HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

SANDRA NEINDORF APPELLANT

AND

MARTA JUNKOVIC RESPONDENT

Neindorf v Junkovic
[2005] HCA 75
8 December 2005
A36/2005

ORDER

1. *Appeal allowed.*

2. *Set aside pars 1, 2 and 3 of the orders of the Full Court of the Supreme Court of South Australia made on 15 October 2004 and, in their place, order that the appeal to that Court be dismissed.*

3. *Appellant to pay the respondent's costs in this Court.*

On appeal from the Supreme Court of South Australia

Representation:

R J Whitington QC with K G Nicholson for the appellant (instructed by Thomson Playford Lawyers)

S Walsh QC with A Rossi for the respondent (instructed by Moody Rossi & Co)

CATCHWORDS

Neindorf v Junkovic

Negligence – Occupiers' liability – Breach of duty of care – Appellant invited the public to attend a garage sale – Garage sale conducted on the driveway of her residence – Driveway surface was uneven – Respondent entered premises and tripped on driveway – Whether risk posed by the uneven surface of the driveway was obvious and relatively minor and whether such considerations justified conclusion that there was no breach of duty of care.

Negligence – Occupiers' liability – Whether appellant owed a duty of care to the respondent – Scope of duty – Relationship between the duty of care and other elements of the tort of negligence – Relevance of obviousness of the risk.

Negligence – Occupiers' liability – Standard of care – Whether appellant breached duty of care – Nature and extent of the premises – Nature and extent of the danger – Significance of economic relationship between the parties – Significance of the respondent's age – Significance of the appellant's knowledge of the danger – Absence of any precautionary measures – Reasonableness of taking precautionary measures – Relevance of obviousness of the risk – Relevance of inattention by the respondent – Relevance of the application to the evidence of the *Wrongs Act* 1936 (SA).

Words and phrases – "obvious risk".

Civil Liability Act 1936 (SA), s 20.
Wrongs Act 1936 (SA), s 17C.

1 GLEESON CJ. The outcome of this case turns upon the application, to an uncomplicated set of facts, of a provision of the *Wrongs Act* 1936 (SA) ("the Act"), which prescribes the matters a court is to take into account in determining the standard of care to be exercised by the occupier of premises. The facts, and the relevant provision of the Act (s 17C), are set out in the reasons of Callinan and Heydon JJ.

2 The respondent suffered injury when she tripped on an uneven surface in the driveway of the appellant's home while attending a garage sale, and fell.

3 It is common ground that the appellant, as occupier of the premises, owed the respondent a duty of care. The issue concerns the standard of care owed by the appellant to the respondent, and whether there was, in the circumstances of the case, a breach of duty. In former times, the common law would have approached that issue by seeking to fit the respondent into one of a number of fixed categories by reference to which an appropriate standard of care was determined. The approach was described by Professor Fleming in 1957 as follows[1]:

> "Liability for physical injuries caused by the dangerous condition of land, though a branch of the law of negligence, has attracted its own, highly complex, pattern of legal rules and has so far withstood the general tendency to measure the existence and scope of duties of care by the broad standards of foreseeability of injury and reasonable conduct. Instead, the judicial approach to this problem, which was formulated during the nineteenth century prior to the final settlement of the conditions of liability for actionable negligence, divides persons entering on land into classes, fixed by reference to the purposes of their visit, with corresponding standards of care owed to each category. Starting from the basic premise that ordinarily a man should be allowed to do with his land as he pleases, the courts have been prepared to qualify this privilege only in favour of persons who have, so to speak, earned their right to protective care. The distinction between different classes of visitors is, therefore, drawn according to the degree of benefit derived by the occupier from their presence, and corresponding to it, in rough correlation, is an ascending standard of care in the preparation of the premises which may be expected by each class for its reception. … Thus, the accepted technique employed in these cases is, first, to determine the legal category to which the individual visitor belongs, and secondly, to apply a precisely defined standard of duty prescribed for the benefit of that class."

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1 Fleming, *The Law of Torts*, (1957) at 428.

4 That was the approach of the common law in Australia until well past the middle of the twentieth century. Far from enshrining notions of protective communalism, it began, as Professor Fleming said, with the basic premise that ordinarily a person should be able to do with his or her land what that person pleases. Very few occupiers keep their land in perfect repair. People are permitted to occupy, and some people can only afford to occupy, premises that are in a state of some disrepair. Legislative and regulatory incursions upon the general proposition that a landowner may use land as the landowner sees fit, extensive as they have been, have never gone to the point of requiring people to remove all potential hazards from their land. It would not be possible to comply with such a requirement.

5 Professor Fleming went on in the same passage to point out that the categorical approach to issues of standard of care in cases of occupiers' liability produced unrealistic distinctions and capricious results. The present case provides an example. Invitees used to be distinguished from licensees, and invitees included persons who entered land for business dealings, such as the customers of a shop. Why the standard of care owed to somebody who attends a garage sale at a suburban dwelling house should be different from that owed, for example, to someone who attends the same premises for a gathering to raise funds for charity, or for a purely social occasion, is not clear. A garage sale at a suburban house must be very close to the borderline, if there is to be a borderline, between commercial and social activity.

6 It was not until the 1980s that the common law of Australia abandoned the approach described by Professor Fleming. In 1987, in *Australian Safeway Stores Pty Ltd v Zaluzna*[2], this Court approved what, in 1984, had been said by Deane J in *Hackshaw v Shaw*[3]:

> "... it is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both of a special duty qua occupier and an ordinary duty of care was owed. All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the

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2 (1987) 162 CLR 479 at 488.

3 (1984) 155 CLR 614 at 662-663.

> discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk."

7 The reference in that passage to proximity as a test for determining the existence of a duty of care has been overtaken by later authority, but that is beside the present point. This is not a case about whether there was a duty of care. Ordinary dwelling houses contain many hazards which give rise to a real risk of injury. Most householders do not attempt to eliminate, or warn against, all such hazards.

8 This development in the common law resulted in a generalised standard of care, described as what a reasonable person would, in the circumstances, do by way of response to a foreseeable risk. Developments in legal principle do not, however, alter the practical realities to which legal principle must be applied. The same problems of everyday living that were sought to be addressed by the old, categorical approach to liability still had to be accommodated by the new approach. Those practical realities include the following. Not all people live, or can afford to live, in premises that are completely free of hazards. In fact, nobody lives in premises that are risk-free. Concrete pathways crack. Unpaved surfaces become slippery, or uneven. Many objects in dwelling houses could be a cause of injury. People enter dwelling houses for a variety of purposes, and in many different circumstances. Entrants may have differing capacities to observe and appreciate risks, and to take care for their own safety. An ordinary kitchen might be reasonably safe for an adult, and hazardous to a small child. The expression "reasonable response in the circumstances" raises a question of normative judgment which has to grapple with all the practical problems that the law had earlier attempted to solve in the manner described by Professor Fleming. The problems did not disappear. They now require consideration under a somewhat different rubric. The fundamental problem remains the extent to which it is reasonable to require occupiers to protect entrants from a risk of injury associated with the condition of the premises. That problem is no longer addressed by prescriptive legal rules which attempt to establish precise and different standards of care for different classes of entrant. Yet the problem remains.

9 It is a matter upon which different views are legitimately open. When courts refer to "community values", they may create an impression that such values are reasonably clear, and readily discernible. Sometimes a judge might be attributing his or her personal values to the community with little empirical justification for a belief that those values are widely shared. Reasonableness, however, is not a matter of legal prescription. That was the fundamental weakness of the old approach to occupiers' liability. It was for the very purpose of avoiding that error that the new, more flexible, approach was adopted.

10 It has been many years since questions such as these were resolved in South Australia by juries. The jury system had the advantage of committing a

judgment on reasonableness to the collective wisdom of a group of citizens chosen at random from the community. The divergence of judicial opinion in the present case upon what is essentially a question of the reasonableness of the behaviour of a householder probably reflects a diversity of opinion that would exist through the whole community. Such diversity is exposed when decisions are made by judges, who give reasons for their decisions, rather than by jurors, who simply deliver an inscrutable verdict.

11 In South Australia, the Parliament has intervened to an extent. Rather than rest with a standard of care at the level of generality expressed in *Hackshaw* and *Zaluzna*, the South Australian Parliament, in Pt 1B of the *Wrongs Act* 1936 (SA)[4], gave directions to courts as to what was to be taken into account in determining the standard of care to be exercised by an occupier of premises. Section 17C(2) listed a series of matters, all of which go to questions of reasonable response to risk, and concluded by referring to "any other matter that the court thinks relevant". The matters listed in pars (a) to (g) of s 17C(2) included factors that, in one way or another, were taken into account in the old common law categories, but the inflexibility of the old approach was not revived. Section 17C(3) then provided:

> "(3) The fact that an occupier has not taken any measures to eliminate, reduce or warn against a danger arising from the state or condition of premises does not necessarily show that the occupier has failed to exercise a reasonable standard of care."

12 That, from one point of view, is a statement of the obvious. If doing nothing about a hazard were of itself sufficient to constitute negligence, there would probably not be an occupier of land in South Australia who could pass that test. It is, however, a useful reminder to decision-makers. The kind of hazard involved in the present case illustrates why that is so. The hazard was an unevenness in the surface of land which could cause a person to trip and fall. There would be few, if any, suburban houses that do not contain hazards of that kind.

13 A similar reminder is to be found in par (g) of s 17C(2), which requires the court to take account of:

> "(g) the extent *(if at all)* to which it would have been *reasonable* and practicable for the occupier to take measures to eliminate, reduce or warn against the danger." (emphasis added).

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4 Now Pt 4 of the *Civil Liability Act* 1936 (SA).

14 The response of most people to many hazards in and around their premises is to do nothing. The legislature has recognised, and has reminded courts, that, often, that may be a reasonable response. Whether, in any particular case, it is a reasonable response is not a matter of legal doctrine. It is not a question of law. It is a question that, historically, courts committed to juries as a question of fact. Judges will have their own opinions about reasonableness, but they are not opinions of law[5].

15 In the Supreme Court of South Australia, two judges (Besanko J at first instance, and Doyle CJ in dissent on appeal) considered that the conduct of the appellant did not constitute a failure to take reasonable care for the safety of the respondent. The unevenness of the surface on which the respondent tripped was so ordinary, and so visible, that reasonableness did not require any action on the part of the occupier. Two judges (Nyland J and Gray J) came to a different view.

16 Like Hayne J and Callinan and Heydon JJ, and substantially for the reasons given by them, I agree with the conclusions reached by Besanko J and Doyle CJ.

17 I agree with the orders proposed by Hayne J.

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5 cf *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 474 [44]-[45], 500 [127].

18 KIRBY J. This appeal concerns the law of negligence. It comes from a judgment of the Full Court of the Supreme Court of South Australia[6]. That Court, by majority[7], found in favour of the plaintiff, Ms Marta Junkovic (the "respondent"). It reversed the decision of Besanko J who had found in favour of the defendant, Ms Sandra Neindorf (the "appellant")[8]. That decision had, in turn, reversed the orders of the primary judicial officer, Mr A A Grasso SM[9]. He had found for the respondent. By special leave, the appellant appeals to this Court seeking restoration of the judgment ordered by Besanko J.

19 Such disparity in judicial outcomes in an otherwise unremarkable case suggests that legal doctrine in this field of law has become uncertain or unstable. In recent years, such uncertainty and instability has been introduced by changes in the basic rules applicable to negligence liability. Such changes are, in no small part, the product of legislation enacted in all Australian jurisdictions since 2001[10], designed to effect "tort law reform"[11]. But, in part, the changes have also come about as a result of decisions of this Court. Changing attitudes in this

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6 *Junkovic v Neindorf* (2004) 89 SASR 572.

7 Gray J and Nyland J concurring; Doyle CJ dissenting.

8 *Neindorf v Junkovic* (2004) 88 SASR 162.

9 *Junkovic v Neindorf* unreported, Magistrates Court of South Australia, 26 November 2003.

10 In South Australia see for example *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA), amending the *Wrongs Act* 1936 (SA) ("Wrongs Act"), and *Law Reform (Ipp Recommendations) Act* 2004 (SA), resulting in the renaming of the Wrongs Act as the *Civil Liability Act* 1936 (SA). Elsewhere see *Trade Practices Amendment (Liability for Recreational Services) Act* 2002 (Cth); *Civil Liability Act* 2002 (NSW); *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW); *Wrongs and Other Acts (Law of Negligence) Act* 2003 (Vic); *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic); *Civil Liability Act* 2003 (Qld); *Personal Injuries Proceedings Act* 2002 (Qld); *Civil Liability Act* 2002 (WA); *Civil Liability Act* 2002 (Tas); *Volunteers (Protection from Liability) Act* 2002 (WA); *Civil Law (Wrongs) Act* 2002 (ACT); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT); *Personal Injuries (Civil Claims) Act* (NT).

11 See Skene and Luntz, "Effects of tort law reform on medical liability", (2005) 79 *Australian Law Journal* 345 at 345-348; Underwood, "Is Ms Donoghue's snail in mortal peril?", (2004) 12 *Torts Law Journal* 39; Cane, "Reforming Tort Law in Australia: A Personal Perspective", (2003) 27 *Melbourne University Law Review* 649.

Court to the content of the common law of negligence have resulted in a discernible shift in the outcomes of negligence cases[12]. According to Professors Skene and Luntz, "[t]he common law, as emanating from the High Court of Australia, was already moving to a much more restrictive attitude towards the tort of negligence."[13] Now the shift has been accelerated by statute.

20 This trend was reflected in the rejection by this Court of the *Caparo* test for the establishment of a duty of care[14]. That test is followed in most other jurisdictions of the common law[15]; but not in Australia[16]. One reason for rejecting *Caparo*, for the ascertainment of the existence (and hence the scope) of a duty of care in negligence, was said to be that it involves the courts too directly in addressing expressly questions of legal and social policy[17] – matters that should be left to Parliament. Yet the shift in judicial outcomes in negligence cases plainly derives from a shift in legal policy, albeit one that is not usually spelt out by judges as *Caparo* would require.

21 Now, another case presents a defendant's attempt to have this Court alter course, this time from an approach expressed in 1982[18]. Because this change of

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12 Luntz, "Editorial Comment: Round-up of cases in the High Court of Australia in 2003", (2004) 12 *Torts Law Journal* 1 at 1-2; Luntz, "Turning Points in the Law of Torts in the Last 30 Years", (2003) 15 *Insurance Law Journal* 1 at 22; Luntz, "Torts Turnaround Downunder", (2001) *Oxford University Commonwealth Law Journal* 95.

13 Skene and Luntz, "Effects of tort law reform on medical liability", (2005) 79 *Australian Law Journal* 345 at 363.

14 After *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618; cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 420-427 [246]-[254]; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 476-477 [117]-[121], 484-485 [138]-[140]; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 286-291 [289]-[302]; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 80-86 [223]-[235]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 604-605 [241].

15 Including recently in the Fiji Islands Supreme Court: *Pacoil Fiji Ltd v Attorney-General (Fiji)* unreported, (Gault, Mason and French JJ), 11 July 2003.

16 *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49]; cf *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626 [238] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 572-573 [158]-[159].

17 cf *Woolcock* (2004) 216 CLR 515 at 593 [229].

18 *Webb v South Australia* (1982) 56 ALJR 912; 43 ALR 465.

course would involve a departure from previous doctrine; undermine responsibility towards legal neighbours that lies at the heart of the modern tort of negligence[19]; and weaken attention to accident prevention[20], I cannot agree with it.

22 In my view, the approach of the majority in the Full Court to the law of negligence was correct. This appeal should be dismissed. This Court should call a halt to the erosion of negligence liability and the substitution of indifference to those who are, in law, our neighbours. The erosion, and the indifference, has gone far enough. This appeal therefore involves important questions of legal principle and approach[21].

The facts

23 On 3 February 2000, the appellant placed an advertisement in the *Trading Post*, a specialist newspaper, advertising a garage sale to be conducted at her home in the weekend 5-6 February 2000. According to the evidence, the appellant had previous experience in conducting garage sales[22]. Such activities are common in the suburbs of Adelaide, where the appellant's home was situated, and elsewhere throughout Australia.

24 The incident out of which the respondent's claim arose happened on 5 February 2000 at about 8.40 am. The day was clear and sunny. The appellant's property included a concrete driveway extending from a carport annexed to the house to the public footpath and road. The driveway comprised sections of concrete joined in an expansion joint which extended throughout its length[23]. The appellant placed a variety of domestic articles for sale on a trestle table situated on the southern side of the driveway close to the carport. Prospective purchasers had no alternative but to approach the goods by walking over the driveway. The appellant expected a volume of pedestrian traffic to attend the sale. She knew, or ought reasonably to have known, of the disparity in the levels of the adjoining concrete slabs in the forecourt of her home. Although the

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19 See Linden, "Torts Tomorrow–Empowering the Injured" in Mullany and Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (1998) 321 at 330.

20 See esp *McLean v Tedman* (1984) 155 CLR 306 at 313; *Bankstown Foundry Pty Ltd v Braistina* [1985] Aust Torts Reports ¶80-713 at 69,127 quoted in *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307.

21 Contra reasons of Hayne J at [92] and Callinan and Heydon JJ at [99].

22 (2004) 89 SASR 572 at 598 [106] per Gray J.

23 (2004) 89 SASR 572 at 574 [2] per Doyle CJ, 581 [52] per Gray J.

respondent was questioned in a manner suggesting that she had visited the property on the evening before the sale, this suggestion was rejected at trial. It was not pursued in this Court and can be ignored.

25 The respondent entered the appellant's premises wearing slip-on shoes. She walked towards the trestle table. To do this, she had to cross the divide in the concrete slabs. An object caught her eye, presumably one of the garden or other items for sale on the trestle table. At that point, her right foot rolled on the elevation of one concrete slab as it adjoined the adjacent slab. The respondent, a woman then aged 53, fell towards the ground, touching it but then regaining her footing. In the course of this motion, she felt a crack in her right foot. This was later diagnosed as having caused a fracture.

The decision at first instance

26 The respondent sued the appellant in the Magistrates Court of South Australia claiming damages for negligence. At trial, the appellant's counsel successively suggested that the respondent had fallen on the public footpath, at another point in the forecourt or in or near a drain hole. All of these suggestions were rejected. The magistrate accepted the veracity of the respondent's version of events and was unimpressed by evidence tendered in the appellant's case.

27 Although the division between the concrete slabs constituting the driveway was clear enough, the respondent had not noticed the variation in the height of the adjoining slabs. This discrepancy measured 10-12 mm (approximately half an inch on the old scale). Her failure to notice the uneven surface was ascribed by the magistrate to inadvertence occasioned by the fact that the appellant was not looking at her feet but was attracted by one of the items displayed for sale, just as the appellant intended her to be.

28 The magistrate concluded that the appellant, having invited visitors such as the respondent who would be unfamiliar with the premises to enter the forecourt and, having placed goods in a position where they could distract attention from the unevenness of the driveway, owed a duty of care to prevent injury from reasonably foreseeable hazards. The magistrate also concluded that simple and inexpensive steps could and should have been taken to diminish, or eliminate, the particular hazard presented to the respondent. He found that such steps included placing a strip of paint along the uneven sides of the slabs to draw attention to them or placing the trestle table over the expansion joint so that persons, such as the respondent, approaching the table, would not have to traverse the uneven surfaces. Accordingly, the magistrate entered judgment in favour of the respondent for $24,464. He rejected the defence of contributory negligence. One might say an unremarkable outcome to an unremarkable case. But, truly, these are remarkable times for the tort of negligence in Australia.

The decisions of the Supreme Court of South Australia

29 *Decision of the single judge*: The appellant appealed to the Supreme Court[24]. In that Court, Besanko J reversed the finding of the magistrate. In his reasons, Besanko J considered that the respondent's case was most closely analogous to the decision of this Court in *Ghantous v Hawkesbury City Council*[25]. That was a case where an elderly pedestrian sued a local government authority for negligence in respect of the maintenance and upkeep of a public footpath. The plaintiff, Mrs Ghantous, who had moved to the side of the footpath in question, slipped on a verge of 50 mm which had developed at one point where the footpath joined the nature strip. She fell and injured herself. Besanko J applied the following statement in the joint reasons in *Ghantous* of Gaudron, McHugh and Gummow JJ[26]:

> "As Callinan J points out in his reasons ... persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes."

30 Extrapolating from this statement, which he regarded to be a legal principle of general application, Besanko J found that the duty of care of the occupier of a domestic property did "not extend to include risks which are obvious and which it is well known are likely to be encountered and which, in all the circumstances, an entrant may reasonably be expected … to notice and avoid"[27]. Applying this finding to the case, Besanko J held that the unevenness at the point at which the respondent had fallen "was not an uncommon or unexpected feature of a domestic property, and it was clearly visible and obvious"[28]. His Honour accepted that different considerations might arise where a defendant was conducting a commercial enterprise[29]. But he considered that the instant case was not to be so classified and that the appellant's commercial activity "was a one-off activity, and a low level activity in the sense that large numbers of people were not likely to enter the property"[30], emphasising that the

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24 Pursuant to the Magistrates Court Act 1991 (SA) s 40(1).

25 (2001) 206 CLR 512. See (2004) 88 SASR 162 at 167 [20].

26 (2004) 88 SASR 162 at 167 [22] referring to (2001) 206 CLR 512 at 581 [163].

27 (2004) 88 SASR 162 at 169 [34].

28 (2004) 88 SASR 162 at 171 [42].

29 (2004) 88 SASR 162 at 171 [43].

30 (2004) 88 SASR 162 at 171 [43].

property was at all times a domestic property. Accordingly, he declined to "expand the scope of the duty of care so as to include within it the unevenness at the point where the plaintiff fell"[31].

31 Cognisant of the possibility of a further appeal, Besanko J considered and rejected the appellant's argument that, if there were a duty of care, with a scope extending to the present case, the respondent's claim failed on the basis of causation. He said that, upon this hypothesis, assuming the existence of a duty of care, there was no error in the magistrate's finding that the preventative measure of placing the table over the point of unevenness in the concrete would have avoided the respondent's fall and damage[32]. However, Besanko J held that, upon an assumption of a duty of care, the respondent had failed to take reasonable care for her own safety. He would have reduced her damages by 30 per cent for contributory negligence[33]. But the outcome of the appeal was dismissal of the respondent's claim.

32 *Decision of the Full Court*: In the Full Court, the majority reasons were given by Gray J (with whom Nyland J agreed). His Honour started his analysis by reference to the provisions of the Wrongs Act, Pt 1B, introduced in 1987[34]. In that Part of the Act, the Parliament of South Australia has redefined, and expressly provided for, an "occupier's duty of care".

33 Gray J found that the duty of South Australian courts was to approach the liability of the appellant by reference to the "code" expressed in the Wrongs Act which, he concluded, substantially reflected concurrent changes in the common law introduced by the decision of this Court in *Australian Safeway Stores Pty Ltd v Zaluzna*[35]. This coincidence of legal developments was subject to the duty of South Australian courts to address specifically the considerations relevant to the existence and non-existence of a duty of care, and the standard of such duty, as spelt out in s 17C of the Wrongs Act[36].

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31 (2004) 88 SASR 162 at 172 [44].

32 (2004) 88 SASR 162 at 172 [49].

33 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 484 following *Hackshaw v Shaw* (1984) 155 CLR 614 at 662.

34 See *Wrongs Act Amendment Act* 1987 (SA).

35 (1987) 162 CLR 479.

36 (2004) 89 SASR 572 at 588-591 [80]-[84]; 598 [109].

34 In Gray J's opinion, *Ghantous* did not govern this case, being concerned with the different issue of the liability owed by a public authority in respect of public places[37]. Addressing the liability of the appellant, Gray J concluded that the open invitation to members of the public, including the very young, the mentally or physically disabled, the elderly and the frail, imposed on the appellant a duty of care the scope of which extended to the cause of the respondent's injury. This was especially so, in his Honour's opinion, taking into account considerations of accident prevention[38] and the commercial interest which the appellant had in opening her property to all comers.

35 Because there were simple steps that could have been taken to guard against the danger in the premises, of which the appellant would have been aware and with which the respondent was unfamiliar, Gray J concluded that the judgment for the respondent should be restored[39]. However, he agreed with Besanko J's assessment of contributory negligence and, accordingly, favoured the entry of judgment for the respondent in a sum reduced by 30 per cent[40]. That sum was later reflected in the judgment of the Full Court.

36 In his dissenting reasons, Doyle CJ accepted that the appellant owed the respondent a duty of care of some kind[41]. He also accepted that *Ghantous* was a special case, delivered concurrently with *Brodie v Singleton Shire Council*[42], and addressed fundamentally the previously anomalous immunity of highway authorities for nonfeasance in respect of the upkeep of highways[43].

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37 (2004) 89 SASR 572 at 597 [103].

38 (2004) 89 SASR 572 at 599 [113] referring to the decisions of this Court in *McLean v Tedman* (1984) 155 CLR 306 at 313; and *Braistina* (1986) 160 CLR 301 at 308-309.

39 (2004) 89 SASR 572 at 599-600 [113]-[115] referring to my own reasons in *Brady v Girvan Bros Pty Ltd* (1986) 7 NSWLR 241 at 246-248.

40 (2004) 89 SASR 572 at 600 [117].

41 (2004) 89 SASR 572 at 577-578 [21].

42 (2001) 206 CLR 512.

43 (2004) 89 SASR 572 at 578 [23]-[24]. This immunity has been restored by legislation, in a modified form, in all jurisdictions except the Northern Territory: see *Civil Liability Act* 2002 (NSW) s 45; *Wrongs Act* 1958 (Vic) s 85; *Civil Liability Act* 2003 (Qld) s 37; *Civil Liability Act* 1936 (SA) s 42; *Civil Liability Act* 2002 (WA) s 5Z; *Civil Liability Act* 2002 (Tas) s 42; *Civil Law (Wrongs) Act* 2002 (ACT) s 113.

37 Doyle CJ agreed that the occupier of private premises could exercise a greater degree of control over those premises than might be expected of a statutory authority responsible for public roads and footpaths[44]. However, whilst acknowledging matters that supported the conclusion reached by the majority in the Full Court, Doyle CJ held that the appellant owed no duty of care to the respondent in respect of the "hazard" which he took the uneven surface of the concrete slabs to present to entrants such as the respondent[45]. The factors that influenced Doyle CJ's conclusion included the modest character of the garage sale conducted by the appellant; the fact that such activities are a "normal and common use of residential premises"; the self-evident character of the "hazard"; and its "everyday nature" which was such that it presented a low magnitude of risk and a low degree of probability that a fall would occur[46].

38 If, contrary to his conclusion, a duty of care was established of a scope that included a requirement to address the uneven surface that caused the respondent's fall, Doyle CJ agreed in the conclusion of the other judges that the respondent's damages should be reduced by 30 per cent for contributory negligence. However, he added his own opinion that this reduction was "rather high"[47].

The appeal to this Court

39 Before this Court, the appellant conceded that she owed a duty of care of some form to the respondent but contended that that duty did not extend to the risk of injury which materialised. In the alternative, it was argued that even if a duty of care, the scope of which extended to include the risk in question, existed, there was no breach of that duty. No issue was taken with respect to causation. The respondent, for her part, did not contest the reduction for contributory negligence. Perhaps, taking the hint following a grant of special leave to appeal on conditions that protected her from the appellant's costs of the appeal[48], the respondent thought it wiser to confine her endeavours to hold on to her modest recovery.

40 Accordingly, the questions that require determination by this Court are as follows:

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44 (2004) 89 SASR 572 at 578 [25].

45 (2004) 89 SASR 572 at 579 [36].

46 (2004) 89 SASR 572 at 579-580 [39]-[43].

47 (2004) 89 SASR 572 at 580 [45].

48 *Neindorf v Junkovic* [2005] HCATrans 430 (17 June 2005).

(1) Did the appellant owe the respondent a duty of care which required her to exercise reasonable care to guard against the risk of injury which materialised?

(2) If so, was that duty of care breached?

Before considering these questions, it is necessary to take account of the relevant legislation.

The applicable provisions of the Wrongs Act

41 *Correct starting point*: The magistrate made no reference to the provisions of the Wrongs Act. Although adverting to the 1987 amendments to that Act, neither Besanko J[49] nor Doyle CJ[50] elaborated upon the applicable provisions. Nor did they consider expressly the application of those provisions to the facts of this case.

42 This Court has repeatedly said in recent times that, where a statute of relevant operation has been enacted, it is the duty of Australian courts to start their analysis of the legal liability of parties affected not with the pre-existing common law but with the statutory prescription[51]. The reason for this requirement is simple. Legislation of a Parliament, acting within its constitutional powers, has an authority that displaces the common law to the extent of the statutory provisions. Where Parliament has spoken, it is a mistake to start with common law authority.

43 With respect, it was only Gray J, in the Full Court, who recognised this principle and considered the statutory provisions at any length[52]. This may have been because of the way the respondent's claim had been pleaded and presented below, as if it were wholly based on the common law. However, this was not

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49 (2004) 88 SASR 162 at 166 [18].

50 (2004) 89 SASR 572 at 574 [1]. Doyle CJ referred to the *Civil Liability Act* 1936 (SA). At the relevant time the Wrongs Act applied.

51 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 544-545 [62]-[64]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1033 [92]; 197 ALR 297 at 316; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 10 [24]; *R v Lavender* (2005) 79 ALJR 1337 at 1357 [107]; 218 ALR 521 at 548.

52 (2004) 89 SASR 572 at 588-589 [80].

correct once Pt 1B was inserted in the Wrongs Act in 1987. That Part was in force at the time of the respondent's injury[53].

44 In his reasons Besanko J noted that the 1987 amendments to the Wrongs Act came into operation at about the same time as "a similar position had been reached at common law" in the decision of this Court in *Zaluzna*[54]. Nevertheless, to the extent that there are any differences of content, emphasis and instruction, the approach of Gray J was the correct one. The statute was the starting point.

45 *Provisions of the Wrongs Act*: The provisions of Pt 1B of the Wrongs Act relevantly include the following:

> "17B In this Part, unless the contrary intention appears –
>
> 'dangerous' includes unsafe;
>
> …
>
> 'occupier' of premises means a person in occupation or control of the premises …;
>
> 'premises' means –
>
> (a) land; or
>
> (b) a building or structure …
>
> …
>
> Occupier's duty of care
>
> 17C(1) Subject to this Part, the liability of the occupier of premises for injury, damage or loss attributable to the dangerous state or condition of the premises shall be determined in accordance with the principles of the law of negligence.
>
> (2) In determining the standard of care to be exercised by the occupier of premises, a court shall take into account –
>
> (a) the nature and extent of the premises; and

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53 Pt 1B of the Wrongs Act is now contained verbatim in Pt 4 ("Occupiers Liability") (ss 19-22) of the *Civil Liability Act* 1936 (SA) which came into force on 1 May 2004.

54 (1987) 162 CLR 479. See (2004) 88 SASR 162 at 166 [18].

(b) the nature and extent of the danger arising from the state or condition of the premises; and

(c) the circumstances in which the person alleged to have suffered injury, damage or loss … became exposed to that danger; and

(d) the age of the person alleged to have suffered injury, damage or loss, and the ability of that person to appreciate the danger; and

(e) the extent (if at all) to which the occupier was aware, or ought to have been aware, of –

(i) the danger; and

(ii) the entry of persons onto the premises; and

(f) the measures (if any) taken to eliminate, reduce or warn against the danger; and

(g) the extent (if at all) to which it would have been reasonable and practicable for the occupier to take measures to eliminate, reduce or warn against the danger; and

(h) any other matter that the court thinks relevant.

(3) The fact that an occupier has not taken any measures to eliminate, reduce or warn against a danger arising from the state or condition of premises does not necessarily show that the occupier has failed to exercise a reasonable standard of care.

…

Exclusion of conflicting common law principles

17E(1) Subject to subsection (2), this Part operates to the exclusion of any other principles on which liability for injury, damage or loss attributable to the state or condition of premises would, but for this Part, be determined in tort.

(2) This Part does not apply to a case where an occupier causes a dangerous state or condition of premises, or allows premises to fall into a dangerous state or condition, intending to cause injury, damage or loss to another."

46 As appears from extracts from the Second Reading Speech of the Minister introducing the Bill which, when enacted, inserted Pt 1B into the Wrongs Act[55], the objects of the measure were (1) to reduce the complexities of the differing categories that had previously existed at common law governing the duties owed to different classes of entrants upon land; (2) to allow courts to take into account the size of landholdings, so that a breach of duty would be less likely to be inferred for an event occurring in a remote part of a large rural landholding than in a "corner of a suburban backyard"; and (3) to relieve an occupier from liability where the danger is "simple, not hidden, and an easy manner for avoiding it is readily apparent"[56].

47 Because of the concurrent re-expression of the common law by this Court in *Zaluzna*, and because of the instruction in the Wrongs Act to determine the liability of an occupier of premises "in accordance with the principles of the law of negligence"[57], it is easy to overlook the provisions of the Act and to proceed directly to judicial expressions of the common law of negligence[58]. This mistake is facilitated by the fact that, after *Zaluzna*, the particular considerations mentioned in s 17C(2) and (3) substantially reflect the standards of the common law. However, where Parliament has provided a list of considerations, instructing a court to take that list "into account"[59], it is essential that the court do so. Especially is this so because of the enactment of the specific instruction that the provisions of Pt 1B of the Wrongs Act operate to the exclusion of any other principles for determining liability for injury[60].

The duty issue

48 *The appellant's contention*: The appellant submitted that the scope of her duty of care did not extend to protecting the respondent from injury arising from the uneven surface of the driveway. Essentially, she expressed three reasons to

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55 Part 1B of the Wrongs Act substantially followed amendments introduced into the law of Victoria by the *Occupiers' Liability Act* 1983 (Vic) which inserted a new Pt IIA into the *Wrongs Act* 1958 (Vic).

56 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 9 April 1987 at 4013 per Hon C J Sumner, Attorney-General.

57 *Kocis v SE Dickens Pty Ltd* [1998] 3 VR 408 at 409-410 per Ormiston JA, 411 per Phillips JA, 427 per Hayne JA.

58 Wrongs Act, s 17C(1).

59 Wrongs Act, s 17C(2).

60 Wrongs Act, s 17E(1). See also s 17C(1).

support her proposition. They were that (1) the gap in the concrete was obvious and the duty owed did not extend to protecting entrants from obvious risks; (2) the case was analogous to *Ghantous* where the plaintiff had failed; and (3) the venue and activity in which the appellant was engaged was domestic, modest and so commonplace that imposition of a legal duty of the propounded kind would offend community standards of reasonableness, reflected in the ambit of liability in negligence at common law.

49 *The appellant's approach is flawed*: In my opinion, by taking issue with the existence of a duty of care that extended to the risk which materialised, the way in which the appellant prosecuted her appeal was misconceived. The error in this approach (which is becoming all too common in this area of law) was attempting to elevate considerations that properly concern the breach element of the tort of negligence into the evaluation of the existence or absence of a duty of care.

50 It is true that it is neither possible nor desirable to attempt to consider the duty of care issue independently of the breach element or, indeed, the other elements relevant to a decision on liability for negligence[61]. The questions that the successive stages of negligence doctrine pose are not entirely free standing. They are interrelated. Negligence is a unified concept. Its subdivision into issues is adapted for convenience and to promote consistency of approach and accurate analysis. The parts should not divert attention from the whole. Thus, in deciding whether or not a duty of care exists, it is necessary to ask what the scope of the purported duty is[62]. However, by and large, the relevant inquiries in this regard are conducted at a relatively general level of abstraction. Identifying the scope of an alleged duty of care requires consideration of, among other things, the nature of the damage suffered[63] and whether the damage was caused by a third party[64] or results from pure omission on the part of the defendant.

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61 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 350 [98]-[99]; *Roe v Minister of Health* [1954] 2 QB 66 at 85.

62 *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 478 [122]-[123]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 620 [286]; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 349-350 [97]; Luntz and Hambly, *Torts: Cases and Commentary*, 5th ed, (2002) at 154.

63 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487; *Hawkins v Clayton* (1988) 164 CLR 539 at 576.

64 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Dorset Yacht Co v Home Office* [1970] AC 1004.

51 The appellant, while admitting that she owed a duty of some kind to the respondent, denied that the duty included within its ambit an obligation to take reasonable care to protect against the risk of physical injury occasioned by the unevenness in her driveway. However, defining the scope of the duty with this degree of specificity is likely to raise serious problems.

52 Professor Fleming advanced two reasons why defining the scope of the duty of care in an overly specific fashion should be avoided[65]:

> "The general standard of conduct required by law is a necessary complement of the legal concept of 'duty'. There is not only the question 'Did the defendant owe a duty to be careful?' but also 'What precisely was required of him to discharge it?' Indeed, it is not uncommon to encounter formulations of the standard of care in terms of 'duty', as when it is asserted that a motorist is under a duty to keep a proper lookout or give a turn signal. But this method of expression is best avoided. In the first place, the duty issue is already sufficiently complex without fragmenting it further to cover an endless series of details of conduct. 'Duty' is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation. Secondly, it is apt to obscure the division of functions between judge and jury. It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant's conduct; it is for the jury to translate the general into a particular standard suitable for the case in hand and to decide whether that standard has been attained."

53 The first reason identified by Professor Fleming for rejecting the appellant's approach to the duty issue is compelling. As an element of the tort of negligence, the duty of care is already overworked. It is problematic enough[66] without imposing the additional burden of particularising, in a detailed fashion, all of the specific risks against which defendants must take care.

54 In relation to the second reason, while it is now uncommon, in most parts of Australia, for juries to decide negligence cases, it is still desirable that

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65 Fleming, *The Law of Torts*, 9th ed (1998) at 117-118 (footnotes omitted); cf Luntz and Hambly, *Torts: Cases and Commentary*, 5th ed (2002) at 213.

66 See *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 616-617 [211]-[212].

questions of law and questions of fact should be properly quarantined, so far as that is practicable. One reason why this is so is because different principles apply to appellate review of determinations regarding questions of law and decisions turning on the facts.

55 There is a third reason, not identified by Fleming, that militates against the appellant's approach. Generally speaking, each of the constituent elements of the tort of negligence – duty, breach and damage – considered *seriatim*, progressively increases the specificity of the inquiry into how the incident occurred and the way in which damage was sustained[67]. The broadest and most general level of analysis occurs at the duty stage[68]. Here, the inquiry is primarily concerned with whether injury to the plaintiff or a class of persons to whom the plaintiff belongs, was reasonably foreseeable[69]. With respect to the breach element, the inquiry is directed, in part, to whether a reasonable person in the defendant's position would have foreseen the risk of injury to the plaintiff. Finally, the damage element is the most specific. The issue here is whether the damage sustained as a result of the breach of duty was of a kind which was reasonably foreseeable[70]. Attempts to force more content into the duty element, by defining the obligation created with greater specificity, turns the traditional analysis of the tort of negligence on its head. It blurs the distinction between its constituent elements. It may also lead to the decision as to breach being pre-empted[71]. This Court should avoid such an error.

56 *A duty of the relevant scope existed*: A relevant duty of care existed in this case. It is firmly established that an occupier owes a duty of care to entrants in respect of risks of physical injury arising out of the condition of the occupier's premises[72]. There is no need for the scope of this duty to be defined with any greater precision than this in the instant case[73]. This Court has said on several

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67 *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd* [1983] 2 NSWLR 268 at 295-296; Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 347.

68 *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 639.

69 *Chapman v Hearse* (1961) 106 CLR 112 at 120-121.

70 *Hughes v Lord Advocate* [1963] AC 837.

71 *Jones v Bartlett* (2000) 205 CLR 166 at 184-185 [57].

72 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263 [17], 289 [102]; *Tame v New South Wales* (2002) 211 CLR 317 at 355 [103]; *Vairy v Wyong Shire Counci*l [2005] HCA 62 at [27].

73 See *Vairy v Wyong Shire Council* [2005] HCA 62 at [25]-[27].

occasions that, in so far as cases involving physical injury are concerned, provided that the test of reasonable foreseeability is satisfied, the elusive additional element needed to establish the existence of a duty of care will also be satisfied[74]. There is no suggestion in this case (and it could not be suggested) that the "undemanding"[75] requirement of reasonable foreseeability was not met by the respondent's case.

The standard of care

57 *Approach of the Wrongs Act*: In the light of the applicable legislation, discussed above[76], it must be accepted that the "principles of the law of negligence", in their generality, as defined by the common law of Australia, are applicable in determining the legal liability of the appellant for the injury to the respondent[77]. Likewise, in determining the standard of care to be exercised by the appellant, as occupier of the premises which the respondent entered, a court is authorised to take into account "any … matter that the court thinks relevant"[78]. These considerations afford a court a broad mandate to perform its task of determining contested claims brought against occupiers by persons who have entered their premises and been injured there. However, it follows from the foregoing analysis[79] that, in determining the standard of care that must be observed, it is essential first to address the list of specific matters that the Court is required by the Wrongs Act to "take into account" in s 17C(2). What relevance do those listed considerations have for the present case?

58 *Nature and extent of the premises*: As to the "nature and extent of the premises"[80], it was a domestic dwelling in the suburbs of Adelaide. This consideration cuts both ways. The appellant suggested that it reduced the

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74 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44; *Jaensch v Coffey* (1984) 155 CLR 549 at 581-582; *Hawkins v Clayton* (1988) 164 CLR 539 at 576.

75 *Inverell Municipal Council v Pennington* [1993] Aust Torts Reports ¶81-234 at 62,403; *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641; *Tame v New South Wales* (2002) 211 CLR 317 at 351-352 [96]; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 352 [104].

76 See above these reasons at [45].

77 Wrongs Act, s 17C(1).

78 Wrongs Act, s 17C(2)(h).

79 See above at [42]-[47].

80 Wrongs Act, s 17C(2)(a).

standard of care to be expected because of the modest character and size of the premises. That was an argument that weighed with Doyle CJ[81]. On the other hand, as the Minister explained when introducing the legislation to amend the Wrongs Act, the imposition of a legal duty of care in respect of "the corner of a suburban backyard" is not *per se* unreasonable[82]. This was not, after all a remote part of a large landholding. The driveway and forecourt of a domestic dwelling would be well known to the occupants. Imposing an obligation in respect of them, at least for some entrants, would not be unreasonable or unduly burdensome. In my view, the nature and extent of the premises, or the relevant part of the premises in question, is a consideration pointing towards a higher standard of care.

59 *Nature and extent of the danger*: The "nature and extent of the danger arising from the state or condition of the premises"[83] is also a consideration favouring the respondent. Whilst it is true, as Doyle CJ observed, that unevenness of residential paths and surfaces represent common hazards for those entering private property[84], in the present case, there was nothing that would have rendered the "hazard" a secret from the appellant. The uneven surface was something that she and her family had to traverse every day. Other entrants onto their property, such as the respondent, would not be so familiar with the uneven surface of the concrete. This would be particularly so if they were old, of poor eyesight, frail, disabled or young and boisterous. Whilst the appellant made much of the expectation and suggested duty on the part of the respondent to watch out for the surface conditions, the whole point of the respondent's coming onto the appellant's property was to view and possibly purchase goods placed on display on a table at hip height. Distraction was a clear danger for entrants with such a purpose, as a moment's thought on the part of the appellant would have indicated to her.

60 *Exposure to the danger*: As to the "circumstances" in which the respondent "became exposed to that danger"[85], it is relevant to take into account the character and purpose of the relationship between the parties. The appellant emphasised the potential for the Full Court's decision to be applied so as to create obligations in respect of entrants onto private domestic property such as charity collectors, friendly neighbours and dinner party guests. However, in each such

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81 (2004) 89 SASR 572 at 579 [32], 580 [39].

82 See above at [46].

83 Wrongs Act, s 17C(2)(b).

84 (2004) 89 SASR 572 at 579 [32]-[33].

85 Wrongs Act, s 17C(2)(c).

case the nature of the relationship of the entrants with the occupier would be different from that in question here. In the respondent's case, she entered pursuant to an express invitation from the appellant. Moreover, as Gray J pointed out, it was an invitation addressed to the public at large, in all of its variety[86]. Having extended an invitation to every category of entrant from the public, the appellant could not now complain about the variety of abilities, capacity and attention of those who had accepted her invitation. Neither by her advertisement, nor by the conduct of her garage sale, did she attempt to limit entry or impose on entrants preconditions of special vigilance.

61 Moreover, the appellant had an economic interest in attracting the respondent to her premises. In *Brady v Girvan Bros Pty Ltd*[87], a case concerned with a common passageway in a shopping mall, I drew attention to the continuing relevance of this consideration for the standard of care that could be expected of the occupier:

> "The respondent was in charge of a large commercial enterprise. Undiscriminatingly, it invited members of the public to do business in that enterprise. It derived, by inference, an economic advantage from their presence in its mall. It must anticipate the presence there of members of the public of all ages, inclinations and capacities. … If the inherent likelihood of spills is great, it is entirely reasonable that those coming onto the premises should be able to look to the occupier for a very high degree of care indeed."

62 The appellant's modest dwelling was no shopping mall. Her sale of household bric-a-brac was scarcely a major commercial enterprise. Although the occasion on which the respondent was injured was the fourth time that the appellant had conducted a garage sale, the number of days on which she did so was limited in comparison to the other more usual uses to which her uneven driveway was put. Nevertheless, this was not a case of a relationship established by charity collection or neighbourly visit. Still less was it an occasion of a visit of friends who might have been expected to have witnessed the concrete fault line on an earlier visit, been warned of it by the host or had no proffered distractions such as caught the respondent's eye.

63 Whilst the former categories into which the entrants onto premises were historically divided have been abolished by the Wrongs Act (and by the common law) the relationship of the entrant and the occupier is still relevant. It was that relationship that lay behind the former categories. It explained why, in some

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86 (2004) 89 SASR 572 at 598 [107].

87 (1986) 7 NSWLR 241 at 246-247.

cases, the common law assigned a higher standard of care than in others. The same is true of the Wrongs Act. It is reflected in s 17C(2)(c).

64 To this day, the common law continues to recognise that, all other things being equal, a higher standard of care is owed by those with contractual or economic interests in the presence of an entrant on their premises. In *Calin v Greater Union Organisation Pty Ltd*[88], this Court made it plain that "the principles of the common law governing the liability of an occupier of premises who agrees for reward to allow a person to enter the premises for some purpose" had not been overruled by the decision in *Zaluzna*. Specifically, the category of duty owed to persons who enter upon premises by virtue of a contractual right has been retained[89].

65 In the present case, the respondent did not argue that she had entered the appellant's premises pursuant to contract, even an implied one. However, that still leaves the standard of care owed by the appellant to be defined. Such standard depends on a full understanding of the relationship between the parties. That relationship was one established by the appellant's invitation to the public to do business with her from which the appellant stood to make a modest economic gain. In such circumstances, there is a higher standard of care than can be expected in relation to total strangers, unexpected visitors or uninvited charity collectors. Those who invite for economic gain can be expected, at the very least, to turn their attention to dangers that will be faced by those who accept their invitation. Moreover, realistically, they may be expected as a practical matter to turn their attention to securing insurance in order to provide indemnity in the event of accidents. The danger of unexpectedly burdening uninsured occupiers may sometimes, subconsciously, influence judicial expositions of the standard of care which occupiers are required to achieve.

66 *Respondent's age*: As to the age of the injured person[90], the respondent was 53 years old when she suffered injury. The specific requirement to consider the age of the injured person stands in the respondent's favour. Whilst a person of her age is not classified as elderly, it is common knowledge that older visitors may have less than perfect vision, stability and alertness. The appellant must have expected this when she extended her invitation to the world at large.

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88 (1991) 173 CLR 33 at 38.

89 As in *Watson v George* (1953) 89 CLR 409. See also *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934 at 1942 [46]; 201 ALR 470 at 480-481.

90 Wrongs Act, s 17C(2)(d).

67 *Appellant's awareness of the danger*: So far as the extent of the appellant's awareness of the danger and entry of persons onto her premises is concerned[91], the appellant was certainly aware of the respondent's entry because she had invited it by advertisement and display and was present when it occurred. Moreover, all of the judges below accepted that the appellant was aware, or ought to have been aware, of the danger presented by the uneven surface of her driveway. This was a feature of her home which, whilst not unique, was clearly evident to her. It was a characteristic to be taken into account in the decision to conduct a garage sale on the driveway and in the way that the appellant displayed the goods for sale there.

68 *Prophylactic steps taken*: As to the measures to eliminate, reduce or warn against the danger[92], no such measures were taken. None at all. To this day, the appellant simply asserts that the respondent was on her own; being obliged to look after herself.

69 If the statutory considerations "eliminate, reduce or warn" are taken into account, as an indication of what might be done in the attainment by occupiers of a reasonable standard of care, the measures that were available to the appellant were several. They were relatively obvious. And they were inexpensive. They included, as the magistrate pointed out[93], the placement of the table in a position straddling the fault in the concrete so as to prevent or diminish the need for members of the public to cross the fault line at its deepest point. They also included the placement of a painted line (or some other perhaps removable strip of identifying material) to highlight the gap in, and change of, the surface. Such markings are now quite common. They are extremely cheap to install. Alternatively, the simple expedient of placing a section of linoleum or a thick mat over the join of the concrete in front of the display table would have reduced the danger inherent in the uneven surface. A warning to elderly entrants to mind their step might have been given. Not one of these elementary and inexpensive precautions was taken.

70 *Reasonableness of taking precautions*: As to the extent to which it would have been reasonable and practicable to take such measures[94], the identified precautions are so modest, inexpensive and obvious that, if the appellant had given fractional attention to making her premises safe for potential entrants such as the respondent, it would not have been a large burden upon her. There is no

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91 Wrongs Act, s 17C(2)(e).

92 Wrongs Act, s 17C(2)(f).

93 See above these reasons at [28].

94 Wrongs Act, s 17C(2)(g).

objective evidence to indicate that any attention was given by her to the issue of accident prevention. The question for decision is therefore whether, within the Wrongs Act criteria and the general principles of the law of negligence that the Act reflects, this is the standard that we have reached in Australia in the exhibition of neighbourly care on the part of persons such as the appellant towards persons such as the respondent. I think not.

71 *Obviousness of the risk*: As the appellant pointed out, it is certainly true that passages appear in many judicial reasons to the effect that, in defining the standard of care in a particular case, it is appropriate to take into account whether the suggested risk is "obvious"[95]. In *Romeo*[96], I wrote that "[w]here a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just." However, that statement was particular to the circumstances of that case. The case involved a manifestly dangerous cliff edge in a nature reserve with a large drop. The statement was qualified[97] by the need of the occupier to take account of "the possibility of inadvertence or negligent conduct on the part of entrants". It could not constitute, and was not intended to constitute, a universal proposition of law, applicable whatever the facts and circumstances of a case[98]. And it said nothing about precautions other than warnings – such as taking practical steps to prevent or reduce the risks of avoidable injury.

72 Based on a misunderstanding of *dicta* of the kind described in *Romeo*, the idea has spread through the courts of Australia that occupiers, with responsibilities for the safety of premises can totally ignore those responsibilities because of the alleged obviousness of the risk to entrants. In principle, that is not and cannot be the law[99]. In a sense, the obviousness of risk speaks chiefly to those who are in charge of the source of the risk and who have the opportunity, and prime responsibility, to reduce or eliminate it. The respondent had no entitlement to change the appellant's premises. She could not re-arrange the

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95 See, eg, *Bressington v The Commissioner of Railways (NSW)* (1947) 75 CLR 339 at 349; *Foufoulas v FG Strang Pty Ltd* (1970) 123 CLR 168 at 170; *Phillis v Daly* (1988) 15 NSWLR 65 at 74 per Mahoney JA.

96 (1998) 192 CLR 431 at 478 [123].

97 (1998) 192 CLR 431 at 478 [123].

98 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 474 [45]; 499-500 [127].

99 *Vairy v Wyong Shire Council* [2005] HCA 62 at [40]; contra *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 at 85 [45]-[46].

trestle table. Nor could she take steps so as to make the premises safer for members of the public, like herself, entering to do business there. In some circumstances, the more obvious the risk, the greater the responsibility of those with the relevant power to protect others from it[100].

73 Entrants might (like the respondent in the present case) be momentarily distracted. The occupier will generally have more time and occasion to consider issues of risk and safety than short-term entrants. Further, a danger of placing so much emphasis on suggested obviousness is that, in a given case, it will distort proper consideration of a defence of contributory negligence[101]. It will take that factor of alleged carelessness on the part of the plaintiff up into the negation of a breach of duty, instead of reaching it at the conclusion of conventional negligence analysis[102].

74 The mischief of this approach, which is spreading like wildfire through the courts of this land and must be arrested if proper negligence doctrine is to be restored, is that it can effectively revive the ancient common law position so that effectively, contributory negligence, of whatever proportion, becomes again a complete defence to an action framed in negligence and debars that action. That consequence would reverse the universal enactment of apportionment legislation. That legislation recognises that, in many cases, a plaintiff's inadvertence or momentary carelessness is much less significant in the responsibility for accidents than a defendant's indifferent neglect of considerations of accident prevention which are substantially the defendant's own obligation.

75 If I could expunge the quoted passage from my reasons in *Romeo*, I would gladly do so[103]. I would take it out, not because it was incorrect as a factual observation in the context of that case but because it has been repeatedly deployed by courts as an excuse to exempt those with greater power, knowledge, control and responsibility over risks from a duty of care to those who are vulnerable, inattentive, distracted and more dependent. The present case is a good illustration. Most people do not normally walk, even on unfamiliar surfaces, looking constantly at their feet. The fact that there was a division in the slabs of concrete in the appellant's driveway was obvious. But the distinct unevenness in surface levels of the adjoining slabs may not have been obvious to a person, like the respondent, who had no warning of it and no reason to

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100 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 500 [128].

101 *Vairy v Wyong Shire Council* [2005] HCA 62 at [46], [162].

102 Lunney, "Personal responsibility and the 'new' volenti", (2005) 13 *Tort Law Review* 76 at 91.

103 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 500 [127].

anticipate it. Especially if the respondent was distracted, as her accepted testimony said, the chances of overlooking the danger or "hazard" (as Doyle CJ described it[104]) was great.

76 The appellant had the knowledge, the power and the economic interest to protect the public at large whom she had invited onto her property. In terms of fault, for failure to act in the circumstances, the responsibility fell mainly on the appellant. It is against risks of the kind that materialised that people such as the appellant can be expected to take precautions (and against the chance that they may fail, they can be expected normally to secure householders' insurance as thousands do).

77 *The supposed Ghantous analogy*: I would not deny that some of the statements of legal principle in Ghantous have application to injuries happening on private property[105]. Nevertheless, Doyle CJ was clearly right in pointing to the significant factual differences between Ghantous and the present case[106]. The relationship of the respondent to the appellant was much closer, more direct and with greater economic mutuality than was Mrs Ghantous' relationship with the local government authority. What might reasonably be expected of the repair and upkeep or precaution and warning in the context of a driveway and forecourt in confined suburban premises to which the public was invited could not reasonably be expected for the maintenance of all verges beside the entire network of a municipality's footpaths. This is precisely the consideration to which Pt 1B of the Wrongs Act was addressed and, in particular, the considerations mentioned in pars (a), (b) and (e) of s 17C(2).

78 A closer analogy to the present case than *Ghantous* is the decision of this Court in *Webb v South Australia*[107]. Although that was an instance, like *Ghantous*, concerned with the liability of a public authority for the condition of the edge of a footpath and was decided by reference to the common law as it was understood before it was restated in *Brodie* and *Ghantous*, the issue concerned a "false kerb" to a footpath that was likely to present the risk of injury to a class of persons that included the plaintiff.

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104 (2004) 89 SASR 572 at 579 [36].

105 Discussed above at [29].

106 (2004) 89 SASR 572 at 578 [22]-[25]; cf 597 [103] per Gray J.

107 (1982) 56 ALJR 912; 43 ALR 465. *Webb* was referred to and applied in the joint reasons of Gaudron, McHugh and Gummow JJ in *Brodie* (2001) 206 CLR 512 at 550 [83], 577 [149], 581 [163].

79 As in the present case, the defendant in *Webb* relied on the propositions that the intervening space, occasioned by the structure of the footpath, was "a very obvious feature" that was therefore not dangerous so that it deprived the plaintiff of a right to recovery. In this Court, these considerations proved persuasive for Wilson J and Dawson J who each dissented. They favoured affirming the conclusions of the trial judge and Full Court below. However, the majority of this Court (Mason, Brennan and Deane JJ) reached the opposite conclusion. They rejected the argument of "obviousness"[108]. It is instructive to recall what the majority said in *Webb*:

> "This finding [below] seems to have been based on its obviousness and on the circumstance that in the seven years that elapsed since its construction there was no record of any previous accident. But obviousness and the absence of accident over this period does not mean that the construction presented no risk of injury. As the false kerb was adjacent to a bus stop there existed the distinct possibility that a pedestrian, because he was in a hurry to catch a bus or was intent on observing an approaching bus or because his attention was distracted for some other reason, would fail to take sufficient care to avoid injury to himself. The happening of the accident demonstrated, if demonstration was needed, that the construction had the potential to cause injury.
>
> Of course a pedestrian could avoid the possibility of injury by taking due care. However, the reasonable man does not assume that others will always take due care; he must recognize that there will be occasions when others are distracted by emergency or some other cause from giving sufficient attention to their own safety. It seems to us that the courts below gave undue emphasis to the circumstance that injury could be avoided by a pedestrian who took reasonable care for his own safety."

80 The present case is factually different in some respects, as is the way with negligence cases. There was no complaint about the original construction of the concrete slabs in the appellant's premises. Nevertheless, the issues of approach, the consideration of obviousness and the relevant place of contributory negligence in the sequence of the analysis of the legal responsibilities of the parties are all common to this appeal. The arguments of the appellant in this appeal harken back to the opinions of the dissenting judges in *Webb*. For my own part, I would adhere to the approach and reasoning of the majority in *Webb* for it correctly states the doctrine of the law of negligence which this Court has hitherto applied.

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108 (1982) 56 ALJR 912 at 913; 43 ALR 465 at 466-467.

Conclusion: a breach of the duty of care

81 *Reasonableness of burden*: This brings me to the essential reason that led Doyle CJ to his dissent in the Full Court. His Honour considered that to impose liability on the appellant would be unreasonable having regard to the modest character of the garage sale and the burden that would be involved in assigning a legal duty on suburban household occupiers of the kind propounded for the respondent.

82 I cannot agree with this conclusion. I consider that the approach of the majority in the Full Court is more consonant with this Court's past legal authority and approach. Whilst the common law of negligence is reflective of notions of reasonableness of outcome, the only safe way to judge particular cases is to approach them by reference to the relevant criteria. The approach of Doyle CJ (and of Besanko J) failed, in my respectful opinion, to pay due attention to three considerations of legal principle identified by Gray J in his reasons[109]. These were first, the need to determine the case primarily by the application of the criteria expressed by Parliament in terms of the Wrongs Act. Secondly, to take into particular account the relationship of the parties, established in this case, because the appellant had invited the public at large to enter upon her premises and had an economic interest in their doing so. And thirdly, to consider the fact that apparently the appellant gave no thought whatever to accident prevention, which earlier decisions of this Court had repeatedly emphasised and required.

83 In his reasons, Gray J referred to the reasons of McHugh JA and myself in the New South Wales Court of Appeal in *Brady*[110]. There, McHugh JA said[111]:

> "Equally important in determining what reasonable care requires is the importance to the community of accident prevention. The High Court has recently stated that accident prevention is unquestionably one of the modern responsibilities of an employer: *McLean v Tedman*[112]; *Bankstown Foundry Pty Ltd v Braistina*[113]. … Likewise, accident prevention is one of the responsibilities of those who for reward, direct or indirect, invite or permit members of the public to attend their premises. … A real risk of

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109 (2004) 89 SASR 572 at 599 [113]-[115].

110 (1986) 7 NSWLR 241.

111 (1986) 7 NSWLR 241 at 254-255.

112 *McLean* (1984) 155 CLR 306 at 313.

113 *Braistina* (1986) 160 CLR 301 at 308-309.

injury should be eliminated unless the cost of doing so is disproportionate to the risk."

84 *Adhering to settled doctrine*: This Court, if it pleases, can now turn its back on communitarian notions in the law, such as accident prevention. It can hold that the world, like ground surfaces, is not a level playing field[114]. It can conclude that the common law imposes no relevant duty of care on householders who invite strangers and the public at large to enter their premises to do business there. It can subsume considerations logically applicable to the breach element into the duty of care. It can effectively restore contributory negligence to its former status as a complete defence to liability. However, the Court must be aware that so concluding involves an important change of legal policy. It involves rejection of earlier approaches of this Court and its exposition of the affirmative duties of occupiers (and others) to turn their minds to accident prevention (and hence to insurance).

85 To the extent that the Court turns away from the earlier principles, in my respectful view it endorses notions of selfishness that are the antithesis of the Atkinian concept of the legal duty that we all owe, in some circumstances, to each other as "neighbours"[115]. This is a moral notion, derived originally from Scripture, that has informed the core concept of the English law of negligence that we have inherited and developed in Australia. It is the notion that, in the past, encouraged care and attention for the safety of entrants on the part of those who invite others onto their premises. (It also encouraged such persons to procure insurance against risk). To the extent that these ideas are overthrown, and reversed, this Court diminishes consideration of accident prevention. (It also reduces the utility and necessity of insurance). From the point of view of legal policy, these are not directions in which I would willingly travel.

86 It is true that in *Thompson v Woolworths (Q'land) Pty Ltd*[116], five members of this Court, including myself, observed that there are "no risk-free dwelling houses" and that "[t]he community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them". I do not resile from these comments. In their generality, they remain true[117]. It is

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114 *Ghantous* (2001) 206 CLR 512 at 639 [355] per Callinan J (dissenting) applied by Besanko J (2004) 88 SASR 162 at 167 [25].

115 Referring to Lord Atkin's speech in *Donoghue v Stevenson* [1932] AC 562 at 580 citing, in turn, St Matthew's Gospel.

116 (2005) 79 ALJR 904 at 911 [36]; 214 ALR 452 at 460-461.

117 See also *Jones v Bartlett* (2000) 205 CLR 166 at 177 [23].

not necessary to compile a list of every potential source of danger in and around the house and to install warnings at every possible point of entry to the land. Self-evidently, such a course could not be justified and would probably be futile[118]. However, these comments do not address the risks of the present case which were beyond the ordinary, which were known or knowable to the householder and which were properly enlivened in her mind by her invitation to the public at large to come onto her premises to buy her goods.

87 *Conclusion*: What it is reasonable to expect of householders living in the citadel of their domestic premises, behind a closed gate that excludes the world at large, is different from what may reasonably be expected of those who invite the public to enter for desired economic advantage to the occupier. In the latter class of case it is not unreasonable to expect considerations of visitor safety (and in many cases insurance) to attract the occupier's attention. Had that been done in the present case, the precautions that should have been taken were obvious, inexpensive and comparatively trivial. The fact that the appellant did not take any measures at all to eliminate, reduce or warn against the danger did not necessarily show that she had failed to exercise a reasonable standard of care[119]. But the fact that she invited the public at large and failed to attend to a known or knowable danger establishes breach of the appellant's duty of an applicable scope that results in legal liability in accordance with the principles of the law of negligence hitherto accepted by this Court[120].

Orders

88 The appeal against the Full Court's judgment should be dismissed with costs.

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118 *Tame v New South Wales* (2002) 211 CLR 317 at 332 [14].

119 See Wrongs Act, s 17C(3).

120 Wrongs Act, s 17C(1).

89 HAYNE J. The facts and circumstances that give rise to this appeal are set out in the reasons of other members of the Court.

90 The appellant, as occupier of the land on which the respondent entered and was injured, owed the respondent a duty to take reasonable care for her safety[121]. Part 1B of the *Wrongs Act* 1936 (SA) (ss 17B-17E) (now Pt 4 of the *Civil Liability Act* 1936 (SA) – ss 19-22) which deals with occupiers liability assumes that to be so. Section 17C(1) (now s 20(1)) provides that the liability of an occupier for injury, damage or loss attributable to the dangerous state or condition of premises shall be determined in accordance with the principles of the law of negligence. The determinative question in this case is presented by s 17C(2)[122]: what was the standard of care to be exercised by the appellant?

91 In deciding that question, s 17C(2) requires a court to take into account the matters that are identified in the eight paragraphs of that sub-section, recognising, of course, that the last of those ("any other matter that the court thinks relevant") is open-ended. Account must be taken of each of the matters that is identified. But in doing so it is important to recall that s 17C(3)[123] makes plain that there are cases in which doing nothing to eliminate, reduce or warn against a danger is consistent with exercising reasonable care. In particular, demonstrating that an occupier "was aware, or ought to have been aware of" both "the danger" that led to an entrant being injured and "the entry of persons onto the premises"[124] does not require the conclusion that the occupier should have taken some step to eliminate, reduce or warn against that danger. Rather, it is necessary to take account of *all* of the matters specified in s 17C(2), including "the extent *(if at all)* to which it would have been reasonable and practicable for the occupier to take measures to eliminate, reduce or warn against the danger"[125] (emphasis added).

92 When the matter is analysed, as it must be[126], by reference to the applicable statutory provisions, it is readily apparent that it raises no point of

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121 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *Jones v Bartlett* (2000) 205 CLR 166.

122 Now s 20(2).

123 "The fact that an occupier has not taken any measures to eliminate, reduce or warn against a danger arising from the state or condition of premises does not necessarily show that the occupier has failed to exercise a reasonable standard of care."

124 s 17C(2)(e).

125 s 17C(2)(g).

126 See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9] per Gaudron, Gummow, Hayne and

(Footnote continues on next page)

principle. It raises no point of principle about developments (recent or historical) in the law of negligence; it raises no point of principle about other aspects of the law. It requires no revisiting of the well-trodden paths of the argument, settled in Australia in *Sullivan v Moody*[127], that the "*Caparo* test" is, as its author Lord Bridge of Harwich said[128], a test whose ingredients "are not susceptible of any such precise definition as would be necessary to give them utility as practical tests". And the decision that is reached in the matter marks no departure from previous doctrine, whether by erosion or tectonic shift. That is because the decision turns on the assessment of what would have been reasonable and practicable for the occupier to do.

93 This inquiry about what would have been reasonable and practicable is not to be undertaken in hindsight[129]. Nor is it to be confined to what could have been done to eliminate, reduce or warn against the danger. Asking what could have been done will reveal what was practicable. It is necessary to ask also: would it have been *reasonable* for the occupier to take those measures?

94 In the present case, the relevant danger was presented by the uneven surface of the appellant's driveway. Neither the fact that the driveway paving was uneven nor the degree of unevenness (a difference of about 12mm between two sections of the concrete) is or was at all uncommon in the driveways of suburban housing. Would it have been reasonable for the occupier to eliminate or reduce the risk of tripping or stumbling on or over the unevenness, or to warn all entrants to watch their step?

95 It may be that some means of reducing the danger could readily have been found. It was suggested that to paint a stripe along the lip of the concrete or to cover it over with a piece of carpet would have done so. Perhaps the danger could even have been eliminated by displaying the goods which were for sale in

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Callinan JJ, 89 [46] per Kirby J; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11] per Gleeson CJ, Gummow, Hayne and Callinan JJ, 545 [63] per Kirby J; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 111-112 [249] per Kirby J; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6-7 [7]-[9] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850 at 1856 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

127 (2001) 207 CLR 562.

128 *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 618.

129 *Vairy v Wyong Shire Council* [2005] HCA 62.

some different way. But would it have been reasonable for an occupier embarking upon a garage sale to take any of these measures?

96 When that question is examined from the proper perspective, without knowing what in fact happened to the respondent, the answer is no. Any suburban house presents many features that can lead to injury[130]. In that sense any suburban house presents many dangers. The appellant, as occupier, was not required to reduce or eliminate the danger presented by an unevenness in the driveway that was no larger than, and no different from, unevenness found in any but the most recently installed suburban concrete driveway. Nor was the occupier required to give some warning to entrants by telling them: "Be careful, the driveway upon which you are to walk is no different from most other driveways." The fact that the appellant had invited the public to attend a garage sale, and displayed the goods for sale as she did, requires no different conclusion.

97 It is only when the particular event of the respondent's stumble is known to have happened that it appears reasonable to take steps to reduce or eliminate the danger presented by unevenness in the driveway surface. Only with that knowledge does it appear reasonable to point out or cover that irregularity. But that is to look at the problem with hindsight. That is not the question the statute (or the common law[131]) presents. That question is what would have been the reasonable response of the occupier before the accident happened.

98 The respondent's claim for damages should have been dismissed. The appeal should be allowed, pars 1, 2 and 3 of the orders of the Full Court of the Supreme Court of South Australia made on 15 October 2004 set aside, and in their place there be an order that the appeal to that Court is dismissed. Consistent with the undertaking given by the appellant when granted special leave to appeal, the appellant should pay the respondent's costs in this Court and the orders for costs made by the Full Court should not be disturbed.

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130 *Jones v Bartlett* (2000) 205 CLR 166 at 177 [23] per Gleeson CJ; *Thompson v Woolworths (Q'Land) Pty Ltd* (2005) 79 ALJR 904 at 911 [36]; 214 ALR 452 at 460-461.

131 *Vairy v Wyong Shire Council* [2005] HCA 62.

CALLINAN AND HEYDON JJ.

The issue

99 This appeal raises no question of principle. It simply presents a question whether under the *Wrongs Act* 1936 (SA) ("the Act"), an occupier of residential premises owes entrants a duty of care to prevent a minor and obvious risk of injury which an entrant, exercising reasonable care for his or her own safety, could reasonably be expected to notice and avoid.

The facts

100 The appellant was the owner and occupier of a house located at 217 Kelly Road in one of the suburbs of Adelaide. She advertised and held a garage sale at the house on Saturday 5 February 2000 to which the respondent came. A garage sale is a familiar event in Australian suburbia. It provides an opportunity for householders to sell, and others to acquire, used household goods. It is an event undertaken informally in circumstances remote from the conduct of retail trade in general commerce, and, by a vendor or vendors infrequently. The appellant here had held four such sales during the previous two years.

101 Adjacent to the house was a carport. A concrete driveway extended from the carport to the road. An expansion joint ran along the length of the driveway. On the left side of the joint the concrete driveway was about 10-12 mm higher than the right. The respondent walked up the driveway towards a table under the carport. As she did, she tripped over the joint. The difference in height was clearly visible and obvious. The driveway was of a type no different from many concrete driveways on residential properties throughout South Australia. The differential in height could in no way be regarded as uncommon, or unexpected of a suburban residence in South Australia. Indeed, as the photographs tendered by the parties unmistakably show, there were even greater irregularities in the surface of the footpath in front of the appellant's residence. The respondent had been, at the time, looking at or towards the goods on offer and paying no attention to the driveway. The weather was fine, and the surface upon which the driveway was constructed was generally flat and open.

The proceedings at first instance

102 The respondent sued the appellant in the Magistrates Court of South Australia. The Magistrate found that the unevenness in the driveway was a matter of which the appellant, who had lived on the property for some years, would have been aware. The Magistrate said:

> "In my view it was reasonably foreseeable that the unevenness in the path posed a risk to the attendees at the garage sale."

103 The Magistrate was also influenced by evidence from an expert received over objection, which included the preposterous contention that "a lot of expecting people would view it [the driveway] in the same way as they viewed a shopping mall for example."

104 The Magistrate identified two means by which the risk could have been reduced, the painting of a line along the joint to draw attention to it, or the placing of a table with goods on it over the uneven part. The Magistrate pointed out that the cost of reducing the risk of injury was low. He accordingly found that the appellant was in breach of a duty of care which she owed to the respondent. He rejected a submission that the respondent was guilty of contributory negligence, excusing her by holding that she would have been distracted by the goods to her right, and therefore not looking where she was placing her feet. He said that the situation may well have been different were it not for the goods placed on display.

The Supreme Court

105 The appellant successfully appealed to a single judge of the Supreme Court of South Australia (Besanko J) on both liability and quantum, as to the latter of which this Court is not concerned. His Honour said this[132]:

> "In my opinion, the duty of care of the occupier of a domestic property in relation to the static condition of the property does not extend to include risks which are obvious and which it is well known are likely to be encountered and which, in all the circumstances, an entrant may reasonably be expected in all the circumstances to notice and avoid."

He added[133]:

> "I think the unevenness at the point where the [respondent] fell was not an uncommon or unexpected feature of a domestic property, and it was clearly visible and obvious."

106 His Honour correctly ruled that the expert's evidence was substantially inadmissible and generally unhelpful[134] (the respondent made no attempt to rely upon it in the Full Court or this Court[135]).

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132 *Neindorf v Junkovic* (2004) 88 SASR 162 at 169 [34].

133 (2004) 88 SASR 162 at 171 [42].

134 (2004) 88 SASR 162 at 172 [45].

135 cf *Fox v Percy* (2003) 214 CLR 118 at 167 [50].

107 His Honour also dealt with contributory negligence[136]:

> "As to contributory negligence, and assuming the [appellant] was in breach of a duty of care which she owed to the [respondent], the latter was not looking where she was going, and the presence of the goods to the right of the driveway does not excuse her failure to take reasonable care for her own safety. Had I held that the [appellant] was liable to the [respondent], I would have reduced the damages awarded to her by 30% by reason of her contributory negligence."

The Full Court of the Supreme Court

108 The respondent then appealed, by leave, successfully, to the Full Court of the Supreme Court (Nyland and Gray JJ, Doyle CJ dissenting)[137].

109 Gray J, with whom Nyland J agreed, was of the view that the appellant foresaw, or ought to have foreseen that entrants to her property might not perceive the dangerous state of the driveway and could readily fall, trip or stumble as a result[138]. His Honour said[139]:

> "The present case involved an advertised garage sale. The [appellant] invited the public at large to attend her premises. She chose to display goods above ground level at a point proximate to her driveway. Intending purchasers had no alternative but to approach the goods for sale by using the driveway. In the ordinary course, it could be expected that the attention of entrants might be drawn to the goods on display and away from the state of the driveway. As a result, through lack of awareness, an entrant could trip, stumble or fall and suffer injury. All this was readily foreseeable.
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> ...
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> [The appellant] could have taken a number of steps to safeguard against such an occurrence. A simple warning at the entrance to her property 'take care – dangerous [or uneven] driveway' could have been erected. The two persons stationed near the goods could have been

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136 (2004) 88 SASR 162 at 172 [48].

137 *Junkovic v Neindorf* (2004) 89 SASR 572.

138 (2004) 89 SASR 572 at 598 [105].

139 (2004) 89 SASR 572 at 598 [105], [108].

directed to provide a warning to visitors. Some form of barrier could have been placed over or around the dangerous area. The dangerous area could have been marked in some way. All of these were practical, inexpensive, and easy steps to take. The [appellant] did nothing."

110 His Honour also dealt with contributory negligence. Gray J said[140]:

"The [respondent] failed to take reasonable care for her own safety. She entered an unfamiliar driveway and failed to look carefully where she was walking. The judge's assessment of the [respondent's] contribution was appropriate."

111 Doyle CJ was of the view that the duty of care owed by the appellant to the respondent did not extend to the taking of precautions to prevent injury attributable to the unevenness in the driveway. The Chief Justice said[141]:

"The [appellant] was aware of the hazard.

The hazard could not easily be removed. To remove it would probably involve relaying part of the driveway. A painted strip might have reduced the danger, by calling attention to the presence of the hazard. Whether there were other measures available to the [appellant] that would, more or less permanently, reduce the hazard is not clear.

I agree that it was foreseeable that a visitor might stumble or fall because of the unevenness, and might suffer injury. Although the unevenness was easily to be seen, it was foreseeable that a particular type of visitor, such as a young child or an elderly person with limited vision, might fail to see the hazard. It was equally foreseeable that in particular lighting conditions the hazard might not be seen.

...

But there is a significant factor pointing the other way. The unevenness in the paving was of a kind and of an extent that pedestrians on roads and footpaths, and entrants on private property, encounter daily. Tree roots, erosion, soil movement and other factors all play a part in producing this state of affairs. In many residences a visitor will encounter the precise kind of hazard that the [respondent] encountered. A visitor is equally likely to encounter undulations in paving due to tree roots, pavers

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140 (2004) 89 SASR 572 at 600 [117].

141 (2004) 89 SASR 572 at 578-579 [28]-[36].

> that have lifted or dropped slightly, cracking in concrete paving, erosion at the edge of hard paving such as Mrs Ghantous[142] encountered.
>
> Such hazards (it cannot be denied that they are hazards) are encountered daily by people entering private property. They are usually easily seen. Sometimes they are not. When encountered they usually do not cause injury, although clearly enough sometimes they do. They are accepted as an everyday aspect of life. This kind of unevenness in paving and paths is a normal hazard of daily life.
>
> I consider that the law of negligence would depart from the concept of fault according to everyday standards, and from the concept of taking reasonable care for one's neighbours, if it imposed a duty to protect entrants on private property against such a hazard.
>
> It needs to be borne in mind that if a duty of care is imposed in respect of such a hazard, it applies to each and every hazard on those parts of private property where visitors can reasonably be anticipated. Removing or neutralising all such hazards could be a significant burden on the occupier of a property. It would be an ongoing task.
>
> It is this factor that makes me incline against finding that the [appellant] owed a duty of care to the [respondent] in respect of the hazard."

112 Although the Chief Justice was of the view that the appeal should be dismissed, he agreed with Gray J that if the appeal were to be allowed, then a reduction of 30 per cent for contributory negligence, although high, was appropriate[143].

The appeal to this Court

113 The case in the courts below was conducted largely on the basis of the common law rather than the Act. No one suggested that the appellant did not owe a duty of care to the respondent. The duty was a duty however to take reasonable care only. It did not extend to a duty to adopt any measures of the kind canvassed, of warning, differently locating the table, or placing a mat on the driveway, or otherwise the levelling out of the difference in height at the joint.

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142 see *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

143 (2004) 89 SASR 572 at 580 [45].

114 The application of the Act, which in general reflects the common law, and which governed the action, demands no different conclusion. Sections 17B, 17C and 17E of the Act provide as follows:

"**Interpretation**

17B In this Part, unless the contrary intention appears –

'**dangerous**' includes unsafe;

'**landlord**' includes a landlord under a statutory tenancy;

'**occupier**' of premises means a person in occupation or control of the premises, and includes a landlord;

'**premises**' means –

(a) land; or

(b) a building or structure (including a moveable building or structure); or

(c) a vehicle (including an aircraft or a ship, boat or vessel).

Occupier's duty of care

17C(1) Subject to this Part, the liability of the occupier of premises for injury, damage or loss attributable to the dangerous state or condition of the premises shall be determined in accordance with the principles of the law of negligence.

(2) In determining the standard of care to be exercised by the occupier of premises, a court shall take into account –

(a) the nature and extent of the premises; and

(b) the nature and extent of the danger arising from the state or condition of the premises; and

(c) the circumstances in which the person alleged to have suffered injury, damage or loss, or the property of that person, became exposed to that danger; and

(d) the age of the person alleged to have suffered injury, damage or loss, and the ability of that person to appreciate the danger; and

(e) the extent (if at all) to which the occupier was aware, or ought to have been aware, of –

(i) the danger; and

(ii) the entry of persons onto the premises; and

(f) the measures (if any) taken to eliminate, reduce or warn against the danger; and

(g) the extent (if at all) to which it would have been reasonable and practicable for the occupier to take measures to eliminate, reduce or warn against the danger; and

(h) any other matter that the court thinks relevant.

(3) The fact that an occupier has not taken any measures to eliminate, reduce or warn against a danger arising from the state or condition of premises does not necessarily show that the occupier has failed to exercise a reasonable standard of care.

(4) Subject to any Act or law to the contrary, an occupier's duty of care may be reduced or excluded by contract but no contractual reduction or exclusion of the duty affects the rights of any person who is a stranger to the contract.

(5) Where an occupier is, by contract or by reason of some other Act or law, subject to a higher standard of care than would be applicable apart from this subsection, the question of whether the occupier is liable for injury, damage or loss shall be determined by reference to that higher standard of care.

(6) An occupier owes no duty of care to a trespasser unless –

(a) the presence of trespassers on the premises, and their consequent exposure to danger, were reasonably foreseeable; and

(b) the nature or extent of the danger was such that measures which were not in fact taken should have been taken for their protection.

...

Exclusion of conflicting common law principles

17E(1) Subject to subsection (2), this Part operates to the exclusion of any other principles on which liability for injury, damage or loss attributable to the state or condition of premises would, but for this Part, be determined in tort.

(2) This Part does not apply to a case where an occupier causes a dangerous state or condition of premises, or allows premises to fall into a dangerous state or condition, intending to cause injury, damage or loss to another."

115 We will now explain why application of s 17C(2) of the Act compels the same conclusion as the common law here.

116 The premises in question were modest residential premises (s 17C(2)(a)). The nature and extent of the danger were minor, obvious, and of a kind, as the evidence shows, encountered unexceptionally on suburban footpaths (s 17C(2)(b)). The circumstances of the injury did include that the occasion involved the selling of goods, and an invitation to the respondent to come on to the appellant's premises to buy them. But such an occasion is far removed from the selling of goods on a daily basis by a commercial retailer. It remains however a matter, indeed one of the very few, weighing in the respondent's favour. There is no suggestion that the respondent's age (53 years at the time of the accident), or any infirmity on her part, precluded her from appreciating the differential in height, to the extent if any that it could fairly be described as a "danger" within the meaning of s 17C(2)(d) of the Act. It is true that there was a finding by the Magistrate and the majority in the Full Court that the appellant was, or ought to have been, aware of the danger, which is a factor of relevance under s 17C(2)(e). Knowledge of the joint and the unevenness of it is not the same however as an appreciation of it as a danger. There was no evidence of any previous problem or accident caused by the joint. The unevenness in question was of a kind often encountered. But in any event it is in our opinion an overstatement to describe the slightly raised concrete on one side as a "danger" of which the appellant was, or should have been aware. It was therefore not unreasonable for the appellant not to have taken measures to guard against the slight risk at most that it presented (s 17C(2)(f)). Accordingly, it is not necessary to explore what could or might have been done in that regard (s 17C(2)(g)). Section 17C(2)(h) contemplates that other matters may be relevant and should be taken into account. One of these is that on the day, and before the respondent injured herself, no fewer than six to eight people had safely walked up the driveway to the table.

117 On the application of the Act, the correct result is that the respondent's case should have failed. In our opinion the conclusion of Doyle CJ is therefore

to be preferred. We would allow the appeal. In accordance with the appellant's undertaking given on the application for special leave to appeal to this Court, the appellant should pay the respondent's costs of that application and the appeal, and the orders for costs made in the courts below should not be disturbed.