doorway between the dining room and the games room and then through the doorway from the games room to the outside. His mother went outside to feed her dogs.
>
> The [appellant] accepted that he knew the door was made of a piece of glass in a wooden frame. He passed through the doorway regularly because it was the main access from the house to the backyard of the premises.
>
> The [appellant] said that about 30 seconds after his mother had walked [past] him, he decided to go outside and join her. He did not see her walk through the doorway between the dining room and the games room. He thought the doorway was open because he did not hear his mother close the glass door behind her. He said he took a turning step with his left leg and during his second step with his right leg his right knee made contact with the glass in the door and the glass shattered and

> exploded outwards into the games room. The glass in the top half of the door then fell straight down on his leg. The [appellant] added that he then heard a gurgling noise down his leg and noticed it was badly cut."

The appellant sustained serious damage to his right leg, the glass severing arteries, nerves and tendons and damaging muscles.

124 Mr Kenneth Fryer had over 40 years experience in working with glass and glazing techniques and was accepted as an expert in the field. He examined a piece of the glass from the glass door and found it to be annealed glass of 4 mm thickness. Mr Fryer also gave evidence about the Australian Standards ("AS") for glass. The first AS was CA26-1957. It was concerned only with wind loads and did not prescribe any mandatory requirements for fitting glass panes against human impact. It recommended the use of annealed glass of 4 mm thickness ("annealed" referring to the method of cooling employed in production of the glass so as to temper it). The AS was revised in 1973, 1979, 1989 and 1994. No significance was attached to the 1994 amendment as it was made after the accident. The 1973 amendment required the fitting of toughened safety glass, laminated glass or wired glass in doors. Whilst this AS was mandatory for buildings built after the date of its introduction, in respect of existing buildings there was no more than a recommendation that glass of this standard be fitted when replacing glass in panes upon breakage. The Commissioner held that there was no statutory duty to replace the glass in the door as the AS changed.

125 Mr Fryer also gave evidence that he, but not an ordinary member of the public, could tell by inspection if glass was laminated safety glass. He had never conducted an inspection of residential premises and had never heard of a domestic property being audited. He estimated that he would charge about $130 for an inspection of average residential premises. He was not asked whether, if asked to inspect the premises leased by the respondents, he would have recommended that the glass door be replaced.

The District Court action

126 The appellant pleaded four causes of action. The first was in contract. The second was in negligence at common law. The third was based on a statutory duty said to flow from the *Occupiers' Liability Act* 1985 (WA) ("the Occupiers' Liability Act") and to be applicable to the respondents as landlords. The fourth was based upon a statutory duty said to flow from the Occupiers' Liability Act and to be applicable to the respondents as occupiers.

127 Section 4(1) of the Occupiers' Liability Act provides that the rules set out in ss 5-7 have effect in place of the rules of the common law for the purpose of determining the care owed by occupiers to entrants. However, s 4(2) states that nothing in these sections alters the common law rules which determine those

upon whom is incumbent a duty of care to entrants. Further, duties which apply in any particular case to show a "higher standard of care" than that required by the statute (for example, that required of common carriers and bailees) are preserved by s 8(1).

128 The appellant claimed that, under all four causes of action, the respondents were required to ensure the residence was leased in a fit and proper state; to take all reasonable measures to ensure that it was safe for use by the occupants; to provide repairs and maintenance to the residence and maintain the premises in good repair; and to ensure the residence complied with all laws relating to building, health and safety. In respect of all the causes of action, liability was said to be attracted by various failures on the part of the respondents. The failures alleged were those to install safety glass in the glass door; to warn the appellant that safety glass was not installed in the glass door; to place a protective guard over the glass in the glass door; to replace the 4mm annealed glass in the door because it was unsuitable for use in a door by reason of its propensity to shatter and explode; to install Grade "A" Safety Glass of the minimum thickness required by AS 1288–1989; and adequately to inspect or have adequately inspected the glass door prior to allowing the appellant and his family into possession of the residence.

129 The Commissioner rejected the claim in contract. In particular, he held that the doctrine of privity operated to preclude the appellant from enforcing any provision of the Lease because he was not a party to it. In respect of the Occupiers' Liability Act, the Commissioner held that any liability as landlord could arise only under s 9 and that:

> "[t]he extent of the landlord's duty of care as landlord pursuant to s 9 is expressly limited to dangers arising from any failure on his part to carry out his responsibilities of maintenance and repair under the tenancy. Therefore s 9 may not apply in a case such as this where the glass door did not require any maintenance or repair and did not render the premises reasonably unfit for human habitation."

He concluded that the statutory claim against the respondents as landlords added nothing to the statutory claim against them as occupiers, but found the respondents liable as occupiers. It was the statute, and not the common law, which defined the care required of the respondents. The Commissioner considered that the decision of this Court in *Northern Sandblasting* meant that s 4(2) of the statute "no longer operate[d] to exclude the landlord as an 'occupier of premises' because the principle in *Cavalier v Pope*[66] has now been rejected". It followed that:

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66 [1906] AC 428.

> "where the landlord has control of premises he may be liable as an occupier of premises pursuant to s 5 of the Occupiers' Liability Act. The landlord's control need not be entire or exclusive.
>
> …
>
> Accepting that the [respondents] did not occupy the premises, it is necessary to consider what control, if any, they exercised in respect of the premises."

130 The Commissioner considered that cl 2.12 of the Lease "gave the [respondents] control in respect of repairs" and that cl 2.13 "preserved the [respondents'] exclusive control in respect of any alterations or additions to the premises". He continued:

> "The meaning of alterations or additions in clause 2.13 went beyond repairs. The replacement of the glass in the door with glass that complied with the latest standard or the replacement of the glass door with some other type of door would have been an alteration under the [L]ease and in the exclusive control of the [respondents]."

He commented that "there is a high likelihood of serious injury to a person if he or she walks or bumps into a full length glass door causing the glass to break" and concluded that:

> "if the premises were inspected on or before 6 November 1992 by a person with building qualifications to assess safety then it is likely that comment would have been made that the glass in the door fell a long way short of the then current standard with a recommendation that it be replaced. The fact that the door was located in the main access way between the inside and outside of the premises increased the likelihood of such a recommendation.
>
> There is no evidence on the cost of a glass door that complied with the standard at the time but I think it fair to conclude that the cost of such a door would be cheap relative to the risk of the danger and the potential gravity of injury. The fact that no person had previously contacted the glass door and caused the glass to break does not make it any less of a serious danger.
>
> I find that the [respondents] were negligent by failing to have the premises adequately inspected for safety prior to allowing the [appellant's] parents into possession. It is likely that such an inspection would have resulted in the state of the glass door being brought to their attention. They should have known the state of the door gave rise to serious danger

> and replaced it with a door that complied with the safety standard at the time. … The consequences of the [appellant's] contact with the glass door were greatly exacerbated by the failure of the [respondents] to install glass which complied with the safety standard at the time. It was reasonably foreseeable that at some stage a person would impact against the glass door given that it was in a main access way in the premises."

131 The Commissioner then proceeded to consider the issue of contributory negligence, and made the finding referred to above.

The Full Court

132 The respondents appealed and the appellant, by notice of contention, sought to revive his claim in contract. The Full Court rejected the appellant's submissions on the contractual issues. It also dismissed a cross-appeal against the contributory negligence finding because of the outcome on the main appeal.

133 The Full Court upheld the respondents' appeal with respect to their liability in negligence. It noted that the appellant contended for a non-delegable duty of care with identical content both at common law and under the Occupiers' Liability Act. However, it allowed the appeal on the anterior point of the content of the duty. Murray J gave the leading judgment. His Honour held that there was no "reasonable requirement to have the [glass] door expertly assessed" and that "the [respondents'] failure to organise such an inspection [did] not constitute a breach of the relevant statutory duty or negligence. The [respondents] did all that was reasonably required of them to discharge their duty of care."

134 Murray J also accepted that "the [appellant's] conduct in walking into the door, rather than the door itself moving so as to impact upon him, was an intervening act breaking the chain of causation between the state of the glass in the door and the receipt of the [appellant's] injuries for which he sued". His Honour continued:

> "This was not a case where anything happened to the door which caused it to break and shower the [appellant] with glass. … [I]t remains the case that the [appellant] was the sole cause of his body coming into collision with the glass. That was, treating the matter in a commonsense way, what caused his injuries, not the [respondents'] failure to organise an expert inspection of the door, which the learned Commissioner found to constitute their breach of duty."

The submissions in this Court

135 The appellant seeks to reinstate the liability of the respondents on three bases. The first is breach of a common law duty of care owed by the respondents

to the appellant. The second is breach of statutory duties of care created by the Occupiers' Liability Act and owed by the respondents as either or both occupiers and landlords. The third is the claim in contract and requires a finding that the respondents were in breach of, and that the appellant was entitled to enforce, the Lease.

136 In respect of the first basis, that in tort, the appellant seeks to have this Court supplement the Commissioner's decision in two respects. The first respect is by finding that the respondents were in breach of, and that the appellant was entitled to enforce, an overriding non-delegable common law duty owed by the respondents to the appellant to ensure that the premises were provided in a reasonable state of repair having regard to the circumstances so that the appellant would not suffer injury or damage; this duty imports a "higher standard of care" within the meaning of sub-s 8(1) of the Occupiers' Liability Act. The second respect is by finding that the appellant was not guilty of contributory negligence.

137 As will be seen, the contention that there was a duty to ensure that the premises were provided in a state that the appellant would not suffer injury or damage should be rejected. It follows that all three ways in which the appellant put his claim turned ultimately upon whether it was unreasonable for the respondents not to take steps to identify and replace the glass that the appellant broke. The appellant fails at this point. It is, however, desirable to expose and consider the intermediate steps involved in the appellant's several arguments.

The contractual claim

138 The appellant's attempt to reagitate the contractual claim must fail. The appellant's case is that he can assert breaches by the respondents of the terms said to be implied in the Lease by pars (b) and (c) of s 42(1) of the Residential Tenancies Act. There was no breach of those terms. Even if there had been, the appellant was not a party to the lease and was not entitled to enforce it against the respondents.

139 Paragraph (b) of s 42(1) had obliged the respondents to "provide and maintain the premises in a reasonable state of repair having regard to their age, character and prospective life". Clause 2.11 of the Lease required the Tenant to keep the glass door in its condition at the commencement of the Lease. Clause 2.12 obliged the Tenant to obtain the prior written consent of the respondents to any repairs the Tenant undertook or authorised. This was at least a modification of the operation of par (b) of s 42(1). Further, and in any event, the clause had not required the Tenant to replace the glass door. The Commissioner found that at the time of the accident the door was as good as a new door of its type. The obligation imposed upon the respondents by par (c) of s 42(1) was to "comply with all requirements in respect of buildings, health and safety under any other written law in so far as they apply to the premises".

However, as the Commissioner correctly held, no written law provided any mandatory requirement that applied to the glass in the glass door.

140 Moreover, the appellant was not a party to the Lease and hence was not privy to it. No exceptions or qualifications of the kind considered in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[67] apply. Nor could the appellant bring himself within s 11 of the *Property Law Act* 1969 (WA) ("the Property Law Act"). So far as relevant, this states:

> "(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.
>
> (2) Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but –"

Sub-section (2) goes on to deal with the availability against the third party of defences (par (a)), the joinder of necessary parties (par (b)) and the enforcement by defendants of obligations imposed on the third party for their benefit (par (c)). Sub-section (3) provides in certain circumstances for the cancellation or modification of the contract by the persons named as parties thereto.

141 The terms of s 11(1) indicate its ancestry in s 56(1) of the *Law of Property Act* 1925 (UK) and its limited field of operation[68]. In *Trident*[69], Dawson J referred to the unsuccessful attempts in England to use s 56(1) to overcome the doctrine of contractual privity. In *Beswick v Beswick*[70], the House of Lords decided that s 56 had replaced s 5 of the *Real Property Act* 1845 (UK). This had

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67 (1988) 165 CLR 107.

68 Section 56(1) is in the same terms as s 11(1), save that it concludes "although he may not be named as a party to the conveyance or other instrument".

69 (1988) 165 CLR 107 at 155.

70 [1968] AC 58.

amended what Lord Upjohn described as "some very ancient law relating to indentures inter partes"[71]. His Lordship continued[72]:

> "The rule was that a grantee or covenantee, though named as such in an indenture under seal expressed to be made inter partes, could not take an *immediate* interest as grantee nor the benefit of a covenant as covenantee unless named as a party to the indenture." (original emphasis)

The rule applied even if the grantee or covenantee had executed the deed[73]. However, the rule had never applied to a deed poll; such a deed could always be sued upon by any person with whom the covenant therein was made[74]. In *Beswick*, Lord Upjohn concluded[75]:

> "Section 56, like its predecessors, was only intended to sweep away the old common law rule that in an indenture inter partes the covenantee must be named as a party to the indenture to take the benefit of an immediate grant or the benefit of a covenant; it intended no more."

142 The text of s 56(1), like that of s 11(1), is not limited to an operation upon instruments which are deeds. However, in England, the received view is that "the true aim" of s 56(1) is "not to allow a third party to sue on a contract merely because it is made for his benefit; the contract must purport to be made *with* him"[76]. This construction of s 56(1) was accepted, after a full review of the authorities, by Neuberger J in *Amsprop Trading Ltd v Harris Distribution Ltd*[77]. There the plaintiff headlessor failed to recover the costs of repairs to the demised premises from the subtenant under covenants in the sublease between the tenant and the subtenant to permit "the superior landlords" to execute the repairs and to demand reimbursement for the costs thereof. While the sublease expressly referred to the plaintiff's predecessor in title as a person for whom the benefit of these covenants by the subtenants was given, the covenants were not made with

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71 [1968] AC 58 at 102.

72 [1968] AC 58 at 102.

73 *Norton on Deeds*, 2nd ed (1928) at 28-29.

74 *Norton on Deeds*, 2nd ed (1928) at 29.

75 [1968] AC 58 at 106.

76 Megarry and Wade, *The Law of Real Property*, 6th ed (2000) at §16-007 (original emphasis).

77 [1997] 1 WLR 1025 at 1032; [1997] 2 All ER 990 at 997-998.

the plaintiff or its predecessor, and s 56(1) had no operation to enable the plaintiff directly to enforce them against the subtenant.

143 In the present case, the Lease was a "conveyance" within the meaning of s 11(1) of the Property Law Act[78]. However, not only did the Lease not purport to be made with the appellant, it was not made for his benefit. The Lease conferred no interest or other benefit upon the appellant. As a matter between the respondents and the tenants, the appellant was a permitted occupant because the Lease stipulated that three persons might occupy the premises. However, the appellant no more had an interest or benefit in the sense of s 11(1) than any other person his parents may have permitted to occupy the premises with them. The first step to engage s 11(1) thus was not satisfied. The sub-section does not confer an interest or benefit where none otherwise is provided; where this interest or benefit is conferred, s 11(1) removes what otherwise may be an obstacle to the enforcement thereof caused by the failure to name the person concerned as a party to the conveyance or other instrument.

144 The relationship between the two sub-sections comprising s 11 is not immediately clear. The introductory words of s 11(2) state that it operates subject to an exception. This is "in the case of a conveyance or other instrument to which subsection (1) applies". The conveyances and instruments specified in s 11(1) appear to be those which confer on a person an immediate or other interest in land or property or the benefit of any condition, right of entry, covenant or other agreement over or respecting land or other property. The Lease, as just concluded, was not such a conveyance or other instrument. Therefore, the exception from any other operation s 11(2) may have does not apply. Further, though the point would not be of significance in this case, s 11(2) speaks broadly of "a contract" and "a benefit", and does not use the language of conveyances and interests in property.

145 Whilst s 11(1) treats the person concerned as a party to the conveyance or other instrument that relates to the land or property in question, s 11(2) does not constitute the person concerned a party to the contract in the ordinary sense. Rather, s 11(2) stipulates special conditions attaching to any enforcement of the contract in an action by that person and s 11(3) preserves, in certain circumstances, the rights of the parties to the contract themselves alone to cancel or modify it.

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78 Section 7 of the Property Law Act defines "conveyance" as including a "lease" and that term in turn is defined as including "an under-lease or other tenancy".

146 It may be accepted that s 11(2) was enacted to overcome dissatisfaction with the rules respecting privity[79]. However, the appellant cannot invoke sub-s (2). This is because the Lease did not "expressly in its terms [purport] to confer a benefit" upon him. For the sub-section to apply, the appellant would need to be identified in the Lease as the conferee of that benefit. He is not. This is so even if it be assumed, without deciding, that the phrase in s 11(2) "expressly in its terms" includes the text of provisions implied by statute such as the Residential Tenancies Act.

147 The result is that the outcome of the appellant's case depends on the fate of his claims on the first and second bases identified above, those relying upon the tort of negligence and the Occupiers' Liability Act. It is convenient to begin with the statute.

Occupiers' Liability Act

148 Section 5 of this statute places a duty upon "an occupier of premises" to take reasonable care for the safety of persons entering them. A threshold question is, therefore, whether the respondents were "occupier[s] of premises".

149 Section 2 states that, unless the contrary intention appears:

> "'occupier of premises' means person occupying or having control of land or other premises;
>
> 'premises' includes any fixed or movable structure, including any vessel, vehicle or aircraft".

150 The statute follows the outline of the *Occupiers' Liability Act* 1957 (UK) ("the UK Act") and decisions construing the UK Act in its original form are of assistance in the interpretation of the Western Australian legislation[80]. The decisions upon the UK Act, in particular that of the House of Lords in *Wheat v E Lacon & Co Ltd*[81], indicate that the identification of a person as an occupier within the meaning of the statute depends on the particular facts, the nature and the extent of the occupation and the control exercised by that person over the premises in question. The definition uses the phrase "person occupying or

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79 See *Trident* (1988) 165 CLR 107 at 117 per Mason CJ and Wilson J.

80 The UK Act was amended by the *Defective Premises Act* 1972 (UK) ("the 1972 Act") and the *Occupiers' Liability Act* 1984 (UK).

81 [1966] AC 552.

having control". In *Wheat*, Lord Pearson observed of the references in the UK Act to occupation and control that[82]:

> "[t]he foundation of occupier's liability is occupational control, ie, control associated with and arising from presence in and use of or activity in the premises."

151 However, in *Harris v Birkenhead Corporation*[83], the English Court of Appeal held that a local government authority was an "occupier" in the statutory sense of a house where it had lawfully asserted (but not otherwise exercised) an immediate right of entry and control and, as a result of that assertion of legal right, the person occupying the house had moved out leaving it empty.

152 A person such as a builder in temporary control of the premises or parts thereof may be an "occupier of premises". As a result of the right to exclusive possession conferred upon the tenant by the demise of the premises[84], a landlord ordinarily would not have control of those premises. But a landlord who lets out his house as a number of individual flats normally retains control over those parts of the premises which the tenants have to use in order to get to and from their flats and, in respect of these common parts, the landlord is an occupier in the sense of the legislation[85].

153 In the present case, nothing of this sort occurred with respect to the terms of the Lease. The occupiers of the premises, for the purposes of the Occupiers' Liability Act, were the appellant's parents and not the respondents.

154 However, as has been indicated, the Commissioner considered that the terms of the Lease gave the respondents control in respect of repairs and preserved their exclusive control in respect of any alterations or additions. Further, s 46 of the Residential Tenancies Act conferred upon the respondents the right to enter the premises in various circumstances, including for the purpose of carrying out or inspecting necessary repairs to or maintenance of the premises[86].

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82 [1966] AC 552 at 589.

83 [1976] 1 WLR 279; [1976] 1 All ER 341.

84 *Radaich v Smith* (1959) 101 CLR 209.

85 *Wheat* [1966] AC 552 at 579; *Jordan v Achara* (1988) 20 Housing Law Reports 607 at 611. See also *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15 where the lease of a shop did not extend to a flat roof area.

86 Residential Tenancies Act, s 46(1)(e).

From this the Commissioner concluded that the respondents "had a degree of control in respect of the premises such that they came within the meaning of 'occupier of premises' as defined in s 2 [of the statute]".

155 That conclusion should not be accepted. As explained earlier in these reasons, the construction given by the Commissioner to the terms of the Lease was incomplete. In any event, the question in this case is whether, when the appellant sustained his injuries, the respondents had control associated with and arising from their presence in or use of or activity in the premises. A question may have arisen respecting the application of the statutory definition if, at the relevant time, the respondents had lawfully asserted an immediate right to enter and control the premises or part thereof. However, the respondents had not done so.

156 This conclusion makes it unnecessary to consider whether the glass door itself might amount to "premises" within the meaning of the statutory definition, on the basis that it was included as a "fixed or movable structure"[87].

157 There remains the appellant's submission that the Occupiers' Liability Act was attracted because the respondents, as landlords, fell within the reach of s 9 thereof. The objective of that provision, as of s 4 of the UK Act[88], is to give any person lawfully upon the premises the same right of action against the landlord, in respect of an injury, as that person would have had as a tenant if the landlord were bound with the tenant or by statute for the maintenance or repair of the premises[89]. Section 9(1) states:

> "Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who may from time to time be on the premises the same care *in respect of dangers arising from any failure on his part in carrying out his responsibilities of maintenance and repair of the premises* as is required under this Act to be shown by an occupier of premises towards persons entering on those premises." (emphasis added)

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87 cf *Bunker v Charles Brand & Son Ltd* [1969] 2 QB 480 where the defendants were held to be the occupiers for the purposes of the UK Act of that area of a partly constructed tunnel occupied by the machine cutting the tunnel.

88 Section 4 of the UK Act was repealed by s 6(4) of the 1972 Act and replaced (by s 4) with a more extensive provision.

89 *Northern Sandblasting* (1997) 188 CLR 313 at 378.

In the present case, there was no failure on the part of the respondents to carry out any responsibilities of maintenance and repair for which they were responsible under the tenancy. The Commissioner correctly decided that s 9 had no application to the present case.

158 Moreover, the effect of s 9(3) is to emphasise that nothing in s 9 relieves the landlord from any duty to which the landlord otherwise is subject. That returns one to the common law claim in negligence.

The claim in negligence

159 Since the decision in *Northern Sandblasting*, there has been uncertainty in the law with regard to the liability in tort of landlords to tenants, occupiers and other entrants of residential premises respecting the unsafe condition of such premises. To dispose of this appeal, it will be appropriate to consider the state of the common law in Australia following *Northern Sandblasting*, and then the scope and content of the duty, if any, cast upon landlords, first in respect of tenants and secondly in respect of other persons upon the premises. Finally, it will be necessary to consider the content of such duty and its susceptibility to delegation.

Northern Sandblasting and the rule in *Cavalier v Pope*

160 The appellant submitted that *Northern Sandblasting* rejected what has been called the rule in *Cavalier v Pope*[90]. This is so, although the significance of *Cavalier v Pope* had rested more in what their Lordships did not say than in what they determined.

161 *Cavalier v Pope* was an action by the wife of a tenant against his landlord, the owner of a dilapidated house which had been let unfurnished, without any reduction of the terms to writing[91]. The flooring of the kitchen was in a defective condition and the tenant and his wife threatened to leave. The landlord's agent promised that, if the tenant stayed, repairs would be made. Some months later but before any repairs had been made, the appellant fell through the kitchen floor. The appellant and her husband brought an action for breach of contract against the landlord. The husband succeeded before Phillimore J and recovered "damages sustained by him by reason of the accident to his wife"[92]. It was the claim by the wife which went to the House of Lords. It failed on the basis that

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90 [1906] AC 428.

91 See, in the Court of Appeal, [1905] 2 KB 757 at 761.

92 [1905] 2 KB 757 at 761.

she was not privy to the contract of repair between her husband and the landlord's agent.

162 Thus read, *Cavalier v Pope* is an instance of an application of the rules respecting privity of contract. No discussion respecting the tort of negligence as it is now understood is found in the speeches in the House of Lords. In *Donoghue v Stevenson*[93], Lord Atkin said of *Cavalier v Pope* that:

> "[i]t was held that the wife was not a party to the contract, and that the well known absence of any duty in respect of the letting [of] an unfurnished house prevented her from relying on any cause of action for negligence."

This "well known absence" is a reference to the rule established in 1863 by Erle CJ in *Robbins v Jones*[94]. *Cavalier v Pope* is better described as a case affirming that rule rather than as creating any rule of its own. *Robbins v Jones* concerned an action under Lord Campbell's Act[95] for the death of a person who fell through a grating erected upon the defendant's land that bridged a public highway and a row of houses owned and let by the defendant. The grating was used as a passage by the public and, when the deceased was attempting to make his way from the highway to one of the houses, he fell through it. Erle CJ, delivering the judgment of the Court of Common Pleas in favour of the defendant, considered the plaintiff's action on a number of alternative heads, only one of which is presently relevant. He said[96]:

> "If the passage over the area be considered as a private way to the houses, then the reversioner is not liable, but the occupier. 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."

163 The significance of what Erle CJ said respecting the letting of houses in a dangerous state was threefold. First, subsequent decisions[97] indicated that a

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93 [1932] AC 562 at 597.

94 (1863) 15 CB (NS) 221 [143 ER 768].

95 9 & 10 Vict c 93.

96 (1863) 15 CB (NS) 221 at 240 [143 ER 768 at 776].

97 See *Northern Sandblasting* (1997) 188 CLR 313 at 325-326, 357, 364-365, 371.

condition of reasonable fitness for habitation nevertheless might be implied if residential premises were let furnished or partly furnished, although there was no implied condition that the premises continue as such during the term. Secondly, the liability of the landlord to the tenant for defects in the condition of the premises was confined to that arising under any covenants or conditions of the lease or tenancy and third parties had no such contractual rights. Thirdly, the landlord, as one out of occupation, had no liability to third parties as an occupier, and in respect of injury to the tenant or any other person arising out of the condition of the premises, the landlord was not liable in negligence.

164 The reasoning in 1863 with respect to tenants reflected the contemporary judicial emphasis upon the maxim *caveat emptor*. In an influential Pennsylvania decision in 1872, *Moore v Weber*, it was said that[98]:

> "[t]he rule here, as in other cases, is *caveat emptor*. The lessee's eyes are his bargain. He is bound to examine the premises he rents, and secure himself by covenants, to repair and rebuild."

165 *Northern Sandblasting* proceeded on the basis of a concession by counsel for the owner of the premises that a duty of care was owed by the owner to the plaintiff, who was the child of the tenants[99]. However, Dawson J pointed out, in a passage with which Gummow J agreed[100], that this concession was based on an acceptance of a statement of King CJ in *Parker v Housing Trust*[101] that the principle in *Cavalier v Pope* is inconsistent with the modern doctrine of liability

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98 71 Pennsylvania State Reports 429 at 432 (1872); 10 American Reports 708 at 711. This is no longer the law in Pennsylvania: *Pugh v Holmes* 405 A 2d 897 (1979).

99 (1997) 188 CLR 313 at 316.

100 (1997) 188 CLR 313 at 342, 370.

101 (1986) 41 SASR 493 at 516-517.

for negligence as it has developed since *Donoghue v Stevenson*[102]. All other members of the Court appeared to agree in this conclusion[103].

166 The result is that in Australia it is no longer correct that a landlord never owes any duty in negligence to occupants in respect of the condition of residential premises. The rejection of the rule in *Cavalier v Pope* does not, however, go so far as necessarily to impose a duty upon the landlord to any person who may be on the premises at any given time. In *Northern Sandblasting*, the existence of some duty to the child of the tenants was assumed by the concession of the landlord. On the pleadings in the present case, the existence of any such duty was denied by the respondents. However, in their written submissions to this Court, the respondents conceded that they owed a duty of care to the appellant, the issues being its content and the presence of a breach of duty in the circumstances of the case. In our view, this concession was properly made, but to find the content of the duty in the particular case requires consideration of the wider question left unanswered in *Northern Sandblasting*.

167 In doing so, it would be of no utility merely to conclude that the duty is to be expressed simply as one to take reasonable care to avoid a foreseeable risk of injury to a person in the situation of the appellant. That would be to leave unanswered the critical questions respecting the content of the term "reasonable" and hence the content of the duty of care, matters essential for the determination of this case, for without them the issue of breach cannot be decided.

The landlord's duty to the tenant

168 The starting point is to consider the relationship between the landlord and tenant. In *Northern Sandblasting*, in a passage with which Gummow J agreed, Dawson J said of the duty of care between the landlord and a guest lawfully upon the premises that it was[104]:

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102 The rule in *Cavalier v Pope* was abolished in the Australian Capital Territory by s 29 of the *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT), inserted by s 3, *Law Reform (Miscellaneous Provisions) (Amendment) Act* 1991 (ACT). However, as Gaudron J pointed out in *Northern Sandblasting* (1997) 188 CLR 313 at 357, the rule appears to retain some operation in England. In *McNerny v Lambeth London Borough Council* [1989] 1 EGLR 81 at 83 Dillon LJ discusses the respective fields occupied by statute and by the rule in *Cavalier v Pope*.

103 (1997) 188 CLR 313 at 339-340 per Brennan CJ, 347-348 per Toohey J, 357-358 per Gaudron J, 365-366 per McHugh J, 391-392 per Kirby J.

104 (1997) 188 CLR 313 at 343.

> "that which arises under the ordinary principles of the law of negligence, namely, a duty to take reasonable care to avoid foreseeable risk of injury to the respondent. The nature and extent of the duty in the particular instance depends upon the circumstances of the case."

169 This statement also holds true of the duty between the landlord and tenant. However, it is only the beginning of the inquiry. The difficulty lies in determining the nature and extent of any duty that exists and that which constitutes a breach thereof. The "circumstances" to be considered may differ between landlord and tenant and landlord and other persons. There is no necessary correlation between the respective duties, although the latter is likely to be less stringent than the former. This case, like *Northern Sandblasting*, is concerned with a letting for residential purposes. What follows is to be understood with that in mind. That which is required in respect of premises let for commercial or educational or other purposes may well differ, but that is not for decision in this case.

170 The basis upon which a landlord's duty in respect of residential tenancies is to rest is a matter of debate. One candidate is the element of "control" the landlord exercises over the premises at the time the tenant moves into occupation, in particular, the opportunity this affords for inspection by an expert engaged by the landlord[105]. With respect, we agree with the view of the learned editors of *Prosser and Keeton on The Law of Torts*[106] that this is a fiction devised to meet the case and not a particularly helpful one. For example, it would not cover cases in which the landlord never had control, either de facto in the case of back-to-back tenancies, or de jure in the case where a landlord assumes ownership after the tenant has gone into possession[107]. The learned editors point out that[108]:

> "[i]t seems obvious that the lessor's 'control,' even under a covenant, is a fiction devised to meet the case, since he has no power to exclude any one, or to direct the use of the land, and it is difficult to see how his privilege to enter differs in any significant respect from that of any carpenter hired to do the work."

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105 See *Northern Sandblasting* (1997) 188 CLR 313 at 340, 359-360.

106 5th ed (1984) at 444.

107 As was the case in *Austin v Bonney* [1999] 1 Qd R 114 at 124.

108 *Prosser and Keeton on The Law of Torts*, 5th ed (1984) at 444.

171 Like Priestley JA in *Avenhouse v Hornsby Shire Council*[109] – an economic loss case – we prefer to return to what his Honour called "the foundational case for all modern consideration of the duty of care in Anglo-Antipodean law". Lord Atkin in *Donoghue v Stevenson* asked whether the relations between the parties in question was so "close and direct" that the act complained of directly affected the plaintiff as a person whom the defendant "would know would be directly affected by his careless act"[110]. The relationship between landlord and tenant is so close and direct that the landlord is obliged to take reasonable care that the tenant not suffer injury. In considering the degree of care which must be taken, and the means by which a tenant may be injured, it must be borne in mind, as already discussed, that ordinarily the landlord will surrender occupation of the premises to the tenant. Thus, 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. Broadly, the content of the landlord's duty to the tenant will be conterminous with a requirement that the premises be reasonably fit for the purposes for which they are let, namely habitation as a domestic residence.

172 This does not exceed the content of statutory requirements in various Australian jurisdictions[111], many of which were enacted to overcome the

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109 (1998) 44 NSWLR 1 at 5.

110 [1932] AC 562 at 581. Lord Atkin may have been influenced by the statement by Buller (*An Introduction to the Law relative to Trials at Nisi Prius*, 4th ed (1785) at 25):

> "Every Man ought to take reasonable Care that he does not injure his Neighbour; therefore, where-ever a Man receives any Hurt through the Default of another, though the same were not wilful, yet if it be occasioned by Negligence or Folly, the Law gives him an Action to recover Damages for the Injury so sustained."

111 Reference already has been made to s 42 of the legislation in Western Australia. Section 25(1)(a) of the *Residential Tenancies Act* 1987 (NSW) imposes a requirement that the landlord provide residential premises in a reasonable state of cleanliness and fit for habitation by the tenant. Sections 103(2)(b) and 103(3)(a) of the *Residential Tenancies Act* 1994 (Q) require the lessor to ensure at the start of the tenancy and thereafter that the premises are fit for the tenant to live in. Section 68 of the *Residential Tenancies Act* 1995 (SA) obliges the landlord to ensure the premises are in a reasonable state of repair at the beginning of the tenancy and to keep them so, having regard to their age, character and "prospective life". Section 68(1) of the *Residential Tenancies Act* 1997 (Vic) obliges the landlord to ensure that the rented premises are maintained in good repair. To varying degrees, these provisions spring from the *Housing Act* 1936 (UK), s 2; the

(Footnote continues on next page)

perceived deficiencies of the rule in *Cavalier v Pope*. The present is not a case such as *Crimmins v Stevedoring Industry Finance Committee*[112] where the existence of a regime established by statute is essential to the formulation of a duty of care, breach of which is relied upon for an action in tort. However, the trend apparent in statute law is a relevant matter in considering the state of development of the common law[113]. In the present field, affecting the daily lives and transactions of a very large proportion of the population, the Court should be slow to hold that the content of a common law duty rises above that which has been imposed by statute in various Australian jurisdictions.

173 Premises will not be reasonably fit for the purposes for which they are let where the ordinary use of the premises for that purpose would, as a matter of reasonable foreseeability, cause injury. The duty requires a landlord not to let premises that suffer defects which the landlord knows or ought to know make the premises unsafe for the use to which they are to be put. The duty with respect to dangerous defects will be discharged if the landlord takes reasonable steps to ascertain the existence of any such defects and, once the landlord knows of any, if the landlord takes reasonable steps to remove them or to make the premises safe. This does not amount to a proposition that the ordinary use of the premises for the purpose for which they are let must not cause injury; it is that the landlord has acted in a manner reasonably to remove the risks.

174 What constitutes the taking of reasonable steps will, as Dawson J noted in *Northern Sandblasting*, depend on all the circumstances of the case. What is reasonable for premises let for the purpose of residential housing may be less demanding than for premises let for such purposes as the running of a school, or the conduct of a hotel or club serving liquor. Moreover, the reasonableness of steps to be taken will be affected by the terms of the lease, including the level at which the rental is pitched[114], the obligations the parties allocated inter se and any specification of limited purposes to which the premises be put. It will also be affected by the terms of any applicable statutes, such as residential tenancy statutes. In some jurisdictions, there may be statutory requirements which supplant any common law duty or which impose a higher duty than the common law.

Housing Act 1957 (UK), s 4; and the 1972 Act, s 4. See also *Northern Sandblasting* (1997) 188 CLR 313 at 373.

112 (1999) 74 ALJR 1; 167 ALR 1.

113 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 74 ALJR 339 at 344-346 [19]-[26]; 168 ALR 123 at 129-131.

114 cf *Bond v Weeks* [1999] 1 Qd R 134 at 139-140.

175 The notion of reasonable fitness prompts three inquiries. The first concerns the presence of dangerous defects. The second, the taking of reasonable care to ascertain them. The third, the exercise of reasonable care to remove them or otherwise to make the premises safe.

Dangerous defects and ordinary use

176 What then may constitute a dangerous defect? The defective flooring in *Cavalier v Pope* and *Voli v Inglewood Shire Council*[115] would be obvious examples. So also the tap in *Northern Sandblasting*; a tap would not be expected to deliver an electrical shock to the person operating it. Likewise live wires or live electrical circuits that are misinstalled, or so exposed as to be liable to be brushed against accidentally[116]; a light switch or light outlet that delivered a shock to one turning it on with dry hands[117]; stairs that could not bear the weight of a person[118]; and a roof that could not support a tenant authorised to be or to work upon it[119]. It may also be that an untempered pane of glass[120] prone to shatter or to explode when a door is opened or closed, or when wind blows against it, would be a dangerous defect. However, that is not this case.

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115 (1963) 110 CLR 74.

116 *Bond v Weeks* [1999] 1 Qd R 134.

117 Aliter where the wiring is defective but safe or where the wiring is not part of the premises (*Assaf v Kostrevski* [1999] NSW Conv R ¶55-883 esp at 56,899-56,900), or where normal use would not cause any injury (*New South Wales v Watton* [1999] NSW Conv R ¶55-885). The finding of the New South Wales Court of Appeal in these cases that the landlord nevertheless was liable must, particularly as to the first of them, be doubted.

118 *Austin v Bonney* [1999] 1 Qd R 114.

119 As was the roof in *Le Cornu Furniture & Carpet Centre Pty Ltd v Hammill* (1998) 70 SASR 414, although there the person on the roof was not a tenant but a workman. The observations of two members of the Full Court in that case respecting the non-delegability of duties of care must be doubted.

120 As was the case in *Becker v IRM Corporation* 698 P 2d 116 (1985), a decision of the Supreme Court of California rejecting the entry of summary judgment for the landlord where the tenant had slipped and fallen against an untempered glass shower door.

177 Some dangerous defects will exist at the time of entry into a tenancy agreement while others might develop during the course of the tenancy. It may be attractive to divide the class of "dangerous defects" between these two heads, but the evidence may sometimes be insufficient to determine which of these is the case in respect of any particular dangerous defect[121]. Rather, a better approach is to look at the origin of the defect, particularly whether it arises from faulty design or workmanship, at whatever stage, or whether it arises from a lack of repair. Those responsible for negligent design or building will ordinarily be liable as primary tortfeasors[122]. Liability for disrepair will ordinarily fall upon the party with the obligation to repair. Liability for negligent repair ordinarily will fall on the repairer.

178 The thread running through these cases is that a dangerous defect will, or may, cause injury to persons using the premises in an ordinary way. They are defects in the sense that they are more than dangerous; they are dangerous in a way not expected by their normal use. Many domestic items might be said to be dangerous: gas ovens, caged fans, hard floors, electrical circuits and panes of glass may cause serious or even fatal injuries[123]. However, they are ordinarily only dangerous if misused. They will only be defective if they are dangerous when being used in a regular fashion and ordinarily would not be dangerous when so used.

179 Moreover, the danger must appear in the course of the use of the premises for the purpose for which they were let. The reasonableness of the conduct engaged in by the person injured will be important. The danger may arise only to those performing acts unauthorised or uncontemplated as part of the purpose for which the tenancy was let. If so, there ordinarily will not be a dangerous defect. The actions contemplated and authorised by the purposes of the lease will depend on all the circumstances of the case. Often they will be expressed by the instrument of lease itself. Thus, ordinarily it will not be an incident of use of residential premises to climb trees situated thereon[124]; nor ordinarily will it be a

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121 See the discussion by Toohey J of the state of the evidence in *Northern Sandblasting* (1997) 188 CLR 313 at 349.

122 *Anns v Merton London Borough Council* [1978] AC 728; *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

123 See the discussion by Mahoney JA in *Phillis v Daly* (1988) 15 NSWLR 65 at 74.

124 Contrast the finding of liability in *Donovan v Port Macquarie Base Hospital*, unreported, Supreme Court of New South Wales, Common Law Division, 22 December 1999.

reasonable use of premises if the tenants do something, such as perform repairs, which they are forbidden to do by the terms of the lease which grants occupancy.

180 It is not necessary for present purposes to pursue this line of reasoning any further. The injury to the appellant was caused by his using the premises in the usual course of an occupancy of residential premises. The glass door, on the facts found by the Commissioner, was not a dangerous defect in the necessary sense. The premises were reasonably fit for the purpose of residential occupancy, both at the commencement of the tenancy (the relevant time according to the appellant) and at the time of the appellant's injury. There was no breach of the respondents' duty of care owed to the tenants. It is not suggested that any higher duty was owed to a permitted occupant such as the appellant.

181 Further, no liability can arise from danger due to disrepair, as the effect of cl 2.11 of the Lease was to impose upon the tenants, not the respondents, an obligation to keep the glass door in the same condition as it was at the commencement of the Lease, although, as the Commissioner had emphasised, the effect of cl 2.12 was that permission to authorise repairs was a matter for the respondents. In any event, at the trial, the question of reasonable fitness of the premises had not turned upon any failure to maintain or repair the glass door. The trial was determined on defective design or construction and failure to inspect the door before allowing the appellant and his family into residence.

182 What has been said is sufficient to dispose of the appellant's case in so far as it rests upon the existence and breach of a duty of care owed to him by the respondents. However, we should deal shortly with the second and third matters referred to above: the taking of reasonable care to ascertain dangerous defects, and to remove them or otherwise to make the premises safe.

Ascertaining dangerous defects

183 The diligence required to ascertain dangerous defects will not in the ordinary case require the institution of a system of regular inspection for defects during the currency of the tenancy. In *Northern Sandblasting*, Kirby J said of a posited requirement of inspections of domestic electricity systems[125]:

> "If correct in principle, it would require regular inspections against the risk of other perils, eg gas supply, floorboards, balustrades, etc. In the absence of evidence about the prevalence of, and need for, any such

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125 (1997) 188 CLR 313 at 394. Statements to similar effect were made at 343-344 per Dawson J, 349 per Toohey J, 370 per Gummow J.

inspections of rented accommodation, there was no foundation for imposing such a duty on landlords leasing residential premises".

184 Nor is there a requirement for the engagement of experts in each of the fields, such as electrical wiring, and glass fabrication and installations, where such risks of defects could, in the nature of things, be seen as a possibility.

185 The appropriate standard is indicated by a passage in the judgment of Ligertwood J in *Watson v George*[126], which was approved by this Court[127]. The defective gas bath-heater which caused the death by carbon monoxide gas poisoning of a paying guest at the defendant's boarding house, when new, had been a safe and efficient appliance and it had been properly installed. Ligertwood J said[128]:

> [The question is narrowed] to whether the defendant in a reasonable course of conduct towards her boarders should from time to time have had the bath-heater examined by an expert to see whether it was functioning properly.
>
> It is easy enough to say at this stage that she should have done so, but a bath-heater is a comparatively simple appliance, a defect in which would be expected to show itself to the ordinary user. The bulging of the water jacket was so rare an occurrence that the expert from the Gas Company had known it to happen on only one previous occasion. I do not overlook the fact that the heater had been in use for more than twenty years, but, even so, apart from the bulging of the water jacket, the heating portion was not in a state of disrepair. The accumulation of rust in the elbow of the secondary flue would appear to be equally unexpected. In these circumstances, I do not think I should hold that there was a failure on the defendant's part to exercise reasonable care towards the users of the bathroom in not calling in an expert from time to time to see that the bath-heater was functioning properly. It would have been better if she had done so, and it may have saved the life of the deceased, but to condemn the defendant on this ground is, I think, to be wise after the event and not to judge the affairs of mankind by the standard of ordinary reasonable human conduct."

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126 [1953] SASR 219.

127 (1953) 89 CLR 409 at 416, 427. See also the discussion by Handley JA in *Stannus v Graham* [1994] Aust Torts Rep ¶81-293.

128 [1953] SASR 219 at 223-224.

Watson v George based the duty in contract. While this does not necessarily translate into tort, it should now be considered to do so, particularly after the judgment of Windeyer J in *Voli v Inglewood Shire Council*[129].

186 As Ligertwood J recognised in the above passage, where the existence of a dangerous defect was merely a possibility (albeit one later realised when the plaintiff was injured), the steps a landlord was required to undertake were only those that would be taken in the course of "ordinary reasonable human conduct". The matter is not an exercise of hindsight. The identification of the requisite steps will depend, among other things, upon whether an ordinary person in the landlord's position would or should have known that there was any risk; whether that person would or should have known of steps that could be taken in response to that risk; and the reasonableness of taking such steps.

187 Mr Fryer (who was the appellant's expert witness) gave uncontroverted evidence that an ordinary person could not tell whether glass was laminated safety glass or not. There was no evidence to suggest the respondents knew that the glass in the door was annealed; or that they knew of the risks involved in using annealed glass; or, indeed, that there existed different types of glass. Commissioner Reynolds also found that there was no evidence that the respondents knew of the Australian Standards. In such circumstances, "ordinary reasonable human conduct" did not require the taking of steps to ascertain the existence of a dangerous defect which the respondents did not, and had no reason to, suspect might exist.

188 However, in another case, a defect may not be unknown or unsuspected; the landlord may have sufficient knowledge or suspicion to make it unreasonable to fail to act. Such action may be called for even if it requires the attendance of experts[130].

189 Legislatures may decide to impose higher standards upon landlords, including specific obligations respecting such matters as electrical wiring and gas connections, and to do so in respect of some classes of premises rather than others. But that is another matter.

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129 (1963) 110 CLR 74 at 85.

130 See *Northern Sandblasting* (1997) 188 CLR 313 at 370-371; *Austin v Bonney* [1999] 1 Qd R 114 at 120, 124-125.

Discharging the duty of care and delegability

190 The duty of care encompasses an obligation to see to the removal of known defects rendering the residential premises unsafe and to make them reasonably safe by that removal. Many landlords, as a practical matter, will be unable to perform and, in some cases, be prohibited by law[131] from performing the necessary repairs. Accordingly issues will arise as to whether it is sufficient for the landlord to engage a competent contractor to deal with the defects. Put another way, the question will be whether the duty to take reasonable care is "personal" and "non-delegable".

191 To characterise a duty in this way involves, in effect, the imposition of strict liability. The content of the principle by which this characterisation is effected remains unclear, notwithstanding what was said by Mason J, after a review of the authorities, in *Kondis v State Transport Authority*[132]. The relationships referred to by his Honour turn more on the nature of the relationship than of the characteristics of the individuals within it. For example, patients in hospitals and children in schools manifest a dependence or vulnerability which, while it may trigger the non-delegable duty, is not necessarily to be seen in the relationship of landlord and tenant. As Kirby J pointed out in *Northern Sandblasting*[133]:

> "Whereas, as a class, landlords might generally be in a better position than tenants, to carry the risk of unexpected harm in demised premises, this would not always be so."

192 Finally, the position of a glass door in a house cannot be compared with a landowner bringing onto the land a dangerous substance or allowing a dangerous activity to be performed on the land. In *Northern Sandblasting*, a case involving electricity, five members of this Court rejected the submission that the landlord had been under a duty which was non-delegable in nature[134]. (It will be convenient later in these reasons to indicate the standing of *Northern Sandblasting* in the light of the reasoning in this judgment.)

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131 See, eg, the prohibition imposed by s 322 of the *Electricity Act* 1976 (Q) referred to in *Northern Sandblasting* (1997) 188 CLR 313 at 349.

132 (1984) 154 CLR 672 at 687.

133 (1997) 188 CLR 313 at 401.

134 (1997) 188 CLR 313 at 333 per Brennan CJ, 346 per Dawson J, 360-362 per Gaudron J, 370 per Gummow J and 396-404 per Kirby J.

193 The content of the landlord's duty in a case such as the present is not one of strict liability, to ensure an absence of defects or that reasonable care is taken by another in respect of existing defects. It is not a duty to guarantee that the premises are safe as can reasonably be made[135].

194 It remains to consider whether a landlord owes to others upon residential premises a lesser duty than that owed to the tenants themselves.

Other occupiers and entrants

195 The general principle, consistently with *Australian Safeway Stores Pty Ltd v Zaluzna*[136], is that liability for injury suffered by an entrant upon residential premises primarily will rest with the occupier. A tenant in occupation, rather than the landlord, has possession and control with power to invite or to exclude, to welcome in or to expel. Those asserting a duty often will be the guests or invitees of the tenant or persons present on the tenant's business or for their business with the tenant. It will be the tenant who is best placed to inform such persons of any dangers or defects[137], and the tenant who "is more directly in touch with emerging repair needs than a landlord who has surrendered possession"[138].

196 However, dangerous defects are unlikely to discriminate between tenants and those on the premises whether as an incident of a familial or other personal relationship, as in this case, *Cavalier v Pope*, and *Northern Sandblasting*, or some other social or business relationship or occasion. The landlord's duty to take reasonable care that the premises contained no dangerous defects, owed in the sense earlier described to the tenants, extends to those other entrants we have identified.

197 Nevertheless, 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. An example of facts not involving the placing of a duty on the landlord is a slippery floor[139]; an unsecured gate to a fenced swimming pool may be another.

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135 cf *Rimmer v Liverpool City Council* [1985] QB 1 at 7; *McNerny v Lambeth London Borough Council* [1989] 1 EGLR 81 at 83.

136 (1987) 162 CLR 479.

137 *Gorman v Wills* (1906) 4 CLR (Pt 1) 764 at 771-772.

138 *Austin v Bonney* [1999] 1 Qd R 114 at 119.

139 cf *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

The duty of care of the landlord to the third party is only attracted by the presence of dangerous defects in the sense identified earlier in these reasons. These involve dangers arising not merely from occupation and possession of premises, but from the letting out of premises as safe for purposes for which they were not safe. What must be involved is a dangerous defect of which the landlord knew or ought to have known.

198 It is unnecessary here to pursue this aspect of the case further. This is because, as indicated above, in the present case treating the appellant as in as good a position as his parents, the tenants, there was no breach of duty by the respondents. The glass door was not a dangerous defect in the relevant sense.

Northern Sandblasting

199 The order of this Court in *Northern Sandblasting* was that the appeal be dismissed, thereby leaving undisturbed the order of the Queensland Court of Appeal that the order of the trial judge dismissing the plaintiff's action against the landlord be set aside and judgment for her be entered against the landlord. The result was that the cause of action upon which the plaintiff sued merged in the judgment in her favour[140]. But the principles of *res judicata* and the doctrine of judicial precedent involve different concepts and serve different ends[141]. The merger of a cause of action by the entry of judgment determines disputed rights between parties, whilst judicial precedent looks ahead to the rules of decision to be applicable in litigation between others. This directs attention to the reasons given in the earlier case.

200 We have indicated that *Northern Sandblasting* is authority for the rejection in Australia of the rule in *Cavalier v Pope*, and that the existence of some duty to the plaintiff was assumed by reason of a concession made by the landlord. There was disagreement in *Northern Sandblasting* as to the nature and extent of that duty in the circumstances of the case.

201 The four members of the Court (Brennan CJ, Toohey J, Gaudron J and McHugh J) comprising the majority in favour of the order dismissing the appeal were divided as to the ground upon which that order should be made.

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140 *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 510.

141 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 37; Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd ed (1996), §16.

Toohey J[142] and McHugh J[143] relied upon breach of a non-delegable duty of care, but the other members of the majority[144] and those Justices who would have allowed the appeal[145] rejected the submission that such a duty had arisen. Brennan CJ[146] and Gaudron J[147] both relied upon breach of a duty of care which involved the need for a pre-letting inspection, but they did not express the point in the same terms. Toohey J[148] said that there were "real difficulties" in the way of a case based upon a failure to inspect. McHugh J did not deal with this point. The Justices in the minority, Dawson J[149], Gummow J[150] and Kirby J[151], were of a view contrary to that of Brennan CJ and Gaudron J.

202 *Northern Sandblasting* thus is an example of a decision of an ultimate appellate court in which there is no majority in favour of either of the two grounds for decision[152]. Further, as regards the non-delegable duty ground, all members of the Court dealt with it and a majority was against it; of those judges who dealt with the other ground for decision, a majority of them was against it.

203 The authority of a decision reached in this way for later cases in trial courts and intermediate courts of appeal is a matter of debate. The issues involved were discussed by Sir George Paton and Professor Sawer in a joint

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142 (1997) 188 CLR 313 at 350-352.

143 (1997) 188 CLR 313 at 368-370.

144 (1997) 188 CLR 313 at 333 per Brennan CJ, 360-363 per Gaudron J.

145 (1997) 188 CLR 313 at 346-347 per Dawson J, 370 per Gummow J, 399-404 per Kirby J.

146 (1997) 188 CLR 313 at 340.

147 (1997) 188 CLR 313 at 360.

148 (1997) 188 CLR 313 at 349.

149 (1997) 188 CLR 313 at 343-344.

150 (1997) 188 CLR 313 at 370.

151 (1997) 188 CLR 313 at 393-394.

152 See "Ratio Decidendi in Appellate Courts", (1949) 23 *Australian Law Journal* 355, and the note by Sir Robert Megarry, (1950) 66 *Law Quarterly Review* 298.

article published in 1947[153], with particular reference to decisions of this Court. Their article was later described as an important one by Sir Rupert Cross in his discussion in *Precedent in English Law*[154].

204 One view is that, in such an instance, there is no discernible *ratio decidendi*, so that the later court is free to decide the legal issues for itself and to adopt any reasoning which appears to it to be correct so long as that reasoning supports "the actual decision" in the earlier case. That approach was adopted by Lord Denning MR in *In re Harper v National Coal Board*[155]. Further, in *Dickenson's Arcade Pty Ltd v Tasmania*[156], Barwick CJ said that, if there was "no reason for decision common to the majority of the Justices", a decision of this Court was "authority only in relation to the statutory and factual situation it resolved and in relation to a case which has, if not precisely, at least substantially and indistinguishably the same statutory and factual situation". Thus, the Chief Justice would have rejected as an adequate foundation a ground accepted only by a majority within the majority supporting the order made by the Court.

205 A variant of these views is that, whilst the earlier case lacks a *ratio decidendi*, a later court is bound to apply the earlier decision if the circumstances of the instant case cannot reasonably be distinguished from those which gave rise to the earlier decision[157]. However, as Professor Stone emphasised, expressions such as "actual decision", "factual situation" and "reasonably distinguishable" present "leeways of choice", given the indeterminacy of the level of generality at which the material facts are to be ascertained[158].

206 Some decisions may yield a *ratio decidendi* only by the inclusion of reasoning as to propositions of law by a member of the Court who dissented as to the application of those principles to the facts. Sir George Paton and Professor

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153 "Ratio Decidendi and Obiter Dictum in Appellate Courts", (1947) 63 *Law Quarterly Review* 461.

154 Cross and Harris (eds), 4th ed (1991) at 93.

155 [1974] QB 614 at 621.

156 (1974) 130 CLR 177 at 188.

157 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 37.

158 Stone, *Precedent and Law: Dynamics of Common Law Growth*, (1985) at 124-128.

Sawer suggested[159] that *Buckle v Bayswater Road Board*[160] is such a case. This was said to be because of a conflict in the reasoning of the majority of Justices (Latham CJ and McTiernan J) and the application by the dissenting Justice (Dixon J) of the same general principles of law as the Chief Justice. Later, Barwick CJ rejected the construction of a "conglomerate" in such a fashion[161]. However, Sir Rupert Cross observed[162]:

> "[P]erhaps we should not make a shibboleth of any requirement that there may be in this context that dissenting judgments should be disregarded; they may at least contain weighty *dicta*."

At all events, where a binding authority cannot be extracted from the majority judgments, a dissenting judgment later may "deserve respectful consideration"[163].

207 It is unnecessary to resolve these problems in this Court in the present case. This is so for two reasons. First, this Court is not necessarily bound by its previous decisions; a difference between the reasons of the Justices constituting the majority in an earlier decision may justify departure from that decision[164]. If there be difficulty in detecting and isolating the propositions of law which provided the grounds for a decision, this Court should not strain to construct a precedent from which it may then be asked to depart. Secondly, there is force in the statement that "from the realistic point of view, we are not sure of the *ratio* of a decision until we can discover its reception and its treatment by subsequent cases"[165]. The present litigation illustrates the point.

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159 "Ratio Decidendi and Obiter Dictum in Appellate Courts", (1947) 63 *Law Quarterly Review* 461 at 466-467.

160 (1936) 57 CLR 259.

161 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188; cf *China Ocean Shipping Co Ltd v P S Chellaram & Co Ltd* (1990) 28 NSWLR 354 at 379-380.

162 *Precedent in English Law*, 4th ed (1991) at 92.

163 *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314.

164 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438; *Northern Territory v Mengel* (1995) 185 CLR 307 at 338-339.

165 Paton and Sawer, "Ratio Decidendi and Obiter Dictum in Appellate Courts", (1947) 63 *Law Quarterly Review* 461 at 480.

208 In that light, we turn to consider *Northern Sandblasting* against the principles we have sought to expound earlier in this judgment. The injuries to the respondent plaintiff in that case arose from the combination of three features of the premises. The first was the arrangement of wires in the stove upon the premises such that the active wire in the stove's hotplate was able to foul the earth wire[166]. Such an arrangement was caused by the work of Mr Briggs, a licensed electrician, when, in the course of repairing the stove, he left exposed a portion of the active wire near a metal strip, to which was attached the earth wire. The metal strip rotated freely so as to make contact with the active wire. When the hotplate was switched on and the active wire touched the metal strip, the active wire could make the earth wire live.

209 The second feature was a defect in the domestic switch box. The stove's earth wire was connected to the major earth wire, which was in turn connected, via a "neutral link" in the domestic switch box, to the neutral wire. However, "the major earth wire had been pulled out of its socket in the neutral link or was too loose in the socket to provide an efficient connection"[167]. There was a finding that there was an untidy tangle of wires in the domestic switch box caused by a tradesman who had worked on it[168] and further that[169]:

> "[t]he defect could have come about at any time by a loosening over a period of time of the screw holding the earth-wire in its seat so that the necessary contact in the link was lost. … Such a loosening could occur spontaneously though gradually until the retentive force of the screw was exceeded by the force applied by the weight of the tangled nest when, it might be expected, the withdrawal of the wire from its socket in the link would follow fairly rapidly."

210 Importantly, as Brennan CJ noted, the untidy work of the tradesman that caused the tangled mess of wires occurred before the tenants were let into possession[170], and Toohey J observed that "[t]here was no evidence to establish when the earth wire became disconnected"[171].

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166 (1997) 188 CLR 313 at 322.

167 (1997) 188 CLR 313 at 323.

168 (1997) 188 CLR 313 at 324.

169 (1997) 188 CLR 313 at 403, fn 359, citing Derrington J in *Harris v Briggs* [1994] Aust Torts Rep ¶81,301 at 61,710.

170 (1997) 188 CLR 313 at 324.

171 (1997) 188 CLR 313 at 349.

211 The third feature concerned the major earth wire, which was also connected to the water pipes of the premises as an additional safety measure. Near these pipes, at the base of "a power pole outside the property"[172], was a metal spike, which was connected to the neutral wire on the power pole. The result, Brennan CJ stated, was that, if electrical charge were conducted to the water pipes and if the additional measure were effective, the current would be "conducted along the pipes and through the ground" to the metal spike, whence it would be conducted back along the neutral wire to the general power system[173]. However, as sometimes occurs and as occurred in that case, the ground between the pipes and the metal spike was a poor conductor of electricity, so that no conduction would occur and the water pipes would retain the electrical current.

212 The cause of the accident was that, when the hotplate was switched on, the active wire in the hotplate snagged the earth wire and made it live. The broken connection in the neutral link had the result that the current in the earth wire was not conducted into the domestic switch box. If this had occurred, the current would have blown a fuse situated there. Instead, the current was conducted into the water pipe system and, because of the lack of connection between the system and the metal spike, remained there until the plaintiff, standing in bare feet on wet ground, touched an outside tap and so completed the circuit.

213 Such a characterisation of the facts leads to the following conclusions. First, the wiring in the stove was a dangerous defect; it made the earth wire active. Secondly, the defective condition of the wiring in the domestic switch box was a dangerous defect in the sense explained earlier in these reasons. It did not actively present a danger but removed a safety measure designed to neutralise any electrical hazards that might arise regarding activation of the earth wire. Thirdly, and for the same reason, the additional safety measure comprised by the metal spike was also a dangerous defect.

214 However, the second dangerous defect may have arisen after rather than before the property was let; it could not be determined when the earth wire became disconnected from the neutral link[174]. The first dangerous defect definitely arose after the letting: the stove stopped working over six months after the commencement of the tenancy when the active wire in the stove became

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172 (1997) 188 CLR 313 at 323.

173 (1997) 188 CLR 313 at 323.

174 (1997) 188 CLR 313 at 343, 348-349.

disconnected[175]. It was only then that the stove was negligently repaired in such a way that made it into a dangerous defect. In any event, none of the three dangerous defects was or would have been discoverable by the landlord at the time of the letting of the premises. There may also be debate as to whether the third dangerous defect was even part of the premises themselves, or whether it was a defect in the electrical work done outside the premises' boundaries by the North Queensland Electricity Board[176].

215 Consistently with the reasoning in the present judgment, the landlord would not have breached any duty to ascertain the existence of the second (the switch box) and third (connection to the metal spike) defects, even assuming that the former existed at the time the premises were let and that the latter was part of the premises. They were not detectable by a landlord inspecting the property and nothing had occurred to make their existence or likely existence known to the landlord[177]. The position is the same in respect of the first defect (the stove wiring). It did not exist at the time the premises were let. There was no dangerous defect even when the stove ceased to work, for there was simply a disconnected wire[178]. The dangerous defect which ultimately caused the plaintiff's injuries arose only through the negligence of the contractor who repaired the stove, when the active wire was left exposed and made able to foul the earth wire.

216 Hence, the only duty in the landlord – which seems to have been the party with the obligation to repair but was prohibited from performing the repairs otherwise than by engaging a licensed electrician[179] – was limited to a duty to engage a licensed and ostensibly competent electrician to repair the stove. There was no breach of this duty, as Mr Briggs was found to have been such an electrician[180]. However, in the event, he was negligent. Liability for the dangerous defect created by the negligent repair work lay solely in the party who caused it – the electrician – and could not be extended to the landlord.

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175 (1997) 188 CLR 313 at 322.

176 (1997) 188 CLR 313 at 386, 403 fn 359.

177 (1997) 188 CLR 313 at 343-344.

178 (1997) 188 CLR 313 at 322.

179 (1997) 188 CLR 313 at 349.

180 (1997) 188 CLR 313 at 349.

217 That being so, and the landlord's duty being limited to a duty to engage a licensed contractor to have the stove repaired, it was not then to be conflated with the electrician's duty to repair the stove without negligence on his part. The effect of so doing would extend the duty to perform the repairs competently from the electrician to the landlord so that it became a duty to ensure the repairs were made competently such that the plaintiff was not exposed to any danger from them. In our view, such a process would be impermissible. The first step must be to determine whether the landlord was under any duty and only then may it be determined whether that duty was delegable[181]. The only relevant content of the landlord's duty was to engage a licensed electrician to repair the defective stove. Whether or not this was delegable, it was not delegated; nor was it breached.

Conclusion

218 The appeal should be dismissed with costs.

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181 See, eg, *Kondis v State Transport Authority* (1984) 154 CLR 672 at 684-685.

219 KIRBY J. This appeal, from the Full Court of the Supreme Court of Western Australia[182], requires this Court to revisit some of the questions that were argued in *Northern Sandblasting Pty Ltd v Harris*[183]. The differences of opinion expressed in that decision have given rise to much commentary and analysis[184]. One observer remarked that "the progeny of *Northern Sandblasting v Harris* will be seen for some years to come"[185]. So it has proved.

The facts and issues

220 The facts of this case are not as tragic as those in *Northern Sandblasting*[186]. But they are serious enough for Mr Marc Jones (the appellant). At the time he was injured, he was twenty-three years of age and a bricklayer. He was living with his parents in residential premises let to them as tenants. He suffered an injury to his right leg when a glass panel in an internal door shattered after he accidentally struck it with his knee. How and why the collision occurred

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182 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999.

183 (1997) 188 CLR 313 ("*Northern Sandblasting*").

184 Evans, "Extension of a landlord's duty of care: The decision in Northern Sandblasting Pty Ltd v Harris", (1997) 12 *Australian Property Law Bulletin* 9 ("Evans"); Orr, "The glorious uncertainty of the common law? *Northern Sandblasting Pty Ltd v Harris*", (1997) 5 *Torts Law Journal* 208 ("Orr"); Griggs, "The Tragedy of *Northern Sandblasting v Harris* and the Landlord's Liability to Third Parties", (1998) 6 *Australian Property Law Journal* 169 ("Griggs"); Handford, "No Consensus on Landlord's Liability", (1998) 6 *Tort Law Review* 105 ("Handford"); Keogh, "Common Law Issues and Implications for Commercial Property Risk Management in *Northern Sandblasting Pty Ltd v Harris*", (1998) 12 (2) *Commercial Law Quarterly* 13; Swanton and McDonald, "Landlords' liability for injuries caused by the defective condition of the premises", (1998) 72 *Australian Law Journal* 345 ("Swanton and McDonald"); Redfern, "*Northern Sandblasting* Again", (1999) 7 *Australian Property Law Journal* 185; Redfern, "*Northern Sandblasting* Once Again", (1999) 7 *Australian Property Law Journal* 281; Wilson, "Landlord's duty after Northern Sandblasting v Harris: how the decision is being interpreted", (1999) 13 *Australian Property Law Bulletin* 73.

185 Griggs, (1998) 6 *Australian Property Law Journal* 169 at 179.

186 *Northern Sandblasting* (1997) 188 CLR 313 at 385; cf Griggs, (1998) 6 *Australian Property Law Journal* 169 at 178; Swanton and McDonald, (1998) 72 *Australian Law Journal* 345 at 349.

is described in the reasons of the other members of the Court[187]. There was no dispute about those facts.

221 The appellant sued the landlords, Mr and Mrs Bartlett (the respondents), based on contract, statute and the common law. Commissioner Reynolds of the District Court of Western Australia found in favour of the appellant on the ground that the respondents had breached the duty owed by them to the appellant under the *Occupiers' Liability Act* 1985 (WA)[188]. However, he made a finding of contributory negligence against the appellant and reduced his verdict by fifty per cent[189]. The respondents appealed to the Full Court of the Supreme Court of Western Australia, which upheld their appeal and set aside the judgment in favour of the appellant. The cross-appeal by the appellant was dismissed. By special leave, the appellant now appeals to this Court.

222 To ascertain the entitlements of the appellant under the contract of lease, under the *Occupiers' Liability Act* and in negligence at common law, there is no substitute for close analysis. As well, so far as the claim in negligence at common law is concerned, to succeed, it requires more than a demonstration that the premises on which the person was injured were less than perfect by contemporary building standards. It is necessary to identify the scope of the duty of care which the respondents, as landlords and owners, are said to have owed to the appellant and to determine whether, in the events that occurred, the respondents were in breach of that duty in a manner that caused the appellant's damage. At every point in this formulation of the issues in negligence (and equally in respect of the claims in contract and under the *Occupiers' Liability Act*), the respondents contested their liability.

The claims in contract and by statute

223 The appellant submitted that, although not himself a party to the lease between the respondents and his parents[190], he was entitled to recover from the

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187 Reasons of Gleeson CJ at [4]-[8], reasons of McHugh J at [96], reasons of Gummow and Hayne JJ at [118]-[125], reasons of Callinan J at [256]-[260].

188 *Jones v Bartlett* unreported, District Court of Western Australia, 4 February 1998.

189 In Western Australia, contributory negligence is available as a defence to a claim under the *Occupiers' Liability Act*: see s 10.

190 The terms of the lease are set out in the reasons of Gummow and Hayne JJ at [118]-[119].

respondents[191] under contractual obligations as enlarged by the *Residential Tenancies Act* 1987 (WA)[192]. However, the Commissioner rejected the claim in contract, concluding that there was no factual foothold for such a claim. This conclusion was reached on the ground that it had not been shown that the requirements of that Act were met, there being nothing in the condition of the subject door which fell short of the provision and maintenance of the premises "in a reasonable state of repair having regard to their age, character and prospective life"[193]. Nor were the premises shown to have been otherwise than reasonably fit for human habitation[194]. The Full Court agreed with these conclusions[195]. So do I.

224 The *Residential Tenancies Act* does not impose an absolute duty on a landlord of a residential tenancy to which the provisions of the Act apply except, relevantly, in respect of the duty to comply with "all requirements in respect of buildings, health and safety under any other written law in so far as they apply to the premises"[196]. There was no such "written law" relevant to this case. The Australian Standard for the selection and installation of glass was expressed as nothing more than a recommendation. Even then, it was only applicable when broken glass was being replaced[197]. Such was not the present case.

225 These conclusions make it unnecessary to explore (as was to some extent done by me in *Northern Sandblasting*[198]) the several arguments upon which such a claim in contract might rest. All of the propounded bases were hotly disputed

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191 By reason of the *Property Law Act* 1969 (WA), s 11. The terms of the section are set out in the reasons of Gleeson CJ at [38]; cf *Northern Sandblasting* (1997) 188 CLR 313 at 326, 405.

192 s 42. The relevant terms of the section are set out in the reasons of Gleeson CJ at [30].

193 *Residential Tenancies Act*, s 42(1)(b).

194 *Jones v Bartlett* unreported, District Court of Western Australia, 4 February 1998 at 14.

195 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 17.

196 s 42(1)(c).

197 Australian Standard, *Glass in buildings – Selection and installation*, AS1288-1989. See reasons of Gleeson CJ at [10], Callinan J at [261].

198 *Northern Sandblasting* (1997) 188 CLR 313 at 404-416.

by the respondents. The further arguments advanced in this Court (to the effect that the lease contained an implied stipulation that steps had been taken to make and keep the premises reasonably fit and safe for the purpose for which they were to be used) did not improve the appellant's claim in contract. In this respect, I agree with the first two reasons given by Gleeson CJ for dismissing those arguments[199]. The Commissioner was correct to reject this aspect of the appellant's claim. The Full Court was correct to confirm his conclusion.

226 Similarly, the statutory claim based on the *Occupiers' Liability Act* can be dealt with briefly. Like the *Residential Tenancies Act*, the relevant provision of the *Occupiers' Liability Act*[200] holds back from imposing on an occupier[201] (or landlord[202]) any obligations greater than the requirement to observe "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"[203]. Nothing in the substantive provisions of the *Occupiers' Liability Act*, therefore, would take the appellant beyond whatever claim he might have in respect of the respondents' suggested breach of their common law duty of care to him, framed in negligence. In this respect, I agree with the reasoning of Murray J in the Full Court[204]. Such duty would ordinarily involve observing reasonable care to avoid a foreseeable risk of injury to the appellant[205]. If the suggested danger inherent in the defect in the glass of the internal door of the respondents' premises was unknown to the landlords, had been the subject of no complaints to them of which they were aware, and was undetectable to the ordinary eye, it would arguably not be unreasonable for them to have omitted to ensure that the appellant suffered no injury or damage by reason of such danger. I do not consider that the *Occupiers' Liability Act* imposed on the respondents a duty of prior inspection of the premises to discover latent dangers, such as the glass panel of the subject door.

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199 Reasons of Gleeson CJ at [35]-[37].

200 s 5. The section is set out in the reasons of Gleeson CJ at [44].

201 s 4.

202 s 9(1).

203 s 5(1).

204 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 22; cf *Westralian Caterers Pty Ltd v Eastment Ltd* (1992) 8 WAR 139 at 145-146.

205 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 per Mason, Wilson, Deane and Dawson JJ.

227 The foregoing conclusions bring me to the central question in the appeal. This is whether, upon the findings of fact made and having regard to the evidence and the present state of Australian law, the Full Court was correct to reject the appellant's claim in negligence against the respondents, based on the common law.

The claim in negligence – *Northern Sandblasting*

228 I must endeavour to decide this appeal in conformity with the law as stated in *Northern Sandblasting*. I am therefore obliged to discover whether, out of the reasoning of the majority in that decision, some rule emerges which the decision in this appeal should apply.

229 Valiant attempts have been made, by careful analysis, to extract from the reasons of the members of this Court in *Northern Sandblasting* binding rules to govern cases involving the common law duty of landlords to tenants[206]. However, with respect to those who have embarked upon this not inconsiderable task, the derivation of a binding rule is not to be ascertained by simply counting the reasons of the Justices by reference to how they each determined the multiple issues presented for decision in that case. Such a course is understandable, and may sometimes provide useful guidance on how questions of law may be determined in the future, if litigated to conclusion in courts of changing composition. However, it is not the way the principle of *stare decisis* operates. I have explained elsewhere how the *ratio decidendi* of a case is to be extracted from the separate reasons of judges of an appellate court[207]. The first rule for doing so is that it is necessary to eliminate from the reckoning the reasoning of the judges in dissent as to the court's orders[208]. In the case of *Northern Sandblasting*, this requires putting to one side the separate reasons of Dawson J, Gummow J and myself. Such reasons may be useful in the exposition and future development of the law. But they do not contribute to the *ratio decidendi*, if any, of the decision.

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206 See eg Orr, (1997) 5 *Torts Law Journal* 208 at 215; Griggs, (1998) 6 *Australian Property Law Journal* 169 at 178; Swanton and McDonald, (1998) 72 *Australian Law Journal* 345 at 346-347.

207 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56]-[59]; cf *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 313-314; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188; *Great Western Railway Co v Owners of SS Mostyn* [1928] AC 57 at 73-74.

208 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417 [56].

230 One principle at least does emerge from the reasons of the majority in *Northern Sandblasting*. The majority of the Court held[209] that the former rule of the common law, that landlords had a limited immunity from liability in negligence to their tenants, established in England by *Cavalier v Pope*[210], no longer expressed the common law in Australia. This Court thus endorsed the earlier suggestions of Australian appellate courts[211] that *Cavalier v Pope* was outmoded and had been overtaken by the generic development of the law of negligence following *Donoghue v Stevenson*[212].

231 Despite a distinct theoretical foundation for the old rule that may be traced to the legal incidents of a lease in English land law[213], in the field of tort liability, a realistic view of leasehold interests and of the contemporary position of landlords with respect to tenants, produces a conclusion that a landlord owes a duty of care to tenants and members of the tenant's household, permitted occupants and visitors, a breach of which will give rise to an entitlement in such a person to recover damages from the landlord for any loss thereby occasioned. It follows that the former limited immunity which landlords enjoyed no longer represents the law in Australia. Instead, it is necessary to apply the broad and general principles of negligence[214].

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209 *Northern Sandblasting* (1997) 188 CLR 313 at 334-340 per Brennan CJ, 347 per Toohey J, 358 per Gaudron J, 365-366 per McHugh J. On this point, the Court was unanimous: see at 342 per Dawson J, 370 per Gummow J, 391-392 per Kirby J; *Assaf v Kostrevski* [1999] NSW ConvR ¶55-883 at 56,901.

210 [1906] AC 428. See also *Cameron v Young* [1908] AC 176 at 179-181; cf *Robbins v Jones* (1863) 15 CB (NS) 221 at 240 [143 ER 768 at 776]; *Thomson v Cremin* [1956] 1 WLR 103; [1953] 2 All ER 1185.

211 *Parker v South Australian Housing Trust* (1986) 41 SASR 493 at 516-517; cf Griggs, (1998) 6 *Australian Property Law Journal* 169 at 172; Handford, (1998) 6 *Tort Law Review* 105 at 106.

212 [1932] AC 562; cf *Greene v Chelsea Borough Council* [1954] 2 QB 127 at 138 per Denning LJ; *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 89-92.

213 Browder, "The Taming of a Duty – The Tort Liability of Landlords", (1982) 81 *Michigan Law Review* 99 at 100; Griggs, (1998) 6 *Australian Property Law Journal* 169 at 170-171.

214 *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 16-20; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 484-488; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Northern Sandblasting* (1997) 188 CLR 313 at 396; cf Swanton, "'Another Conquest in the Imperial Expansion of the Law of Negligence': *Burnie Port*

(Footnote continues on next page)

232 As in *Northern Sandblasting*[215], the landlords in this case (the respondents) had seen the legal writing on the wall. They did not press an argument of immunity based on *Cavalier v Pope*. They accepted that they owed a duty of care. However, they did not specify its precise content.

233 In my opinion, beyond the foregoing, no other binding rule emerges from an analysis of the reasons of the majority in *Northern Sandblasting*. The reasoning of Brennan CJ and Gaudron J was quite different from the reasoning of the other members of the majority, Toohey J and McHugh J. Brennan CJ favoured a rule that a landlord was under a duty of care, in respect of the demised premises, which extended to prior inspection to discover, in effect, latent defects in the premises[216]. Gaudron J thought there was a duty on the landlord to repair those defects which posed a special danger and required rectification[217]. On the other hand, Toohey J and McHugh J severally concluded that a personal and non-delegable duty arose, by analogy with other cases of special dependence[218].

234 In the circumstances of such substantial differences in the reasoning of the majority it is, I believe, impossible to extract a second binding rule from *Northern Sandblasting*. Neither the suggested duty of prior inspection (in either of its formulations) nor the suggested acceptance of a non-delegable duty is therefore established as part of the common law in Australia.

235 It follows that, as a matter of law, I am at liberty to maintain the view that I expressed in *Northern Sandblasting* concerning the duty which, statute apart, a landlord owes to a tenant. Of course, I am also free to derive from the main thrust of the majority conclusions in that decision a tendency or trend of the common law to expand the scope of the liability of the landlord in Australia. I am free to take into account, in addition to the arguments of the present parties, the commentaries which *Northern Sandblasting* has elicited. And I am entitled

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Authority v General Jones Pty Ltd", (1994) 2 *Torts Law Journal* 101; Swanton and McDonald, (1998) 72 *Australian Law Journal* 345 at 348.

215 (1997) 188 CLR 313 at 391.

216 *Northern Sandblasting* (1997) 188 CLR 313 at 340.

217 *Northern Sandblasting* (1997) 188 CLR 313 at 360. See also the reasons of Gaudron J at [88].

218 *Northern Sandblasting* (1997) 188 CLR 313 at 349 per Toohey J, 367-368 per McHugh J; cf 360-362 per Gaudron J. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; cf Orr, (1997) 5 *Torts Law Journal* 208 at 210-211; Handford, (1998) 6 *Tort Law Review* 105 at 105-106; Swanton and McDonald, (1998) 72 *Australian Law Journal* 345 at 347-348.

to consider any developments of the law in the courts of other jurisdictions which share the same general legal principles and similar statutory and common law developments, where such courts have considered the legal liability of landlords to their tenants. The defects of the common law commonly include a want of systematic development[219], an exaggerated faith in the concept of freedom of contract[220], an occasional persistence with views which may simply disguise a preference for the interests of landlords over tenants[221] (of which the former immunity enjoyed by landlords was but one illustration) and a common lack of attention to the proper role of the law in encouraging accident prevention[222].

236 In response to *Northern Sandblasting*, commentators have suggested that landlords of residential dwellings "should ensure that their insurance is adequate to cover situations of liability to third parties in negligence and under a statutory duty of care"[223]. Deprived of a clearly applicable binding rule of law, such advice might well be prudent. But it hardly clarifies the duty which the law imposes. For my own part, I would be prepared to accept that the decision of the majority in *Northern Sandblasting*, although yielding no binding rule, has enlarged a landlord's duty to its tenants at common law. No other conclusion would be consistent with the outcome in the facts of that case by which the injured child of tenants was held entitled to recover damages from the landlord, notwithstanding the reasonable steps which the landlord had taken to protect the tenants and their family from harm.

237 Therefore, after *Northern Sandblasting*, I consider that: (1) a landlord owes a duty of care not solely under the contract of lease and not only to tenants but also to third parties (such as permitted occupants and visitors) injured as a result of a patent defect in the tenanted premises; (2) a landlord may discharge such duty of care by undertaking an inspection of the premises prior to each lease or renewal of a lease, by responding reasonably to defects drawn to notice, and by ensuring that any repairs are made which such inspection or notice discloses to be reasonably necessary; and (3) a landlord may ordinarily discharge its duty by delegating such inspection and repair to a competent person[224]. However, these conclusions leave open other questions: (4) whether the common law in

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219 *Northern Sandblasting* (1997) 188 CLR 313 at 358-359 per Gaudron J.

220 *Sargent v Ross* 308 A 2d 528 at 533-534 (1973).

221 Stanfield, "Residential Landlords Beware ... and Insure!", (1995) 15 (10) *Proctor* 7.

222 cf *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309.

223 Evans, (1997) 12 *Australian Property Law Bulletin* 9 at 13.

224 Griggs, (1998) 6 *Australian Property Law Journal* 169 at 178.

Australia has developed sufficiently to impose on a landlord an affirmative duty to conduct, or procure the conduct of, a detailed inspection of every possible source of danger in the premises; (5) whether such inspection must be by experts capable of detecting latent defects not reasonably apparent to an untrained eye; and, (6) if so, whether the failure to procure such experts will impose legal liability on the landlord where a tenant or associated third party is injured by reason of a defect of which the landlord personally remains reasonably unaware.

The landlord's liability: overseas developments

238 All of the common law countries inherited from English law principles which accorded to landlords a highly favoured position in respect of liability in negligence at common law for damage suffered by tenants. Judges of the twentieth century, stimulated by protective legislation, have been gradually eroding this position as anomalous and unreasonable. Whilst Australian law took the better part of a century to dispose of the immunity in *Cavalier v Pope*, in the United States, legislation in the first decades of the twentieth century modified this rule[225]. Judges condemned the rule as showing "untoward favoritism ... for landlords"[226]. They relegated the immunity "to the history books where it more properly belongs"[227].

239 The position reached by United States' authority is summarised in these terms[228]:

> "[M]odern accident law tends to reject obsolete immunities from the normal operation of negligence doctrine. This is typically accomplished first through the creation of exceptions to such immunities, and then through the abandonment of the immunities altogether in favor of general negligence principle[229]. The same process has manifested itself in the case of the immunities of landlords ... The exceptions described ... permit the application of normal negligence law notwithstanding the asserted rule of landlord immunity. They have become so widespread that courts are beginning to question whether the exceptions should not be expanded into a substitute rule covering the liability of landlords, namely that of normal negligence law."

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225 See discussion in *Altz v Leiberson* 134 NE 703 at 704 (1922) per Judge Cardozo.

226 *Sargent v Ross* 308 A 2d 528 at 530 (1973).

227 *Sargent v Ross* 308 A 2d 528 at 533 (1973).

228 Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), vol 5 at 293.

229 Citing *Mounsey v Ellard* 297 NE 2d 43 (1973).

240 Amongst the circumstances where liability is established, recognised by United States law, are cases where the demised premises are devoted to public use or access and in which the landlord has not exercised reasonable skill to ensure that there are no dangerous conditions on the premises[230]. Another circumstance arises where a covenant to repair is included in the lease or incorporated by statute and the landlord has, or should have, knowledge of a defect[231]. A still further instance may arise where the landlord is aware of a dangerous condition but does not disclose it to the tenant or a third party who enters upon the premises with the tenant's consent[232].

241 So far as Canadian law is concerned, writers of textbooks have criticised the confusion and injustice that have occasionally arisen from the "conflict between the general principles of the law of negligence and the traditional immunity of landowners"[233]. However, in Canada, as in Australia, the courts were generally "unwilling to alter the course of a century of jurisprudence despite its obvious inadequacy for the task"[234]. Eventually, significant legislative relief was provided[235]. This fact was noticed in *Northern Sandblasting*[236]. Both the Canadian legislation there mentioned and the Western Australian legislation applicable in this case had their origins in the *Occupiers' Liability Act* 1957 (UK)[237]. The existence of such legislation, and its operation and defects, were known when *Northern Sandblasting* was argued before this Court.

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230 *Restatement of the Law, Torts*, 2d at §359; cf *Nayman v Tracey* 599 So 2d 604 (1992); *Martinez v Woodmar IV Condominiums Homeowners Association Inc* 941 P 2d 218 (1997); *Dikeman v Carla Properties Ltd* 871 P 2d 474 (1994).

231 Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), vol 5 at 291; *Restatement of the Law, Torts*, 2d at §357; cf *Dickison v Hargitt* 611 NE 2d 691 (1993); *Long v Jensen* 522 NW 2d 621 (1994); *Richwind Joint Venture 4 v Brunson* 645 A 2d 1147 (1994).

232 *Restatement of the Law, Torts*, 2d at §358.

233 Linden, *Canadian Tort Law*, 6th ed (1997) at 637 citing Bohlen, "The Duty of a Landowner Towards Those Entering His Premises of Their Own Right", (1921) 69 *University of Pennsylvania Law Review* 237 at 237.

234 Linden, *Canadian Tort Law*, 6th ed (1997) at 637.

235 *Gaul v King* (1979) 103 DLR (3d) 233 at 238; *Fleischmann v Grossman Holdings Ltd* (1976) 16 OR (2d) 746 at 749-750.

236 *Northern Sandblasting* (1997) 188 CLR 313 at 411 referring to *Residential Tenancies Act* 1970 (NS).

237 See also *Northern Sandblasting* (1997) 188 CLR 313 at 411.

242 The position of the common law in New Zealand would seem to be similar to that which existed in Australia before *Northern Sandblasting* finally rejected the principle in *Cavalier v Pope*[238]. In New Zealand, the terms of the *Occupiers' Liability Act* have also been copied from the English template[239].

243 In South Africa, the rule affording a limited immunity to landlords was overthrown[240]. However, in substituting an obligation upon landlords to take reasonable care to avoid foreseeable risks of injury to tenants and their invitees, South African law held back from imposing the kind of positive duty of inspection and discovery of latent defects for which the appellant argued in this appeal. Thus, in *King v Arlington Court (Muizenberg) (Pty) Ltd*[241], Ogilvie Thompson J explained the limits of a landlord's liability with respect to the management and control of demised premises upon which an injury has occurred:

> "[W]here a defect in premises is one which is likely to cause harm to others and is in itself of such a character that it should have been discovered by the exercise of reasonable care on the part of the owner-landlord, the latter is negligent in permitting the defect to continue to exist. ... Where, on the other hand, the defect complained of is of such a character that it would not normally be discovered by the exercise of reasonable care, the mere averment of its existence will not necessarily import that the owner-landlord has been negligent."

244 I am conscious of the dangers of ventures such as these into the laws of other jurisdictions[242]. It is easy to mistake or misunderstand the state of authority. However, the brief review which I have undertaken illustrates the following points: (1) in most jurisdictions, the immunity of landlords at common law has finally been overthrown or highly qualified; (2) attempts have generally been made to place the liability of landlords in the mainstream of negligence doctrine; (3) these developments have been complemented and stimulated by the passage of legislation imposing specific obligations on landlords, although such

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238 Todd (ed), *The Law of Torts in New Zealand*, 2nd ed (1997) at 299-301; cf *Napier v Ryan* [1954] NZLR 1234; *Nicholls v Lyons* [1955] NZLR 1097.

239 *Occupiers' Liability Act* 1962 (NZ), s 8 repeats s 4 of the *Occupiers' Liability Act* 1957 (UK).

240 *Spencer v Barclay's Bank Limited* [1947] 3 SALR 230.

241 [1952] 2 SALR 23 at 29-30.

242 cf Feldthusen, "Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?", (2000) 8 *Tort Law Review* 33 at 38.

obligations have ordinarily been limited to a duty to exercise reasonable care; and (4) courts in other jurisdictions have held back from imposing positive duties to ensure inspection by experts to discover latent defects[243]. Generally speaking, if such obligations are to be imposed by the law, it must be done with the authority of legislation. Doubtless, considerations relevant to this last-mentioned conclusion include the fact that the imposition of such duties would have economic ramifications in terms of the availability of low cost housing[244], the imposition of costs associated with inspections that would ordinarily be passed on to tenants[245], and such inspections would not necessarily contribute greatly to accident prevention.

The arguments of the parties

245 *The appellant's contentions*: It was at the heart of the appellant's case that this Court should demonstrate a concern with accident prevention similar to that which the Court has adopted in other fields, notably that of employer liability to employees[246]. The appellant argued that, unless this Court expressed the common law in such a way as to impose affirmative duties of inspection on landlords to discover, and remedy, latent defects of the kind that existed in the glass of the door which caused his injuries, such injuries would continue to happen to people like himself. Landlords would have no legal incentive to discover defects, to repair them and thereby to prevent injuries from happening. Vulnerable tenants, their families and visitors, who could least manage to protect or insure themselves, would be left to their own devices[247]. Their complaints after accidents would be met by the response that they should have included a contractual term in their lease – ignoring the common lack of bargaining power of the typical tenant in a residential tenancy to enforce such a demand. Tenants would be obliged to carry, in effect, the personal risks of such injuries.

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243 Until now, express stipulation apart, there has been no duty in a landlord to inspect for the purpose of discovering latent defects: *Watson v George* (1953) 89 CLR 409 at 427.

244 cf *Northern Sandblasting* (1997) 188 CLR 313 at 398, 402.

245 cf *Northern Sandblasting* (1997) 188 CLR 313 at 402; Handford, (1998) 6 *Tort Law Review* 105 at 107.

246 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309; cf *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 74 ALJR 743 at 764 [101]; 170 ALR 594 at 622-623.

247 Griggs, (1998) 6 *Australian Property Law Journal* 169 at 177.

246 According to the appellant, if the common law were to impose more active duties upon landlords, this might result in some marginal increase in the cost of lettings. Such costs would indeed be passed on to tenants generally. The imposition of higher duties might also result in the withdrawal from the rental market of premises that were unacceptably defective and dangerous to human habitation. But the net benefit to the community, to preventing accidents and the benefits even to landlords, in the improvement of their premises, would outweigh such costs.

247 Tenants are normally forbidden, both by the terms of their lease and by the general law, from effecting structural repairs to demised premises. The development of the common law to impose duties of regular and expert inspection, prior to each new letting and renewal of leases or following relevant complaints, would, the appellant suggested, be the kind of interstitial development of legal principle which was the proper province of the courts[248]. It was not a development that had to wait for legislation. Legislative change was slow in coming and appeared to have become paralysed by the enactment of the *Occupiers' Liability Act* 1957 (UK) and its descendants. Having adopted its limited terms, legislatures appeared to have lacked the imagination, drive and incentive to do much more.

248 *The answers of the landlord*: Whilst I accept that minds might differ upon arguments of this kind, I am not convinced by them in the facts of this case.

249 The respondents pointed out that a change in the expression of the common law, along the lines urged for the appellant, would have very substantial economic, social and even political implications. It would be preferable for such implications to be addressed to the other branches of government than to the courts. It is one thing to abolish or modify an anachronistic immunity[249] or to reformulate past rules of liability in terms of general concepts of broad application[250]. When the encrustations of the common law are revealed as anomalous and unjust, it is proper for courts to return the particular instance to

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248 cf *Northern Sandblasting* (1997) 188 CLR 313 at 385-386.

249 cf *Boland v Yates* (1999) 74 ALJR 209 at 235-240 [125]-[142]; 167 ALR 575 at 609-616; *Arthur J S Hall & Co (a firm) v Simons* [2000] 3 WLR 543; [2000] 3 All ER 673.

250 *Hackshaw v Shaw* (1984) 155 CLR 614; *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 267-275 [242]-[258].

the central doctrine applicable[251], in this case the common law of negligence. However, these legitimate functions of judicial exposition and refinement would be exceeded were this Court to travel significantly beyond the obligations which the present common law and such legislation as has been enacted impose upon landlords. Except where legislation imposes a duty with which the landlord must comply, the common theme of contemporary obligations is to hold back from imposing absolute liability. Moreover, it is to limit the statutory obligations of landlords to the standard of reasonable care[252]. It is to impose common law standards of a similar character. Such standards exclude liability for latent defects of which a landlord has no notice and is reasonably unaware.

250 In the present case, the respondents argued that no evidence supported a conclusion that they were aware of any defect in the glass of the door with which the appellant collided. There was no suggestion of previous accidents. There was no evidence of previous complaints or requests by tenants, permitted occupants or visitors that went unheeded. It is not always true that landlords are better able to detect defects in the demised premises than the tenants and their families and guests who occupy or visit them. The agent who performed an inspection for inventory purposes in this case had made no mention of any relevant defect. Even the expert witness called by the appellant accepted that the defect would not be detected by lay inspection. Whilst he would have been prepared, for a fee, to inspect the premises prior to execution of a lease or its renewal, his evidence did not suggest that such inspections were common. Still less did his evidence establish that inspections of such a kind were standard or even frequent practice in Australia in residential tenancies of this kind[253].

251 In terms of principle and logic, such inspections could not, in any case, be limited to examination of the possible defects of internal doors with glass panels. Inspections of gas, electricity, flooring, ceilings, balconies, railings and all aspects of the premises would be required by such a principle. They would have to be performed by different experts for the necessary fees. By inference, such costs would all be passed on to tenants as a class[254]. Of course, these remarks concern the liability of landlords of residential premises. Different

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251 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29.

252 cf *Northern Sandblasting* (1997) 188 CLR 313 at 415.

253 cf *Northern Sandblasting* (1997) 188 CLR 313 at 394.

254 *Northern Sandblasting* (1997) 188 CLR 313 at 394. Such costs might include increased security bonds: Griggs, (1998) 6 *Australian Property Law Journal* 169 at 177; and increased rents: Stanfield, "A Landlord's Liability to Repair: When Does it Arise and How Far Does it Extend?", (1995) 3 *Australian Property Law Journal* 209 at 220.

considerations may well apply to premises used by government or its agencies or by private bodies, including for commercial, public, schooling, health care or other purposes. Where members of the public generally are invited onto, or have a right to enter, premises a higher duty will be imposed by the law.

Conclusion and order

252 The common law in Australia could certainly impose on landlords the kind of duty argued for by the appellant if this Court so decided. However, a decision to do so is by no means self-evident or incontrovertible. For a court to impose such obligations, involving duties of affirmative action, would be unusual. Necessarily, it would have a retrospective effect. In the great variety of tenancy arrangements that exist, it could work a serious injustice on particular landlords. Such landlords, until now, have been entitled to assume that their duty was limited to that of taking reasonable care to avoid foreseeable risk of injury from defects of which they were on notice or of which (by appropriate inspection) they would reasonably become aware because they were obvious to a reasonable landlord or its agent[255]. When legislatures impose significantly extended liability, they normally do so with notice, after public consideration and following an opportunity for advice on the ramifications. Such notice permits those affected to make their own judgments and to procure appropriate insurance[256]. None of these steps can be taken by a court. All of these points were made in *Northern Sandblasting*.

253 It follows that the appellant's claim in contract was properly dismissed at trial. His claims based on breach of statute and negligence at common law were rightly rejected by the Full Court. As that Court acknowledged, the respondents owed a duty of care to the appellant. But that duty was limited to one of taking reasonable care to avoid a foreseeable risk of injury to a person in the position of the appellant. It was not shown that the respondents breached the duty as so expressed. It is unnecessary to consider the other arguments (principally related to causation) which would only have arisen if a different conclusion had been reached on the foregoing issues.

254 The appeal should be dismissed with costs.

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255 cf *Northern Sandblasting* (1997) 188 CLR 313 at 402.

256 cf *Northern Sandblasting* (1997) 188 CLR 313 at 402.

255 CALLINAN J.

The Facts

256 The respondents owned a modest house at Mt Pleasant in Western Australia. It had been constructed in about 1960. At a later date a games room was added. There was a door between the dining room and the games room. It had no unusual features. The door was made of annealed glass four millimetres thick framed in timber. Its handle was on the left side at about two-thirds of its height. The door opened inwards to the dining room.

257 On 6 November 1992 the appellant's parents agreed in writing to take a lease of the house to expire on 6 November 1993. They held over as fortnightly tenants after that date.

258 The Tenancy Agreement was expressed to be subject to the *Residential Tenancies Act* 1987 (WA) and contained a number of clauses including the following:

> "1. **AGREEMENT**
>
> THE OWNER LETS and the Tenant takes the premises situated at … MT PLEASANT together with the furniture and chattels (if any) therein as set out in the schedule attached hereto for use as a PRIVATE DWELLING to be occupied by not more than THREE persons.
>
> …
>
> **Property condition report** 2.9.1 The Tenant agrees within 14 days of receipt of the Property Condition Report to sign and return same noting any variations. Failure to do so will make the unsigned Property Condition Report the basis of this agreement for security bond purposes.
>
> …
>
> **Maintenance and movement chattels** 2.11 The Tenant agrees to keep all floors, floor coverings, walls, ceilings, windows (including glass), window treatments, doors (including glass if any), light fittings, fixtures and fittings, furniture, and all household effects in the same condition as they were at the commencement of this Tenancy and in accordance with the Property Condition Report (fair wear and tear excepted), and if any of such shall be moved during the tenancy the Tenant agrees to replace all items in the positions set out on the Schedule/Inventory as at the commencement of the tenancy.
>
> …

> **Alterations to the premises** 2.13 The Tenant shall not make any alterations or additions to the premises or to any fixtures or fittings, or place any sign thereon, or paint the premises, use blue tack or any other adhesive material, or drive any nails or screws into or deface any part of the premises.
>
> …
>
> **Non assignment** 2.20 The Tenant shall not assign, underlet or part with possession of the premises or any part thereof or grant any Licence to occupy the whole or any part.
>
> …
>
> **SPECIAL CONDITIONS**
>
> …
>
> 5. THE TENANTS AGREE TO QUARTERLY INSPECTIONS. PRIOR NOTICE WILL BE GIVEN."

259 A "Property Condition Report" for which cl 2.9.1 made provision was prepared and signed by the appellant's parents after an inspection on 6 November 1992. Under the heading "Enclosed Patio", which the Court was informed was a reference to the games room, there appeared this item: "Doors – Intact".

260 The appellant took up residence in the house with his parents in July 1993. He was then twenty-three years old and a bricklayer by occupation. At about 6 pm on 27 November 1993 the appellant walked into the door that I have described. The glass broke. His right leg was cut and permanently injured.

261 Had the house been constructed after 1973 the door would not have complied with the Australian Standard Code of Practice for Installation of Glass in Buildings (AS 1288 – 1973)[257]. Compliance with that Standard required annealed glass of a thickness of 8 millimetres. The later Standard promulgated in 1989 contained a note to this effect[258]:

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257 The 1973 Standard was amended in 1979, 1989 and 1994. No significance was attached to the 1994 amendment as it was made after the accident. AS 1288 – 1989 required a minimum thickness of 10 millimetres.

258 Section 5 - Human Impact Safety Requirements: 5.1 General, n 7.

> "For locations where glass is likely to be subjected to human impact, it is recommended that safety glass … be used *when broken glass is being replaced*." (emphasis added)

262 For reasons which will appear it is unnecessary for me to decide whether the glass in the door in question was in a location where it was "likely to be subjected to human impact". It by no means strikes me as inevitable however that because a door, the purposes of which are both to deny and give access, is located between the interior and exterior of premises, it is in a location where it is *likely* to be subjected to human impact. To describe such a door as a *serious danger* would, in any event, be a considerable overstatement of the position.

263 The appellant sued the respondents for damages for personal injury in negligence, for breach of statutory duty and for "breach of conditions of the lease".

264 After a trial limited to the issue of liability the District Court of Western Australia (Commissioner Reynolds) made this finding:

> "I find that if the premises were inspected on or before 6 November 1992 by a person with building qualifications to assess safety then it is likely that comment would have been made that the glass in the door fell a long way short of the then current standard with a recommendation that it be replaced. The fact that the door was located in the main access way between the inside and outside of the premises increased the likelihood of such a recommendation."

265 The Commissioner then went on to hold that the respondents were negligent in failing to have the premises adequately inspected for safety before allowing the appellant's parents into possession: that it was likely that such an inspection would have resulted in the state of the glass door being brought to their attention. The Commissioner then said that the respondents should have known that the state of the door gave rise to a serious danger and that they should have replaced it with a door that complied with the safety standard at the time that the appellant suffered injury.

266 The Commissioner next dealt with the respondents' contention that the appellant's injuries were caused or contributed to by his negligence. At this point he said that his finding was based on a breach, by the respondents, of the duty of care required to be shown by them towards the appellant pursuant to the *Occupiers' Liability Act* 1985 (WA), s 10 of which provides:

"**Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947**

The Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 applies to claims under this Act."

267 Sections 4, 5 and 9 of the *Occupiers' Liability Act* are also relevant and provide as follows:

"**Application of sections 5 to 7**

4 (1) Sections 5 to 7 shall have effect, in place of the rules of the common law, for the purpose of determining the care which an occupier of premises is required, by reason of the occupation or control of the premises, to show towards a person entering on the premises in respect of dangers –

(a) to that person; or

(b) to any property brought on to the premises by, and remaining on the premises in the possession and control of, that person, whether it is owned by that person or by any other person,

which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier of premises is by law responsible.

(2) Nothing in sections 5 to 7 shall be taken to alter the rules of the common law which determine the person on whom, in relation to any premises, a duty to show the care referred to in subsection (1) towards a person entering those premises is incumbent.

Duty of care of occupier

5 (1) Subject to subsections (2) and (3) the care which an occupier of premises is required by reason of the occupation or control of the premises to show towards a person entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier is by law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement or otherwise, his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

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

(3) A person who is on premises with the intention of committing, or in the commission of, an offence punishable by imprisonment is owed only the duty of care referred to in subsection (2).

(4) Without restricting the generality of subsection (1), in determining whether an occupier of premises has discharged his duty of care, consideration shall be given to –

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

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

(c) the nature of the premises;

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

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

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

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

…

Duty of care of landlord

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

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

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

(4) This section applies to tenancies created before the commencement of this Act as well as to tenancies created after its commencement."

268 The Commissioner concluded that the appellant's knowledge of the presence of the door, and his failure to check his position in relation to the door together with other matters, required that he be held to be responsible for his own injuries to the extent of 50%.

269 The respondents appealed to the Full Court of the Supreme Court of Western Australia. The appellant cross-appealed. The Court (Murray, White and Scott JJ) upheld the respondents' appeal and dismissed the appellant's action[259].

270 The leading judgment was written by Murray J, with whom the other members of the Court agreed. His Honour dealt first with the claim of the appellant for "breach of conditions of the lease". Such a claim was asserted by the appellant as arising by virtue of a combination of s 11 of the *Property Law Act* 1969 (WA)[260] and s 42(1)(b) and (c) of the *Residential Tenancies Act*[261]. The

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259 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999.

260 "**Persons taking who are not parties**

11 (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.

(2) Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but –

(a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to

(Footnote continues on next page)

appellant's reliance upon these was intended not only to provide an independent cause of action, but also, if made out, to defeat the claim for contributory negligence.

271 His Honour rejected the assertion. His Honour said that although it was not necessary for the appellant to be a party to the lease to enforce it, expressly in terms it needed to confer a benefit upon the appellant, if not by naming him as a third party beneficiary, at least by unmistakably identifying him as a person of that character, and the agreement in this case did not do so[262]. Whether the reach of s 11 of the *Property Law Act* may be somewhat less than that I need not decide

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enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;

(b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and

(c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.

(3) Unless the contract referred to in subsection (2) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the person referred to in that subsection has adopted it either expressly or by conduct."

261 "**Owner's responsibility for cleanliness and repairs**

42 (1) It is a term of every agreement that the owner –

…

(b) shall provide and maintain the premises in a reasonable state of repair having regard to their age, character and prospective life; and

(c) shall comply with all requirements in respect of buildings, health and safety under any other written law in so far as they apply to the premises.

(2) In this section **'premises'** includes chattels provided with the premises (whether under the agreement or not) for use by the tenant."

262 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 15.

because, on any view, the appellant does not fall within its intended operation in this case. Accordingly I need say no more about that Act in these reasons.

272 Murray J turned then to the appellant's claim in negligence, and the alternative claim for breach of statutory duty under the *Occupiers' Liability Act*.

273 Section 9(1) equates the duties of landlords responsible for the maintenance and repair of premises with those of occupiers in certain circumstances. I have already set out its text.

274 His Honour, on the basis of this section said that the Commissioner was right to regard the respondents as occupiers "in respect of the condition of the door as, [he] would think, in a practical sense were the [appellant's] parents as tenants"[263]. If, his Honour said, it was right to regard the state of the door as constituting a dangerous part of the premises in a way causally related to the receipt of the appellant's injuries, then, by s 5(1) of the *Occupiers' Liability Act*, the respondents were under a duty to the appellant as an entrant upon the premises to take "such care as in all the circumstances of the case [was] reasonable to see that that person [did] not suffer injury or damage by reason of any such danger"[264]. His Honour posed the ultimate question in this way[265]:

> "When all the verbiage is cut away, it seems to me that the question truly at issue between the parties was whether the appellants were in breach of their statutory duty of care or the similarly expressed duty in negligence at common law by failing to inspect the glass door, necessarily with expert assistance, on the evidence, so as to discover that although it was adequate when installed, it did not meet current safety standards at the time of and during the continuation of the lease in a way which would make it more likely to cause injury to a person who came into contact with the door other than in the ordinary way of opening and closing it. In that event the annealed glass might readily have been replaced at no great expense with safety glass."

His Honour referred to the inspection that had been made and for which the Tenancy Agreement provided and repeated the evidence that the person making the inspection would have brought to the attention of the respondents any matter

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263 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 20.

264 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 20.

265 *Bartlett v Jones* unreported, Supreme Court of Western Australia, 22 February 1999 at 24.

affecting the safety of the premises. But, his Honour said, the door appeared to be in good repair and operating normally. In those circumstances, he held, there was no breach of any duty of care by the respondents and the appeal should be allowed.

275 I agree that there was no breach of any statutory duty, but for somewhat different reasons. True it would be, that, if the respondents were responsible as landlords for the maintenance of the premises, they would then come to owe, pursuant to s 9(1) of the *Occupiers' Liability Act*, a duty of care towards entrants, of the same kind as might be owed by occupiers of premises to entrants. But that duty is not a duty at large. The duty imposed by the section was a duty "in respect of dangers arising from any failure on [the respondents'] part in carrying out [their] responsibilities of maintenance and repair of the premises".

276 There could be no such failure here. The state of the door was not such as to call for any maintenance or repair on the part of the respondents. And, in my opinion, to describe the door as a "danger" whether in terms of s 5 of the *Occupiers' Liability Act*, if that were relevant, or in terms of its ordinary meaning would be to misdescribe an object in every day, apparently benign usage, in an incalculable number of buildings throughout the country, as it was in the household in this case for thirty or so years.

277 But there is an even more fundamental reason why s 9 of the *Occupiers' Liability Act* can have no application here. By cl 2.11 of the Tenancy Agreement the appellant's parents as tenants (and not the respondents as landlords) agreed to "keep all … doors (including glass if any) … in the same condition as they were at the commencement of th[e] Tenancy … ". Accordingly that part of s 9 of the *Occupiers' Liability Act* which provides "[w]here premises are occupied … by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises … " could not relevantly be satisfied.

278 The remaining question is whether the respondents owed the appellant any, and if any, what other duty of care. I will proceed first upon the assumption that the *Occupiers' Liability Act* does leave room for the imposition of duties at common law, upon landlords, towards entrants other than tenants as occupiers. The appellant submitted that the respondent landlords in this case did owe common law duties towards the appellant on the basis of the decision of this Court in *Northern Sandblasting Pty Ltd v Harris*[266]. In that case a child of the tenants suffered severe injuries by electrocution as a result of the failure by a qualified, and apparently competent electrician, to discover and repair a very hazardous defect in the electrical system of a residence which had been let by the appellant to the respondent's parents. The Court (Brennan CJ, Toohey, Gaudron

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266 (1997) 188 CLR 313.

and McHugh JJ; Dawson, Gummow and Kirby JJ dissenting) held that the landlord was liable to the injured child in negligence. However, no clear majority ratio beyond that emerges from the judgment although all members of the Court[267] were of the view that *Cavalier v Pope*[268] should not be regarded as stating the current common law in Australia.

279 Two members of the Court, Toohey J and McHugh J held that the landlords owed to the members of the tenants' household a personal, non-delegable duty of care, the former on the ground that the combination of an element of control in the landlord, and a special dependence or vulnerability of the child, gave rise to an assumption of responsibility by the landlord[269]: and the latter on the ground that in undertaking to have the stove repaired the landlord owed the members of the tenants' household a personal duty of which the contractor's negligence had caused it to be in breach[270].

280 Brennan CJ held the landlord liable on the ground that it owed a duty of care to the tenants and those who, to its knowledge, were intended to occupy the premises under and for the purposes of the tenancy, in respect of defects at the time the tenants were in possession. His Honour explained that the standard required of the landlord was, as stated by McCardie J in *Maclenan v Segar*[271] (a case in contract) and that the "duty does not extend to defects in the premises that are discoverable only after the landlord parts with possession"[272]. The passage in which McCardie J in *Maclenan* defined the contractual duty is quoted by his Honour[273] and would oblige the landlord to make the premises as safe for the purpose "mutually contemplated" by the parties "as reasonable care and skill on the part of any one can make them".

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267 (1997) 188 CLR 313 at 334-340 per Brennan CJ, 342 per Dawson J, 347 per Toohey J, 357 per Gaudron J, 365-366 per McHugh J, 370 per Gummow J (agreeing with Dawson J and Kirby J), 391-392 per Kirby J.

268 [1906] AC 428.

269 (1997) 188 CLR 313 at 353 per Toohey J.

270 (1997) 188 CLR 313 at 368-369 per McHugh J.

271 [1917] 2 KB 325.

272 (1997) 188 CLR 313 at 340.

273 (1997) 188 CLR 313 at 336.

281 The difficulties in the application of such a rule were, as noted by Brennan CJ[274], discussed by Fullagar J in *Watson v George*[275] where the latter said "that the rule does not impose liability in the absence of negligence on the part of anybody".

282 Gaudron J found against the landlord on the basis that there had been a breach of a duty of care owed to the members of the tenants' household at the commencement of the tenancy. Her Honour's opinion was that the obligation arose in relation to a foreseeable risk of injury, even if the defects might only have been discovered on inspection by persons with special skills. I do not take her Honour in terms to have held that the duty owed was non-delegable, but what her Honour in substance held may not be any different from holding that there existed a duty to eliminate even defects that might have been discerned on inspection by persons with special skills only. However, it would seem that her Honour, unlike Brennan CJ, Toohey J and McHugh J, would not hold a landlord liable for defects emerging after the beginning of the tenancy unless the defects were ones of which the landlord was aware, or ought to have been aware.

283 As owner, before the inception of a tenancy, but not later, a landlord does have control over premises. However a tenancy only comes into existence as a result of an agreement, almost always made after an inspection by the prospective tenant. Subject to any statutory provisions to the contrary, the parties are free to agree upon such terms as they wish. It is no answer to say that the bargaining position is an unequal one. That may or may not be so. And if it is, it is not a matter for the courts. In modern times people of limited means only may choose to invest in a house for rental purposes, particularly after their retirement, and comparatively wealthy people may regard the occupation of premises as a tenant, rather than as an owner, as a much more prudent financial arrangement to make. In the case of commercial premises it is even more difficult to discern on which side, if any, the balance lies. In recent times, so widespread has been the sale of business premises and the taking of a lease back by large corporations, that the practice is one of which the courts might take judicial notice. In the circumstances in which the child in *Northern Sandblasting* was so tragically injured, she was in fact no more vulnerable than a not unreasonably unwary adult would have been. Children will always be more vulnerable to lesser and greater degrees. The child in *Northern Sandblasting* was not dependent in fact on the landlord and the latter did not assume any responsibility for her.

284 Nor can I with respect regard the fact that the landlord in *Northern Sandblasting* arranged to have the stove which was the source of the defect

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274 (1997) 188 CLR 313 at 336-338.

275 (1953) 89 CLR 409 at 424-425.

repaired, as a ground for saddling it with a personal, non-delegable duty of care. If this is to be the law then it would be very difficult for any landlord ever to be sure that it has satisfied its duty of care. In my respectful opinion the courts should be very cautious about extending the range of non-delegable duties, the law in respect of which has already developed in a not entirely satisfactory and principled way[276].

285 The difficulties of application referred to by Brennan CJ[277] and discussed by Fullagar J in *Watson v George*[278], and the unnecessary importation of a principle not previously applied to cases of owners and occupiers of premises, who are free, subject to statute, to make their own contractual arrangements are reasons why I, with respect, would not, unless I were bound to do so, adopt the principle stated by Brennan CJ.

286 Not only does there not appear to be any clear, majority view as to the nature and extent of any duty owed by a landlord to a tenant in *Northern Sandblasting*, but it should also be noted that the landlord from the outset in that case made a concession that it owed a duty of care in negligence to the respondent: to exercise care to keep the premises reasonably safe for the child's use and to avoid reasonably foreseeable risk to her[279]. As Kirby J says the precise foundation for the concession was never made clear.

287 It is one thing to say that *Cavalier v Pope*[280] no longer states the relevant law. It is an altogether different matter to erect some legal edifice of a duty of care in its place. It may also be questioned whether the courts should intrude into this area at all. For centuries obligations and rights in respect of the use, occupation and entry upon premises were matters of contract and common law. In more recent times, as this case and *Northern Sandblasting* show, there has been some statutory intervention. The statute in this case was enacted before *Northern Sandblasting* was decided, and therefore *Cavalier v Pope* could then have reliably been taken to be stating the common law on the topic. The Western Australian *Occupiers' Liability Act* might properly be regarded as the maximum intrusion upon the common law as it then was, that was intended by the Parliament. There is certainly no universal view in common law jurisdictions

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276 See *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 394-402 per Kirby J. See also *Scott v Davis* [2000] HCA 52 at [352] - [353] per Callinan J.

277 (1997) 188 CLR 313 at 336-338.

278 (1953) 89 CLR 409 at 424-425.

279 (1997) 188 CLR 313 at 391.

280 [1906] AC 428.

that the rule in *Cavalier v Pope* should be abolished, or abolished other than by statute. Prosser and Keeton[281] discuss the differing positions in the various States of the United States, some of which have legislated, and some not, to impose varying kinds of liability upon landlords. Examples are provided by the authors[282]. Statute and some exceptional situations apart[283], generally the principle for which *Cavalier v Pope* stands remains an important part of the law in the United States.

288 There was discussion during argument of a number of policy considerations including the supposed imbalance of bargaining power to which I have already referred. The undesirability of any attempt in a case of this kind to assess and weigh the consequences of these, and to prefer one or others of them are referred to by Kirby J in *Northern Sandblasting*. His Honour said, and I agree, that the Court really has no way of estimating the economic consequences of the erection of a new duty of care in landlord and tenant situations[284]. Whether one might choose to rent or buy premises may depend on many factors, factors which may change from time to time, such as interest rates, building costs, fluctuating stocks of premises, the relative attractions of real estate as an investment, rates of taxation, and even perhaps rates of immigration. In short any imbalance itself may fluctuate from time to time. There is much to be said for the proposition that courts should, develop and apply, to use the language of

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281 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 434-436.

282 See *Shroades v Rental Homes, Inc* 427 NE 2d 774 (1981) (*Landlords and Tenants Act*); *Hall v Warren* 632 P 2d 848 (1981) (*Building Code*); *Simon v Solomon* 431 NE 2d 556 (1982) (*State Sanitary Code*); *Allen v Equity & Investors Management Corp* 289 SE 2d 623 (1982); *Second Restatement of Property*, §17.6 & Reporter's Note 4; cf *Turner v Thompson* 430 NE 2d 157 (1981) (failure to light stairs public nuisance under *Municipal Code*); *Slusher v State* 437 NE 2d 97 (1982) (reckless homicide conviction of landlords, arising out of death of tenant's guest due to disrepair of landing, reversed on due process grounds). See also *Thornas v Barnes* 634 SW 2d 554 (1982).

The only States with neither a relevant statute nor a decision are Alabama, Arkansas, Colorado, Indiana, Mississippi, South Carolina and Utah. See Browder, "The Taming of a Duty – The Tort Liability of Landlords" (1982) 81 *Michigan Law Review* 99 at 113 n 56.

283 For example, potentially harmful protuberances such as dangerous awnings; premises leased for admission to the public; common areas; and cases in which the landlord has a continuing duty to repair.

284 (1997) 188 CLR 313 at 402.

Prosser and Keeton[285] "a healthy scepticism towards invitations to jettison years of developed jurisprudence in favour of a beguiling legal panacea".

289 I have concluded that not only did neither the Tenancy Agreement nor the *Occupiers' Liability Act* create or impose any liability upon the respondents, but also the former by reason of cl 2.11 by clear implication excluded it. That should be sufficient to dispose of the case. However, in the courts below and here, as in *Northern Sandblasting*, the respondents did accept that they owed a common law duty of care to the appellant, without really articulating its content in their submissions to this Court. If any duty were owed, a matter of which I am far from convinced, I would define it as no more than a duty to provide, at the inception only of the tenancy, habitable premises. And that the respondents in this case surely did.

290 I have discussed the issue of the existence and nature of a duty of care in this case, upon the basis that there is nothing in the *Occupiers' Liability Act* express or implied to exclude it. The Court did not hear argument[286] that by clear implication that Act does exclude a common law duty of the kind for which the appellant contends, or indeed even of a lesser kind. It may be that the *Occupiers' Liability Act* should be read as comprehensively stating (subject to sub-s 9(3)) the obligations of landlords towards entrants: that having decided to intrude upon the common law, the intrusion was intended in that regard to be complete to the extent stated in the Act, leaving no room for any other liability.

291 Section 9 imposes a duty upon a landlord only in respect of premises that the landlord is obliged to maintain or repair[287]. When the landlord is responsible for the maintenance or repair of premises should that duty be taken to be comprehensive of the landlord's duties in those circumstances? The duty is owed in respect of matters arising from any failure to maintain and repair. It would seem to be an anomalous and unintended result if the landlord might be under a duty of care in respect of dangers in circumstances in which the landlord is not responsible for the maintenance or repair of the premises. Sub-section 9(3) states that nothing in the section is to relieve a landlord of any duty that he is under apart from the section. Sub-section 9(3) is unlikely to have been intended to have an operation in respect of any lesser duty than sub-s 9(1) imposes. Sub-section 9(3) should, I think, be read as intending to keep intact any contractual, special, or other statutory duties that a landlord might owe to

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285 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 434.

286 There was limited discussion regarding the exclusion of the common law by the *Occupiers' Liability Act*: sub-s 4(1).

287 sub-s 9(1), *Occupiers' Liability Act*.

occupants, entrants or others and any duties arising out of a nuisance emanating from the property not caused by the tenants.

292 The respondents in this case were not negligent. They were in breach of no relevant statutory or other duty of care to the appellant. I would dismiss the appeal with costs.