HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, KIRBY, HAYNE AND CALLINAN JJ

MODBURY TRIANGLE SHOPPING CENTRE PTY LTD — APPELLANT

AND

TONY PAUL ANZIL & ANOR — RESPONDENTS

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61
23 November 2000
A16/2000

ORDER

1. *Appeal allowed with costs.*

2. *Orders of the Full Court of the Supreme Court of South Australia made on 12 August 1999 set aside. In lieu thereof, order that the appeal to that Court be allowed with costs, the orders of Judge David made on 29 January 1999 are set aside and the action is dismissed with costs.*

On appeal from the Supreme Court of South Australia

Representation:

A J Besanko QC with K G Nicholson for the appellant (instructed by Thomson Playford)

S W Tilmouth QC with B F Beazley and P D Pedler for the respondents (instructed by Knox and Hargrave)

CATCHWORDS

Modbury Triangle Shopping Centre Pty Ltd v Anzil

Negligence – Duty of care – Whether in the circumstances found an occupier of land owed a duty to take reasonable care to protect those lawfully on its land against the criminal acts of third parties.

1 GLEESON CJ. The first respondent sued the appellant, in tort, for damages for personal injury. The injury was inflicted by three unknown men, one armed with a baseball bat, who criminally assaulted the first respondent in a car park. There is no suggestion that the appellant was vicariously responsible for the conduct of the attackers. The basis of liability is said to be that the appellant was the occupier of the car park; that, at the time of the attack, the car park lights were off; that, in the circumstances of the case, which will be set out in more detail below, the failure to leave the lights on was negligent; that the risk of harm of the kind suffered was foreseeable; and that the negligence was a cause of the harm.

2 The primary issue argued in the appeal concerns the principle upon which an occupier of land may be liable, in an action for negligence, to a person who, whilst on the land, is injured as a result of the deliberate wrongdoing of a third party. There was also an issue as to causation.

The facts

3 The appellant was the owner of a shopping centre in a suburb of Adelaide, known as the Modbury Triangle Shopping Centre ("the Centre"). The first respondent was employed by Focus Video Pty Ltd ("Focus Video"), which leased premises in the Centre, used as a video shop. The Centre had a large outdoor area for car parking. The video shop faced the car park. Nearby, there were all-hours automatic teller machines. At night, the car park was dark (except for slight illumination from fluorescent lighting on the roof of the verandah facing the car park), unless the car park lights were turned on. There were four lighting towers. They were controlled by timing devices.

4 The video shop closed at 10 pm. The attack occurred at around 10.30 pm on Sunday, 18 July 1993. The first respondent was the only person who remained in the video shop. The only other shop that had been open that night was a chemist shop, which had closed at 8 pm. The first respondent, who was the manager, closed the video shop and walked a distance of about 10 metres towards his car, which was parked in the car park. The car park lights were not on at the time. The first respondent was attacked by the three assailants, and was badly injured.

5 Under the terms of the lease between the appellant and Focus Video, certain services, including lighting of the common areas, were provided at the discretion of the appellant. The car park was one of the common areas. The lease provided that the tenant would be liable to pay a proportion of the cost of certain operating expenses, the other proportions being paid by the other tenants. Those operating expenses included all charges for electricity and lighting in the common areas.

6 Before July 1992 the practice had been to leave the car park lights on until 11 pm. This practice had ceased in July 1992, but in December 1992 the lights

were left on until around 10.15 pm for a few weeks over the holiday period, following a request by the co-manager of the video shop. In early 1993, the co-manager, Ms Lehmann, made complaints to the appellant's representatives about the time at which the lights went off. From the beginning of 1993 until the attack on the first respondent in July 1993, the lights were not left on after 10 pm. There was uncertainty in the evidence as to exactly what time the car park lights were turned off on the night of the attack, and during the period immediately before that night. In opening at the trial, counsel for the respondents said that the evidence would show that, at the relevant time, the lights switched off automatically at about 10 pm. However, the evidence was not so precise, and much of it was expressed in ambiguous terms. The trial judge was not able to make a finding as to exactly when the lights went off. He said: "I accept the evidence of Ms Lehmann that for approximately 12 months the car park lights either did not operate at night or were turned off before 10.00 pm." The problem is that Ms Lehmann's attention was directed to the fact that the lights were not on after 10 pm. Since the video shop closed at 10 pm, and the person in charge would take some time to be ready to leave, that person would leave the shop at a time when the car park lights were off. Ms Lehmann did not give clear evidence as to whether the lights went off at 10 pm, or at some earlier time, or at different times on different nights. Nobody appears to have mentioned, at the trial, that if the lights were timed to go off at 10 pm, the complaints from the video shop might have been resolved by closing the shop a little earlier. It is understandable that the lights may have been timed to switch off at the closing time of the last shop in the Centre to remain open. That could explain why they went off at 10 pm. It is not easy to understand why they might switch off earlier, or why they might switch off at different times on different nights. The trial judge's finding on the matter is ambiguous. When, in the course of argument in this Court, the ambiguity was pointed out, senior counsel for the respondents first said that his understanding of the evidence was that on the night in question the lights went off at 10 pm. Subsequently, he said there was no precise evidence about that. The trial seems to have been conducted on the basis that all that mattered was that the lights were not on after 10 pm.

The proceedings

7 The respondents sued the appellant in the District Court of South Australia. The second respondent is the wife of the first respondent. She sued for damages for loss of consortium. Damages were agreed at $205,000 for the first respondent and $5,000 for the second respondent.

8 The action was heard before Judge David[1]. He found for the respondents. He said:

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1 *Anzil v Modbury Triangle Shopping Centre Pty Ltd* (1998) 201 LSJS 196.

> "I reject the defendant's argument that because the acts of third parties were involved there can be no duty of care. It has clearly been established by a number of authorities cited to me (although in different circumstances) that there can be a duty of care to prevent damage or injury from the acts of third parties. I also reject the argument that if there is a duty of care by the defendant to the tenants it is for the total security of the tenants and customers and this would entail all of the paraphernalia involving total security. It is argued that such a duty would be far too onerous. In my view the duty of care need not extend that far and I find that there is a duty of care for the security of the tenants and their customers merely concerning security as affected by the lighting of the common area."

9 As the first respondent was neither a tenant nor a customer, it may be taken that his Honour intended to refer also to employees of tenants. The learned judge was right to assume that there was no material difference between the duty, if any, owed to employees of tenants and that owed to customers of tenants. Since the car park was not closed to the public generally, he might have added a reference to members of the public who simply used the car park for their convenience, such as visitors to a nearby hospital. People who might come to use the automatic teller machines at any hour of the day or night could constitute a further category; or they may have been included as customers. As the learned judge understood, people who lawfully used the car park at night were not only tenants; and, in fact, the first respondent was not a tenant. It may be asked why, if the appellant were responsible for the security of all such people, at least in so far as it was affected by the lighting of the car park, the appellant would not have been obliged to leave the lights on all night. A person using an automatic teller machine at 11 pm would be just as likely a target for criminal violence as an employee leaving the video shop at 10.30 pm.

10 On the issue of causation, the trial judge found that there was "a clear connection between the safe guard of the lighting of the common area being denied to the plaintiff and the attack." It will be necessary to consider whether, in a context such as the present, a clear connection amounts to causation.

11 There was an appeal to the Full Court of the Supreme Court of South Australia (Olsson, Mullighan and Nyland JJ)[2]. The principal judgment was delivered by Mullighan J, with whom the other members of the Court agreed. As to the scope of the appellant's duty of care he said:

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2 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (1999) 204 LSJS 212.

> "The control and responsibility for the car park, as a common area, remained with the appellant at all times. In my view, it is not a matter of whether the appellant positively assumed responsibility. It always had responsibility and had a duty to take reasonable care to avoid foreseeable risk to persons using the Centre, including those who did so at night to access the automatic teller machines or the Focus Video shop.
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> There can be no question that there was a foreseeable risk of harm to persons using the car park at night if there was inadequate lighting. It was known that persons went to the Centre at night and used the car park to access the ATMs and the video shop. It was a simple measure to avoid that risk by changing a timing device so that the lights on the nearest tower were on at appropriate times.
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> Having considered these matters, the extent of the duty of care was to ensure that sufficient lights were on when workers and customers were at the Centre."

12 On the issue of causation, the Full Court agreed with the trial judge.

The duty

13 Most actions in tort which come before trial courts arise out of relationships in which the existence of a duty of care is well established, and the nature of the duty well understood. Cases arising out of the use of a motor vehicle, or involving employer and employee, or bailor and bailee, turn upon the application to the facts of well settled principles concerning legal responsibility. References to duty of care, breach of duty, and causation provide convenient sub-headings for a judgment, but in many cases the concepts require no further analysis. In other cases, of which the present is an example, there is a real issue as to the scope of legal responsibility. Such an issue cannot then be resolved by a detailed recitation of the facts, the repetition of the standard rubrics under which discussion of the tort of negligence is commonly organised, and an appeal to common sense. I do not suggest that is what occurred in the present case. The learned judges identified and addressed the problem that arose, although, as will appear, I disagree with the conclusion they reached. A recitation of facts may not be useful unless it distinguishes between facts essential to the cause of action, particulars, and evidence. Modern pleadings take a form which often blurs such distinctions. The rubrics under which issues are organised for discussion may do little to assist the resolution of those issues. Common sense is important, but it is not a substitute for legal analysis when that is required.

14 In some cases, where there is a problem as to the existence and measure of legal responsibility, it is useful to begin by identifying the nature of the harm suffered by a plaintiff, for which a defendant is said to be liable.

15 The first respondent suffered personal injury, the direct and immediate cause of which was the deliberate wrongdoing of the three men who attacked him. If the attack had occurred in a nearby street, or anywhere other than on land occupied by the appellant, there would have been no possible basis for attributing liability to the appellant. It is the appellant's occupation of the land on which the attack occurred that is the basis for a claim that the appellant was in breach of a duty of care it owed to the first respondent. The lack of care asserted was an omission adequately to light the place of the attack. The assumption is that leaving the lights on would have prevented the attack.

16 It is not contended that the harm suffered by the first respondent resulted from some defect or danger in the physical state or condition of the car park. This is not a case, for example, where inadequate lighting resulted in the concealment of some dangerous object or condition in the car park, with consequent damage to person or property.

17 That an occupier of land owes a duty of care to a person lawfully upon the land is not in doubt. It is clear that the appellant owed the first respondent a duty in relation to the physical state and condition of the car park. The point of debate concerns whether the appellant owed a duty of a kind relevant to the harm which befell the first respondent. That was variously described in argument as a question concerning the nature, or scope, or measure of the duty. The nature of the harm suffered was physical injury inflicted by a third party over whose actions the appellant had no control. Thus, any relevant duty must have been a duty related to the security of the first respondent. It must have been a duty, as occupier of land, to take reasonable care to protect people in the position of the first respondent from conduct, including criminal conduct, of third parties. People in the position of the first respondent would include employees of tenants of the shopping centre, visitors to the shopping centre, including customers of tenants, users of the automatic teller machines, and, perhaps, any member of the public using the car park at any time for any lawful purpose.

18 The basis of the duty which, as occupier, the appellant owed in relation to the physical state or condition of the premises was control over, and knowledge of, the state of the premises[3].

19 The appellant had no control over the behaviour of the men who attacked the first respondent, and no knowledge or forewarning of what they planned to do. In fact, nothing is known about them even now. For all that appears, they might have been desperate to obtain money, or interested only in brutality. The inference that they would have been deterred by lighting in the car park is at least

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3 *Commissioner for Railways v McDermott* [1967] 1 AC 169 at 186.

debatable. The men were not enticed to the car park by the appellant. They were strangers to the parties.

20 In *Smith v Leurs*[4], Dixon J said:

> "It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger."

21 Control was the basis of liability in *Dorset Yacht Co v Home Office*[5], where Lord Morris of Borth-y-Gest[6], after citing the above passage, said that the case was one of a special relationship involving a duty to control another's actions.

22 Reliance is sometimes the basis of a duty of care. Here there was no relevant reliance. Why the video shop could not have been closed in sufficient time to enable employees of the shop to walk to their cars before the lights went off (assuming they went off at 10 pm) was not investigated at the trial. There was nothing to prevent the first respondent's employer from making such arrangements for the security of its employees as it saw fit. The lease did not give the appellant the exclusive right to take measures for the safety and security of employees and customers of tenants.

23 The present is not relevantly a case of assumption of responsibility. The respondents submitted that the appellant assumed responsibility for the illumination of the car park. That submission confuses two different meanings of responsibility: capacity and obligation. The appellant owned and occupied the car park, controlled the lights in it, and decided when they would be on and when they would be off. But the relevant question is whether the appellant assumed an obligation to care for the security of persons in the position of the first respondent by protecting them from attack by third parties.

24 In *Kondis v State Transport Authority*[7], Mason J said:

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4 (1945) 70 CLR 256 at 262.

5 [1970] AC 1004.

6 [1970] AC 1004 at 1038-1039.

7 (1984) 154 CLR 672 at 687.

> "The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. The hospital undertakes the care, supervision and control of patients who are in special need of care. The school authority undertakes like special responsibilities in relation to the children whom it accepts into its care. If the invitor be subject to a special duty, it is because he assumes a particular responsibility in relation to the safety of his premises and the safety of his invitee by inviting him to enter them. And in *Meyers v Easton* the undertaking of the landlord to renew the roof of the house was seen as impliedly carrying with it an undertaking to exercise reasonable care to prevent damage to the tenant's property. In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property *as to assume a particular responsibility for his or its safety*, in circumstances where the person affected might reasonably expect that due care will be exercised." (emphasis added).

25 The fact that, as occupier of the car park, the appellant had the capacity to decide when, and to what extent, it would be lit at night, does not mean that the appellant assumed a particular responsibility to protect anyone who might lawfully be in the car park against attack by criminals. The policy adopted by the appellant as to the hour at which the lights went off suggests that the purpose of the lights was to attract customers, rather than deter criminals. Whether or not that is so, there is nothing in the evidence to suggest that the appellant assumed a responsibility which, at least in the case of employees of tenants of the Centre, might ordinarily be expected to be a responsibility of their employers. It was the first respondent's employer which decided the hour at which the video shop would close, and what, if any, arrangements would be made for the after-hours security of employees. The argument provides an example of what Gummow J, in *Hill v Van Erp*[8], described as "[t]he use of the imprecise and beguiling but deceptively simple terms 'known reliance' and 'assumption of responsibility'."

26 Leaving aside contractual obligations, there are circumstances where the relationship between two parties may mean that one has a duty to take reasonable care to protect the other from the criminal behaviour of third parties, random and unpredictable as such behaviour may be. Such relationships may include those

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8 (1997) 188 CLR 159 at 229.

between employer and employee[9], school and pupil[10], or bailor and bailee[11]. But the general rule that there is no duty to prevent a third party from harming another is based in part upon a more fundamental principle, which is that the common law does not ordinarily impose liability for omissions. This was explained by Lord Goff of Chieveley in *Smith v Littlewoods Ltd*[12]. His Lordship said, with reference to a general duty of an occupier to take reasonable care for the safety of neighbouring premises:

> "Now if this proposition is understood as relating to a general duty to take reasonable care *not to cause damage* to premises in the neighbourhood … then it is unexceptionable. But it must not be overlooked that a problem arises when the pursuer is seeking to hold the defender responsible for having failed to *prevent* a third party from causing damage to the pursuer or his property by the third party's own deliberate wrongdoing. In such a case, it is not possible to invoke a general duty of care; for it is well recognised that there is no *general* duty of care to prevent third parties from causing such damage." (original emphasis)

27 The same point was made in *Perl Ltd v Camden LBC*[13].

28 As Brennan J pointed out in *Sutherland Shire Council v Heyman*[14], the common law distinguishes between an act affecting another person, and an omission to prevent harm to another. If people were under a legal duty to prevent foreseeable harm to others, the burden imposed would be intolerable. Referring to Lord Atkin's speech in *Donoghue v Stevenson*[15], his Honour said[16]:

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9 *Chomentowski v Red Garter Restaurant Ltd* (1970) 92 WN (NSW) 1070; *Public Transport Corporation v Sartori* [1997] 1 VR 168; *Fraser v State Transport Authority* (1985) 39 SASR 57.

10 *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] Aust Torts Reports ¶81,399.

11 *Pitt Son & Badgery Ltd v Proulefco* (1984) 153 CLR 644.

12 [1987] AC 241 at 270.

13 [1984] QB 342.

14 (1985) 157 CLR 424 at 477-479.

15 [1932] AC 562 at 580.

16 (1985) 157 CLR 424 at 478.

> "The judgment of Lord Esher MR in *Le Lievre v Gould* which Lord Atkin cites makes it clear that the general principle expresses a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to another by that other, by a third person, or by circumstances for which nobody is responsible."

29 The control and knowledge which form the basis of an occupier's liability in relation to the physical state or condition of land are absent when one considers the possibility of criminal behaviour on the land by a stranger. The principle involved cannot be ignored by pointing to the facts of the particular case and saying (or speculating) that the simple expedient of leaving the car park light on for an extra half hour would have prevented the attack on the first respondent. If the appellant had a duty to prevent criminal harm to people in the position of the first respondent, at the least it would have had to leave the lights on all night; and its responsibilities would have extended beyond that. Furthermore, the duty would extend beyond the particular kind of harm inflicted by the criminals in the present case. It would presumably include criminal damage to property. If the baseball bat had been used, not against the first respondent, but against his car window, or if the car had been stolen, the same principle would govern the case. The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.

30 There may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of foreseeability, and predictability, that it is possible to argue that the case would be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it. The possibility that knowledge of previous, preventable, criminal conduct, or of threats of such conduct, could arguably give rise to an exceptional duty, appears to have been suggested in *Smith v Littlewoods Ltd*[17]. It also appears to be the basis upon which United States decisions relating to the liability of occupiers have proceeded[18]. A leading American textbook states that[19]:

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17 [1987] AC 241 at 261 per Lord Mackay of Clashfern.

18 See *Restatement of the Law of Torts* 2d at §§ 302B, 344.

19 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 199-201 (footnotes omitted).

> "The duty to take precautions against the negligence of others … involves merely the usual process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the defendant of exercising such care.
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> …
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> There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law."

31 That does not represent an accurate statement of the common law in Australia.

32 The factor most commonly taken into account in the United States in determining whether criminal activity was reasonably foreseeable is knowledge on the part of the occupier of land of previous incidents of criminality[20].

33 It could not reasonably be argued that the present is such a case. There had been illegal behaviour in the area. A restaurant near the car park had been broken into. During a period of a year before the incident in question, there had been two attempts to break into an automatic teller machine. About a year before the incident, the car window of an employee of the video shop had been smashed. This does not indicate a high level of recurrent, predictable criminal behaviour.

34 It is unnecessary to express a concluded opinion as to whether foreseeability and predictability of criminal behaviour could ever exist in such a degree that, even in the absence of some special relationship, Australian law would impose a duty to take reasonable care to prevent harm to another from

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20 See *Kline v 1500 Massachusetts Avenue Apartment Corp* 439 F 2d 477 (1970); *Holley v Mt Zion Terrace Apartments Inc* 382 So 2d 98 (1980); *McClendon v Citizens and Southern National Bank* 272 SE 2d 592 (1980); *Butler v Acme Markets* 89 NJ 270 (1982); *McCoy v Gay* 302 SE 2d 130 (1983); *Ann M v Pacific Plaza Shopping Center* 863 P 2d 207 (1993); *Piggly Wiggly Southern Inc v Snowden* 464 SE 2d 220 (1995); *McClung v Delta Square Ltd Partnership* 937 SW 2d 891 (1996); *Nivens v Hoagy's Corner* 133 Wn 2d 192 (1997); *Sturbridge Partners Ltd v Walker* 482 SE 2d 339 (1997).

such behaviour[21]. It suffices to say two things: first, as a matter of principle, such a result would be difficult to reconcile with the general rule that one person has no legal duty to rescue another; and secondly, as a matter of fact, the present case is nowhere near the situation postulated.

35 The most that can be said of the present case is that the risk of harm of the kind suffered by the first respondent was foreseeable in the sense that it was real and not far-fetched. The existence of such a risk is not sufficient to impose upon an occupier of land a duty to take reasonable care to prevent harm, to somebody lawfully upon the land, from the criminal behaviour of a third party who comes onto the land. To impose such a burden upon occupiers of land, in the absence of contract or some special relationship of the kind earlier mentioned, would be contrary to principle; a principle which is based upon considerations of practicality and fairness. The principle cannot be negated by listing all the particular facts of the case and applying to the sum of them the question-begging characterisation that they are special. There was nothing special about the relationship between the appellant and the first respondent. There was nothing about the relationship which relevantly distinguished him from large numbers of members of the public who might have business at the Centre, or might otherwise lawfully use the car park. Most of the facts said to make the case special are, upon analysis, no more than evidence that the risk of harm to the first respondent was foreseeable.

36 The appellant is entitled to succeed upon the ground that its duty as an occupier of land did not extend to taking reasonable care to prevent physical injury to the first respondent resulting from the criminal behaviour of third parties on that land.

Causation

37 The case provides an illustration of the interrelationship that sometimes exists between questions of legal responsibility and causation.

38 In the Full Court, it was said that common sense indicated that causation was established. However, that was against the background of a previously expressed conclusion that the appellant had a legal responsibility for the security of the first respondent.

39 The issue of causation in the present case arises in circumstances where the objective facts are not disputed, and there is no question about physical cause

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21 Mason P, in *W D & H O Wills (Aust) Ltd v State Rail Authority of NSW* (1998) 43 NSWLR 338 at 358-359, indicated a negative opinion on that question, and gave cogent reasons for that indication.

and effect. The direct and immediate cause of the injuries was the conduct of the three attackers, who were acting independently of the appellant. The conclusion that, if the car park lights had been on, the three men would not have attacked the first respondent, may or may not be dictated by common sense. Let it be supposed that it is correct, or at least not such as to warrant interference by this Court. In a case such as the present, it is difficult to see what further role common sense can play. The answer to the question whether, upon that hypothesis, the appellant's omission was a cause of the first respondent's injuries depends upon the view that is taken of the appellant's responsibilities. On the view adopted at first instance, and in the Full Court, the answer may be in the affirmative. But on the opposite view, a different result follows.

40 In *Environment Agency v Empress Car Co Ltd*[22], Lord Hoffmann discussed the problem of applying common sense notions of causation in cases involving the intervention of third parties or natural forces. He gave an example of a theft of a car radio, and pointed out that the question whether conduct of the car owner was in some way a cause of the loss might depend upon the view that was taken as to the extent of his responsibility to take care of his property. So it is in the present case. The finding on causation adverse to the appellant can only be justified on the basis of an erroneous view of the nature of the appellant's duties as occupier. On an accurate legal appreciation of those duties, the appellant's omission to leave the lights on might have facilitated the crime, as did its decision to provide a car park, and the first respondent's decision to park there. But it was not a cause of the first respondent's injuries.

Orders

41 The appeal should be allowed with costs. The orders of the Full Court of the Supreme Court of South Australia should be set aside. In place of those orders, the appeal to that Court should be allowed with costs, the judgment of the trial judge should be set aside and the action should be dismissed with costs.

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22 [1999] 2 AC 22 at 29-31.

42 GAUDRON J. I agree with the reasons of the Chief Justice and the orders which he proposes. I agree also with the remarks of Hayne J, particularly his Honour's emphasis on the significance of control over third parties before the law imposes a duty of care to prevent foreseeable damage from their actions.

43 There are situations in which there is a duty of care to warn or take other positive steps to protect another against harm from third parties. Usually, a duty of care of that kind arises because of special vulnerability, on the one hand, and on the other, special knowledge, the assumption of a responsibility or a combination of both. Those situations aside, however, the law is, and in my view should be, slow to impose a duty of care on a person with respect to the actions of third parties over whom he or she has no control.

44 KIRBY J. This appeal from a judgment of the Full Court of the Supreme Court of South Australia[23] raises two questions. The first question is the scope of the duty of care owed by the landlord of a suburban shopping centre to an employee of a tenant under the law of negligence. That employee was assaulted by three assailants whilst leaving his place of employment in the centre late at night after a time at which the landlord had extinguished lighting of common areas. Clearly the landlord owed a duty of care to some extent to a person in the position of the employee. It is the scope of that duty that falls to be determined under the first question.

45 The second question, if a duty of care of relevant scope is found, is whether a breach of that duty caused the employee's damage. In short, can the landlord be held liable under the law of negligence for being a cause of the undoubted damage which the employee (and derivatively his wife)[24] suffered by reason of the assault?

The facts

46 A general description of what happened is contained in the reasons of Gleeson CJ[25] and Callinan J[26]. However, to explain my different conclusions, it is necessary to refer to some additional facts. Legal authority and principle require courts to dissect the concept of negligence for the purposes of analysis[27]. But the conclusion reached in each case depends upon a thorough understanding of the facts[28]. From the facts is ultimately derived the answer to the question: does the law impose legal responsibility on the defendant (and persons like the defendant) in the circumstances proved?

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23 *Modbury Triangle Shopping Centre Pty Ltd v Anzil & Anzil* (1999) 204 LSJS 212.

24 The second respondent, Mrs Christine Anzil, recovered judgment in an agreed sum of $5,000 in respect of loss as a wife. It was agreed that her claim was wholly dependent upon the success of her husband's claim. It is convenient to refer to Mr Anzil as "the respondent".

25 Reasons of Gleeson CJ at [3]-[6].

26 Reasons of Callinan J at [119]-[131].

27 *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 475-476 [115].

28 Davis, "The Argument of an Appeal" in *Jurisprudence in Action: A Pleader's Anthology*, (1953) 171 at 181.

47 Mr Tony Anzil, whose entitlements govern the outcome of the proceedings, was not just an occasional visitor to the subject premises. Nor was Modbury Triangle Shopping Centre Pty Ltd ("the appellant") a landlord that leased premises to a tenant and then played only a small role in the premises, as was the case in *Northern Sandblasting Pty Ltd v Harris*[29] and *Jones v Bartlett*[30]. This was not a case about the liability of an absentee landlord responsible for common areas in an apartment or like building[31]. This case concerned a substantial commercial property, controlled and managed by the appellant, which leased premises in its suburban shopping centre. This activity necessarily involved both employees and customers gaining access to the centre in their motor vehicles.

48 Such motor vehicles typically require off-street parking, adjacent to the centre. So it was in this case. The whole point of such a centre is to offer a variety of shops to customers, including some which cater for late night customers. One such shop was a restaurant. Another was a pharmacy with a business ordinarily closing at 8.00 pm. There was also an automatic teller machine in operation at the centre. One shop was the video store in which the respondent was employed.

49 The evidence showed that the appellant was well aware of the video store's opening hours. Moreover, the appellant would have been aware that the nature of the business of such a tenant was one which involved handling significant amounts of cash. In contemporary conditions in suburban Australia, the video store was thus, to some extent, a magnet to potential thieves. This fact was given emphasis because the respondent, or his colleague, Ms Lehmann ("the co-manager") to the knowledge of the appellant, commonly worked alone in the store which was brightly lit inside, affording a clear view at night to anyone outside the store. That view was obviously enhanced if the adjacent car park was itself in darkness. Occupants of the store could not see observers watching their movements from the cover of darkness. But such observers could see them.

50 The car park, and thus the area where the assault on the respondent took place, was not part of the demised premises of the tenant's store or of any other shop. By the lease, executed in common form with the tenants of the centre, common areas, including the car park, remained under the control of the

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29 (1997) 188 CLR 313. This case concerned a lease of a domestic dwelling.

30 [2000] HCA 56. This case also concerned a lease of a domestic dwelling.

31 cf *Kline v 1500 Massachusetts Avenue Apartment Corporation* 439 F 2d 477 (1970); *Holley v Mt Zion Terrace Apartments, Inc* 382 So 2d 98 (1980).

appellant[32]. The appellant assumed responsibility for lighting the car park. Four towers were installed containing lighting equipment. Their purpose was doubtless to attract business: but, as the appellant's manager stated, it was also for "general security".

51 This is not, therefore, a case in which the appellant would have been required, by the claim against it, to undertake structural adjustments of a significant and expensive kind. The towers and lighting equipment were already in place. All that was required, on the part of the appellant, was that the duration of the lighting emanating from the towers be extended and maintained, as a matter of regularity, until a safe time after the closure of the last shop in the centre, namely the video store. To suggest that the video store should have closed its doors earlier to accommodate the lighting arrangements which the appellant provided[33] is somewhat unrealistic in the competitive business of video hiring. It was not a suggestion made at trial by or for the appellant.

52 The appellant was aware that the employees of the video store commonly remained on the store premises until about 10.20 pm. According to the co-manager, until about 12 months before the respondent was assaulted, it was the practice of the appellant to illuminate the car park until about 11.00 pm. However, some time after that period, the lights were extinguished earlier. The precise time the lights were turned off varied; but in any case it was before the closing time of the video store. The trial judge accepted the co-manager's evidence in this regard.

53 The trial judge found that, prior to the assault on the respondent, specific complaints had been made to the appellant about the lights being turned off early. Such complaints were accompanied by requests that the appellant should keep the lights illuminated until the employees of the video store had left work at about 10.20 pm. The trial judge concluded that, apart from a period around New Year 1992 and for an interval after the assault on the respondent, such complaints had "had no effect"[34].

54 The general acceptance by the appellant of a responsibility to provide lighting in the car park area after dark is therefore clear from the evidence. The appellant was not without remedy in the event that it extended the hours of lighting at the request of a particular tenant. The lease between the appellant and

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32 See lease, cll 3.1, 5.1, 5.2, 6, 7.5.8.5, 7.5.8.8, 7.5.8.10, 7.13, 7.39.

33 Reasons of Gleeson CJ at [6], [22].

34 *Anzil & Anzil v Modbury Triangle Shopping Centre Pty Ltd* (1999) 201 LSJS 196 at 200.

the tenant made it clear that it was the tenant that was obliged to pay the costs of services in "common areas". The tenant was obliged to "take the whole of its requirements of such service [including electricity] exclusively from the [appellant] and [to] pay to the [appellant] such price therefor as the [appellant] may from time to time determine"[35]. The tenant was specifically obliged to pay operating expenses, which could include all charges for electricity "furnished or supplied to the [tenant] of the general benefits or purposes of the [tenancy] or the particular benefit or purpose of any shop"[36]. In such circumstances, judged by the standard of reasonable conduct, it is difficult to comprehend the reluctance or indifference of the appellant, before the respondent was assaulted, to meet its tenant's request for a slightly extended period of lighting in the car park. Yet reluctant or indifferent the appellant certainly was. In the result, the tenant's request was denied.

55 The apprehension of danger, reflected in the complaints to the appellant, is not really difficult to understand. Apart from the character of its business, the store in question was situated near an automatic teller machine, another magnet to thieves. The store was the only shop in the centre ordinarily operating so late at night. In these circumstances, it is difficult to imagine a softer target than the tenant's store and its employees[37]. But imagination on the part of the appellant was not required because the co-manager had specifically, repeatedly and emphatically brought the danger faced by employees to the appellant's notice. Action, not imagination, was what was lacking.

56 The appellant was not entitled to dismiss the expressed concerns of its tenant's employee as far-fetched or unrealistic. The evidence showed that about 12 months before the incident affecting the respondent, the co-manager's car window had been smashed and her car entered whilst in the car park when it was in darkness. There were also two attempts to break into the automatic teller machine. Furthermore, the restaurant adjacent to the car park had been broken into. The exact dates on which these incidents occurred were not certain. But the appellant was fully aware of them.

57 Additionally, common knowledge, which would be attributed to the appellant, would indicate the specific dangers to employees of a cash business in a store in a suburban shopping centre operating late at night. Thieves tend to target cash businesses of such a kind, especially operating in hours of darkness. The risk that thieves will do so, particularly where they hope that their victim

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35 Lease, cl 6.

36 Lease, cl 7.5.8.5. See also cl 7.5.3.

37 Prosser and Keeton, *The Law of Torts*, 5th ed (1984) at §33.

may be carrying cash, is more than reasonably foreseeable. If there is a routine that can be readily observed from the safety of darkness, an attack of the kind that happened to the respondent will not only be possible in contemporary Australia – it may, depending on the circumstances, be probable. And in this case, what happened was not only predictable – it was predicted.

The relevant questions and issues for decision

58 The process before this Court is an appeal, not a trial. It is therefore necessary for the appellant to show that the judges below, and all of them, were in error in the conclusions which they reached[38]. Such error might involve an error of law in the approach which the judges took to the issues for decision. Or it might involve an error of fact-finding. Ordinarily, this Court does not disturb concurrent findings of fact at trial and on appeal, at least without strong reasons to do so[39].

59 In *Romeo v Conservation Commission of the Northern Territory*[40], I pointed out that, in disputed claims framed in negligence, "[u]nless particular issues are conceded, it is highly desirable that trial courts should approach such disputes by considering, in turn, the standard questions". Of the six issues which I set out, four are presently relevant[41]:

> "1. Is a duty of care established? (The duty of care issue.)
>
> 2. If so, what is the measure or scope of that duty in the circumstances? (The scope of duty issue.)
>
> 3. Has it been proved that the defendant is in breach of the duty so defined? (The breach issue.)
>
> 4. If so, was the breach the cause of the plaintiff's damage? (The causation issue.)"

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38 *Eastman v The Queen* (2000) 74 ALJR 915 at 959 [247]; 172 ALR 39 at 98; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1364-1365 [68]-[72]; 174 ALR 585 at 605-606.

39 *Louth v Diprose* (1992) 175 CLR 621 at 634.

40 (1998) 192 CLR 431 at 475 [115].

41 *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 475 [115].

60 In the way in which the present case was litigated, the first issue was not seriously in contest. According to the respondent, that issue was actually conceded by the appellant before the Full Court. In any case, the relationship of a landlord to the employees of a tenant, coming onto common property pursuant to, and within the scope of, a tenancy, involves an established duty relationship[42]. Certainly, in the case of a landlord managing the operations and common property of a commercial shopping centre, all of the elements are present to create the relationship which Lord Atkin described in *Donoghue v Stevenson* as being that of a "neighbour"[43]. There is reasonable foreseeability of injury. There is also geographical proximity[44]. There is, moreover, circumstantial proximity. In the present case, there is also causal proximity, in the sense that the actions or omissions of the appellant were of the kind that would directly affect a person such as the tenant's employee.

61 To say this is not to return to the failed notion of "proximity" as the universal indicium of the duty of care at common law[45]. It is, however, to accept that, in its narrow and historical sense, as a measure of factors relevant to the degree of physical, circumstantial and causal closeness, proximity is the best notion yet devised by the law to delineate the relationship of "neighbour". There is no inconsistency between the use of proximity for this limited purpose (with the requirement of foreseeability and the restraints of policy) and my statement, in an earlier case, that "proximity's reign ... as a universal identifier of the existence of a duty of care at common law, has come to an end"[46]. Used in the way I suggest, proximity remains a consideration. Self-evidently, some notion must be invoked to control the ambit of the duty. A duty of care is not one owed to the world at large. It is owed to one's legal "neighbour". That idea does not connote only the adjoining householder. Nor does it connote unknowable strangers. The appellant's relationship with a person such as the respondent was clearly proximate.

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42 cf *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116 at 120; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488; *Bryan v Maloney* (1995) 182 CLR 609 at 617-618; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 340, 342-343, 347, 358-359.

43 [1932] AC 562 at 580.

44 *Jaensch v Coffey* (1984) 155 CLR 549 at 584-585; cf Katter, *Duty of Care in Australia* (1999) at 44-45.

45 cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 414 [238]; Davies, "Common law liability of statutory authorities: *Crimmins v Stevedoring Industry Finance Committee*", (2000) 8 *Torts Law Journal* 133 at 136.

46 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 414 [238]; cf Katter, *Duty of Care in Australia* (1999) at 8-10.

62 I will not, therefore, take more time over this first question. I cannot see that it is reasonably arguable. If foreseeability and proximity are established[47], there remains a question of whether it is "fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrongdoer for the benefit"[48] of the person making the claim. As this question requires identification of the "measure or scope" of the duty, I will postpone answering it until I have addressed that issue.

63 There was, in this case, no statutory basis for denying the existence of a duty of care on the part of the appellant towards the respondent[49]. Nor was there any applicable contractual exception of liability. True, the lease between the appellant and its tenant did contain a purported exclusion of liability. In terms, this exempted the appellant from liability for, or responsibility to, "the Lessee its officers employees servants agents customers licensees invitees or visitors for any loss damage or injury suffered through loss or theft from the Centre or the Demised Premises"[50]. The scope of this exemption was not explored at length in this appeal because, correctly, the appellant accepted that the contractual arrangements between it and the tenant could not exempt it from any liability which the law imposed on it towards a person such as the respondent.

64 It is in this way that the appeal was ultimately narrowed to the first of the two questions stated at the outset of these reasons, namely whether, in the circumstances, the established duty of care owed by the appellant to the respondent (generally stated as being to avoid foreseeable risks of injury to the respondent)[51] extended to a duty to provide lighting of the car park adjacent to the video store until the ordinary time of the departure of employees such as the

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47 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419-420 [244]-[245]; *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 476-477 [117]-[118]; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 275 [259]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 43 [221]-[222]; 167 ALR 1 at 57.

48 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 275 [259].

49 As can sometimes arise in respect of the liability of statutory authorities. See eg *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 471-472 [105]-[107]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 41-43 [213]-[222]; 167 ALR 1 at 54-57.

50 Lease, cl 12.4.

51 cf *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 478-479 [123].

respondent. If it did, there could be no disputing the evidence that the appellant was in breach of that duty. There would then arise the second contested question of whether the breach, so established, caused or materially contributed to the respondent's damage.

The scope of the duty to guard against criminal acts by a third party

65 This Court has not previously considered the specific question of whether, at common law, a duty of care may be established and extend, in its scope, to the avoidance of foreseeable risks of injury arising out of the criminal acts of a third party. However, in terms of legal principle, I can see no reason why, depending on the circumstances, such a duty could not arise. A conclusion that it may do so is reinforced by addressing the usual considerations when faced with an attempt to apply established legal principles to a novel fact situation. A court asked to do so:

1. will consider the principles themselves as laid down in existing legal authority;

2. where there is no binding legal authority, will have regard to analogous developments of legal principle, including cases decided in the courts of other common law countries; and

3. in reaching its conclusion, will take into account any relevant considerations of legal principle and policy. In the present context this will be done by responding to the question whether it is "fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrongdoer for the benefit"[52] of the person making the claim. It will not be done by asking whether the case, or the relationship between the parties, is somehow "special" (whatever that word may mean).

66 In the United States of America, England and Canada, courts of high authority have had to consider analogous questions. In Australia, appellate and trial courts have likewise done so. Such courts have not accepted a universal principle excusing the person sued simply because the damage suffered arose out of the criminal acts of a third party. On the contrary, in many instances where the acts were foreseeable and the relationship between the parties was legally close (to use a neutral word), legal liability has been imposed.

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52 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 275 [259]; cf *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618.

67 A starting point for analysis is *Lillie v Thompson*[53], a unanimous decision of the Supreme Court of the United States. There, the petitioner had sued for damages under the *Federal Employers' Liability Act*[54]. By that Act, her employer was liable if she could show that her injury had resulted "in whole or in part from [its] negligence". The employee, a 22 year old telegraph operator, was seriously assaulted whilst at work. She proved that she was required to work alone between 11.30 pm and 7.30 am in an isolated part of the employer's railroad yards. The negligence asserted was that the employer had failed to exercise reasonable care "to light the building and its surroundings or to guard or patrol it in any way"[55], even though the employer knew that the yards were frequented by "dangerous characters"[56]. At trial, the case was taken from the jury. The trial judge's reasons for doing so paralleled the arguments paraded before this Court in the present case. The trial judge concluded that the law did not permit recovery "for the intentional or criminal acts"[57] either of a fellow employee or of an outsider. Additionally, the trial judge found that there was no causal connection between the injury and the employer's failure to light or guard the premises.

68 The Supreme Court of the United States disagreed. It reversed the trial judgment in favour of the employer and remitted the matter to the District Court for retrial. In its reasons, the Supreme Court said[58]:

> "Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it[59]. Breach of that duty would be

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53 332 US 459 (1947).

54 45 USC §51.

55 332 US 459 at 461 (1947).

56 332 US 459 at 460 (1947).

57 332 US 459 at 461 (1947). Reference was made to a number of earlier cases: *Davis v Green* 260 US 349 (1922); *St Louis-San Francisco Railway Co v Mills* 271 US 344 (1926); *Atlantic Coast Line Railroad Co v Southwell* 275 US 64 (1927); *Atlanta & Charlotte Air Line R Co v Green* 279 US 821 (1929).

58 332 US 459 at 461-462 (1947).

59 *Restatement of the Law, Torts*, §302, Comment *n*:

(Footnote continues on next page)

> negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

69 Unsurprisingly, given the decision of the Supreme Court in *Lillie v Thompson*, courts in the United States have, since 1947, repeatedly upheld claims brought against owners and occupiers of business and residential premises for liability in respect of damage suffered by persons entering the premises, although such damage was caused by the criminal acts of a third party. It has been recognised that the landlords of premises to which users and members of the public have access must maintain the common areas in their possession and control in a way that reasonably protects users and the public against such foreseeable criminal acts[60]. The duty of landlords is not that of an insurer for the safety of others against such acts. There is no absolute duty to implement perfect security measures. All that is required is[61]:

> "a duty to take reasonable steps to protect customers [which] arises if the business knows, or has reason to know, either from what has been or should have been observed or from past experience, that criminal acts ... are reasonably foreseeable".

70 These standards apply in the United States to the common areas accessed by employees of a store in a shopping centre[62], a store car park[63] or apartment

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> "*n.* The actor's conduct may create a situation which affords an opportunity or temptation to third persons to commit more serious forms of misconducts which may be of any of several kinds. (1) The third person may intend to bring about the very harm which the other sustains. ... The actor is required to anticipate and provide against all of these misconducts under the following conditions in all of which it is immaterial to the actor's civil liability that the third person's misconduct is or is not criminal ...:
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> …
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> 8. where he knows of peculiar conditions which create a strong likelihood of intentional or reckless misconduct."

60 *Kline v 1500 Massachusetts Avenue Apartment Corporation* 439 F 2d 477 (1970).

61 *McClung v Delta Square Ltd Partnership* 937 SW 2d 891 at 902 (1996).

62 *Ann M v Pacific Plaza Shopping Center* 863 P 2d 207 (1993).

63 *Butler v Acme Markets, Inc* 445 A 2d 1141 (1982); *Nivens v 7-11 Hoagy's Corner* 943 P 2d 286 (1997); *Piggly Wiggly Southern, Inc v Snowden* 464 SE 2d 220 (1995).

buildings[64]. All of these cases lay emphasis on the fact that, once the relevant relationship between the landlord and the entrant is shown, recovery depends substantially on whether the criminal act which occurred was reasonably foreseeable[65]. In most of the cases where the claimant has succeeded, he or she could establish the existence of knowledge in the landlord of the relevant risks[66]. Without some past incident or complaint, it will ordinarily be very difficult for a claimant to establish negligence[67]. Where there have been no previous incidents known to the landlord, such claims have commonly been dismissed[68]. Even where a duty of relevant scope is accepted in cases of this kind, it remains for the court to determine precisely what was required in the particular case and whether such requirement would, had it been fulfilled, have prevented the damage which the claimant suffered[69].

71 A year after the decision by the United States Supreme Court in *Lillie v Thompson*, the English Court of Appeal in *Stansbie v Troman*[70] upheld a claim that the duty of care owed by a decorator to a householder extended, in its scope, to taking reasonable care to lock the premises in which the decorator was working so as to protect them from the criminal acts of a third party. The decorator was not vicariously liable for the acts of such a person. There was no "special" relationship between the decorator and the householder (whatever that self-fulfilling expression might mean). But it was held to be reasonably foreseeable, in the circumstances, that if the decorator left the premises unlocked, he could expose such premises to invasion by thieves causing the loss to the householder which in fact occurred. He was thus liable in negligence.

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64 *Holley v Mt Zion Terrace Apartments, Inc* 382 So 2d 98 (1980); cf *Sturbridge Partners Ltd v Walker* 482 SE 2d 339 (1997).

65 *Piggly Wiggly Southern, Inc v Snowden* 464 SE 2d 220 (1995).

66 *Kline v 1500 Massachusetts Avenue Apartment Corporation* 439 F 2d 477 (1970); *Holley v Mt Zion Terrace Apartments, Inc* 382 So 2d 98 (1980).

67 *Butler v Acme Markets, Inc* 445 A 2d 1141 (1982); *McClung v Delta Square Ltd Partnership* 937 SW 2d 891 (1996).

68 See eg *McClendon v Citizens and Southern National Bank* 272 SE 2d 592 (1980); *McCoy v Gay* 302 SE 2d 130 (1983).

69 *Butler v Acme Markets, Inc* 445 A 2d 1141 (1982).

70 [1948] 2 KB 48.

72 It is suggested[71] that the later English case, *Dorset Yacht Co Ltd v Home Office*[72], with a similar outcome, is a "very special one". In this area of legal discourse, the opaque adjective "special" has been much invoked for want of a more informative concept[73]. It is not, in my view, a helpful adjective at all. It is an admission that questions of legal policy control the scope of liability in such cases. What is "special" in the circumstances, in the relationships of the parties or in the vulnerability of the victim is what a court says is "special" for policy reasons. It is far more honest and principled to acknowledge that this is so and to deal with such cases taking into account frankly the issues of principle and policy that are raised.

73 In *Dorset Yacht Co Ltd v Home Office*, civil liability in negligence was imposed on the Home Office for damage caused by the criminal acts of youths who had escaped from Borstal care. The general principle which that decision upholds cannot, in my view, be confined to its own "special" facts. It cannot be restricted by describing the relationship between the Home Office or its officers and the youths as "special". It could hardly be so. In *Smith v Littlewoods Organisation Ltd*[74], Lord Goff of Chieveley expressly said that (admittedly in circumstances described, without further explanation, as "special") a person will be liable in law for the deliberate wrongdoing of a third party. The quoted words used by Lord Goff in *Smith v Littlewoods Organisation Ltd*[75] apply to the facts of the present case. With respect, it is irrelevant that the application of the principle led, in *Smith*, to dismissal of the particular claim there before the court. The only purpose of mentioning the decision is to derive from it a principle of general application or to exclude an exemption from liability of universal operation.

74 Canadian authority also evidences similar conclusions, although the question of the liability of a party for the criminal acts of a third party does not appear to have reached the Supreme Court of Canada. Because of a spatial relationship between the claimant and the party sued, the existence of a duty of care has not infrequently been conceded[76]. The debate has then been addressed,

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71 Reasons of Callinan J at [146].

72 [1970] AC 1004.

73 Reasons of Gleeson CJ at [20] by reference to *Smith v Leurs* (1945) 70 CLR 256 at 262, reasons of Gaudron J at [43], reasons of Callinan J at [147]; cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 284-285 [283].

74 [1987] AC 241 at 272.

75 Set out in the reasons of Callinan J at [145].

76 As it was in *Allison v Rank City Wall Canada* (1984) 6 DLR (4th) 144.

as here, to the scope of that duty. As in United States cases, this question has focused in Canada on the knowledge of the risk which is possessed by, or can be attributed to, the landlord[77]. In practical terms, unless it can be shown that there has been a relevant previous incident or complaint, it is ordinarily difficult for a claimant to recover. The importance of such an incident is that it will establish that the landlord has been alerted to the risks of harm to a person to whom the landlord owes a duty of care.

75 Australian courts have also upheld claims framed in negligence where the damage suffered by the plaintiff has been caused by the criminal acts of a third party. It is true that, in a number of such cases, the relationship between the parties to the proceedings was, like that in *Lillie v Thompson*, that of employer and employee[78]. This Court has repeatedly pointed out that such a relationship imposes a heavy duty of care and affirmative responsibilities of accident prevention[79]. To that extent, employer and employee decisions may be distinguishable from the present case. However, they do serve to rebut any universal principle that, in Australian law, parties sued in negligence can escape liability simply because the damage complained of was caused by the deliberate criminal act of a third party. No principle of public policy, no general doctrine of denying relief[80] and no concept of causal interruption[81] has so far succeeded in forbidding recovery in such cases where the general principles of negligence law would otherwise uphold recovery.

76 In several Australian cases, outside the employment relationship, claimants have recovered although the damage for which they sued arose from such criminal acts. So it was in the case of a schoolchild incompetently

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77 *Q v Minto Management Ltd* (1985) 15 DLR (4th) 581.

78 *Chomentowski v Red Garter Restaurant Pty Ltd* (1970) 92 WN (NSW) 1070; *Fraser v State Transport Authority* (1985) 39 SASR 57; *Public Transport Corporation v Sartori* [1997] 1 VR 168.

79 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309; *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 74 ALJR 743 at 764-765 [101]-[104]; 170 ALR 594 at 622-624.

80 eg on the basis of the maxim ex turpi causa non oritur actio (an action arises not from a bad cause): *Smith v Jenkins* (1970) 119 CLR 397 at 409-414; *Jackson v Harrison* (1978) 138 CLR 438; *Gala v Preston* (1991) 172 CLR 243.

81 eg the exception of novus actus interveniens (new intervening act): *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

supervised at a bus stop[82]; in the case of a bailee who failed securely to fence and protect goods from the criminal acts of a third party[83]; and where the occupier of licensed premises failed adequately to protect a guest attending a function at the premises[84].

77 This review of legal authority therefore demonstrates that neither in Australia nor in any other common law country examined have claims in negligence for damage consequent upon the criminal acts of a third party been excluded as a universal category or class. Such claims have been evaluated by the application to the facts of each case of the ordinary principles of negligence law. For this Court now to hold that no duty of care of a relevant scope requiring reasonable preventive measures can arise in respect of the criminal acts of a third party would amount to a departure from basic legal doctrine. Moreover, it would isolate the approach of the common law in Australia from that of other like countries.

Policy considerations sustain liability

78 Is it "fair, just and reasonable" that the law should impose a duty on the appellant, in a case such as the present, to take reasonable care to avoid foreseeable risks of injury from the criminal acts of third parties to persons such as the respondent? The appellant submitted that it was not. Several arguments can be deployed to support the appellant's proposition. However, in my view, each of these arguments, when analysed, is shown to be wanting.

79 *The liability is personal not vicarious*: First, it might be suggested that it is offensive to common sense to burden one person with the consequences of the wilful criminal conduct of another. On this view, society should extract its penalties, both criminal and tortious, from the person actually guilty of the wrongdoing and not impose them on another person by classifying the resulting damage as an outcome of the latter's negligence. But this is not the approach of the common law in any country. The putative tortfeasor is not, in truth, held liable in law for the criminal acts of a third party. There is no vicarious liability for such acts. The tortfeasor is liable, instead, for its *own* breach of duty in failing, in the circumstances, to take its *own* steps to safeguard, from the foreseeable consequences of such acts, those to whom a duty is owed *by it*.

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82 *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] *Aust Torts Rep* ¶81-399. Special leave was refused: (1997) 4 Leg Rep SL 3.

83 *Pitt Son & Badgery Ltd v Proulefco* (1984) 153 CLR 644.

84 *Wormald v Robertson* [1992] *Aust Torts Rep* ¶81-180.

80 *Legal ingenuity is irrelevant*: With respect, it is completely irrelevant that, but for a statute in South Australia[85], the respondent might have sued his employer and not the appellant[86]. That fact merely affords a possible explanation for the bringing of the proceedings against the appellant alone. It does not help to resolve the question of whether, in law, those proceedings are entitled to succeed. Legal ingenuity is not the sole preserve of corporations or those who successfully rely on such ingenuity to advance their legal interests[87]. Sometimes ordinary citizens and injured workers, like the respondent, are the beneficiaries of accurate legal advice. They have no less claim on the law's bounty. If in law they are entitled to recover, the courts must so hold.

81 *Statute and contract are silent*: It might be argued that if liability is to be imposed on landlords in circumstances such as the present, this should be done, expressly, by contract, such as a lease, or by statute[88]. However, as the present case illustrates, contracts will ordinarily be drafted by, or for, the party in the superior economic position, normally the landlord. Sometimes, as here, such a contract will even purport to exclude liability in relation to various categories of entrant. In a given case, such provisions may sometimes afford the landlord a means of securing indemnity or contribution from its tenant. But it will not usually bind employees of a tenant or other entrants who are not, as such, parties to the contract. Their entitlements, if any, will be defined by law. They cannot be excluded by a contract between others. Furthermore, legislation has never been the sole determinant of legal rights in such cases. There is no basis for suggesting that common law rights in these circumstances should be limited.

82 *Levels of urban crime*: Then it might be argued that the law in this area has developed in its most expansive form in the United States because of higher levels of urban crime in that country. Is this a basis for suggesting that similar legal duties in Australia are unnecessary or should be confined to cases unhelpfully described as "special", of which this is not one? Such an argument has no legal merit. As long ago as 1970, Mason JA in *Chomentowski v Red Garter Restaurant Pty Ltd*[89] remarked:

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85 *Workers Rehabilitation and Compensation Act* 1986 (SA), s 54(1).

86 Reasons of Callinan J at [120].

87 eg *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1307-1308 [78]-[81]; 164 ALR 520 at 542-543; *Bond v The Queen* (2000) 74 ALJR 597; 169 ALR 607.

88 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 400; *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 41 [213]; 167 ALR 1 at 54.

89 (1970) 92 WN (NSW) 1070 at 1084.

> "Although it is a somewhat melancholy reflection on our community and its ability to order its affairs, I venture to think that the risk of robbery accompanied by violence would occur to the mind of any reasonable man who proposed to travel at night from business premises to a night safe with a substantial sum in cash upon his person".

83 Crimes of the kind here in question are common enough in Australia today. The principles of negligence law are expressed in general terms. What it might be reasonable to foresee, and to impose by way of a legal duty on a landlord of a shopping centre in one part of an Australian city, might not apply elsewhere – whether in the same city, in a country town or in the remote outback. A principled solution to such claims lies not in adopting a universal exemption for supposed reasons of legal policy. Still less does it lie in attempting to confine recovery to an unknown and unknowable category of "special cases" or cases of "special relationships" or "special vulnerability". It lies in the neutral application of the basic rules of the law of negligence to the evidence proved and the inferences drawn from such evidence in the particular case.

84 *Duties to other entrants*: Then it might be suggested that to expand the scope of the duty of care to impose obligations on a landlord to protect employees of a tenant, such as the respondent, would necessarily involve the imposition of duties in respect of many other categories of persons entering the common areas of a shopping centre at night. Would a duty of such a scope require illumination of the car park all night against the risks to the occasional person using the automatic teller machine?[90] Would it impose duties of care even to trespassers, including persons such as the respondent's assailants, should they fall and injure themselves in the darkness?

85 Whilst it is proper to test the limit of liability which the law imposes by asking such hypothetical questions, the ultimate answer is to be found in the fact that the solution in each case must be anchored in the evidence and would be discovered by the touchstone of reasonableness. Proving a breach of a duty of care of a given scope will usually depend, in a case such as the present, on whether the landlord had actual or constructive knowledge of risks faced by the particular entrant. Whilst entrants as a class, and particular entrants, cannot impose liability simply by giving notice to the landlord of some real or imagined danger, the fact of notice is at least an answer to a suggestion that subsequent damage and loss was unforeseeable. The more notice that is given, and the more often, the more likely will it be that legal liability will be imposed for the failure to respond to such notice where doing so would have been simple and reasonable in the circumstances and protective of the claimant.

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90 Reasons of Gleeson CJ at [29].

86 *Balancing costs and protection*: If the question before the Court is examined in economic terms, a case such as the present has to be viewed from the perspective of the general principle that this Court's decision establishes. I agree that the coherence of tort law depends, in part at least, on notions of "deterrence and individual responsibility"[91]. The law of tort exists not just to provide, or deny, redress to the particular claimant but also to establish standards which the law requires, and for default of which it imposes its sanctions[92]. Does, therefore, the imposition of liability in a case such as the present on a party such as the appellant impose an unreasonable burden on it, and on shopping centres in Australia like it, to keep lighting in car parks illuminated at night to prevent or discourage some criminal acts? Does it do so when account is taken of the costs of energy consumption, environmental degradation by floodlighting and the partial relief only which such lighting would afford from wilful criminal acts by third parties?

87 These are reasonable questions. In particular circumstances, the answers to them could justify rejection of a claim. They could do so either because the circumstances were not such as to warrant the law's imposing a duty of care of a relevant scope or because of a conclusion that, even if a duty of that scope were applicable, its discharge would not, in the circumstances, have prevented the damage that actually occurred. But such questions scarcely warrant rejection of the present claim once an exemption for the criminal acts of a third party is rejected as a universal proposition. Here, the provision of approximately 20 minutes of extra lighting in the car park would hardly diminish individual responsibility on the part of employees of a tenant, such as the respondent. The co-manager had acted responsibly in bringing complaints to the notice of the appellant. It was the appellant, once on notice, that acted without responsibility. If such indifference is not then sanctioned by a verdict in favour of the respondent, the legal deterrence against unrealistic neglect and unjustifiable omission to act is completely removed. The "neighbour" of Lord Atkin has truly crossed to the other side of the street[93] and the law will be upholding wilful indifference to the safety of others. This is not my concept of Lord Atkin's neighbour principle.

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91 Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", (1995) 111 *Law Quarterly Review* 301 at 317 quoted in reasons of Hayne J at [116].

92 cf *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 399-400.

93 *Donoghue v Stevenson* [1932] AC 562 at 580.

A duty of care of a relevant scope existed

88 The appellant placed much reliance on a recent decision of the New South Wales Court of Appeal in *W D and H O Wills (Australia) Ltd v State Rail Authority of New South Wales*[94]. The respondent, for his part, submitted that that case had been wrongly decided. It is unnecessary to resolve that question. The facts were quite different from the present case. The lessor in that case had substantially relinquished its capacity to control activities taking place on the demised premises[95]. Here, on the contrary, the area in which the respondent was assaulted was not part of the demised premises at all. It was part of the common areas within the terms of the lease. In those common areas, the appellant had reserved to itself the exclusive right to "operate, manage, equip, police, light, repair and maintain" the premises "in such manner as the [appellant] shall in its sole discretion determine"[96].

89 Having reserved and exercised sole control over the common areas in this way, and having asserted that control in relation to the car park (by altering the hours of illumination and denying requests for its adequate extension) the appellant can scarcely contend that it was not, in law, responsible for the injuries received by the respondent in the darkened car park. Nor is its submission convincing that the tenant alone is liable to its employee because it later installed a spotlight outside its store. In the face of such persistent neglect of the safety of persons using the common areas of the premises, it is unsurprising that the tenant finally took its own precautions and did so irrespective of the requirements of the lease. Because of a statutory provision[97], the tenant was immune from liability at common law. But it was not, it seems, immune from discharging a duty, reinforced by specific complaints, which experience suggested that the appellant should have taken earlier for the safety of persons such as the respondent.

90 In the present case, the evidence accepted at the trial, and the inferences drawn from that evidence by the trial judge and the Full Court, fully justified their conclusion that a duty relationship existed. Authority also supported an expression of that duty as one that required the appellant to take reasonable care to avoid foreseeable risks of injury to the respondent. The duty expressed in such terms extended to include, at least, those steps reasonably necessary to protect the respondent from the consequences of foreseeable criminal acts by third parties. One such step would have been to leave the car park illuminated until about

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94 (1998) 43 NSWLR 338.

95 (1998) 43 NSWLR 338 at 357.

96 Lease, cl 5.1.

97 *Workers Rehabilitation and Compensation Act* 1986 (SA), s 54(1).

10.20 pm. The facilities for doing so were in place. Doing so involved no expensive structural change. It required no acquisition of costly equipment. It had been done previously. The additional costs would have been minimal. Under the lease, those costs could in any case have been passed on to the tenant concerned. The appellant was, as it acknowledges, on notice of a number of complaints and requests to extend the time of illumination. It must be taken to have been aware of the elements of the particular tenant's business that created particular risks to a person such as the respondent. It was aware of a number of relevant criminal acts in the vicinity. Because of its control of the common areas, the appellant was in the best position to anticipate and guard against such risks. Doing so was within the scope of the economic activity in which it was engaged.

91 The appellant was entitled to refuse to take the step which its tenant's employee had requested it take. But when it did so, it assumed legal responsibility for damage caused to the respondent by the want of reasonable care to a legal neighbour inherent in that response. The liability owed to other entrants would depend on all the circumstances[98]. Other entrants were not so repeatedly exposed to danger. They had not made special complaints and requests. Their presence within the centre would not have been so closely bound up in the mutual economic interests of the appellant, its tenants and their employees. Even if the common law ordinarily hesitates to impose affirmative duties to protect others, the law of negligence is not confined to acts of commission. It extends to careless omissions to act. Such was this case. Rushing to the rescue of the respondent was not what the law required of the appellant. Reprogramming a simple light switch in the face of numerous requests to do so was scarcely an onerous burden. I do not accept that the law of negligence in Australia sanctions such obdurate indifference to the safety of persons such as the respondent. This is not, I believe, the common law in the United States, England or Canada. Nor do I consider that it is the common law in Australia.

92 The trial judge and the Full Court were therefore entitled to conclude, as they did, that the duty of care of the appellant to the respondent extended, in this case, to the provision of lighting of the car park until the respondent had left at the usual time. I therefore turn to the second issue.

The inference of causation is sustained

93 Causation in fact is a matter to be determined from all of the evidence, and the inferences drawn from the evidence. As has been said many times, it is a

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98 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 217-218 [94]-[96].

question that requires the application of common sense[99]. So much ink has been spilt over causation, including recently in this Court[100], that I decline to add more than is necessary.

94 The appellant submitted that, even if it had provided lighting in the car park until about 10.20 pm, after the employees of the video store had time to lock up and depart, there was no basis for concluding that doing so would have prevented the injuries to the present respondent. It is true that the respondent's assailants could have attacked him notwithstanding the existence of illumination in the car park. However, both the trial judge and the Full Court accepted that darkness increased the risk of criminal acts occurring. There was uncontested evidence before the trial judge that good lighting discourages criminals, in part because it increases the risk of detection or identification. Lighting also permits occupants of premises to identify people outside the store, and whether they may be carrying weapons. It was accepted by the trial judge that the respondent, before leaving the store, would have looked out the window to his car to see if there was anybody suspicious near the car. Lighting of the car park may also have made the assailants visible from the nearby public road.

95 It is common knowledge that many people, absent from their homes or businesses, arrange for lights to operate inside their premises or in the perimeter during periods of perceived risk. Or they will install sensors to illuminate dark areas in the event of movement within them. They do these things because common experience suggests that light tends to discourage criminal acts. The existence of lighting would not have been a total shield to a person in the position of the respondent. But the fact that it was believed to have protective benefits lay behind the repeated requests of the co-manager that it be extended by the appellant until after the store closed. These requests were not based upon erroneous assumptions about the variety of criminal conduct. Without lighting, the video store and the respondent were rendered a most vulnerable target. Common sense therefore sustains the inference drawn by the trial judge and the Full Court that it was sufficiently established, in all the circumstances, that the breach of duty caused the respondent's injury. I would hesitate to disturb their conclusion.

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99 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; *Chappel v Hart* (1998) 195 CLR 232 at 268-269 [93].

100 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 420-421; *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 482-484 [133]-[137]; *Chappel v Hart* (1998) 195 CLR 232 at 238 [6]-[7], 247-248 [34], 255-262 [62]-[81], 268-276 [93]; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 277-281 [28]-[36].

96 Of course, the appellant's omission was not the sole cause of the respondent's damage[101]. It was not even the direct cause. The direct cause was the criminal conduct of the respondent's assailants. But the appellant's omission represented a fact which it was open to the trial judge to conclude had materially contributed to the respondent's damage. Where a party such as the appellant fails to establish that its conduct had no effect and claims that the damage suffered would have occurred in any event, it bears the forensic obligation of persuading a court to that conclusion. Unsurprisingly, in my view, the appellant failed in this endeavour before the trial judge. The Full Court was correct to reject the arguments on the causation issue. No error is shown that would warrant this Court's substituting its opinion for that of all of the judges below.

Order

97 The appellant therefore fails on the two points which it argued. It follows that, in my opinion, the appeal should be dismissed with costs.

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101 It is not necessary to show that it was the only or main cause: see *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 420-421; *Chappel v Hart* (1998) 195 CLR 232 at 240 [13]-[14], 244-245 [27]; *Wormald v Robertson* [1992] Aust Torts Rep ¶81-180 at 61,569.

98 HAYNE J. I agree that, for the reasons Gleeson CJ gives, this appeal should be allowed with costs, and consequential orders made as his Honour proposes.

99 I add something on my own account about some aspects of the debate in this case about duty of care. "The concept of a duty of care, as a prerequisite of liability in negligence, is embedded in our law by compulsive pronouncements of the highest authority."[102] It is not "an unnecessary fifth wheel on the coach"[103]. Rather, as Professor Stapleton has pointed out, it is a concept which "allows courts to signal … relevant systemic factors going to the issue of liability"[104].

The scope of a duty of care

100 In almost every case in which a plaintiff suffers damage it is foreseeable that, if reasonable care is not taken, harm may follow. The conclusion that harm was foreseeable is well-nigh inevitable. As Dixon CJ said in argument in *Chapman v Hearse*[105], "I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence." Foresight of harm is not sufficient to show that a duty of care exists.

101 As Fleming has pointed out, however[106]:

> "No generalisation can solve the problem upon what basis the courts will hold that a duty of care exists. Everyone agrees that a duty must arise out of some 'relation', some 'proximity', between the parties, but what that relation is no one has ever succeeded in capturing in any precise formula."

In *Perre v Apand Pty Ltd*[107], three members of the Court expressly rejected the adoption of what is sometimes described as the three-stage test said to have been

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102 *Hargrave v Goldman* (1963) 110 CLR 40 at 63 per Windeyer J.

103 Buckland, "The Duty to Take Care", (1935) 51 *Law Quarterly Review* 637 at 639.

104 Stapleton, "Duty of Care: Peripheral parties and alternative opportunities for deterrence", (1995) 111 *Law Quarterly Review* 301 at 303.

105 (1961) 106 CLR 112 at 115.

106 Fleming, *The Law of Torts*, 9th ed (1998) at 151.

107 (1999) 198 CLR 180 at 193 [9] per Gleeson CJ, 210-212 [77]-[82] per McHugh J, 301-302 [331]-[333] per Hayne J.

formulated by Lord Bridge of Harwich in *Caparo Industries Plc v Dickman*[108]. In particular, as McHugh J pointed out[109]:

> "[A]ttractive as concepts of fairness and justice may be in appellate courts, in law reform commissions, in the academy and among legislators, in many cases they are of little use, if they are of any use at all, to the practitioners and trial judges who must apply the law to concrete facts arising from real life activities."

As his Honour said[110]:

> "[I]f negligence doctrine is to escape the charge of being riddled with indeterminacy, ideas of justice and morality should be invoked only as criteria of last resort when more concrete reasons, rules or principles fail to provide a persuasive answer to the problem."

The present case is one in which resort to more concrete reasons, rules and principles helps to resolve the problems it presents. The rules and principles to which reference must be made concern the liability of occupiers to entrants upon their premises and the obligations of a person to control the conduct of another.

102 Noting that the appellant and first respondent could, respectively, be described as the occupier of land and an entrant upon that land does not wholly resolve the duty of care issue. There can be no dispute that an occupier of land owes some duty of care to those who enter it[111]. But detecting that the parties stood in a relationship where one owed some duty of care to the other by no means exhausts the first in the traditional trilogy of issues in an action for damages for negligence: duty, breach and damage. The relevant question in the present case is not whether an occupier owes *some* duty of care to an entrant. The question is what is the *extent* of the duty which the occupier owes.

103 Because the extent of a duty falls for decision in relation to "concrete facts arising from real life activities"[112] it will not always be useful to begin by examining the extent of a defendant's duty of care separately from the facts which give rise to a claim. That may be possible, and useful, in a simple case

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108 [1990] 2 AC 605 at 617-618.

109 (1999) 198 CLR 180 at 211 [80].

110 (1999) 198 CLR 180 at 212 [82].

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

112 *Perre* (1999) 198 CLR 180 at 211 [80] per McHugh J.

(like motorist and injured road user) where the duty of care and its content are well established. In other cases, however, it may lead to an insufficiently precise formulation of the duty which obscures the issues that require consideration. That lack of precision may lie in formulating the duty too narrowly: for example, by asking did the defendant owe a duty of care to fence the *part* of the cliffs in its reserve from which the plaintiff fell[113]? It may also, as in this case, lie in formulating the duty too broadly: for example, by asking did the defendant owe *any* duty of care to the plaintiff?

104 In *Sutherland Shire Council v Heyman*[114], Brennan J pointed out that "a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered and in reference to the plaintiff or a class of which the plaintiff is a member". Ordinarily it may be expected that it will be sufficient to state the duty of care by reference to these two matters: the kind of damage suffered and the class of which the plaintiff is a member. Even that, however, may not suffice in some cases.

105 In cases such as the present, where the extent of the relevant duty is not clear, it is useful to begin by considering the damage which the plaintiff suffered, and the particular want of care which is alleged against the defendant. Asking then whether that damage, caused by that want of care, resulted from the breach of a duty which the defendant owed the plaintiff, may reveal more readily the scope of the duty upon which the plaintiff's allegations of breach and damage must depend.

106 The complaint made by the respondents in this case was that the first respondent suffered personal injury because the appellant did not leave the car park lights on when he was leaving the shop where he worked. The complaint was *not* that the appellant should have, but did not, control access by the assailants to the premises it occupied. It is important, then, to appreciate that the allegation of breach (and, by necessary implication, the scope of the duty alleged) concerned the state of the premises. It was not about third parties coming on to, or remaining on, the premises. The allegation therefore invites attention to the connection between the state of the premises and the assault by those third parties.

107 It is evident that the respondents' contentions required acceptance of two critical steps: one about causation and one about duty of care. As I have said, the particular act or omission of the appellant which the respondents alleged amounted to a want of due care was not providing sufficient illumination of the

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113 cf *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431.

114 (1985) 157 CLR 424 at 487.

car park. As Gleeson CJ points out, the causal connection between a lack of light in the car park and the attack on the first respondent is by no means self-evident. The conduct of criminal assailants is not necessarily dictated by reason or prudential considerations. There is no basis for deciding whether the absence of better lighting affected the conduct of those who assaulted the first respondent in any way which might have enabled him to avoid their attack. Moreover, it is not enough to say, as the respondents contended, that better lighting would have enabled the first respondent to keep a better look out. Avoiding the assailants' attack depended as much upon what they did to catch him unaware, as upon his ability to keep a good look out for them. I prefer, however, to put these considerations aside and to look to the more fundamental question of duty.

The appellant as occupier

108 The appellant was alleged to owe a duty to the first respondent because the appellant occupied, and thus controlled, the land on which the first respondent was assaulted. In particular, it was the appellant's ability to control the lighting of that land which was central to the respondents' case. The appellant could, however, exercise no control over those who assaulted the first respondent. The lack of ability to control the assailants is important in considering the question of causation. It is also important in considering the question of duty.

109 The duty which the respondents alleged the appellant owed was not a duty about the lighting of the car park. The failure to light the car park was no more than the particular step which the respondents alleged that reasonable care required the appellant to take. It does not define the scope of the relevant duty any more than asking whether providing a fence at the *particular* point on the cliff where Ms Romeo fell defined the ambit of the duty which it was alleged that the Conservation Commission of the Northern Territory owed her[115]. The duty which the respondents alleged that the appellant owed must be understood to have been a duty to take reasonable steps to hinder or prevent criminal conduct of third persons which would injure persons lawfully on the appellant's premises. The particular step to which the respondents pointed as being reasonable was leaving on the car park lights. The particular criminal conduct of which complaint was made was assault occasioning bodily harm to the first respondent. The duty alleged cannot, however, be confined by those two features. If the appellant owed the first respondent a relevant duty of care, it was to take *whatever* steps were reasonable in all the circumstances to hinder or prevent *any* criminal conduct of third persons which injured the first respondent or *any* person lawfully on the premises. But the acts of those third parties resulted from the choices which they made. Moreover, they were choices which were, as I

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115 *Romeo* (1998) 192 CLR 431.

have said, not necessarily dictated by reason or prudential considerations. It was, therefore, a duty to take reasonable steps to attempt to affect the conduct of persons whom it had no power to control. No such duty has been or should be recognised.

110 Some emphasis was given in oral argument to the proposition that an employer may owe an employee a duty to take reasonable care to prevent the employee being robbed. If that is so, however, it is because the employer can prevent the employee going in harm's way[116]. The employer has the capacity to control the situation by controlling the employee and the system of work that is followed. The duty which the employer breaks in such a case is not a duty to control the conduct of others. It is a duty to provide a safe system of work and ensure that reasonable care is taken[117].

111 In those cases where a duty to control the conduct of a third party has been held to exist, the party who owed the duty has had power to assert control over that third party. A gaoler may owe a prisoner a duty to take reasonable care to prevent assault by fellow prisoners. If that is so, it is because the gaoler can assert authority over those other prisoners[118]. Similarly, a parent may be liable to another for the misconduct of a child because the parent is expected to be able to control the child[119].

112 The occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land. It is these powers of control which establish the relationship between occupier and entrant "which of itself suffices to give rise to a duty … to take reasonable care to avoid a foreseeable risk of injury"[120] to the entrant. It is the existence of these powers which lies behind both the particular conclusion in *Hargrave v Goldman*[121] that occupiers of land owe a duty to take reasonable care in respect of fire or other hazards originating on the land and general statements, of the kind made by Lord

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116 cf *Chomentowski v Red Garter Restaurant Ltd* (1970) 92 WN (NSW) 1070.

117 *Kondis v State Transport Authority* (1984) 154 CLR 672.

118 cf *Howard v Jarvis* (1958) 98 CLR 177; *Hall v Whatmore* [1961] VR 225.

119 *Smith v Leurs* (1945) 70 CLR 256 at 262 per Dixon J.

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

121 (1963) 110 CLR 40; affirmed on appeal *Goldman v Hargrave* (1966) 115 CLR 458; [1967] 1 AC 645.

Nicholls of Birkenhead in his dissenting speech in *Stovin v Wise*[122], that "[t]he right to occupy can reasonably be regarded as carrying obligations as well as rights".

113 The appellant, in this case, did not control what happened to the first respondent. It is not enough to say that the appellant had power to act in a way that may have made the occurrence less likely (by leaving the lights on). That is doing no more than restating, in other words, a conclusion about foresight or, perhaps, causation. The conduct which caused the first respondent's injuries was deliberate criminal wrongdoing. By its very nature that conduct is unpredictable and irrational. It occurs despite society devoting its resources to deterring and preventing it through the work of police forces and the punishment of those offenders who are caught. That is, such conduct occurs despite the efforts of society as a whole to prevent it. Yet the respondents' contention is that a particular member of that society should be held liable for not preventing it.

114 I have emphasised the inability of the appellant to control the conduct of the assailants who injured the first respondent because a duty to take steps to control that conduct should not be found if the person said to owe the duty has not the capacity to fulfil it. It may be said, however, that analysing the matter in this way pays too much attention to the position of the occupier and too little to the position of the injured party. In particular, it may be said that the question should be whether the occupier could reasonably have hindered the offending behaviour, if only by doing something which would have better allowed the injured party to protect himself from attack.

115 Framing the relevant question in this way draws attention to a fundamental consideration. The injuries which the first respondent suffered were caused by the wrongful acts of others. If those others could be identified and had sufficient assets to meet a judgment, the first respondent would have full compensation for his injuries. The present action is brought against a party who, if sued with the assailants, would be found liable to contribute little, if anything, to the damages awarded to the first respondent. Yet because the appellant was sued alone, it is said that it is liable for all the damage.

116 To hold that the appellant owed a duty to take reasonable steps to prevent or hinder the attack on the first respondent is not only to hold the appellant responsible for conduct it could not control, it is to impose liability on it when its contribution to the occurrence, compared with that of the assailants, is negligible. As Professor Stapleton points out[123], the coherence of tort law depends upon "the

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122 [1996] AC 923 at 931.

123 "Duty of Care: Peripheral parties and alternative opportunities for deterrence", (1995) 111 *Law Quarterly Review* 301 at 317.

notions of deterrence and individual responsibility". Those values would be diminished if the appellant is held to owe a duty of care of the kind for which the respondents contend. To accept the respondents' submissions would be to impose a duty which does nothing to deter wrongdoing by the appellant or other occupiers. Further, it would shift financial responsibility for the consequences of crime from the wrongdoer to individual members of society who have little or no capacity to influence the behaviour which caused injury.

117 Established principle provides the answer to the present problem because it reveals that there is no duty to control the criminal conduct of others except in very restricted circumstances. Being an occupier of land should not be added to those exceptional cases, at least where the complaint that is made by the plaintiff is not about the occupier failing to control access to or continued presence on the premises[124]. I would wish to reserve for consideration in a case in which they are raised the questions that are presented by a complaint of that last kind. Further, like Gleeson CJ, I would wish to leave open for consideration the appropriate approach in cases where an occupier has a high degree of certainty that harm will follow from lack of action.

118 Finally, it is suggested that the conclusion reached in this matter by the trial judge and the Full Court about the measure and scope of the duty owed by the appellant are concurrent findings of fact. That is not so. Conclusions about the duty of care which a defendant is alleged to have owed to a plaintiff are conclusions of law[125]. Whether there was a breach of that duty is a question of fact. The central question in this appeal was a question of law. It should be resolved in the appellant's favour.

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124 cf *Chordas v Bryant Pty Ltd* (1988) 20 FCR 91; *Public Transport Corporation v Sartori* [1997] 1 VR 168.

125 *Teubner v Humble* (1963) 108 CLR 491 at 503 per Windeyer J; *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at 757-758 per Lord Somervell of Harrow, 759 per Lord Denning.

CALLINAN J.

The Issue

119 At a little after 10:00 pm in the evening of 18 July 1993, three vicious assailants armed with a baseball bat waited in a dark car park attached to a shopping centre, for the emergence of an employee of the lessee and proprietor of a video rental shop situated in the centre. As that employee, the first respondent, approached his car parked in the car park they assaulted him. In consequence he suffered serious injuries. In ensuing proceedings both the District Court of South Australia[126] (David J) and the Full Court of the Supreme Court of South Australia[127] (Olsson, Mullighan and Nyland JJ) were of the opinion that the appellant, as lessor of the shop, should be held responsible and liable in damages to the respondents by reason of its failure to provide illumination of the car park. The question in this Court is whether those Courts were correct in so holding.

Further Facts

120 It is not surprising that when governments abolish long standing causes of action[128] such as those formerly available in South Australia to employees against negligent employers, injured employees and those who represent them will use all of their ingenuity, sometimes with success, to persuade courts that some other person of means should pay damages to the injured worker. This case appears to me to bear those features.

121 No separate consideration need be given to the second respondent's claim for damages for loss of consortium as her case depends upon the outcome of the first respondent's action.

122 The centre is a substantial one containing numerous shops, a restaurant, banks and other commercial premises. It includes a large car park which is part of a common area and which contains trolley bays with trolleys in them, clumps of trees, and bushes in various places. A witness whom the primary judge accepted, gave evidence that people would have been able to hide behind those bushes whether the lights were on or not. The shop is on the north-east corner of the centre and has a frontage to the car park. It is visible from the main road which is about 70 metres away from it.

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126 *Anzil v Modbury Triangle Shopping Centre Pty Ltd* (1999) 201 LSJS 196.

127 *Modbury Triangle Shopping Centre Pty Ltd v Anzil & Anzil* (1999) 204 LSJS 212.

128 See s 54(1) of the *Workers Rehabilitation and Compensation Act* 1986 (SA).

123 There was, at the material time, fluorescent lighting under the roof of the verandah in front of the shop which at night produced some light spill on to the car park but did little beyond that.

124 There are also, within the car park, four, tall, lighting towers. At night, with the lights fixed to the towers turned off, the car park, including the area near the video shop, is in darkness.

125 The evidence at the trial was not clear as to precisely during which periods and dates the lights of the car park were turned on. It may be that from time to time the tower lights were left on until about 10:00 pm. They were not, in any event, on at the time of the assault. A co-manager of the shop had complained on a number of occasions before it occurred to the centre management that there was a lack of lighting in the car park whilst the video shop was open at night and after its time of closure. An automatic teller machine was accessible at all hours. The only other "late opener" was a pharmacy within the centre that closed at 8:00 pm.

126 The first respondent's evidence was that it was his practice, when he left the video shop at night, to look out to see if anyone was about. If he saw anyone he would not leave the shop until that person in the car park had left.

127 At about 10:15 pm on Sunday 18 July 1993 the first respondent, being the last person remaining at the video shop, closed the shop, looked outside to see if anyone was about, saw no-one, and then proceeded to walk a distance of about ten metres across the car park towards his motor vehicle which was parked in the space closest to the shop. It was then that he was attacked and injured.

128 Some other matters are relevant. The appellant was well aware of the hours of the shop. The tenant had obligations in respect of the supply of electricity including to pay:

> "7.5.8.5 All charges for water gas oil electricity light power fuel telephone sewerage garbage and other services or requirements furnished or supplied to the said Land of the general benefits or purposes of the said Land or the particular benefit or purpose of any shop and not otherwise the responsibility of any lessee."

That the employees of the lessee of the shop would be readily able to be observed from outside it at night, was, or should have been, apparent to the appellant.

129 On the night of the assault it was so dark that the first respondent could see little or nothing in the car park from the store. He claimed that when the lights were on there was no place for would-be attackers to hide but this was a claim, as will appear, that was not borne out by other evidence.

130 After the assault the appellant recommenced, for a period, illumination of the car park until 10:45 pm and the first respondent's employer provided some additional lighting.

131 The respondents point to and rely on three other matters: a restaurant adjacent to the car park had, before the assault, been broken and entered; there had been attempts to break into the automatic teller machines on two occasions before it; and, about 12 months earlier the co-manager's car window had been smashed and her car temporarily occupied by an unidentified person.

The Appeal to this Court

132 The respondents rely upon the holdings at first instance and in the intermediate appellate Court, that the appellant was in breach of a duty of care owed to the first respondent and that that breach caused, or significantly or materially increased, the risk of injury to him.

133 The respondents initially put their submission on the first issue in very broad terms indeed. They said that the scope of the duty of care owed by a landlord in control of commercial premises to employees of its tenants is to minimise the risk of injury to them by criminal acts of third parties, whenever it is reasonably foreseeable that criminal conduct may take place, and the cost of minimising or eliminating that risk is reasonable.

134 The submission goes beyond any formulation of the duty to be found in any of the decided cases in this country. If accepted it would, in many cases, elevate the duty owed by a landlord to the person with whom he or she is in a contractual relationship, the tenant, beyond the duty owed by the tenant to his or her employee. That this may be so is apparent from the facts of this case. Electricity supply was the subject of specific provision in the lease. It could equally have been the subject of specific provision that certain lights would remain on during designated hours if the tenant and the appellant were *ad idem* on that matter and chose to include it in their contract. If, as a matter of contract between the landlord and the tenant, the former were not obliged to illuminate the car park until after the shop ceased to trade at night, a court should, in my opinion be slow to impose a duty to do so, in favour of an employee of the tenant by reason of the fact of the tenancy or otherwise. It is common knowledge that a variety of lights, spotlights, floodlights, and lights that may be activated by the passage of a person or object across a space are readily available. Indeed the respondents' case effectively acknowledges this to be so. There appears to be no reason why the tenant itself did not seek the appellant's permission either to install lights of these kinds, or to implement other measures for the safety of the first respondent. The evidence was that after the assault the tenant did in fact provide a spotlight or spotlights. The closing of the shop and the first respondent's movement from it to his car park were clearly incidents of his employment. The evidence leaves unexplained why such measures were not

adopted by the tenant[129]. I only discuss the relationship between the appellant, the tenant, and the first respondent because the respondents seek to elevate it to a special relationship, as a basis for the imposition of a duty of care upon the appellant as landlord to the first respondent as employee of the tenant. Nothing turns in my opinion upon any such relationship. There was, in the circumstances, no relevant difference between the duties owed to other lawful entrants upon the car park and the respondent.

135 The submission suffers further defects. It refers to "criminal conduct". The question immediately presents itself, what sort of criminal conduct, all criminal conduct; conduct by way of assault and robbery; conduct by way of criminally negligent driving of a motor vehicle in the car park; stalking of a woman in the car park? The possibilities are many and varied. By parity of reasoning, on the respondents' broad submission, the appellant could possibly be held[130] liable in similar circumstances for money stolen from users of the automatic teller machine, people coming to service it, and delivery people, as well as their employees, and for injuries inflicted upon them by violent criminals.

136 The submission speaks of the reasonable foreseeability of criminal conduct. The problem about criminal conduct is that at one and the same time, it may be both unpredictable in actual incidence, wanton and random, and, on that account, always on the cards. In that sense, that a criminal may be actuated to commit a criminal act against property or person, in situations of varying degrees of security, including a high degree of security is always foreseeable. Furthermore, it will never be possible to eliminate entirely, or indeed "substantially minimise"[131], as the respondents' submission and the language of the Full Court would have it, the risk of injury by a criminal act. All that will be possible is some reduction in the risk. As Weintraub CJ of the Supreme Court of New Jersey said in *Goldberg v Housing Authority of the City of Newark*[132]:

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129 It may be taken that the tenant was neither sued nor joined by reason of s 54 of the *Workers Rehabilitation and Compensation Act* abolishing causes of action by employees against employers for damages for personal injury.

130 The lease here purported expressly to exempt the appellant from liability to the tenant or its employees from loss or theft.

131 The *Shorter English Oxford Dictionary,* 3rd ed (1944) relevantly defines "minimum" to mean, among other things "the least amount attainable". To require minimisation would literally be to require reduction in risk to the point almost of elimination.

132 186 A 2d 291 at 293 (1962).

> "Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable."

137 Is it possible to frame a narrower, acceptable proposition applicable to the facts of this case to support the decision in favour of the respondents? As I have already suggested, foreseeability alone is not enough to found a duty. As Brennan J said in *Sutherland Shire Council v Heyman*[133], "[s]ome broader foundation than mere foreseeability must appear before a common law duty to act arises." And as Deane J said in the same case[134]:

> "That being so, reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of case in which such proximity of relationship will be found to exist are properly to be seen as special or 'exceptional': cf per Dixon J in *Smith v Leurs*[135] and *Dorset Yacht Co Ltd v Home Office*[136]."

138 In all relevant respects the appellant was the occupier of the car park. It may readily be accepted that in that capacity it certainly owed a duty of care to the first respondent, a duty, the content of which would have been at least as great as that owed to any other lawful entrant upon the car park, but the question is whether the duty extended to the anticipation and prevention of the criminal conduct that occurred in the circumstances of this case.

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133 (1985) 157 CLR 424 at 479.

134 (1985) 157 CLR 424 at 502.

135 (1945) 70 CLR 256 at 262.

136 [1970] AC 1004 at 1038-1039, 1045-1046, 1055 and 1060.

139 The respondents relied on statements by members of this Court in *Romeo v Conservation Commission of the Northern Territory*[137]. Among these were the observations of McHugh J[138]:

> "Since *Zaluzna*, the duty of a public authority is to take reasonable care in all the circumstances of the case. Once a risk of injury to an entrant on the premises is reasonably foreseeable, the duty requires the authority to eliminate that risk if it is reasonable to do so having regard to 'the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the [authority] may have.'[139]"

However, foreseeability there was not sufficient of itself to found an obligation upon the statutory occupier to erect a fence upon an obvious cliff to prevent a drunken entrant from falling from it.

140 In *Smith v Leurs*, Dixon J pointed out that in practice a different rule generally applies to the control of actions or conduct of third persons. His Honour said[140]:

> "But, apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or

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137 (1998) 192 CLR 431 at 456-458 [61]-[65] per Gaudron J, 460 [75] per McHugh J, 476-479 [117]-[124] per Kirby J, 487-488 [149]-[152] per Hayne J.

138 (1998) 192 CLR 431 at 460 [75].

139 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

140 (1945) 70 CLR 256 at 261-262.

> property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child inflicting intentional damage on others or causing damage by conduct involving unreasonable risk of injury to others[141]."

141 In my opinion there is nothing exceptional about the relationship between the parties here such as to create, in the language of Dixon J[142] a "special relations[hip]" between them.

142 The three cases[143] relied on by the respondents in which injuries were inflicted by criminals can, in my opinion, be put to one side because the injuries were sustained by employees, and it was the employer, as employer, who was held liable for them.

143 In the United States, since the decision in *Kline v 1500 Massachusetts Ave Apartment Corp*[144] some State Supreme Courts have recognized that the scope of the duty owed by the owner of a shopping centre to maintain common areas within its possession and control may include protection against criminal acts of third parties[145]. Those decisions generally take into account the "probability" or

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141 Salmond, *Torts*, Ch 3, s 17:6 (at 69 of 9th ed (1936)); Winfield, *Torts*, 2nd ed (1943) at 105; *American Restatement of Law, Torts, Negligence*, §315, §316; *Bebee v Sales* (1916) 32 TLR 413; *Brown v Fulton* (1881) 9 Rettie 36; cf *North v Wood* [1914] 1 KB 629; *Black v Hunter* (1925) 4 DLR 285; *Kennedy v Hanes* (1940) 3 DLR 499 at 509-510; *Edwards v Smith* (1940) 4 DLR 638.

142 The views of Dixon J in *Leurs* were cited with apparent approval by Viscount Dilhorne in *Dorset Yacht Co* [1970] AC 1004 at 1045-1046 and Lord Pearson at 1055.

143 *Public Transport Corporation v Sartori* [1997] 1 VR 168*; Chomentowski v Red Garter Restaurant Pty Ltd* (1970) 92 WN(NSW) 1070 approved in *March v Stramare* (*E & M H) Pty Ltd* (1991) 171 CLR 506; and *Fraser v State Transport Authority* (1985) 39 SASR 57.

144 439 F (2d) 477 (1970).

145 *Johnston v Harris* 198 NW 2d 409 at 410 (1972) (Michigan), *McClung v Delta Square Limited Partnership* 937 SW 2d 891 (1996) (Tennessee); *Sun Trust Banks Inc v Killebrew* 464 SE 2d 207 (1995) (Georgia); *Sturbridge Partners Ltd v Walker* 482 SE 2d 339 (1997) (Georgia); *Ann M v Pacific Plaza Shopping Center* 6 Cal 4th 666, 863 P 2d 207 (1993) (California) *Restatement of the Law of Torts* (2d) at §§ 302B, 315, 344, 448 and 449 (1965); *Piggly Wiggly Southern v Snowden* 464 SE 2d 200 (1995) (Georgia); *Butler v Acme Markets* 89 NJ 270 (1982) (New Jersey); *Holley v Mt Zion Terrace* 382 So 2d 98 (1980) (Florida).

(Footnote continues on next page)

otherwise of the occurrence of criminal activity[146]. I would however (with appropriate adaptations to the facts of this case) adopt, on this issue the language of Mason P in *WD & HO Wills v State Rail Authority of New South Wales* [147]:

> "Nevertheless, I confess to difficulty in seeing that the existence of duty turns upon the level of probability of harm ensuring. There may be a very high probability that criminal activity causing harm may take place in certain areas of Sydney, but *non constat* that the occupier or adjacent neighbour has a duty of care to those who suffer. The mechanism of foreseeability is ultimately an unsatisfactory touchstone of a duty of care in this area.[148]"

144 In Canada there are cases in which the scope of the duty owed by a landlord[149] has been held to include the protection of tenants from the criminal acts of third parties[150]. In one of these a duty was conceded, and in the other, the Court held that there had been an assumption of responsibility.

145 In *Stansbie v Troman*[151] the Court of Appeal held that the scope of duty of care owed by a decorator to a householder with respect to the state of the premises included the locking of the premises so as to protect them from criminal entry. But the case turns on its own facts, including the contractual relationship between the parties. It provides no basis for any rule of general application. In *Smith v Littlewoods Ltd*[152] a case which involved a lockfast, derelict cinema,

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But see also *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 201 and the cases cited there.

146 For example, in *Foster v Winston-Salem Joint Venture* NC 281 SE 2d 36 (1981) (North Carolina) an actual case of an assault (upon a customer) in a car park, there had been 36 incidents of criminal conduct in the previous year (at 37). However, Carlton J (at 41-42) in dissent in that case made similar observations to those of Mason P and Weintraub CJ which I have quoted.

147 (1998) 43 NSWLR 338 at 359.

148 See also *Smith v Littlewoods Ltd* [1987] AC 241 at 279 per Lord Goff of Chieveley.

149 See *Allison v Rank City Wall Canada* (1984) 6 DLR (4th) 144 and *Q v Minto Management Ltd* (1985) 49 OR (2d) 531.

150 See Linden, *Canadian Tort Law*, 5th ed (1993) at 352-355.

151 [1948] 2 KB 48.

152 [1987] AC 241.

Lord Goff of Chieveley applied the principles expressed in *Dorset Yacht Co Ltd v Home Office*[153], but in doing so his Lordship did not define the "negligence" to which he referred in the context of the prevention or deterrence of criminal activity generally[154]:

> "That there are special circumstances in which a defender may be held responsible in law for injuries suffered by the pursuer through a third party's deliberate wrongdoing is not in doubt … But there is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonaby foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer."

In the event however the House of Lords held that no relevant duty of care existed in that case[155].

146 The *Dorset Yacht Co Ltd v Home Office*[156] case is, I think, a very special one. As Lord Reid[157] pointed out, the Borstal Officers negligently failed to carry out their orders with respect to the young offenders whom they were obliged to keep under proper supervision and restraint. Lord Pearson[158] expressly found a special relationship of an exceptional kind as referred to by Dixon J in *Leurs*. It is clearly distinguishable from this case.

147 I have come to the conclusion that the duty owed by the appellant to the first respondent in the circumstances of this case did not extend to a positive obligation to keep the lights illuminated on the towers, or any tower, until after the shop closed. That does not mean that there can never be a duty, whether dischargeable by turning lights on, or otherwise to take precautions to prevent or reduce the chances of criminally inflicted injury or loss by third parties.

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153 [1970] AC 1004.

154 [1987] AC 241 at 272-273.

155 For an analysis of the speeches in that case see Mason P in *WD & HO Wills v State Rail Authority of New South Wales* (1998) 43 NSWLR 338 at 358-359.

156 [1970] AC 1004.

157 [1970] AC 1004 at 1031.

158 [1970] AC 1004 at 1055.

However, as Dixon J in *Leurs* said, for such a duty to arise, there must be something special in the circumstances, or the nature of the relationship between the plaintiff and the defendant. I do not consider that anything of that kind exists here.

148 That is enough to dispose of the case but as the issue of causation was fully argued I will deal with it also.

149 It was submitted by the respondents that there were concurrent findings of fact at first instance, and in the Full Court in their favour on this issue. On close examination however, I do not think that this is so. The primary judge, David J, said, in discussing the evidence of a criminologist called by the respondents, that it was a "common sense conclusion" that the victim of an attack such as this one was far more "vulnerable" in a dark environment than a well lit one.

150 In the Full Court Mullighan J (with whom Nyland J agreed) and Olsson J endorsed the reasoning on causation of the primary judge, the latter going so far as to say that "it [was] against common sense to suggest that causation had not been established in this case."[159] That four judges have so concluded is a powerful consideration. But to hold that something was likely to happen "as a matter of common sense" is not quite the same as to make a positive finding of fact on disputed facts. It is to assume that a common view should, and would be taken of particular events by all or most sensible people. It is at most to draw an inference from facts. But more significantly, it involves the further assumption that all or most criminal conduct is actuated by, and proceeds according to considerations of common sense. Assumptions about dictates of common sense can often be dangerous. It by no means strikes me as a matter of common sense that the absence of the relevant lighting in this case made the attack here inevitable, or caused, or indeed even invited it. The plans of the centre which were tendered showed that it would have been a very simple matter for the assailants to have concealed themselves behind the wall in front of the chemist shop or the bank, and possibly shrubs, and in other places, or behind the first respondent's car. Indeed, the first respondent's evidence in the following exchange goes some way to accepting this to be so and that lighting or not he was always at risk:

> "Q. So you were always at risk, weren't you, that someone might be hiding around the corner or coming from – looking at [the exhibit] if someone was approaching along the side of the building say from the Sizzler direction walking along the footpath immediately outside, you'll have difficulty locating them.

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159 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (1999) 204 LSJS 212 at 212.

A. That's right."

151 In the circumstances, I do not consider that the absence of lighting caused, or in any material or significant sense, increased the risk of injury to the first respondent[160].

152 What strikes me as very likely, and at least as likely as the competing inference, is that the assailants, having brought their bat with them to commit an assault, would not take it home without first using it for that purpose, lighting or not. In short, in my opinion, the respondents' case should have failed on the issue of causation as well as the issue of duty of care.

153 I would allow the appeal with costs and order that the respondents pay the appellant's costs of the trial and the appeal to the Full Court.

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160 See *Chappel v Hart* (1998) 195 CLR 232.