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Landlords' Liability

Introduction

1. In the 2009 -10 Survey of Income and Housing it was found that an estimated 24% of households in Australia were rented from a private landlord. A similar percentage of households in NSW were estimated to be rented from a private landlord[1]. In the circumstances, it is little surprise that there is so much litigation surrounding the liability of landlords to tenants and members of their households and other entrants to leased premises.

2. This papers examines some of the many cases in this area, and aims to identify some guiding principles to assist practitioners in dealing with matters where a landlord's liability is in issue.

The Previous Position at Common Law

3. Prior to 1997 the Common Law did not recognise a duty of care with respect to leasing a dilapidated house. In 1863 Erle CJ in *Robbins v Jones* set out the position as follows:

> *A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against the letting down of a tumble down house*[2]*.*

4. The reasoning in 1863 with respect to tenants reflected the contemporary judicial emphasis upon the maxim *caveat emptor*. In an 1872 decision in Pennsylvania in *Moore v Weber*[3] it was said that:

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

5. In *Cavalier v Pope*[4] a landlord of a run-down house contracted with the tenant to repair the defective floor. The landlord failed to conduct the repairs and the tenant's wife was injured as a result. The landlord had no contractual liability as the tenant's wife was not a party to the lease. There was no tortious liability because the law did not recognise a duty of care with respect to the leasing of a dilapidated house.

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[1] Australian Bureau of Statistics – Year Book Australia 2012
[2] *Robbins v Jones* (1863) 15 CB(NS) 221, 240; [1861-73] All ER Rep 544, 547
[3] (1872) 71 Penn SR 429 at 432; 10 Am R 708 at 711
[4] *Cavalier v Pope* [1906] AC 428, 430

***Northern Sandblasting Pty Ltd* v *Harris* (1997) 188 CLR 313**

6. In *Northern Sandblasting Pty Ltd v Harris*[5] the High Court held that the rule that the law did not recognise a duty of care with respect to the leasing of dilapidated premises should no longer be followed in Australia.

7. In *Harris,* proceedings were brought by a child, Nicole Harris (by her next friend, Pamela Harris), against the landlord of residential premises, Northern Sandblasting Pty Ltd (**"Northern Sandblasting")**. Ms Harris was electrocuted when she turned off a tap in the garden (**"the Accident")**, she suffered severe brain damage leaving her in a vegetative state.

8. The Accident was caused by 2 faults. The first fault involved a tangle of wires left by an electrical contractor that had been engaged by Northern Sandblasting, which effectively rendered the entire earthing system on the property unsafe. The second fault was due to negligent work by the same electrical contractor when conducting repairs to a stove, which meant that the earth and active wires in the stove element could connect and thus enliven the whole earthing system.

9. In the Queensland Supreme Court the independent contractor was found liable but he was impecunious. In the High Court it was argued that Northern Sandblasting's duty of care extended to an inspection of the premises after the electrical contractor finished the original repairs and before the Harris family occupied the premises. It was also argued that Northern Sandblasting had a non-delegable duty of care in respect of the stove repair, which required Northern Sandblasting to not only take reasonable care, but to personally ensure that reasonable care was taken by the electrical contractor that it had retained.

10. A majority of 4:3 held that Northern Sandblasting was negligent, however, the majority comprised of Brennan CJ, Toohey, Gaudron and McHugh JJJ, differed in their reasoning. McHugh and Toohey JJ found that the doctrine of non-delegable duty of care should apply to landlords and was breached by Northern Sandblasting. Brennan CJ rejected the applicability of the doctrine of non-delegable duty to landlords, but held that Northern Sandblasting was negligent under ordinary principles of negligence in respect of the first fault. Brennan CJ stated the duty of Northern Sandblasting as:

> *being (i) limited to defects in the premises at the time when the tenant is let into possession; and (ii) owed to the tenant and to those who, to the knowledge of the landlord, are intended to occupy the premises under and for the purposes of the tenancy…the duty does not extend to defects in the premises that are discoverable only after the landlord parts with possession*[6]*.*

11. Gaudron J also rejected the applicability of the doctrine of non-delegable duty of care to landlords, but found that:

> *the relationship between a landlord and those who constitute a tenant's household is one that gives rise to a duty on the part of the*

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[5] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 (**"*Harris*"**)
[6] Ibid 340

> *landlord to take reasonable care for their safety by putting and keeping the premises in a safe state of repair*[7].

12. Gaudron J distinguished the position prior to lease to that after the lease has commenced[8] and found that in respect of defects that:

> *are not present at the commencement of a lease but develop during its term, a landlord's duty extends only to remedying those defects of which he or she is or ought to be aware. In practical terms, that may mean that the duty is confined to remedying those defects which are notified by the tenant or by members of his or her household*[9].

13. Gaudron J considered that at the beginning of the lease, the landlord's duty:

> *extends to defects and potential defects which pose special dangers (for example, defects in electrical wiring or gas connections) and which, ordinarily, are discoverable on inspection only by persons exercising special skill or expertise*[10].

Analysis

14. Toohey and McHugh JJ held that Northern Sandblasting had a non-delegable duty of care, Brennan CJ and Gaudron J held that a more general duty of care was owed, and the minority of Dawson, Kirby and Gummow JJJ held that Northern Sandblasting was not liable in negligence or under a non-delegable duty of care. In short, the majority held that landlords do owe a duty to tenants and other entrants of residential premises, however, the content of the duty owed remained unclear.

***State of New South Wales* v *Watton* [1998] NSWCA 291**

15. A District Court judge's reasoning process and interpretation of *Harris* was challenged on appeal in *State of New South Wales v Watton*[11].

16. *Watton* was also an electrocution case. Mr Watton was a tenant at residential premises owned by the State of New South Wales (**"the Premises"**). Prior to Mr Watton occupying the Premises, an inspection was conducted by a properties clerk which did not make note of any faulty wiring. On 30 December 1994 Mr Watton suffered an electric shock due to faulty wiring at the Premises. It was not in issue that the wiring did not conform to any Australian Standard. It was not known who installed the faulty wiring although there was no suggestion that it was Mr Watton.

17. At trial there was expert evidence that the work had not been carried out by a competent licensed electrical tradesman. There was other non-conforming wiring in the Premises, including an electrical socket. The expert also gave evidence, which was accepted by the trial judge, that most lay persons that observed the electrical socket would have reacted by seeking an electrician's

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[7] Ibid 358
[8] Ibid 359
[9] Ibid 360
[10] Ibid 360
[11] *State of New South Wales v Watton* [1998] NSWCA 291 (**"*Watton*")

advice, and an electrician would have been alerted by the socket lying on the floor to the possibility of other unauthorised wiring at the Premises.

18. The trial judge concluded that *Harris* was authority for the proposition that there was a duty to inspect premises which was part of, and an extension to, the duty of care owed by a landlord to the incoming tenant. The trial judge also found that there was a want of care in the inspection process. The landlord was negligent.

19. On appeal Beazley JA, with Powell JA and Fitzgerald AJA agreeing, rejected the proposition that there was an independent duty of care upon a landlord to inspect premises. It was held that where a duty of care is owed, the content and standard of care are to be determined by the particular circumstances of the case. A landlord owes a duty of care to a tenant to make leased premises as safe for the purpose as reasonable care and skill on the part of the landlord can make them.

20. Although the trial judge had misstated the effect of *Harris,* this was irrelevant to the determination of the appeal. In the particular circumstances of *Watton,* there was an obligation to inspect the Premises before the commencement of the tenancy. The obligation to inspect arose under statute, implied from the requirement to complete and provide the tenant with a condition report at the start of the tenancy.

21. Accordingly, the circumstances gave rise to an obligation to inspect, and that inspection was carried out negligently. The negligent inspection led to Mr Watton's injury. The appeal was dismissed.

Analysis

22. The conclusion reached by the Court of Appeal was that *Harris* was not authority for the proposition that there was an independent duty of a landlord to inspect premises, nor does it establish that a landlord does not have a duty to inspect premises before letting them to a tenant. It was held that a landlord's duty to take reasonable care might or might not encompass an obligation to inspect, depending upon the circumstances.

23. The Court described the duty owed by a landlord to a tenant as being "*to make leased premises as safe for the purpose as reasonable care and skill on the part of the landlord can make them*". As discussed below, this is no longer the content of the duty imposed by the Courts.

***Jones* v *Bartlett* [2000] 205 CLR 166**

24. The differing reasons given by the majority in *Harris* left the Common Law in a state of uncertainty regarding the tortious liability of landlords to tenants and other entrants of residential premises. *Jones v Bartlett*[12] provided the occasion to end that uncertainty. The case is an important one, accordingly, a substantial portion of this paper has been dedicated to analysing the principles that can be elucidated from it.

25. *Jones* involved an injury to the adult son of tenants (**"the Plaintiff"**) at residential premises in Perth (**"the Premises"**) in 1993. The Plaintiff resided

[12] *Jones v Bartlett* [2000] 205 CLR 166 (**"*Jones*"**)

at the Premises with his parents. The Plaintiff walked through an interior glass door without looking whether it was open or closed. The glass in the door smashed, causing the Plaintiff serious injuries to his right leg. The alleged negligence or contractual breach of the landlords consisted in failing to have an expert inspect the Premises before they were let to the tenants, and in failing to have the glass in the door in question replaced with thicker glass, which would have complied with safety Standards had the Premises been newly constructed, or had the glass door been replaced, at that time.

26. The glass door conformed with the Australian Standard in force at the time it was constructed, but not with the Australian Standard of 1973 (which was later updated in 1979 and 1989). The latter Australian Standard was mandatory for buildings built after the date of its introduction, but in respect of existing buildings there was no more than a recommendation that conforming glass be fitted when replacing glass upon breakage.

27. It was argued that had the landlord engaged an expert to conduct regular inspections of the Premises, the inadequacy of the thickness of the glass would have been identified and a recommendation made to replace it with thicker, conforming glass. It was argued the landlord's failure to conform to the 1973 Standard rendered the Premises defective.

28. Prior to the commencement of the lease, an inspection of the Premises was carried out by the tenants, and an agent on behalf of the landlords. No safety issues were raised. The agent was not a qualified builder. At the Hearing there was evidence from an expert glazier that if he had inspected the Premises, he would have been able to readily detect that the glass in the door did not conform with the current Australian Standard, but he gave evidence that he had never previously been called upon to conduct such an inspection of any domestic residence. The expert considered the general public would not be able to identify non-conforming glass.

29. It was argued that the landlord was in breach of contract, in breach of a Common Law duty of care owed to the Plaintiff, or in breach of statutory duties of care created by the *Occupiers Liability Act 1985* (WA).

30. At trial in the District Court, Commissioner Reynolds found for the Plaintiff, finding that the landlords were negligent. That finding was reversed by the Full Court of the Supreme Court of Western Australia. The Plaintiff appealed to the High Court.

31. The majority of the High Court found that the Premises were not defective[13] and that the appeal should be dismissed. The Court held that the Plaintiff's claim for breach of contract, breach of statutory duty and Common Law negligence could not succeed.

32. Gleeson CJ referred to *Harris*, stating that the "*premises in that case were undoubtedly defective*"[14]. His Honour considered that in *Jones* the case did not involve a defect. There was nothing about the Premises that alerted, or should have alerted, the landlords to any unusual danger. The Premises were

[13] Ibid Gleeson CJ, Gummow J in joint judgment with Hayne J, Gaudron, Kirby and Callinan JJ
[14] Ibid 21

constructed in accordance with the Standard prevailing at the time, and were adequately maintained[15].

33. In an oft-quoted paragraph, His Honour stated:

> *there is no such thing as absolute safety. All residential premises contain hazards to their occupants and visitors. Most dwelling houses could be made safer, if safety were the only consideration. The fact that a house could be made safer does not mean it is dangerous or defective. Safety standards imposed by legislation or regulation recognise a need to balance safety with other factors, including cost, convenience, aesthetics and practicality. The standards in force at the time of the lease reflect this. They did not require thicker or tougher glass to be put into the door that caused the injury unless, for some reason, the glass had to be replaced. That, it is true, is merely the way the standards were framed, and it does not pre-empt the common law. But it reflects common sense*[16].

34. By reference to the potential for many household items to be hazardous to a person behaving as carelessly as the Plaintiff, Gleeson CJ stated he did not accept that the Premises were defective in any relevant sense.

35. In considering the liability of the landlords in tort, Gleeson CJ stated:

> *there is no ground in principle for imposing upon the repondents an obligation greater than an obligation to take reasonable care to avoid a foreseeable risk of injury to their prospective tenants and members of their household. The critical question is as to what is reasonable*[17].

36. His Honour stated he agreed with the Full Court's decision that there was no failure to take reasonable care, and the claim in negligence must fail. He stated the judgment was a judgment of fact based on the circumstances, and can't be circumvented by a specific formula. As they determine whether a duty exists, the standards of a reasonable person determine whether the duty is breached. Whether it is reasonable for landlords to have premises inspected by an expert before a tenancy begins depends upon the circumstances of the case, there is no answer of universal application.

37. Gaudron J stated that it follows from *Harris* that under general law, a landlord of residential premises owes a duty of care to the members of his or her tenant's household. However, *Harris* does not clarify what the precise content of the duty is.

38. Gaudron J observed that in *Harris*, only she and Brennan CJ considered landlords owe a general duty of care. Her Honour stated that in *Harris*, she was of the view that the duty owed by a landlord is a duty to take reasonable care for the safety of those who constitute the tenant's household by putting and keeping the premises in a safe state of repair. What was reasonable would depend upon whether the tenants were in possession. Prior to the tenant's possession it was reasonable both to inspect the premises and to remedy existing defects that gave rise to a foreseeable risk of injury. Where

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[15] Ibid 22
[16] Ibid 23
[17] Ibid 57

there were defects or potential defects which posed special dangers (such as electrical wiring or gas connections) it was reasonable to have an inspection conducted by an expert in that regard. As regards defects which were not present at the commencement of the lease, reasonable care only required remedying of those defects of which the landlord was or ought to have been aware[18].

39. Gaudron J observed that the duty identified by Brennan CJ in *Harris* was confined to "*defects*" and does not assist the Plaintiff in *Jones* because the glass door was not defective. The duty identified by Gaudron J was simply to put and keep the premises in a state of safe repair, and as the glass door was not defective, it was not in need of repair. Accordingly, the duty owed was not breached.

40. Her Honour stated that in order for the Plaintiff in *Jones* to succeed, a greater duty of a landlord would have to be recognised, namely a duty to ensure premises are as safe for residential use as reasonable care and skill on the part of anyone can make them. Her Honour also stated that it would need to be held that it is reasonable to replace items which, though not defective, involve a foreseeable risk of injury if safer items are available.

41. In finding that such a greater duty did not exist, Her Honour commented that the landlord/tenant relationship is contractual and involves an element of choice. The parties can elect not to enter the relationship should they wish. The relationship between a tenant and the members of his/her household involves a greater degree of control than the relationship between a landlord and the members of his/her tenant's household. Accordingly, there is no reason why a greater duty should be placed on a landlord than on an occupier (such as the tenant). As an occupier is only required to take such care as is reasonable in the circumstances, a landlord should not be subject to a greater duty.

42. In a joint judgment, Gummow and Hayne JJ considered the previous judicial consideration of a landlord's duty, concluding:

> *the result is that in Australia it is no longer correct that a landlord never owes any duty in negligence to occupants in respect of the condition of residential premises. The rejection of the rule in Cavalier v Pope does not, however, go so far as necessarily to impose a duty upon the landlord to any person who may be on the premises at any given time[19].*

43. Their Honours recognised that the nature and extent of the duty owed depends upon the circumstances, and those circumstances may differ between landlord and tenant, and landlord and other persons. The latter is likely to be less stringent than the former[20].

44. Their Honours stated that, as in *Harris*, *Jones* involved residential premises, and their judgement is to be understood with that in mind:

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[18] Ibid 88
[19] Ibid 166
[20] Ibid 169

> *that which is required in respect of premises let for commercial or educational or other purposes may well differ, but that is not for decision in this case*[21].

45. Gummow and Hayne JJ stated that ordinarily a landlord will surrender occupation of the premises to the tenant, and therefore the content of any duty owed by the landlord:

> *is likely to be less than that owed by an owner-occupier who retains the ability to direct what is done upon, with and to the premises. Broadly, the content of the landlord's duty to the tenant will be conterminous with a requirement that the premises be reasonably fit for the purposes for which they are let, namely habitation as a domestic residence*[22].

46. Their Honours stated that premises would not be reasonably fit if the ordinary use of the premises would, as a matter of reasonable foreseeability, cause injury. Landlords are under a duty not to let premises with defects that the landlord knows or ought to know make the premises unsafe for the use to which they are put. That duty can be discharged by taking reasonable steps to ascertain the existence of any defects and, once the landlord knows of any defects, to take reasonable steps to remove them. Their Honours stated that:

> *this does not amount to a proposition that the ordinary use of the premises for the purpose for which they are let must not cause injury; it is that the landlord has acted in a manner reasonably to remove the risks*[23].

47. Gummow and Hayne JJ concluded that what constitutes "*reasonable steps*" will depend upon the circumstances, and what is reasonable for residential premises may be less than on commercial premises, such as a school or hotel. It may also depend on other factors such as the terms of the lease, including the amount of rent, any obligations of the parties and any specifications regarding limitations regarding the use to which the premises are to be put. Their Honours considered the "*reasonable fitness*" of premises involved 3 steps; the first concerns the presence of dangerous defects, the second is the taking of reasonable care to ascertain defects and the third is the exercise of reasonable care to remove them or otherwise make the premises safe.

48. Their Honours discussed the three steps in further detail, giving examples of dangerous defects including; the tap in *Harris,* exposed live wires, stairs that could not bear the weight of a person, or a roof that could not support the weight of a tenant authorised to be upon it. They stated a glass pane prone to shatter when a door is opened or closed could also constitute a dangerous defect, however, the hazard in *Jones* was not of that nature.

49. Gummow and Hayne JJ considered that many household items might be said to be dangerous, such as a gas oven or a caged fan, however, those items are only dangerous if misused. They concluded that such items will only be defective if they are dangerous when being used in a regular fashion. Their

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[21] Ibid 169
[22] Ibid 171
[23] Ibid 173

Honours stated a further requirement is that the danger must appear in the course of the use of the premises for the purpose for which they were let. If the danger only arises in circumstances where the tenant is performing an unauthorised act, there will ordinarily not be a dangerous defect.

50. Their Honours held that in *Jones* the Premises were being used in the usual course of occupancy, but the glass door was not a dangerous defect in the necessary sense. The Premises were reasonably fit for the purpose of residential occupancy, both at the commencement of the tenancy and at the time of the accident. There was no breach of duty as there was no defect[24].

51. The fact that there was no defect was sufficient to determine that the Plaintiff's claim must fail, however, Their Honours went on to deal with the second and third steps.

52. As regards the taking of reasonable care to ascertain dangerous defects, Their Honours considered "*reasonable care*" did not require a system of regular inspection during the tenancy, nor did it require the engagement of experts where risks of defects (such as electrical defects) could be seen as merely a possibility. The appropriate standard was "*where the existence of a dangerous defect was merely a possibility (albeit one later realised when the Plaintiff was injured), the steps a landlord was required to undertake were only those that would be taken in the course of "ordinary reasonable human conduct*"[25]. It is not an exercise of hindsight. Their Honours suggested the standard could be identified by asking whether an ordinary person in the landlord's position would or should have known that there was any risk, whether that person would or should have known of steps that could be taken in response to that risk, and the reasonableness of that risk. The expert evidence confirmed this standard was not breached by the landlords in *Jones*.

53. In respect of the third step, the exercise of reasonable care to remove defects, Their Honours stated a landlord's duty is not one of strict liability to ensure an absence of defects or to ensure reasonable care is taken by another person (such as an electrical contractor) in respect of existing defects. It is not a duty to guarantee that the premises are as safe as can reasonably be made.

54. Gummow and Hayne JJ helpfully considered the duty of a landlord to other occupiers and entrants (as opposed to the duty owed to the tenant/s), concluding that the duty owed by the landlord to the tenant, to take reasonable care that the premises contain no dangerous defects, also extends to other entrants. However, in many cases, the duty owed by the landlord to the other entrant will be narrower than the duty owed by the tenant to the other entrant, the reason being that the tenant is in occupation. Their Honours gave examples of a slippery floor or an unsecured gate around a swimming pool. Such defects are beyond a landlord's duty as:

> *what must be involved is a dangerous defect of which the landlord knew or ought to have known*[26].

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[24] Ibid 181
[25] Ibid 186
[26] Ibid 197

55. Kirby J stated that following *Harris*, it was apparent that landlords owe a duty of care to tenants and members of the tenant's household, to which the broad principles of negligence should be applied. Beyond establishing such a duty exists, no other binding rule emerges from *Harris*. His Honour stated that following *Harris*, a landlord owes a duty not only under the lease contract, but also at Common Law. The duty is owed to tenants and third parties who are injured as a result of a patent defect in the tenanted premises. His Honour stated that the duty can be discharged by undertaking an inspection of premises prior to each lease or its renewal, and by responding reasonably to defects drawn to notice and by ensuring any repairs are made which the inspection or notice discloses to be reasonably necessary. His Honour stated the duty can be discharged by delegating the inspection and repair to a competent person[27].

56. His Honour stated that following *Harris*, there were still questions left unanswered, such as;

1) Whether the Common Law imposes on a landlord an affirmative duty to conduct, or procure the conduct of, a detailed inspection of every source of danger at the premises;

2) Whether such an inspection must be by an expert capable of detecting a latent defect which is not apparent to the untrained eye;

3) If so, whether the failure to procure such an expert will impose legal liability on the landlord where an injury is caused by a defect of which the landlord personally remains reasonably unaware[28].

57. In considering whether the Court should impose a duty of the sort contended for by the Plaintiff, Kirby J considered that:

> *except where legislation imposes a duty with which the landlord must comply, the common theme of contemporary obligations is to hold back from imposing absolute liability. Moreover, it is to limit the statutory obligations of landlords to the standard of reasonable care. It is to impose common law standards of a similar character. Such standards exclude liability for latent defects of which a landlord has no notice and is reasonably unaware*[29].

58. His Honour speculated that if a duty was imposed upon a landlord to conduct, or arrange the conduct of, an inspection by an expert of such items as the glass door in *Jones,* the same principle would need to be applied in respect of inspections of gas, electricity, flooring, ceilings, balconies, railings etc, each requiring an inspection by a different expert for a different fee. His Honour considered such costs would necessarily be passed on to tenants. His Honour acknowledged that different principles may apply to commercial premises, whereby:

> *where members of the public generally are invited on to, or have a right to enter, premises a higher duty will be imposed by law*[30].

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[27] Ibid 237
[28] Ibid 237
[29] Ibid 249
[30] Ibid 251

59. His Honour discussed the policy issues surrounding the imposition of a greater duty on landlords, commenting that where legislature imposes an extended liability, it normally does so with notice, which allows those affected to make their own judgments and obtain appropriate insurance. Such steps can not be taken by a Court[31].

60. His Honour considered that the Common Law could impose on landlords a duty as contended for the Plaintiff in *Jones* (namely, a duty to have an expert inspect the premises prior to the commencement of the tenancy), however, a decision to do so is by no means self-evident or incontrovertible. His Honour considered for a Court to impose such obligations, involving duties of affirmative action, would be "*unusual*", and "*in the great variety of tenancy arrangements that exist, it could work a serious injustice on particular landlords*"[32].

61. Kirby J expressed the duty as:

> *limited to that of taking reasonable care to avoid foreseeable risk of injury from defects of which they were on notice or of which (by appropriate inspection) they would reasonably become aware because they were obvious to a reasonable landlord or its agent*[33].

62. His Honour considered that the landlord had not breached that duty and the Plaintiff's claim must fail.

63. Callinan J considered a landlord should not be saddled with a personal, non-delegable duty of care. His Honour stated:

> *in my respectful opinion the courts should be very cautious about extending the range of non-delegable duties, the law in respect of which has already developed in a not entirely satisfactory and principled way*[34].

64. Callinan J was reluctant to impose a Common Law duty upon landlords above that provided for by statute or any contractual obligation. His Honour did not conclusively determine the existence or otherwise of a Common Law duty, however, His Honour stated that:

> *if any duty were owed, a matter of which I am far from convinced, I would define it as no more than a duty to provide, at the inception only of the tenancy, habitable premises. And that the respondents in this case surely did*[35].

65. His Honour's judgment gives little away as to whether a landlord owes a Common Law duty to tenants or other entrants, and if so, what the nature of that duty is. Even if a duty was owed, it was not breached by the landlord in *Jones*.

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[31] Ibid 252
[32] Ibid 252
[33] Ibid 252
[34] Ibid 284
[35] Ibid 289

66. In his dissenting judgment, McHugh J found in favour of the Plaintiff. He found that the exercise of reasonable care by the landlord required that, either immediately before the letting to the tenants, or at some reasonable period before that time, the Premises should have been inspected by a person with building qualifications to assess its safety[36]. If an inspection had been carried out, the risk of injury and means of avoiding it would probably have been pointed out to the landlord[37].

67. McHugh J stated that it followed that:

> *there was present in the premises a reasonably foreseeable risk of injury to persons such as the appellant of which the landlords ought to have known[38]*.

68. The cost of a replacement door would have been cheap relative to the risk of danger and potential gravity of the injury[39]. His Honour considered that the standard of reasonable care required the glass in the door to conform to at least the 1973 Australian Standard[40].

69. The effect of McHugh J's minority judgment is that a landlord would be required to have residential premises inspected by someone with building qualifications immediately before the premises were let to a tenant, or at some reasonable period before that time.

Analysis

70. Although to a lesser extent than in *Harris*, the fact that Their Honours did not provide a joint judgment makes the principles arising from the decision in *Jones* difficult to discern. There is no doubt that a landlord owes a Common Law duty to tenants and other entrants, but Their Honours once again differed in their views as to the content of the duty owed.

71. As regards a landlord's duty to inspect premises, Gummow and Hayne JJ considered that the duty with respect to ascertaining dangerous defects would be discharged if the landlord takes reasonable steps to ascertain the existence of such defects[41]. Their Honours did not consider that reasonable care requires regular inspections throughout the tenancy[42], nor does it require an expert to inspect the premises where the risk of a defect could be seen as a mere possibility. Kirby J held that the duty owed can be discharged by undertaking an inspection of premises prior to each lease or its renewal[43]. Gaudron J referred to her own judgment in *Harris,* stating that prior to the tenant's possession, it was reasonable both to inspect the premises and to remedy existing defects that gave rise to a foreseeable risk of injury[44].

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[36] Ibid 107
[37] Ibid 107
[38] Ibid 109
[39] Ibid 109
[40] Ibid 111
[41] Ibid 173
[42] Ibid 183
[43] Ibid 237
[44] Ibid 88

72. It is difficult to contemplate circumstances whereby reasonable care would not require a lay inspection of the premises before the commencement of a tenancy. Prior to the commencement of the tenancy, the landlord is the occupier and has a greater degree of control, but once the tenancy commences, occupation is surrendered to the tenant. However, as highlighted by Gummow and Hayne JJ, there are instances where the landlord never had control, such as where there are back-to-back tenancies or where a landlord assumes ownership after the tenant has gone into possession[45].

73. It should be borne in mind that in many circumstances, such as in *Watton*, a requirement to inspect will be imposed by statute or by contract. Presently in New South Wales, s.15 of the *Residential Tenancies Act 2010* provides that a standard form residential tenancy agreement may be prescribed by the Regulations. The standard form residential tenancy agreement at Schedule 1 of the *Residential Tenancy Regulations 2010* provides that "*a condition report relating to the condition of the premises must be completed by or on behalf of the landlord before or when this agreement is signed*". Accordingly, where the standard form prescribed by the Regulations is used, the landlord's duty will encompass an obligation to inspect.

74. The Common Law duty does not require that an expert in every potential field be retained to conduct an inspection, however, the circumstances in a particular case may require an expert inspection if a defect is more than a mere possibility, that is, the landlord knew or ought to have known of a dangerous defect. The judgments of Gleeson CJ[46] and Kirby J[47] provide useful discussion of the policy against the imposition of such an obligation.

75. As regards the content of the duty generally, Gleeson CJ and Gummow and Hayne JJ expressed the duty broadly to be to take reasonable care to avoid foreseeable risk of injury, with the practical content of the duty to be determined by the particular circumstances. A key factor in the determination being the presence or otherwise of "*dangerous defects*".

76. Gaudron J described the duty as "*to put and keep the Premises in a safe state of repair*[48]. Kirby J described the duty of landlords as being *"limited to that of taking reasonable care to avoid foreseeable risk of injury from defects of which they were on notice or of which (by appropriate inspection) they would reasonably become aware because they were obvious to a reasonable landlord or its agent*[49] .

77. Callinan J was reluctant to even confirm the existence of a Common Law duty, but considered that if a duty were owed, it is no more than a duty to provide at the inception only of the tenancy, habitable premises.

78. The decision in *Jones* has narrowed the scope for interpretation of the content of a landlord's duty that existed following *Harris*. However, the content of the duty is not entirely clear. In particular, the role of the existence or otherwise of a "*dangerous defect*" was unclear from the various judgments.

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[45] Ibid 170
[46] Ibid 19
[47] Ibid 251
[48] Ibid 88
[49] Ibid 252

79. It is apparent that the content of the duty will vary depending upon the circumstances, in particular, it is notable that the duty owed by a landlord of commercial premises will not necessarily be the same as that owed by a landlord of residential premises.

80. Subsequent to the decision in *Jones*, the NSW Court of Appeal has further explored some of the variable circumstances which impact upon the content of the duty. The balance of this paper explores the key cases in which the NSW Court of Appeal has embarked upon this task.

***Ahluwalia & Ors* v *Robinson* [2003] NSWCA 175**

81. *Ahluwalia & Ors v Robinson*[50] also involved an injury sustained by shattered glass. On 4 November 1995 Ms Robinson ("**the Respondent**") attended residential premises ("**the Premises**") which were tenanted by her former partner, Mr Read, who was also the father of her son. The Respondent attended the Premises to collect her son. When the Respondent arrived at the Premises, Mr Read was bathing the child in the bathroom. The Respondent asked Mr Read to hurry up, and as she turned to walk out of the bathroom she slipped due to water on the floor. As the Respondent slipped, her right foot went through a glass shower screen ("**the Screen**"), which shattered causing her substantial injury.

82. The glass in the Screen complied with the relevant Australian Standard at the time that the Screen was installed. The subsequently updated Standard required safety glass to be used in new installations but did not impose a requirement that existing glass be replaced with safety glass.

83. At the District Court trial, evidence of the managing agent's file was admitted over objection. The file contained a record of a vast number of issues raised with the Premises over the period 1990 to 1995, however, those issues mainly went to matters such as electricity wiring, plumbing, drainage and the general dilapidation of the Premises. There was no issue noted with the Screen. There was expert evidence from an architect that he would not have been able to determine from inspection whether the glass in the Screen was safety glass.

84. At the District Court trial, the primary judge, English DCJ, found that a visual inspection by a lay person would not have disclosed that the glass in the Screen was not safety glass. Her Honour considered that the Premises had not been adequately maintained and constantly required attention. Her Honour found that there were defects in the Premises which rendered it hazardous to occupy, and a prudent landlord would have arranged for an expert inspection of the Premises to ensure they were fit for habitation. Her Honour held that if an expert inspection had been conducted, the presence of the annealed glass in the Screen would have been discovered , and had the glass been replaced, it was more probable than not that when the Respondent's foot contacted the glass in the Screen it would not have penetrated it. Her Honour found in favour of the Respondent.

85. The NSW Court of Appeal upheld the appeal. Hodgson JA, with Sheller JA and Bryson J agreeing, stated that *Jones* made it clear that:

[50] *Ahluwalia & Ors v Robinson* [2003] NSWCA 175 ("***Ahluwalia***")

> *in the absence of a contract supportive of a higher duty, the duty of a landlord in relation to the safety of premises does not in general require a landlord to commission experts to inspect premises to look for latent defects, nor is it a duty to make premises as safe as reasonable care can make them. In general terms, the duty of the landlord is to be determined by reference to foreseeable risk of harm and what a reasonable person would do in response to that risk*[51].

86. The Court held that the only basis upon which the trial judge had found that there was a foreseeable risk arising from the Screen was by finding that a reasonable person would have commissioned an inspection of the Premises by an expert. The Court found that the various issues noted by the managing agent gave force to an agrument that there was a foreseeable risk from issues such as electrical wiring and plumbing, but reasonable care would only have required an inspection by an expert electrician or a plumber, not an expert in another area, or a person with general building or architectural expertise[52].

87. The Court held that even if an inspection had been conducted by someone with general expertise in building and/or architecture, there was insufficient evidence before the Court to justify a finding, on the balance of probabilities, that such an expert would have detected that the glass in the Screen was not safety glass. Even if the glass was detected as not being safety glass, having regard to the relevant Australian Standard, it is not clear an expert would have recommended that the glass in the screen be replaced in any event.

88. The Court of Appeal hypothesised that even if an expert had inspected the Premises and recommended that the glass in the Screen be replaced, it is a real question as to whether reasonable care would have required replacement of the glass in the Screen, having regard to the multiple other issues at the Premises, such as with the electricity and plumbing, which would have had priority over replacing the glass in the Screen, and would have required very substantial expense, which in turn would have impacted upon the rent asked for the Premises[53].

89. In summary, despite the Premises being in a general state of dilapidation, and with known issues with electricity and plumbing, the Court was not willing to impose a duty upon the landlord to arrange an inspection by a general building and/or architectural expert. The glass in the Screen did not give rise to a foreseeable risk of injury and there was no breach of duty.

Analysis

90. A landlord's duty is not to make premises as safe as reasonable care can make them.The duty owed by a landlord in residential premises was expressed as being determined by reference to foreseeable risk of harm and what a reasonable person would do in response to that risk.

91. In the absence of some contractual obligation, a landlord generally is not required to commission experts in specific fields to inspect the premises,

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[51] Ibid [23]
[52] Ibid 25
[53] Ibid 28

although if there is some unusual danger, of which the landlord knew, or ought to have known, the circumstances may extend the duty to an expert inspection in respect of that danger. It must also be established that the result of that inspection would have been a recommendation to take precautions against the particular risk posed.

***Sakoua & Anor* v *Williams* [2005] NSWCA 405**

92. The principles in *Jones* were also applied in *Sakoua & Anor* v *Williams*[54]. *Sakoua* also involved an injury at tenanted residential premises ("**the Premises**"). The owners ("**the Appellants**") purchased the Premises in July 2001. It was the Appellants' intention to develop the Premises, but in the meantime they decided to rent them. Ms Williams ("**the Respondent**") was their first tenant. The Respondent commenced renting the Premises on 13 October 2001.

93. The previous owner had purchased the Premises in 1974. The front steps were in place at that time.

94. On 20 October 2001 the Respondent sustained injuries when she fell on the 3 front steps ("**the Steps**") of the Premises. The Respondent alleged the Appellants were negligent in failing to provide safe access to the Premises, in particular, she alleged that the absence of a handrail and landing on the Steps and the presence of a tree stump in the vicinity of the Steps, made them unsafe.

95. At the trial both parties adduced expert evidence. There were a number of disagreements between the experts, but the following common ground emerged from their reports:

    1) The construction of the Steps did not involve any breach of the building Ordinances at the time of construction;
    2) The construction of steps with risers of varying heights was "*contrary to good building practice*";
    3) "*Arguably*" the failure to provide a landing between the doorway and the top step was contrary to "*good building practice*" at the time;
    4) If the Premises had been constructed a few months later, the construction would have involved breaches of the applicable law, in that the risers were not of a consistent height, a landing was not provided and arguably a handrail should have been provided.

96. At the trial in the District Court, Patten DCJ found a verdict for the Respondent.

97. In a 2:1 judgment, the NSW Court of Appeal upheld the appeal. Mason P gave detailed consideration to the various judgments in *Jones*. His Honour stated that although *Jones* established that a landlord of residential premises owes a duty to an incoming tenant, the scope of that duty had not been formulated in identical terms by Their Honours.

98. Mason P stated that Gleeson CJ and Gummow and Hayne JJ had expressed the duty to be "*to take reasonable care to avoid foreseeable risk of injury, leaving the practical content of the duty to be governed by the circumstances*

[54] *Sakoua & Anor* v *Williams* [2005] NSWCA 405 ("***Sakoua***")

of the case"[55]. His Honour considered Gaudron and Kirby JJ favoured slightly narrower formulations of the duty, respectively being, "*a duty to put and keep premises in a state of safe repair*" and, "*to take reasonable care to avoid foreseeable risk of injury from defects of which the landlord was on notice or of which (by appropriate inspection) the landlord would reasonably become aware*"[56]. His Honour stated that:

> *for Kirby and Gaudron JJ, the concept of a dangerous defect was central to the narrower duty of care that they favoured. For Gleeson CJ, Gummow and Hayne JJ the presence of such a defect at the inception of a tenancy was seen as highly relevant to a finding of breach of the more generally expressed duty of care that they favoured*[57].

99. His Honour considered that none of the Justices in the majority in *Jones* had gone as far as to take any duty to repair beyond requiring the landlord to address "*defects*" of which he or she was, or ought to have been aware. His Honour stated each of Their Honours in *Jones* defined "*defect*" in the context to mean something more than a condition capable of causing injury.

100. Mason P, with Brownie AJA agreeing, focussed upon the definition of "*defect*" given by each of the majority in Jones. His Honour concluded that he could not agree with the trial judge, or with Beazley JA, that the question to be decided was whether the Steps were reasonably safe for the purposes for which they were to be put. His Honour stated, "*in a tort case, such a test appears both to be unhelpful and to contradict the scope of the duty found by the majority in Jones*"[58].

101. Mason P stated that the obviousness of the danger identified did not provide a basis for liability. Such obviousness was equally apparent to the Appellants and the Respondent and is not, in itself, a criterion of liability[59].

102. His Honour stated that all stairs are inherently dangerous, especially if traversed by users like the Respondent, who fail to some degree to take reasonable care for their own safety. His Honour repeated his remarks in *Francis* v *Lewis*[60] that:

> *foreseeability of risk of injury is not determinative of breach of duty of care. If, which I doubt, the learned trial judge overlooked this he would have been in error. The duty is one of reasonable care, not whether safety could have been improved by modification. The duty is not confined to one owed to those who are careful for their own safety, but it is relevant to take into account that Plaintiffs are themselves expected to act reasonably and take care for their own safety when determining what is reasonable (see generally Phillis v Daly (1988) 15 NSWLR 65 at 74, David Jones Limited v Bates [2001] NSWCA 233, Waverley Municipal Council v Swain [2003] NSWCA 61 at [114].*

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[55] Ibid 4
[56] Ibid 5
[57] Ibid 7
[58] Ibid 22
[59] Ibid 23
[60] *Francis* v *Lewis* [2003] NSWCA 152 at [40]-[41]

> *In recent years, this Court has emphasised that no stairs are perfectly safe and that it is wrong to suggest that a Plaintiff who is injured by falling on stairs has prima facie some cause of action (see Baulkham Hills Shire Council v Pascoe [1999] NSWCA 431 at [12], North Sydney Council v Plater [2002] NSWCA 225 at [43]-[44], Owners Strata Plan 30889 v Perrine [2002] NSWCA 324. In Wilkinson v Law Courts Ltd [2001] NSWCA 196, Heydon JA, with whom Meagher JA and Rolfe AJA agreed, said at [32]:*
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> *Stairs are inherently, but obviously, dangerous. Many measures might have been taken to make the stairs as safe as human skill could possibly make them; but the duty is only to take care which is reasonable under the circumstances. Among the essential circumstances is the following fact: "persons using steps may misjudge their footing and slip or trip but this is an everyday risk which members of the public avoid by taking care for their own safety": Stannus v Graham [1994] HCA 46; (1994) Aust Tort Reports 81-297 at 61,566 per Handley JA*[61]*.*

103. Mason P considered that the configuration of the Steps was "*patent*". The Respondent had inspected the Premises before she leased them and she even claimed that she had told the agent that, "*I don't like the look of these steps*". His Honour acknowledged that the Steps had been constructed in accordance with the prevailing Standards at the time, but there was a finding that the construction of the Steps with risers of varying height was "*contrary to then current good building practice*"[62].

104. His Honour stated that the issue of breach must be considered as at the time the Premises were let, but the factual inquiry as to whether the Steps constituted a dangerous defect and/or whether it was unreasonable not to repair them before letting should at least have regard to the history of safe usage. His Honour noted the previous owner knew of no incident or accident over the previous 27 years.

105. Mason P concluded that *Sakoua* was not a case where the landlord had knowledge or suspicion which made it unreasonable to fail to upgrade the steps or call in an expert for advice. His Honour considered that the Respondent's expert evidence at its highest identified unsafeness in the departures from good building practice, but those departures "*were quite visible and in no way unusual dangers*"[63].

106. His Honour commented that just because more recent Standards had been sharpened, this did not in itself create a duty to upgrade the Steps, nor did it establish that the Steps were defective in the sense recognised in *Jones*[64]. The Steps could have been safer, but their deficiencies were clearly visible, whereby the Respondent using them ought to have appreciated that a degree of care was required when negotiating them. The risks were as obvious to the Respondent as to the Appellants. His Honour noted that the short distance from the top to the bottom of the Steps meant that any injury would be unlikely to be serious and the history of no previous accidents meant there

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[61] *Sakoua & Anor* v *Williams* NSWCA 405 at [26]
[62] Ibid 29
[63] Ibid 31
[64] Ibid 32

was nothing to put the Appellants on notice of a defect or condition requiring attention[65].

107. Mason P stated that negligence was not established by pointing out that the Steps could have been made safer with little expenditure, especially where any expenditure might be expected to be reflected in a higher rental[66].

108. In her dissenting judgment, Beazley JA found that there was no error shown in the trial judge's conclusion. Her Honour stated that

> *the existence or otherwise of an Ordinance requiring a landing at the time the steps were built does not determine whether in this case there was a breach of duty of care by the Appellants to the Respondent*[67].

109. Her Honour stated that the difference between *Sakoua* and *Jones* was that in *Sakoua* the unsafe condition of the steps was "*obvious, as a matter of ordinary observation*", whereas in *Jones*, it was not apparent to a lay person that the thickness of the glass was such as to make it unsafe. Her Honour stated that it is apparent from *Jones* that a landlord is under an obligation at the time of the commencement of the tenancy to ensure that premises are reasonably safe for the purposes for which they are let. Her Honour considered that in *Sakoua*, this required the steps to be reasonably safe for the purpose for which the Premises were to be put.

110. The implication from Her Honour's judgment is that *Sakoua* did not beg the question, "*did reasonableness require an inspection by an expert?*" Instead, the unsafe nature of the Steps was obvious, as a matter of ordinary lay observation, at the commencement of the letting. The landlord's duty was breached by not taking reasonable precautions to guard against the risk posed by the Steps.

Analysis

111. In summary, Beazley JA considered that *Jones* differed from the circumstances in *Sakoua*, because in *Jones* the hazard could not have been identified by a lay person, whereas in *Sakoua*, the unsafe nature of the Steps was obvious as a matter of lay observation. Accordingly, the Appellants were, or ought to have been on notice of the unsafe nature of the Steps, and the question then was whether reasonable care was taken to guard against that risk. Her Honour considered it wasn't. According to Her Honour's judgment, if premises are unsafe at the commencement of the tenancy, and the unsafe nature is, or ought to be apparent to a lay observer, a landlord will breach the duty owed if he/she fails to take reasonable precautions to guard against the risk posed. It matters not that the risk is equally apparent to both landlord and tenant.

112. The majority did not interpret *Jones* to that effect. Mason P and Brownie AJA observed that none of the majority in *Jones* had elevated a landlord's duty beyond requiring the landlord to address "*defects*" of which he/she was, or ought to have been aware. A defect was something more than a condition

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[65] Ibid 33
[66] Ibid 34
[67] Ibid 65

capable of causing injury. Stairs are inherently dangerous, just because they could be made safer does not mean they are defective, especially in circumstances where there is no evidence of any previous accidents. Any unsafeness was equally apparent to both the Respondent and the Appellants, and the Respondent should have appreciated she had to take care when using them.

113. The majority judgment raises the question, "*if there had been a history of accidents on the Steps, would this have rendered the Steps defective in the sense contemplated by the majority in Jones*?"

***NSW Department of Housing* v *Hume bhnf Donna Hume & Anor* [2007] NSWCA 69**

114. *NSW Department of Housing* v *Hume*[68] was another case involving an injury sustained at tenanted residential premises ("**the Premises**"), however, *Hume* involved an injury to a visitor to leased premises, as opposed to a tenant or a member of his/her household. *Hume* was also another case where Beazley JA, in finding against the landlord, the NSW Department of Housing ("**the Appellant**"), was in the minority.

115. On 14 August 1995, Tyler Hume ("**the Respondent**"), a 2 ½ year old child, was dropped by his mother, Ms Hume, as she was exiting the Premises. Ms Hume and the Respondent had been visiting an acquaintance, Ms Slade, who had been a tenant at the Premises since 1981. Ms Hume had stayed at the Premises for 2 or 3 nights a week for approximately 5 years.

116. The Premises had a porch which did not exceed 1 metre above ground level. There were steps leading down to ground level from the porch ("**the Steps**"). The Steps comprised 4 risers and 3 steps. On the right hand side in the direction of descent, the Steps stopped short of the wall, leaving a relatively narrow gap between the side of the Steps and the wall ("**the Gap**"). There was no balustrade on the porch, nor a handrail on either side of the Steps.

117. Unfortunately Ms Hume suffered from a problem with her right knee dislocating. She never knew when that might occur. As Ms Hume approached the Steps, carrying the Respondent, her right knee dislocated and she "free fell" into the Gap, dropping the Respondent ("**the Accident**"). The Respondent suffered serious injury. Some days after the Accident, a railing was installed which extended up the Steps and across the landing.

118. At the District Court trial, Ms Slade gave evidence that in 1991 or 1992 she had informed the Appellant that one of her friends, and her son and other children, had fallen off the porch at the Premises, and that she believed the porch should have a railing. When she followed this up with the Appellant, she was informed that the Appellant was "*looking into it*", but no action was taken. There was evidence from a Ms McKay that she had fallen from the porch in 1991.

119. There was expert evidence from Dr John Cooke, architect, that although there was no applicable Australian Standard that required the erection of a

[68] *NSW Department of Housing* v *Hume bhnf Donna Hume & Anor* [2007] NSWCA 69 ("***Hume***")

guard rail, the safety of the porch and Steps would have been significantly improved if railings had been provided.

120. At the District Court trial, Delaney DCJ found the Appellant had breached its duty of care to the Respondent by failing to provide a handrail.

121. In a 2:1 judgment, the NSW Court of Appeal upheld the appeal.

122. On appeal, the Respondent argued that the circumstances were distinguishable from *Jones,* because in *Jones* there was nothing unusual about the premises which alerted, or should have alerted, the owner of the premises to any unusual danger. The evidence of prior complaints was emphasised. It was argued that having been on notice of prior falls, the Appellant was also on notice that further falls could occur. It was submitted that it was irrelevant that the Australian Standard did not require a railing to be installed, because the Appellant ought to have realised that any fall from the porch could have resulted in serious injuries.

123. Senior Counsel for the Respondent conceded that if no prior complaint had been made, on the authority of *Jones*, he would probably have lost as the Appellant would not have known of the defect. However, it was argued that once the primary judge had accepted evidence of the prior complaint, the Appellant was on notice of the dangerous condition of the Premises, and it would have been reasonable for it to have installed the handrails that were erected shortly after the Accident.

124. The Appellant argued that its duty to the Respondent was confined to that delineated by Gummow and Hayne JJ in *Jones* as a "*duty to entrants to leased residential premises to take reasonable care that the premises contained no dangerous defects*"[69].

125. In noting that the Respondent was an "*other entrant*" to the Premises (as opposed to a tenant or member of his/her household), McColl JA gave detailed consideration to the nature of the duty owed. Her Honour noted that in *Jones*, Gummow and Hayne JJ said in obiter that the circumstances to be considered may differ between a landlord and tenant and a landlord and other persons, with the latter likely to be less stringent than the former. McColl JA noted that Their Honours concluded that:

> *[t]he landlord's duty to take reasonable care that the premises contained no dangerous defects, owed …to the tenants, extends to …other entrants*" on the basis that "*dangerous defects are unlikely to discriminate between tenants and those on the premises whether as an incident of a familial or other personal relationship …or some other social or business relationship or occasion*"[70].

126. McColl JA stated that Kirby J was the only other member of the Court in *Jones* who considered the nature of the duty a landlord owed to visitors to leased premises. Her Honour stated that:

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[69] Ibid 54
[70] *Jones* v *Bartlett* 205 CLR 166 at [196]

> *on His Honour's approach (at [231]), no distinction was to be drawn between the duty a landlord owed to tenants and other entrants to the leased premises, whether they be permitted occupants or visitors*"[71].

127. Her Honour considered that in *Jones* there was no agreement between the majority as to the scope of a landlord's duty to tenants and members of their family, nor was there any agreement between Gummow and Hayne JJ on the one hand, and Kirby J on the other, as to the scope of a landlord's duty to other entrants to residential premises[72].

128. In her judgment, McColl JA helpfully provides a comprehensive summary of many of the NSW Court of Appeal decisions in the area subsequent to *Jones*. Her Honour ultimately concluded that *Ahluwalia* is the only authority in the NSW Court of Appeal since *Jones* which concerned a landlord's duty of care to a visitor to leased residential premises. In that case, no distinction was drawn between the duty owed to a tenant and that owed to a visitor. In *Ahluwalia,* Hodgson JA (with Sheller JA and Bryson J agreeing) considered the ambit of a landlord's duty of care was to be determined by reference to a foreseeable risk of harm, and what a reasonable person would do in response to that risk[73].

129. McColl JA, with Basten JA agreeing, concluded that there was no decision of the NSW Court of Appeal in which Gummow and Hayne JJ's views about a landlord's duty of care to a visitor to leased residential premises (namely, that a landlord's duty is to take reasonable care that the premises contained no dangerous defects), has been accepted as authoritative. Instead, Her Honour considered the duty owed to the Respondent was the same as the authorities provide is the duty owed by a landlord to a tenant, namely, to take reasonable care to avoid foreseeable risk of injury, however, that duty did not require the landlord to make the Premises as safe as reasonable care could have made them.

130. In short, Her Honour concluded that the duty owed by a landlord to a visitor was no different to the duty owed to a tenant. That duty was not confined to being a duty to take reasonable care that the premises contained no dangerous defects, it was a duty to take reasonable care to avoid foreseeable risk of injury. It was not a duty to make the premises as safe as reasonable care could have made them.

131. Having established the nature of the duty owed by a landlord to a visitor, Her Honour went on to consider whether that duty had been breached. Her Honour stated the photographs of the porch and Steps showed they were "*unremarkable*", it was not the "*condition*" of the Steps or porch which caused Ms Hume to fall. Neither the porch nor the Steps were defective *per se*[74].

132. Her Honour described the evidence about the "*previous incidents*" as "*imprecise*", and concluded that the Appellant did not need the "*imprecise complaints*" of the "*previous incidents*" to be aware of the risk that in the absence of a handrail, a person who fell off the porch or Steps might be injured. That risk was foreseeable and was a "*matter of common sense*".

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[71] *NSW Department of Housing* v *Hume bhnf Donna Hume & Anor* [2007] NSWCA 69 at [63]
[72] Ibid 65
[73] Ibid 86
[74] Ibid 90

However, failure to eliminate a risk that was reasonably foreseeable and preventable is not necessarily negligence, "*it is necessary to determine what was a reasonable response to that risk: Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd [2002] HCA 35; (2002) 211 CLR 317 at [99] per McHugh J*"[75]. Her Honour acknowledged that in other cases, evidence of prior use without incident has been regarded as relevant but not determinative, but in this case, the evidence of imprecise prior complaints did not attract any obligation on the Appellant's part to erect a handrail, the porch and Steps were "*no more or less inherently dangerous than any such structures or the many other dangers in the premises*"[76]. There was no doubt the Steps and porch could have been made safer, but that does not mean they were dangerous or defective.

133. McColl JA, with Basten JA agreeing, held that there was a risk, "*albeit probably a low one*" that a person whose hands were full might stumble and fall on the porch or the Steps and sustain injury because there was no handrail to break the fall, but that risk was "*one of many encountered in domestic premises*"[77]. The Australian Standard at the time of construction did not require a handrail to be installed. While this is not determinative of the issue of breach, it reflects what, "*the reasonable person would have regarded as a reasonable response to the risk posed by the porch and steps*"[78].

134. Beazley JA agreed with the majority regarding the nature of the duty owed, namely, that the Appellant owed a duty to the Respondent to take reasonable care to avoid foreseeable risk of injury, but did not have to make the premises as safe as reasonable care could make them. However, Her Honour considered *Hume* was a case where there was little practical difference between making the premises "*as safe as reasonable care could make them*" and "*taking such care as is reasonable in the circumstances*".

135. The evidence of Dr Cooke that a handrail would have made the Steps and porch significantly safer, was common sense. The Appellant would have known the Premises would be used and visited by a range of age groups in a variety of circumstances. The unguarded Steps and porch posed a risk of injury, the likelihood of children falling was particularly high. The erection of a handrail was a simple, inexpensive response to that risk, the risk being a risk of serious injury.

136. It was relevant, but not decisive, that the Appellant had been informed of previous falls, but the unguarded Steps and porch posed a risk regardless of complaint. The requirement imposed by the Australian Standard was relevant, but not decisive.

137. In short, Her Honour considered that the Steps and porch were unsafe and posed a risk of serious injury. The erection of a handrail was a simple, inexpensive response to the risk. The Appellant was negligent in not installing it.

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[75] Ibid 91
[76] Ibid 93
[77] Ibid 95
[78] Ibid 96

Analysis

138. All of the justices held that the duty owed to both tenants and members of their household, and visitors, is not as narrow as suggested by Gummow and Hayne JJ in *Jones*. It is not confined to being a duty to take reasonable care that the Premises contained no dangerous defects of which the landlord knew or ought to have known. Instead, the duty is a broader one, being a duty to take reasonable care to avoid foreseeable risk of injury. The Judgment indicates that even if there is not a *defect*, if there is a foreseeable risk of injury, it is necessary to consider what was a reasonable response to that risk.

139. The majority judgment clarifies that just because an aspect of the premises could be made safer does not mean it is dangerous or defective. In considering what is a reasonable response to a risk, evidence of prior use of the Premises without incident is relevant but not necessarily determinative. Similarly, evidence of prior complaints may be of little assistance if those complaints were imprecise, and the risk complained about was obvious as a matter of common sense. Although the obligation imposed by an Australian Standard is not determinative of breach, it is reflective of what a reasonable person would have regarded as a reasonable response to the risk posed.

140. In short, just because something may pose a foreseeable risk, it is not necessarily negligent to fail to take action to eliminate that risk. Domestic premises contain many risks[79], not all can be eliminated. The question is what was a reasonable response to the risk posed. The answer to that question can be informed, although not necessarily determined, by any obligation imposed by the prevailing Australian Standard.

***Talbot-Price* v *Jacobs* [2008] NSWCA 189**

141. *Talbot-Price* v *Jacobs*[80]involved an injury to a tenant at residential premises ("**the Premises**"). In May 2002 the tenant ("**the Appellant**") leased the Premises from the landlord ("**the Respondent**"). The Premises consisted of a ground floor, a "*middle*" floor and a loft ("**the Loft**").

142. On 31 July 2002, the Appellant sustained serious injuries when he was descending a ladder ("**the Ladder**") from the Loft to the "*middle*" floor. The Appellant alleged the Ladder gave way or slipped while he was descending it. It was common ground that at all relevant times, to the knowledge of both the Appellant and the Respondent, the Ladder was old and unsafe.

143. The Respondent's defence was based on 2 propositions:

1) She denied that the Loft and the Ladder formed part of the leased Premises;
2) She had discharged whatever duty of care she owed to the Appellant by warning him, on 2 occasions, that he was not to occupy or use the Loft, and by warning him on 1 occasion that the Ladder, which the Appellant knew was dangerous, should not be there.

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[79] *Jones v Bartlett* [2000] 205 CLR 166 at [23] per Gleeson CJ
[80] *Talbot-Price* v *Jacobs* [2008] NSWCA 189 ("***Talbot-Price***")

144. At trial, the Respondent testified that after the former tenant moved out (but before the Appellant moved in), the Respondent had removed the Ladder and put it on a rubbish heap outside. The Appellant denied that he had put the Ladder back into the Premises. The question as to how the Ladder came to be back in place in the Premises was not determined.

145. The District Court trial judge, Black DCJ, accepted that prior to the commencement of the lease, the Respondent informed the Appellant that the Loft was not to be used. The trial judge also accepted the Respondent's evidence that on 19 May 2002, she saw the Ladder back in position inside the Premises, affixed by nails and providing access to the Loft. The Respondent was shocked because she had earlier put the Ladder on a rubbish heap. On 19 May 2002, when asked whether she knew the Appellant was using the Ladder for access to the Loft, she replied, "*I presumed that, yes*". She also agreed that she had heard the Appellant say that the Ladder was dangerous and she responded, "*yes, that ladder shouldn't be there and I told you there was no access to the Loft*".

146. Black DCJ held that the Appellant knew perfectly well that he was not meant to go up to the loft and to go there would be against the express prohibition of the Respondent and "*contrary to the terms upon which he was granted a lease*". His Honour concluded that the Loft, "*was not included in the letting and indeed further was expressly excluded*". His Honour found in favour of the Respondent.

147. The grounds of appeal were largely directed to asserting errors in the credibility and factual findings His Honour made. The NSW Court of Appeal of Ipp JA, McColl JA and Basten JA held that His Honour was not in error in making the credibility and factual findings that he did. All 3 Justices held that the appeal should be dismissed, although McColl JA and Basten JA provided slightly different reasoning to Ipp JA.

148. Ipp JA held that neither the Ladder nor the Loft formed part of the leased Premises, accordingly, the Respondent owed no duty of care to the Appellant in relation to the Loft and the Ladder. His Honour stated:

> *if the Respondent did owe a duty of care, it was a generalised duty that she discharged by telling the Appellant not to use the loft, and that the ladder "shouldn't be there". He knew very well that the ladder was dangerous. Before the accident happened, he told the Respondent that himself*[81].

149. Basten JA, with McColl JA agreeing, stated that the:

> *argument that the loft was not part of the leased premises was unattractive …the fact that it may be risky to seek access to particular parts of premises (such as the roof) does not mean that they were not part of the leased premises*[82].

150. His Honour stated even if the Loft and Ladder did not form part of the leased Premises, the Appellant was, in effect, a trespasser, which did not mean that his claim would necessarily fail.His Honour considered that, at the highest,

[81] Ibid 100
[82] Ibid 110

the Respondent intended there to be a contractual obligation on the Appellant not to use the loft.

151. Basten JA stated that it was not in dispute that the Ladder was seen to be in place by the Respondent on 19 May 2002, more than 2 months before the accident occurred. On that occasion, when asked whether she knew that the Appellant was using the Ladder for access to the Loft, the Appellant said "*I presumed that, yes*". The Respondent heard the Appellant say that the Ladder was dangerous and she responded, "*yes, that ladder shouldn't be there and I told you there was no access to the Loft*".

152. Basten JA, with McColl JA agreeing, stated the trial judge had concluded that the duty owed was as stated by McColl JA in *Hume*, namely, a duty to take reasonable care to avoid foreseeable risk of injury, but not a duty to make the Premises as safe as reasonable care could make them. His Honour stated that rather than applying this test,

> *the question was whether, rather than constructing a staircase or otherwise providing safe access to the loft, it was reasonable and sufficient for the lessor* [the Respondent], *in circumstances noted above, to direct her tenant* [the Appellant] *not to use the loft. In substance, His Honour found that such conduct did not amount to a want of reasonable care, with the result that the Appellant failed. No error of fact or law has been demonstrated in that conclusion. Accordingly, the appeal should be dismissed with costs*"[83].

Analysis

153. The fact that the Appellant was on notice of the fact that the Ladder was in place at the Premises, and she presumed the Appellant was using the Ladder for access to the Loft, leads to the conclusion that the Appellant was on notice of the risk posed by the old and unsafe Ladder. It was presumably a foreseeable risk of injury of which the Respondent (the landlord) was, or ought to have been aware. The question was then *"what was a reasonable response to that risk?".* Having regard to the circumstances, the Court held a direction from the Respondent to the Appellant not to use the Ladder and Loft was sufficient.

154. The case highlights the fact that what is considered a "*reasonable response*" to the risk posed is dependent upon the surrounding circumstances. The fact was emphasised by Basten JA, with McColl JA agreeing, when he stated:

> *the obligation of a lessor to keep premises in a reasonable state of repair, having regard to the age of the premises and the rent payable for them, provides no absolute requirement of safety. Premises may be constructed according to standards which would not be adequate for new premises, or may deteriorate with age and become unsafe in particular respects. There may be delay in carrying out repairs. The nature of the danger, the size and structure of the premises, the number of tenants and whether they are of full age, together with a variety of other factors, will be important in determining whether or not the action (or inaction) of a lessor with respect to identifying and rectifying the danger is reasonable. In the present case, the premises*

[83] Ibid 116

> *were occupied by a single adult tenant; the premises were extensive; the risk arose out of use of the loft, which was by no means an essential room for the comfortable enjoyment of the premises; the risk was well-known to the appellant and required no warning*"[84].

***Vasilikopoulos* v *New South Wales Land and Housing Corporation* [2010] NSWCA 91**

155. *Vasilikopoulos* v *New South Wales Land and Housing Corporation*[85] involved an injury to the wife ("**the Appellant**") of a tenant at premises ("**the Premises**") owned by the NSW Land and Housing Corporation ("**the Respondent**").

156. The Appellant's husband had lived at the Premises since 1987. In 2007 the Appellant underwent 2 knee replacement operations, following which she began to experience problems using the shower in the Premises, particularly between September and December 2007. The shower was over the bath, and the bath had high walls, which the Appellant had difficulty stepping over. There had been no problem using the shower prior to 2007. The problem with using the shower and bath arose because of the deteriorating physical condition of the Appellant, not because of any deterioration in the Premises.

157. The Respondent received advice from the Appellant's doctor and a Health Department occupational therapist that action should be taken regarding the bath and shower. The Respondent acknowledged that work should be done and gave it "*priority one*". In November 2007 the Respondent did some work in measuring up and making estimates, but the work was not completed and the Appellant suffered injury on 9 December 2007. The work was carried out in 2008.

158. The Appellant sued the Respondent in negligence. At the trial in the NSW District Court, Acting District Court Judge Hungerford found that the Appellant did not owe the relevant duty of care, and even if it did, it did not breach that duty.

159. On appeal, the Appellant put great emphasis on the fact that when the Respondent's officers heard about the Appellant's health problems, they were sympathetic and stated they would attend to the problem.

160. Young JA stated

> *the Appellant says effectively that if the landlord does take that responsibility on and then does nothing, then some sort of duty to do what it promised to do arises and it is negligent if it does not do it*[86].

161. Young JA, with Handley AJA and Sackville AJA agreeing, stated that in a:

> *normal case of landlord and tenant, if there be such a case, the law looks to the tenant to look after her own safety, and if she does suffer some sort of disability and a relatively minor alteration can make*

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[84] Ibid 113
[85] *Vasilikopoulos* v *New South Wales Land and Housing Corporation* [2010] NSWCA 91 ("***Vasilikopoulos***")
[86] Ibid 14

> *things more safe, then one would normally expect the tenants to do that*[87].

162. The Court rejected the proposition that because the Premises were public housing and the tenants were pensioners, the Respondent was not in the same position as a "*normal*" landlord. There was no authority for such a proposition[88].The Respondent submitted that there was no authority for the proposition that when premises become unsuitable by reason of the deteriorating physical condition of the occupants, and the landlord knows about that, that the landlord has a duty to remedy the matter. The Appellant argued it is not necessarily the case that whenever that situation arises the landlord will have a duty, but one must look at all the circumstances of a particular case. The Appellant argued that the test was set out in *Hume*, namely, whether the Respondent had taken reasonable care to avoid foreseeable risk of injury.

163. Young JA, with Handley AJA and Sackville AJA agreeing, rejected the Appellant's argument. The Court held that it was quite clear from the authorities cited by McColl JA in *Hume*, that "*the prime focus on that test is on the state of the premises at the time of the letting*"[89]. His Honour stated

> *it cannot be the situation that merely because a landlord considers that it has some sort of public obligation or moral obligation or that it feels sympathetic towards its tenants and thus agrees to fix something, and takes longer than the tenants would like for that problem to be fixed, that thereupon there is some legal burden or legal duty laid upon the landlord for which it will be liable in damages if there is a breach*[90].

164. His Honour concluded that there was no duty on the Respondent despite what it might have said, just because the Premises, which were fixed when let, had become unsuitable by reason of the deteriorating physical condition of an occupant.

165. Sackville AJA agreed with Young JA's conclusions and reasons, but His Honour went further in his reasons, stating that

> *the document of 6 July 2007 requested that work be carried out, but the request was expressed to be subject to confirmation that the work could be done and in any event did not specify the work required. It was necessary for specifications to be drawn up, costing to be completed, approval to be obtained, a contractor to be engaged, and other preparations undertaken. If there were any duty to exercise reasonable care to ameliorate the difficulties the Appellant found herself facing, it seems to me that, on the evidence, no finding could be made that the Respondent breached that duty*[91].

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[87] Ibid 15
[88] Ibid 17
[89] Ibid 21
[90] Ibid 27
[91] Ibid 41

Analysis

166. *Vasilikipoulos* is authority that residential tenanted premises, which were suitable at the commencement of the tenancy, but become unsuitable just because of the deteriorating physical condition of the tenant, and the landlord knows about it, the landlord is not necessarily under a duty to remedy the matter.

167. The obiter of Young JA with Handley AJA and Sackville AJA agreeing indicates that, assuming the landlord has complied with his/her obligations at the commencement of the tenancy, and the tenant then suffers some sort of disability whereby a minor alteration will make the premises more safe, the tenant would normally be expected to arrange that alteration.

168. In *Vasilikopoulos* the Respondent submitted an illustration whereby a landlord said to a tenant of 10 years, "*I see you have a problem, I'll fix it*" so the tenant herself took no action to fix the problem. Young JA, with Handley AJA and Sackville AJA agreeing, stated in obiter that:

> *there may well be a case of breach of contract if one can say that the tenant's action is a form of consideration or there may be some sort of estoppel, but that is not this case*[92].

169. Presumably, that was not the case in *Vasilikopoulos* because the tenants were pensioners and lacked the means to take action to rectify the problem themselves anyway. The case was not pleaded on that basis. However, it is a potential argument in other cases with different factual circumstances.

***Loose Fit Pty Limited* v *Marshbaum & Ors* [2011] NSWCA 372**

170. *Loose Fit Pty Limited* v *Marshbaum & Ors*[93] involved an injury to a visitor to leased commercial premises ("**the Premises**"). Mr Kocx and Ms Hickie ("**the Owners**") purchased the Premises in 2003. Part of the Premises included an internal staircase ("**the Staircase**"). In 2003, shortly after purchasing the Premises, the Owners arranged for a builder to carry out substantial renovations. The builder was not licensed and approval for the building work was neither sought nor obtained from the local Council.

171. When the Staircase was reconstructed after the renovations, it did not have a handrail as per the plans for which Council approval was obtained back in 1977. The failure to install the handrail was a breach of the Building Code of Australia ("**BCA**"). Mr Kocx gave evidence that he had not sought Council approval for the renovations because the builder told him it was not necessary to do so.

172. Loose Fit Pty Limited ("**the Appellant**") took a lease for part of the Premises on 1 June 2005 ("**the 2005 Lease**"). The Appellant operated a fitness centre from the Premises. The 2005 Lease did not include the Staircase. During the negotiations for the 2005 Lease, the Appellant raised the question of a handrail for the lower part of the Staircase. The primary judge found that, to the extent he turned his mind to it, the representative of the Appellant concluded there was no need for a handrail on the upper part of the

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[92] Ibid 26
[93] *Loose Fit Pty Limited* v *Marshbaum & Ors* [2011] NSWCA 372 (**"*Loose Fit*"**)

Staircase. By the commencement of the 2005 Lease, the Owners had fitted a handrail to the lower part of the Staircase, but not the upper part.

173. In September 2005 the Owners (who were formerly a couple) separated. Mr Kocx had no further dealings with the Premises. On 1 September 2006, the Appellant entered into a new lease with the Owners ("**the 2006 Lease**"). The 2006 Lease included the Staircase.

174. On 1 November 2006, Ellen Marshbaum ("**the Plaintiff**") and her husband attended the Premises to sign up for bi-weekly fitness sessions. On 10 November 2006, the Plaintiff was leaving the Premises via the Staircase, she fell as she lost her footing as she descended the upper part of the Staircase ("**the Accident**").

175. At the time of the Accident there was no handrail on the upper part of the Staircase. There was a "stud wall" on the right hand side of the Staircase ("**the Wall**"). The Wall was 120 cm to 130 cm high and was between 10cm and 15 cm wide. The Plaintiff stumbled as she descended the Staircase, she was unable to hold onto the Wall to steady herself and she fell, sustaining serious injuries.

176. Shortly after the Accident, the Appellant arranged, and paid for, the installation of a handrail on the Wall.

177. In the NSW Supreme Court trial, there was agreement by the expert witnesses that the failure to have a handrail on the upper part of the Staircase was a breach of the BCA. The dimensions of the risers and goings of the Staircase were also in breach of the relevant Australian Standard in operation at the time of the renovations.

178. The Primary Judge, Hoeben J, found that the Appellant, as occupier, owed a duty to the Plaintiff to exercise reasonable care for her safety when she came on to the Premises. His Honour also found that when the Plaintiff entered into an agreement with the Appellant, the contractual duty owed by the Appellant was accurately stated by McCardie J in *Maclenan* v *Segar* [1917] 2 KB 325, at 332-333:

> *where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them*[94].

179. His Honour found that the Appellant did not have actual knowledge of the "*problems*" with the Staircase. His Honour stated that in relation to whether the Appellant should have had such knowledge, the discrepancies in the dimensions of the risers and goings would only have been obvious to an expert, however, it should have been obvious to the Appellant that a handrail was needed on the upper part of the Staircase. At the very least the Appellant should have made enquiries, if it had done so, it would have been told a handrail was required by the BCA.

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[94] Ibid 41

180. Hoeben J held that the Appellant had breached its duty of care. A reasonable person operating a fitness centre should have concluded there was a risk of injury to persons if a handrail were not provided. It was obvious that a person of small stature would not be able to grip the top of the Wall for support.

181. Because of the height and width of the Wall, a reasonable person in the position of the Appellant should have concluded that there was a foreseeable risk of injury to females of short stature. The risk of a fall was not insignificant, and the consequences of a fall were likely to be very serious. The burden of taking precautions, namely by installing a handrail, was small, both by way of inconvenience and expense.

182. The Plaintiff had not sued the Owners, but the Appellant had Cross-Claimed against them. Hoeben J rejected the Cross-Claim. His Honour held in reliance on *Jones* per Gummow and Hayne JJ, that the Owners' duty was to take reasonable care to ensure that the Premises contained no "*dangerous defects*". His Honour concluded that the absence of a handrail could not be classified as a "*dangerous defect*". His Honour held that as the Appellant had been in occupation of the whole of the Premises (including the Staircase) for over 2 months, and had operated its business from the Premises for 18 months, it was in the best position to assess its clientele and the potential risks to persons using the Staircase.

183. The Appellant appealed the decision against it in respect of the Plaintiff's claim and, unsurprisingly, the decision on the Cross-Claim against the Owners.

184. The Appellant argued that it should not have been held liable to the Plaintiff, pointing to a number of matters supporting that contention, including: the Appellant had only been the occupier of the Staircase for 2 months; the Staircase was fitted by the Owners in 2003; and there had been no complaints about the Staircase in the period since the commencement of the 2005 Lease.

185. Sackville AJA, with Campbell JA and Handley AJA agreeing, rejected this aspect of the appeal. His Honour set out the nature of the duty owed as occupier as follows:

> *under general law to take reasonable care to avoid a foreseeable risk of injury to the Plaintiff: Australian Safeways Stores Pty Ltd v Zaluzna [1987] HCA 7; 162 CLR 479. The obligation is to exercise reasonable care to prevent injury to an entrant who uses reasonable care for his or her own safety: Roads and Traffic Authority of New South Wales v Dederer [2007] HCA 42; 234 CLR 334, at 345-346 [45], per Gummow J; Laresu Pty Ltd v Clark [2010] NSWCA 180, at [38], per Macfarlan JA (with whom Tobias JA and Handley AJA agreed). What constitutes the exercise of reasonable care will depend upon the circumstances of the particular case: Wilkinson v Law Courts Ltd [2011] NSWCA 196, at [32], per Heydon JA (with whom Meagher JA and Rolfe AJA agreed)*[95].

186. The relevant risk was the risk that an entrant might miss her footing or otherwise stumble, thus falling down the Staircase. The risk was not

[95] Ibid 68

insignificant. Without a handrail, a person of small stature had no adequate means to steady herself. A reasonable person in the position of the Appellant should have recognised that the absence of a handrail would increase the risk that a short patron would fall as she descended the Staircase. The installation of a handrail was a simple and inexpensive measure that could have been taken. The nature of the risk, the gravity of the possible consequences of a fall and the simplicity of the precaution that could have obviated the risk of harm were more significant than the relatively short incident-free period of use of the Staircase[96].

187. His Honour stated that the effect of s.5A(1) of the *Civil Liability Act 2002* (NSW) is to apply the same standard of care, whether a claim is brought in tort or in contract. Accordingly, the trial judge was correct to uphold the Plaintiff's claim both in tort and contract.

188. For this purpose of this paper, the more significant finding on appeal was in relation to the Appellant's Cross-Claim against the Owners.

189. In order to succeed on the Cross-Claim, the Appellant had to establish that the primary judge was incorrect to conclude that, if sued by the Plaintiff, the Owners would not have been liable to her. His Honour stated that the members of the Court in *Jones* differed as to the content of the duty owed by a landlord in the case of a lease of residential premises. His Honour referred to the following summary of *Jones* provided by Mason P (with whom Brownie AJA agreed) in *Sakoua*[97]:

> *The Court discussed the content of the duty, with respect to the condition of the premises at the inception of the letting. Three justices in the majority favoured a duty expressed in terms of one to take reasonable care to avoid foreseeable risk of injury, leaving the practical content of the duty to be governed by the circumstances of the case (per Gleeson CJ at 184 [56]-[58], per Gummow and Hayne JJ at 213 [168]-[169]).*
>
> *Two justices in the majority favoured slightly narrower formulations of the duty, referring to a duty to put and keep the premises in a state of safe repair (per Gaudron J (at 192 [88]-[93]), or to take reasonable care to avoid foreseeable risk of injury from defects of which the landlord was on notice or of which (by appropriate inspection) the landlord would reasonably become aware (per Kirby J at 240 [252]). Callinan J expressed no opinion beyond the tentative statement that if any duty were owed, a matter of which he was far from convinced, he would define it as no more than a duty to provide, at the inception of the tenancy, habitable premises (at 252 [289])*.

190. Sackville AJA stated that in *Sakoua*, Mason P had quoted with approval a passage from the judgment of Hodgson JA (with whom Sheller JA and Bryson JA agreed) in *Ahluwalia*[98] as follows:

> *…Jones v Bartlett makes it clear that, in the absence of a contract supportive of a higher duty, the duty of a landlord in relation to the*

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[96] Ibid 78
[97] at 589-590 [4]-[5]
[98] at [23]

> *safety of premises does not in general require a landlord to commission experts to inspect premises to look for latent defects, nor is it a duty to make premises as safe as reasonable care can make them. In general terms, the duty of the landlord is to be determined by reference to foreseeable risk of harm and what a reasonable person would do in response to that risk*[99].

191. Sackville AJA stated that the primary judge had used as his "*starting point*" the observations of Gummow and Hayne JJ in *Jones*, namely that the key issue to be determined was whether the absence of a handrail could properly be characterised as a "*dangerous defect*". His Honour stated that it was important to note that in *Jones*, Gummow and Hayne JJ made it clear that their more detailed [and hence narrower] analysis of the duty owed was directed to leases of residential premises.

192. Sackville AJA stated that *Jones*:

> *does not stand for the proposition that a landlord of commercial premises breaches the duty of care owed to an entrant onto the premises only if the entrant is injured by a "dangerous defect". I think that the primary judge was diverted from the correct enquiry by confining his attention to determing whether the absence of a handrail amounted to a "dangerous defect". The questions that have to be addressed are whether there was a foreseeable risk of harm to the entrant and, if so, what (if anything) a reasonable person in the landlord's position would have done in response to that risk. The existence of a "dangerous defect" might be an important consideration in answering those questions, but it is not necessarily the only decision. In New South Wales it is also to take account of s.5B of the CL Act*[100].

193. His Honour stated that as a general proposition, as between a tenant-occupier and a landlord of commercial premises, liability for injuries sustained by an entrant onto premises will rest primarily with the tenant-occupier, because he/she is generally in possession and has control of the premises and can determine who enters and under what conditions. However, everything depends on the particular circumstances of the case[101].

194. His Honour referred to the fact that it was the Owners who had arranged the renovations by an unlicensed builder. They did not obtain Council approval. The Staircase was not built with a handrail in accordance with plans submitted to the Council for approval in respect of the original Staircase in 1977. Mr Kocx never made enquiries with Council to see what approval was required, or whether the work carried out by the builder complied with safety requirements. His Honour concluded:

> *bearing in mind that the premises were to be used a wellness centre and that the staircase would be used by clients of the centre, it could hardly be disputed that the Owners should have made enquiries as to the safety requirements applicable to the renovations, including the staircase. In any event, it was the conduct of the Owners in*

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[99] *Loose Fit Pty Limited* v *Marshbaum & Ors* [2011] NSWCA 372 at [87]
[100] Ibid 90
[101] Ibid 91

> *undertaking the renovations without complying with the applicable safety standards that created the very hazard that later resulted in the Plaintiff sustaining her injuries*[102].

195. His Honour stated that in 2005, Mr Kocx had applied a handrail to the lower part of the Staircase at the request of the Appellant. As Mr Kocx was well aware that he had made no previous enquiries as to the safety requirements of the Staircase, he should then have been alerted to the need to make enquiries as to whether a handrail was needed at the upper part of the Staircase.

196. His Honour observed that:

> *Courts have been reluctant to find that a landlord breached the duty owed to entrants onto the leased premises where the risk to safety was ascertainable only by a careful inspection of the premises prior to the lease being entered into. This is not such a case*[103].

197. His Honour distinguished *Loose Fit* by the fact that the Owners had created the risk by carrying out the renovations in a manner that did not comply with safety Standards. At the commencement of the lease the Owners were aware that no enquiries had been made as to whether the Staircase complied with safety Standards. The Owners should have been aware that the Staircase would be used by the Appellant's clients, and those clients would include people of a short nature (i.e. who could not use the Wall to stabilise themselves). The Owners were in at least as good a position as the Appellant to appreciate that the absence of a handrail on the upper part of the Staircase created a risk to the safety of patrons, and the risk was simple and inexpensive to eliminate.

198. The risk of injury was foreseeable and not insignificant. A reasonable person in the position of the Owners would have taken the precaution of installing a handrail before the commencement of the 2006 Lease.

199. Sackville AJA, with Campbell JA and Handley AJA agreeing, upheld the Appeal on the Cross-Claim and assessed the Owners' contribution as 50%.

Analysis

200. The more detailed analysis of the duty owed by a landlord, described by Gummow and Hayne JJ in *Jones*, was not intended to apply to commercial premises. Their Honours specifically stated so in their joint judgment. For obvious policy reasons, including the volume and differing age, stature and level of mobility, of entrants, the NSW Court of Appeal has held that the duty owed in respect of commercial premises is the broader duty, namely, to take reasonable care to avoid foreseeable risk of injury, with the more specific content only determinable by reference to the specific circumstances.

201. If a landlord *creates*[104] a risk that eventuates in an injury, without making enquiries as to whether the relevant Safety Standards have been complied with, it is arguably more likely that the landlord will be held negligent than in

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[102] Ibid 94
[103] Ibid 97
[104] Emphasis added

circumstances where the alleged breach of duty is based merely on a failure to carefully inspect and ascertain the presence of a risk.

Conclusion - Some Practical Points

202. *Jones* arguably left unclear the role of the presence or otherwise of dangerous defects in ascertaining whether a landlord's duty in respect of residential premises has been breached. Since *Jones* the NSW Court of Appeal has favoured the view that, broadly speaking, a landlord's duty in respect of residential premises is determined by reference to a foreseeable risk of injury, and what is a reasonable response to that risk. The presence or otherwise of a dangerous defect is undoubtedly, at least, a highly relevant factor in that enquiry.

203. *Loose-Fit* is authority that the duty owed in respect of commercial premises is to take reasonable care to avoid foreseeable risk of injury, the narrower formulation of the duty discussed by Gummow and Hayne JJ in *Jones* was expressly stated to be directed only to landlords of residential premises. Whether the premises are residential or commercial, regard must be had to the principles of negligence in the *Civil Liability Act 2002* (NSW).

204. The common principle from each of the cases in this paper is that the question of the content of the duty and whether it has been breached will depend upon the circumstances in the particular case.

205. The decision in *Jones*, and the subsequent decisions of the NSW Court of Appeal, indicate the findings the Court will likely make regarding the content of the duty, and whether it has been breached, in certain circumstances. Guiding principles can be extracted from the cases. However, the facts in every case will differ, and the argument as to the content of the duty, and whether it has been breached, will turn upon those facts.

206. The following is a non-exhaustive list of suggested queries to which a practitioner ought to turn his/her mind when investigating a matter, gathering evidence and preparing the matter for Hearing:

1) Was a lay inspection carried out prior to the commencement of the lease?

2) Was there any contractual and/or statutory obligation to inspect the premises?

3) Were there any unusual dangers in existence prior to the commencement of the lease, which ought to have alerted a lay person to the presence of a dangerous defect being more than a mere possibility, thereby arguably requiring an expert to be retained to further investigate the matter?

4) If an expert had inspected the premises, would he/she have made any recommendations regarding the taking of action to guard against the risk?

5) What was the risk that eventuated in the accident?

6) Was the risk obvious as a matter of lay observation or only to an expert eye?

7) Did the item that posed a risk contravene any applicable Australian Standard?

8) Was the landlord ever notified of any complaints made about the risk?

9) Was the landlord otherwise put on notice of any risk?

10) Had there been any other accidents/incidents concerning the item/premises that eventuated in the accident?

11) What is the history of safe usage of the item/area that eventuated in the accident?

12) Were the premises leased for commercial or residential use?

13) Did the accident occur while the premises were being used for the purpose for which they were let?

14) Was the injured person authorised to be in the area they were in at the time of the accident?

15) Was the risk that eventuated in the accident caused by the deteriorating health of the injured person, or the physical deterioration of the premises?

16) Was the risk that eventuated in the accident created by the landlord?

17) By reference to inconvenience and a dollar amount, what would have been the cost of guarding against the risk that eventuated in the accident?

18) Had any direction been given by the landlord to the tenant not to use or access the area or item that posed the risk, and was such direction a reasonable response having regard to the particular circumstances, such as:

    i. For what purpose were the premises let?
    ii. Who were the occupants of the premises?
    iii. What was the level of rent paid?

S J Holmes

Chambers

12 June 2013