Australian Safeway Stores Pty Ltd v Zaluzna - [1987] HCA 7

HIGH COURT OF AUSTRALIA

Mason, Wilson, Brennan, Deane and Dawson JJ.

AUSTRALIAN SAFEWAY STORES PTY. LTD. v. ZALUZNA
(1987) 162 CLR 479
10 March 1987

Negligence

Negligence—Dangerous premises—Injury to entrant—Liability of occupier—Duty of care—Invitee—Special duties owed by occupier to different classes of entrant—General duty of care—Whether general duty of care coexists with special duty—Customer injured by slipping on damp floor—Whether general duty of care.

Decisions

MASON, WILSON, DEANE AND DAWSON JJ.: On Saturday 20 January 1979 towards midday the respondent entered what has been described as the "foyer area" of the appellant's supermarket at Mount Waverley in Victoria, intending to buy some cheese. It was a rainy day and in consequence the vinyl-tiled floor of the foyer area had become wet or moist. Unfortunately, before entering the area of the supermarket where the merchandise was displayed, the respondent slipped and fell heavily on the floor. She sustained personal injury. She sued the appellant in the Supreme Court of Victoria for damages for negligence, alleging both a breach of the general duty of care and a breach of the duty owed by an occupier to an invitee. The action was tried by a judge sitting alone.

2. The learned trial judge ruled that the case was not one in which it was appropriate to look for a duty of care cast in terms of the principles enunciated by Lord Atkin in Donoghue v. Stevenson (1932) AC 562, at p 580. In coming to that conclusion, his Honour relied primarily on the decision of the House of Lords in London Graving Dock Co. Ltd. v. Horton (1951) AC 737 . He therefore directed himself in accordance with the classic exposition of the invitor's duty to his invitee as laid down by Willes J. in Indermaur v. Dames (1866) LR 1 CP 274, at p 288, namely, that it was the appellant's obligation to take reasonable care to prevent damage from unusual danger of which it knew or ought to have known.

3. The trial judge, while recognizing that the moisture on the floor did constitute some kind of hazard to customers, held that it was no more than customers shopping on a wet morning would ordinarily expect. It was not an unusual danger. However, his Honour acknowledged that there might be room for different views about such a conclusion and he therefore proceeded to consider the case on the assumption that there was an unusual danger. His Honour found that the mopping-up procedures adopted by the appellant in order to cope with the wet conditions had not been shown to fall short of what was reasonable. He also considered a number of other possible safeguards which it was alleged that the appellant might have undertaken. In the result his Honour found that the appellant was not in breach of the duty of care that would arise on the assumption he had made. He dismissed the respondent's action.

4. The respondent appealed to the Full Court (Starke, Murphy and Beach JJ.) and by the notice of appeal launched a comprehensive attack on the findings of the trial judge. When the appeal came on for hearing, leave was given to add a further ground of appeal as follows:

> "That the learned Trial Judge was wrong in law in finding that the defendant did not owe the plaintiff a general duty of care."

In the result, this new ground was the only ground of appeal with which the Full Court dealt. Indeed, we were informed from the Bar table that by arrangement no argument was addressed to the Full Court on the other grounds of appeal. They were not abandoned. The Full Court allowed the appeal. Starke J., with whom the other members of the Court agreed, referred to two recent decisions of this

Court in Hackshaw v. Shaw (1984) 155 CLR 614 and Papantonakis v. Australian Telecommunications Commission (1985) 156 CLR 7 (decisions which had not been published at the time of the trial) and found them determinative of the success of the appeal. His Honour described the error of the trial judge as:

> "that whilst he considered the application of Indermaur v. Dames, he did not consider whether or not there were circumstances which justified the application of Donoghue v. Stevenson, and in failing to take that matter into consideration, ... he committed a reversible error".

Murphy J. added a comment to the like effect. The Court ordered a new trial.

5. Counsel for the appellant advances three propositions in support of the appeal. The first is that the case was one in which the only relevant relationship of proximity was that of occupier and invitee and that consequently the only duty of care owed by the appellant to the respondent was the special duty described in Indermaur v. Dames. The second proposition is that the trial judge did consider whether there were circumstances which gave rise to the existence of a general duty of care. The third proposition is that if the appellant did owe a general duty of care there was no difference, in the circumstances of the case, between the content of that duty and the content of the special duty considered by the trial judge, with the result that his Honour's findings necessarily constitute a finding that the appellant was not in breach of any general common law duty of care.

6. We do not think that any of these propositions should prevail. The first proposition must yield, as the Full Court recognized, to the recent decisions in Hackshaw and Papantonakis. We will return to this aspect of the case. The second proposition is intimately related to the first. As will be seen, it must fall with it for the reason that such consideration as the trial judge gave to the allegation based on Donoghue v. Stevenson was coloured by his Honour's reliance on Horton, a decision which cannot now be said to be of any authority in this country. It may well be that detailed analysis would disclose that there is much to be said in favour of the third proposition. The difficulty with it, however, is that the findings of the trial judge were put in issue by the notice of appeal to the Full Court and the issue was not disposed of. The view in support of the order for a new trial appears from the judgment of Murphy J. His Honour recognized that the trial judge may not have reached any different conclusion on the application of the Donoghue v. Stevenson principle; nevertheless he continued:

> "However, it does appear likely to me that his Honour's overall approach to the negligence issues may well have been influenced and possibly clouded by his initial conclusion that the principles expressed in Horton's Case represented the law in the State of Victoria. The plaintiff was in my opinion entitled to have the facts and the evidence of the facts, considered against the backdrop of the proper legal principles to be applied ...".

We agree with his Honour's view and with the conclusion of the Full Court that, once it was determined that the appellant owed a general duty of care to the respondent, it was appropriate to order a new trial.

7. We return, then, to the principal issue. The recent review of relevant authority undertaken by

Deane J. in Hackshaw, at pp.642-663, and by Mason J. in Papantonakis, at pp.14-20, prepares the way for a more definitive statement on this aspect of the law of negligence in Australia. In Papantonakis, at p.32, Deane J. referred to the reasons which he gave in Hackshaw and continued:

> "... it should now be again accepted in this country that the so-called 'special duty' which an occupier of land owes to an invitee is, on analysis, properly to be seen as the ordinary common law duty to take reasonable care: 'The duty is a duty to take reasonable care. The standard is the standard of the reasonable man', per Fullagar J., Commissioner for Railways (N.S.W.) v. Anderson (1961) 105 C.L.R. 42, at p. 56. In that regard, the dissenting judgments of Lord MacDermott and Lord Reid in London Graving Dock Co. Ltd. v. Horton (1951) A.C. 737 accord better with subsequent developments in the law of negligence and are to be preferred, at least in this country, to the judgments of the majority of their Lordships which were largely rendered inoperative in England by subsequent statutory provision: see Occupiers' Liability Act 1957 (U.K.), s.2(4)(a)."

Mason J. in Papantonakis, at p.20, said:

> "In relation at least to a person in the position of an invitee, Anderson and Voli must be taken as settling that the duty of an occupier, even as it is expressed in the Indermaur v. Dames formulation, is no more and no less than the ordinary duty of reasonable care."

His Honour reserved for consideration at some later time the question whether the duty of the occupier also amounts to a duty to ensure that reasonable care is taken and then added that he did not regard the notion of concurrent duties as inconsistent with the duty of an occupier to an invitee being itself a duty to exercise reasonable care. The notion of concurrent duties to which his Honour referred was that which had been explained in a number of previous cases in this Court (see, in particular, Public Transport Commission (N.S.W.) v. Perry (1977) 137 CLR 107, at pp 130-132, 138 -139).

8. Wilson J. in Papantonakis, at p.23, found it impossible, in the circumstances of that case, to distinguish between the duty of care resting in ordinary negligence and the duty of care resting in the occupier. His Honour continued:

> "I would expect that this will always be the case where the particular facts do not import any relevant relationship other than that of occupier to entrant. This is because the common law, in enunciating the duty of reasonable care that is owed by an occupier to different classes of entrant to his property is particularizing one aspect of the field of the general law of negligence. It seeks to express what the general duty of care will require of an occupier in particular circumstances: Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 CLR 274, at p 317 ; Commissioner for Railways (N.S.W.) v. Anderson (1961) 105 CLR 42, at p 56. "

These observations of Wilson J., together with the passage that follows in his Honour's judgment, lend support to the notion of concurrent duties, as also does the joint judgment of Brennan and

Dawson JJ. in the same case. At pp.27-28, their Honours say:

> "An occupier of land is under a general duty of care to a person entering on the land, whether as invitee, licensee or trespasser, independent of any special duty, where there are circumstances giving rise to the general duty. That is now the settled law of this country: see Hackshaw v. Shaw (1984) 155 CLR 614 . It is also settled that any special duty owed by an occupier does not restrict the scope and burden of the general duty: see Public Transport Commission (N.S.W.) v. Perry (1977) 137 CLR 107, at p 131, per Gibbs J.; Hackshaw v. Shaw (1984) 155 CLR 614, at pp 650-651, per Deane J. In Hackshaw v. Shaw the majority of the Court did not go as far as Deane J. who held that 'the so-called "special duties" owed by an occupier to a person lawfully upon his land are instances of the duty of care arising under that general law in the circumstances of the relevant category of case' ((1984) 155 C.L.R. 614, at p. 657).
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> Nevertheless, it will usually be a barren
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> exercise to consider whether the special and general duties are distinct but co-existing or whether the special duty is subsumed under the general duty. We would not resolve this question until it is necessary to decide whether the special duty may, in some circumstances, impose a higher or more exacting burden than the general duty, or whether the special duty can arise in circumstances where the general duty does not. It is clear that the general duty does not restrict the scope and burden of the special duty and, until it is necessary to decide and it is decided that the limits of the special duty are within the limits of the general duty, we would not depart from the theory of co-existing duties. The rules relating to the duties owed to invitees and licensees are concerned with laying down the standard of care appropriate to two special classes of case (per Fullagar J. in Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 CLR 274, at p 295) and they may be instructive in cases where the tribunal of fact can find no relevant relationship between the defendant and the plaintiff save that of occupier and person entering."

It may be remarked that although, as Brennan and Dawson JJ. observe in this passage, the majority of the Court in Hackshaw did not go as far as Deane J. in identifying the formulation of special duties owed by an occupier as instances of the general duty of care under the law of negligence, it would appear from the passages that we have quoted that a majority in Papantonakis (Mason, Wilson and Deane JJ.) do go that far.

9. These judgments raise important issues. Does a theory of concurrent general and special duties, giving rise as it does to complications that raise "some intricate and possibly confusing arguments" (the Judicial Committee in Southern Portland Cement Ltd. v. Cooper (1973) 129 CLR 295, at p 309; (1974) AC 623, at p 645) serve any useful purpose as the law of negligence is now understood? Is there anything to be gained by striving to perpetuate a distinction between the static condition of the land and dynamic situations affecting the land as a basis for deciding whether the special duty is more appropriate to the circumstances than the general duty? The present case illustrates the neat issue that such a question can raise: on the one hand, the appellant argues that because the condition of the floor was caused by wet weather it was unrelated to any activity of the appellant and therefore the special duty supplied the relevant test; on the other hand, it was the activity of conducting a commercial operation on the premises that provided the context for the accident and what could be

more dynamic than the constant movement of rain-soaked shoppers over the floor of a supermarket on a Saturday morning? If it was always the case that the formulations of an occupier's duty in specific terms contributed to the easy ascertainment of the law there would be a case for their retention, as Wilson J. acknowledged in Papantonakis (at p.23), but the pursuit of certainty in this way loses its attraction if its attainment depends on the resolution of difficult questions based on artificial distinctions. It seems to us that the utility of the theory of concurrent duties could be accepted only if a situation could arise in which it was possible to establish a cause of action in reliance upon Indermaur v. Dames which could not be pursued by reference to the general duty of care postulated in Donoghue v. Stevenson. And yet case after case affirms, as the reviews to which we have referred demonstrate, that the special duties do not travel beyond the general law of negligence. They are no more than an expression of the general law in terms appropriate to the particular situation it was designed to address.

10. It must also be remembered that the duty of an occupier to an invitee was articulated by Willes J. in Indermaur v. Dames in 1866. The "plain tenor" of this pronouncement, to adopt the phrase used by Fleming in his text, The Law of Torts (1983) 6th ed., at p.430, is that an invitor's obligation with respect to dangers on his premises should be measured by the flexible standard of reasonable care, as part of the general law of negligence. Unfortunately it has been treated more as a statutory definition of exclusive application to the occupier of dangerous premises in their relationship to invitees. Yet in Heaven v. Pender (1883) 11 QBD 503 , the Court of Appeal was concerned with formulating a duty of care in circumstances where unsound staging had been erected on premises to which there had been an invitation to the plaintiffs to enter, and the case really depended on the duty of the owner of the premises to persons so invited. The principle enunciated in that case, although not expressed in terms of the statement of Willes J., was taken up by Lord Atkin in formulating the general duty in Donoghue v. Stevenson. There remains neither warrant nor reason for continuing to search for fine distinctions between the so-called special duty enunciated by Willes J. and the general duty established by Donoghue v. Stevenson. The same is true of the so-called special duties resting on an occupier of land with respect to persons entering as licensees or trespassers.

11. So long as these alternative formulae are retained, courts and others concerned with the application and administration of the law are committed to pursuing the "barren exercise" to which Brennan and Dawson JJ. referred. We are unable to see sufficient justification for their continued recognition. It is a mistake to think that the failure of an occupier of dangerous premises to take reasonable care does not encompass an act or omission on the part of the occupier which suffices to attract the general duty. What is reasonable, of course, will vary with the circumstances of the plaintiff's entry upon the premises. We think it is wholly consistent with the trend of recent decisions of this Court touching the law of negligence, both in this area of an occupier's liability towards entrants on his land and in the areas which were the subject of consideration in San Sebastian Pty. Ltd. v. Minister Administering the Environmental Planning and Assessment Act 1979 (1986) 68 ALR 161 and Cook v. Cook (1986) 61 ALJR 25; 68 ALR 353, to simplify the operation of the law to accord with the statement of Deane J. in Hackshaw, at pp. 662-663 :

> "... it is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both of a special duty qua occupier and an ordinary duty of care was owed. All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A

> prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk."

12. In the circumstances of the present case, the fact that the respondent was a lawful entrant upon the land of the appellant establishes a relationship between them which of itself suffices to give rise to a duty on the part of the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent. There must be a new trial to determine whether the appellant was in breach of that duty.

13. The appeal should be dismissed.

BRENNAN J.: The 20th January 1979 was a rainy day at Mount Waverley, a suburb of Melbourne. That day Mrs Zaluzna, the respondent, went into the appellant's supermarket at Mount Waverley to buy cheese. She was walking across the foyer of the supermarket when she slipped and fell because, as Tadgell J. found, the vinyl tiles on the floor of the supermarket were covered with a moist film. He said:

> " I am not talking about a situation where shoppers are sloshing about in a considerable amount of water. I am speaking of the kind of dampness or moisture which one commonly finds and, as I would think expects to find, when large numbers of people with wet feet and clothes and umbrellas and shopping buggies, come indoors and walk around an area which is covered with some impervious flooring. If that was the extent of the moisture, and in my opinion the evidence does not really indicate that it was greater, then assuming its source was as I have supposed, I should not be prepared to find that it constituted an unusual danger to the plaintiff."

That day an employee had been directed to mop up excess water carried in by customers, but his Honour was unable to find whether or not the moisture on the part of the floor on which Mrs Zaluzna slipped had been mopped over. On the hypothesis that the moisture on the floor was an unusual danger - an hypothesis which his Honour's earlier finding had rejected - he made further findings. First, that the appellant knew of the moisture but, secondly, that no failure to take reasonable care to prevent damage from the moisture had been established against the appellant. Accordingly, he dismissed Mrs Zaluzna's action for damages for negligence. The duty of care which his Honour held the appellant to owe to Mrs Zaluzna was the duty of care owed by an invitor to an invitee. The classical statement of that duty is to be found in the judgment of Willes J. in Indermaur v. Dames (1866) LR 1 CP 274, at p 288 :

> " And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or

otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

2. Mrs Zaluzna appealed to the Full Court. Before the appeal was heard, this Court delivered judgment in Papantonakis v. Australian Telecommunications Commission (1985) 156 CLR 7. In that case, Dawson J. and I said (at pp 27-28):

" An occupier of land is under a general duty of care to a person entering on the land, whether as invitee, licensee or trespasser, independent of any special duty, where there are circumstances giving rise to the general duty. That is now the settled law of this country".

In supposed reliance on the published reasons in that case, the respondent added a seventh ground to her notice of appeal reading as follows:

" That the learned Trial Judge was wrong in law in finding that the defendant did not owe the plaintiff a general duty of care."

On that ground, the Full Court allowed the appeal and ordered a new trial. Starke J. held that the learned trial judge was in error in failing to consider "whether or not there were circumstances which justified the application of Donoghue v. Stevenson, and in failing to take that matter into consideration". Murphy J. held that the learned trial judge was in error "in considering that in a case of the type with which we have been concerned here the general duty of care could not arise". Beach J. agreed with the reasons of Starke and Murphy JJ. Their Honours did not find it necessary to consider the other grounds of appeal which challenged, inter alia, his Honour's finding that there had been no failure to take reasonable care to prevent damage from the moisture on the floor.

3. The seventh ground of appeal raises two questions for consideration. The first is whether there was evidence establishing or tending to establish circumstances giving rise to a general duty of care in addition to any special duty imposed on the appellant as occupier of the supermarket; the second question is whether the duty owed by an occupier of premises to an invitee in respect of the condition of the premises should be stated in the terms of Lord Atkin's speech in Donoghue v. Stevenson (1932) AC 562 rather than in the terms of the judgment of Willes J. in Indermaur v. Dames.

4. It is convenient to speak of a general duty and a special duty of care as shorthand references to the respective duties of care which were discussed by Lord Atkin and by Willes J. in those cases. General duties of care can arise from a variety of relationships between the person on whom the duty is imposed and the person to whom it is owed, but the special duty of an invitor can arise from but one class of relationship - the relationship between an occupier of premises and his invitee. The standard of care expected of a person on whom a general duty of care is imposed is usually stated in the terms used by Alderson B. in Blyth v. The Birmingham Waterworks Company (1856) 11 Ex 781, at p 784 (156 ER 1047, at p 1049):

" Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a

prudent and reasonable man would not do."
The special duty of care owed by an occupier to an invitee is stated more particularly: it is to use reasonable care to prevent damage from a specified class of hazard, namely, an unusual danger of which the occupier knew or ought to have known. A special duty of care to a person entering premises under contract or as of right or as a licensee or as a trespasser is also owed by an occupier of the premises, the formulation of the duty differing according to the class of entrant.

5. The coexistence of a general duty of care with a special duty has been contested in cases where an occupier of premises was sued by a trespasser. The special duty owed by an occupier to a trespasser was, at least until the middle of this century, extremely limited - indeed, it can hardly be described as a duty of care at all: see the authorities cited by the Privy Council in Commissioner for Railways v. Quinlan (1964) AC 1054, at pp 1072-1075 . The law as it had been laid down became ill-suited to a modern Australian community in which a greater relative importance had come to be given to personal safety as against freedom in the use and control of property: see Munnings v. Hydro-Electric Commission (1971) 125 CLR 1, per Windeyer J. at p 24. To give greater protection to the personal safety of trespassers, it was desirable to develop the law judicially in those jurisdictions where the legislature had not intervened. In this Court, there was little hesitancy in accepting that "circumstances over and above the character of the visitor as a trespasser may give rise to a general duty of care, with the result that an occupier is liable to a trespasser for negligence" (per Fullagar J. in Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 CLR 274, at p 296), and that view has now prevailed: Hackshaw v. Shaw (1984) 155 CLR 614. The Privy Council, however, was hesitant to accept the liberating solution of a dual relationship between an occupier of premises and a person who enters them as a trespasser: see Quinlan, at pp. 1080-1081 . There Viscount Radcliffe, commenting on the view expressed by Kitto J. in Thompson v. Bankstown Corporation (1953) 87 CLR 619, at pp 642-643, that a trespasser may also be the occupier's neighbour in Lord Atkin's sense of that term, said (at p. 1081):

" ... if the relation of occupier and trespasser is
to be displaced by 'some other relation,' as may
happen, the grounds upon which that displacement can be held to occur must admit of reasonably precise definition, otherwise the task of charging juries as to what the law requires or allows will become virtually incapable of formulation."
In Southern Portland Cement Ltd. v. Cooper (1973) 129 CLR 295, at pp 309-310; (1974) AC 623, at p 645, Lord Reid said:

> " Australian courts have tended to proceed on somewhat different lines, perhaps in order to avoid restrictions flowing from the decisions in Addie's ((1929) A.C.358) and Quinlan's Cases. This has led to some intricate and possibly confusing arguments as to whether, in a given state of facts, there are two duties, existing side by side, falling upon an occupier towards trespassers or potential trespassers. These complications become unnecessary if it is right, as their Lordships think it is, to state the occupier's duty towards trespassers in wider terms than appear in Addie's Case, or in some passages in Quinlan's Case. Once it is accepted that the nature of this duty cannot be determined without reference to such all- embracing considerations as their Lordships have mentioned, the need for the imposition of two separate parallel duties disappears."

6. The English development of the law widened the scope of the special duty, thus reducing the need to invoke a coexistent general duty: see Herrington v. British Railways Board (1972) AC 877 . A reluctance to impose on an occupier a general duty of care to a trespasser can be accounted for by the view that "it would be unfair to allow (the trespasser) by his wrong-doing to interfere seriously with the occupier's freedom of action in making proper use of the premises": Commissioner for Railways v. McDermott (1967) 1 AC 169, at p 190. However, that consideration was met in this Court by treating the fact that the plaintiff is a trespasser as relevant to the existence and content of the general duty: see per Fullagar J. in Cardy, at p.299; Munnings v. Hydro-Electric Commission, at pp 11,28. In Hackshaw v. Shaw, when the fetter on the invocation of coexistent duties forged by Quinlan and Southern Portland Cement was loosened if not struck, Gibbs C.J. observed (at p.627):

" It seems to me of small importance to deny that a general duty of care may coexist with the special duty which an occupier owes to a trespasser if it is conceded that the relationship of occupier and trespasser may be replaced by another relationship. At any rate it is settled law in this country that the special duty may be replaced by the general duty if the relationship between the parties is not simply that of occupier and trespasser and there are circumstances which give rise to a duty of care."

7. That being the settled law with respect to trespassers, a fortiori it was the settled law with respect to persons entering lawfully. That had already been decided in Public Transport Commission (N.S.W.) v. Perry (1977) 137 CLR 107, where Gibbs J. said (at p 132):

" It may be taken as settled that in appropriate circumstances a person who has lawfully come on to premises occupied by the defendant can recover damages for injuries sustained by reason of the negligence of the defendant, i.e., for breach of the duty defined in Donoghue v. Stevenson. In other words the occupier may owe to a person lawfully on his land a general duty of care in addition to the special duty which is owed by an occupier to an invitee or a licensee."

8. A general duty of care must arise, if at all, from circumstances which establish a relationship which imports the duty. If there be any difference between a general duty and a special duty, a single relationship cannot import both. The law does not speak with a forked tongue. The existence and measure of a duty of care, whether special or general, depend upon the actual relationship between the person who is said to owe the duty and the person to whom the duty is said to be owed. But when the facts of a case are found to be such that some of those facts in combination would give rise to one duty and another combination would give rise to a different duty, the defendant's liability depends on whether the plaintiff's damage has been caused by the defendant's failure to discharge any of the duties of care to which the various combinations of facts give rise. Therefore, when the liability of an occupier of property to a person entering the property is in question, the relationship of the occupier with the person entering itself suffices to give rise to a special duty of care, but if there are other circumstances which establish a relationship from which a wider general duty of care arises, the wider duty is not discharged by doing merely what would suffice to discharge the narrower duty: Perry, at p.131. The relationship of occupier and entrant is not a source of immunity from liability for breach of a wider duty if, in the circumstances, such a duty has arisen from some further relationship between them. On the other hand, when the facts of a case establish but a single relationship, so that one duty only is imported

and that is a special duty, there is no room for importing a different general duty: see McDermott, at p.191. In such a case, either the special duty and the general duty are the same (what they are called does not matter) or the circumstances do not give rise to the general duty.

9. In Papantonakis, Dawson J. and I held there were facts which established a relationship between the plaintiff and the occupier of the premises on which the plaintiff entered apart from, or in addition to, the relationship of invitor and invitee and that a general duty of care arose from that further relationship. Thus approached, the case fell for determination according to whether the general duty of care had been breached. But that decision says nothing about the facts of the present case. We do not have before us a transcript of the evidence, and that presents an obstacle to determining whether there was evidence in this case tending to establish circumstances giving rise to a general duty of care. However, it was accepted in argument that the judgment of Tadgell J. contained findings on all material facts (though the findings were not necessarily accepted). On that assumption, it is possible to determine whether there was any evidentiary foundation for a general duty of care.

10. Subject to one exception, it appears that there were no circumstances which might have established any relationship between the appellant and Mrs Zaluzna other than the relationship of invitor and invitee. The injury which Mrs Zaluzna sustained was caused solely by her slipping on the moist floor; she entered on the floor of the appellant's supermarket to buy cheese and for no other reason; apart from mopping the floor, the appellant did nothing which might have created or increased the risk of her slipping; it was merely the occupier of the supermarket. No act or omission on the part of any employee (apart, possibly, from mopping the floor) caused or contributed to Mrs Zaluzna's injury. Mopping a floor on which Mrs Zaluzna would foreseeably walk is an act which creates a relationship giving rise to a general duty of care if careless mopping would enhance the risk of slipping. That act apart, there are no facts which tend to establish a relationship giving rise to a general duty of care different from the duty imposed on an invitor in conformity with Indermaur v. Dames. As his Honour found that there was no want of reasonable care in mopping, it was unnecessary to consider whether the undertaking of the mopping gave rise to a general duty of care. If his Honour's finding were set aside and the Full Court substituted a finding that carelessness in mopping caused or contributed to the risk of injury, it would be open to the Full Court (assuming the issue was raised by the pleadings or in the conduct of the litigation) to enter judgment for Mrs Zaluzna. The failure of the trial judge to consider the general duty presents no impediment to relief on the issues as they would be determined by the Full Court. If the finding stood, the judge's failure to consider the general duty is irrelevant to the result. Whether the finding stands or whether it is set aside, there is no need for a retrial. Leaving aside the possibility that a relevant general duty of care may have arisen from undertaking the mopping of the floor, there are no findings which point to evidence of any other circumstances establishing or tending to establish some further relationship. On that footing, the duty of care imposed by law on the appellant towards Mrs Zaluzna was imposed by reason only of the relationship of invitor and invitee. I turn then to the question as to the formulation of an invitor's duty of care.

11. The relationship of invitor and invitee has been understood to give rise to the duty of care defined by Willes J. in Indermaur v. Dames, and that was the duty which Tadgell J. held to apply. There was no attack in the appeal to this Court upon his Honour's application of the principles derived from Indermaur v. Dames. Such an attack was made in the notice of appeal to the Full Court, but their Honours did not find it necessary to decide that question. The attack on his Honour's judgment raised under the seventh ground of appeal necessarily depends on whether a general duty arises from the relationship of invitor and invitee which is or may be different in some way from - perhaps more onerous than - the special duty of care defined in Indermaur v. Dames.

12. The scope of a general duty and the scope of a special duty owed by an occupier of premises to a person entering on them at his invitation have been considered by this Court in a number of cases. Perhaps the clearest exposition of the subject is to be found in the judgment of Fullagar J. in Cardy which, since it furnishes an authoritative answer to the question now arising, warrants examination. First, his Honour pointed out (at p.294):

" The rules for which we refer primarily to
Indermaur v. Dames and Gautret v. Egerton ((1867)
LR 2 CP 371) are now (rightly, I think) regarded as part of the general law relating to negligence. According to that general law a duty to take reasonable care for the safety of others arises from certain situations."
Then his Honour pointed out that duties of care arise from de facto relationships which are of infinite variety. He said (at pp.294-295):

" One such relationship is that which subsists
between an occupier of land and visitors who enter
upon his land. It is, of course, under normal circumstances, to be expected by an occupier that visitors will enter for various reasons and for various purposes. And in such cases the common law has not been content to leave the situation to the general rule without extension or qualification. It has not been content to say that, when a visitor enters and the relationship comes into existence, the occupier becomes subject to a duty of care for the safety of the visitor, and that the standard of care required of him is that which is laid down by Alderson B., and depends on all the circumstances of the case. In the first place, the common law recognized that harm might befall a visitor not by reason of any act or omission of the occupier after entry but by reason of some dangerous condition of the premises, and that in some cases the occupier ought to be held responsible for the harm suffered. And, in the second place, it did not (as it might have done, and as the Occupiers' Liability Act 1957 in England now, in effect, does) leave the standard of care in relation to the condition of premises to be decided according to the general formula of Alderson B., but defined more specifically the standard of care to be required of the occupier ...

> In what I have just said lies, in my opinion, the true significance, which is twofold, of the rules laid down by Willes J. about a century ago." (Emphasis added.)

> 13. In Rich v. Commissioner for Railways (N.S.W.) (1959) 101

CLR 135, at p 144, his Honour referred to Mummery v. Irvings Pty.Ltd. (1956) 96 CLR 99, at p 110, as pointing out that the duty "which the occupier of premises, as such, owes to invitees or licensees present on the premises is a separate and distinct duty, which arises from the mere fact of the occupation of the premises, and relates only to the condition of the premises". The special duty does not necessarily depend on an act done by an occupier or an omission made by him; occupancy of dangerous premises is itself sufficient to found the duty of care to persons entering by invitation or permission. Occupancy is not merely one of the circumstances establishing a neighbour relationship founding a general duty of care to persons who enter or who might foreseeably enter on the premises. At the time when Indermaur v. Dames was decided, the occupancy of dangerous premises had been held to be insufficient by itself to impose on the occupier a duty of care to every entrant: see Gautret v. Egerton (1867) LR 2 CP 371 . It may be that occupation of dangerous premises would be regarded by a modern court as a more significant factor in establishing a neighbour relationship sufficient to attract a general duty of care to persons who might foreseeably enter the premises, but

the law has not left the existence of a duty of care to an invitee to be assessed in all the circumstances according to contemporary ways of thought. The special duties are imposed by law on an occupier of land in virtue of his occupation although, as Fullagar J. said in Cardy, the law holds that the occupier ought to be held liable only "in some cases". The rule which imposes the special duty supplies, so far as it extends, the principles governing the invitor-invitee relationship. Nevertheless, the rule is consistent with, and does not lie outside, the general law of negligence. Although it prescribes a standard of care, the prescribed standard does not fall outside the general standard laid down by Alderson B. The prescribing of the standard, however, makes it unnecessary to speculate whether a jury, directed in accordance with the speech of Lord Atkin and the judgment of Alderson B., would apply to an invitor the same criterion of liability as it would apply when it is directed in terms of the rule prescribing the invitor's special duty.

14. The rules relating to invitees and licensees, as Windeyer J. said in Cardy (at p.317) "do no more than state what the law has determined a reasonable man must do to discharge a duty of care arising in particular circumstances" (emphasis added). In that case Fullagar J. said (at p.295) that the rules "are concerned only with laying down the standard of care appropriate to two special classes of case" and "are concerned only with cases where a visitor has suffered harm through some dangerous condition of the premises". His Honour saw no inconsistency between the standard of care prescribed by the respective rules defining the special duties of care and the standard of care contained in the formula stated by Alderson B. But his Honour should not be taken to mean that the varying standards of care applicable in respect of the duty owed to different classes of entrant were to be assessed in accordance with, and subject to no more precise guidance than, the formula stated by Alderson B. The particular standards of care formulated in the rules defining the special duties are the legal standards "appropriate to two special classes of case".

15. The rules prescribing the special duties of care owed by an occupier of premises to the various classes of persons entering on those premises conclusively answer, so far as they go, the questions arising under the general law as to whether the relationship between the occupier and the person entering gives rise to a duty of care and as to what a prudent and reasonable occupier of the premises on whom a duty of care is imposed should do or refrain from doing to discharge it. The issues of fact arising under the rules prescribing the special duties of care are more confined than the issues which arise when there is a relationship which gives rise to a general duty of care.

16. By bringing the rules defining the special duties of an occupier into the framework of the general law of negligence, a step was taken which led towards the subsuming of the particular rules within the general rules derived from the seminal speech of Lord Atkin and the judgment of Alderson B. earlier mentioned. Thus, in Voli v. Inglewood Shire Council (1963) 110 CLR 74, Windeyer J. said (at p 89):

" ... even without the aid of a statute such as now
exists in England, the trend of judicial authority
has been to treat the liability of an occupier for mishaps upon his premises as governed by a duty of care arising from the general principles of the law of negligence. The special rules concerning invitees, licensees and others are ultimately subservient to those general principles. Instead of first looking at the capacity in which the plaintiff comes upon the premises, and putting him into a category by which his rights are measured, the tendency now is to look at all the circumstances of the case, including the activities of the occupier upon, or in respect of, the premises, and to measure his liability against the conduct that would be expected of a reasonably careful man in such circumstances."

His Honour thought that the judgments in Cardy provided "recent illustrations of this tendency". But, with great respect to his Honour, the judgments in this Court up to that time had maintained the rules defining the special duties of an occupier as the rules applicable to the particular relationships of occupier of premises and the various classes of persons entering on them. What this Court had done was to assert that that relationship did not necessarily exclude the existence of another relationship giving rise to a general duty. In cases where the only relevant relationship was that of occupier and invitee, the authority of Indermaur v. Dames remained undiminished. In Commissioner for Railways (N.S.W.) v. Anderson (1961) 105 CLR 42, Fullagar J. delivered a judgment which, though in dissent on the facts, commanded the concurrence of Kitto J. (in the majority) as an exposition of the law. His Honour said (at p. 55):

" In cases of this type juries in this country
are, I think, invariably directed in accordance
with the exposition of Willes J. in Indermaur v. Dames, and it is on a correct understanding of that exposition that the present case, in my opinion, depends."

He went on to say (at p.56) of the statement of Willes J.:

" The statement does not lay down a special rule
outside and apart from the general law of
negligence. Nor does it, within the general law of negligence, prescribe a special standard of care. The duty is a duty to take reasonable care. The standard is the standard of the reasonable man. The gravamen of the whole passage lies in its statement of what may fairly be regarded as reasonable care in cases where a visitor enters on premises as an invitee of the occupier. It ought not to be read as requiring of the occupier something more than reasonable care."
However, far from subsuming the formulation of the special duty as laid down in Indermaur v. Dames in the formulation of a general duty, his Honour's judgment turned on the elements of the special duty as Willes J. had laid them down. He held that there was no evidence that the Commissioner or any of his servants knew or ought to have known that the wooden bar on which the plaintiff had struck his head possessed the character of an unusual danger: see p.57. That was the very ground of his dissent. In his Honour's judgment, I do not detect any want of recognition of the applicability of the formulation of the special duty by Willes J. in Indermaur v. Dames.

17. In Hackshaw v. Shaw, Deane J. understood Fullagar J. and Kitto J. as having moved towards "the full unifying effect that Donoghue v. Stevenson, properly understood, had had upon (the law of negligence)" (at p 652). And in Papantonakis, Mason J. (at p 20) regarded Anderson and Voli "as settling that the duty of an occupier, even as it is expressed in the Indermaur v. Dames formulation, is no more and no less than the ordinary duty of reasonable care". If these passages are taken to suggest that the formulation of the general duty of care has subsumed the formulation of the special duty, I would be respectfully unable to agree. As I read the cases, the law is correctly stated by Gibbs C.J. in Hackshaw v. Shaw, at p 622:

" Notwithstanding the trend to which Windeyer J.
referred in Voli v. Inglewood Shire Council, this
Court has not discarded the special rules of the common law which have 'adopted a fixed classification of the capacities or characters in which persons enter upon premises occupied by others, and (have established) a special standard of duty ... in reference to each class': Lipman v. Clendinnen ((1932) 46 C.L.R.550, at p. 555). However, the Court has held that there may coexist with, or be superimposed on, the special duty which is owed by an occupier to persons in those

various categories 'a general duty of care, which is not related to the condition of the premises, and which arises not from the fact of occupation but from the general circumstances of the case': Rich v. Commissioner for Railways (N.S.W.) (at p.144)."
In Papantonakis, though Dawson J. and I did not depart from the theory of coexisting duties, we did not exclude the ultimate subsumption of the special duty formulation by the formulation of the general duty. The future course of legal development may see a narrowing of the differences between the formulations, but the rules relating to the special duties cannot now be regarded as obsolete or superseded.

18. The retention of the special duties serves two purposes, one positive the other negative. First, it establishes as a matter of law that the occupation of premises is a sufficient foundation per se for imposing on the occupier a duty of care at least to persons lawfully entering on the premises. Secondly, it provides some limitations on those duties of an occupier which arise when there is no relevant relationship other than that of occupier and person entering. It may be open to debate whether the development of the law is best served by retaining legal rules which prescribe the balance between the interests of the occupier and the interests of the person entering rather than by ascertaining where the balance lies in each case according to broad notions of foreseeability and reasonableness, but the history of this branch of the law and modern attempts to restate it (see Lord Wilberforce's restatement in respect of trespassers in Herrington, at pp.919-921) testify to the utility of prescribing the extent of the duty which occupation of premises imposes on the occupier towards the various classes of persons who come or might come upon his premises. Moreover, I would respectfully agree with the view expressed by Wilson J. in Papantonakis where, in reference to the formulations of the duty of an occupier towards the different classes of persons who may enter his property, his Honour said (at p.23):

" The community's natural desire for certainty in the
law is best served by their retention, so long as
their relationship to the fundamental principles of the law of negligence is recognized and maintained."

19. It follows that the relationship of invitor and invitee
does not give rise to a duty made more onerous by referring its legal origin to what Lord Atkin said in Donoghue v. Stevenson rather than to what Willes J. said in Indermaur v. Dames. Tadgell J. was right to consider whether there had been a breach of the special duty of care formulated in Indermaur v. Dames (though I would reserve consideration of the question whether the special duty was correctly stated in London Graving Dock Co.Ld. v. Horton (1951) AC 737 , to which his Honour referred, until the correctness of that decision comes in question). Subject to what I have said about undertaking the mopping of the floor, there were no facts in the case to attract consideration of a general duty of care and no wider or more onerous duty imposed on the appellant than that defined by Willes J. in Indermaur v. Dames. As there were no unresolved issues of fact between the parties, an order for a new trial was not warranted.

20. If the order for a new trial is set aside and the seventh ground of appeal to the Full Court is held to fail, Mrs Zaluzna's appeal to the Full Court on grounds 1 to 6 remains unresolved. Therefore I would remit the matter to the Full Court to hear and determine the appeal. It should be heard and determined on the footing that Tadgell J. was right to consider the duty of care prescribed by Indermaur v. Dames. If his Honour's findings of fact stand, that is the only relevant duty arising for consideration. If his Honour's findings as to the mopping of the floor are set aside, a question may arise as to whether Mrs Zaluzna suffered her injuries by reason of the appellant's breach of a general

duty of care, but that is a question which the Full Court can determine.

21. The appeal to this Court should be allowed, the order for a retrial set aside and the appeal to the Full Court remitted to the Full Court to hear and determine the issues which have not yet been resolved.

Orders

Appeal dismissed with costs.

Cited by:

Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)

> 169. After referring to Art 6(1) of the *Tokyo Convention* on which Qantas relied, his Honour concluded on the question of whether a duty was owed at 188:
>
> > In my opinion, the provisions of the Treaty cannot, in any relevant sense, in the private, as distinct from a public law context (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423 at 430) detract from the common law "neighbourhood" principle which underpins the existence of a duty of care in an occupier's situation such as the present (see *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 per Windeyer J at 316 ; *Australian Safeway Stores Pty Ltd v Zaluzna* (19 87) 162 CLR 479).

Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
Aidzan Pty Ltd (in liq) v K. & A. Laird (N.S.W.) Pty Ltd (in liq) [2024] NSWCA 185 -
Aidzan Pty Ltd (in liq) v K. & A. Laird (N.S.W.) Pty Ltd (in liq) [2024] NSWCA 185 -
DAC Finance (NSW/Qld) Pty Ltd v Cox [2024] NSWCA 170 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Gomez v Woolworths Group Limited [2024] NSWCA 121 (21 May 2024) (Bell CJ, Gleeson and Adamson JJA)

> 12. There was an admission by Woolworths on the pleadings that as the occupier of the supermarket premises it owed a duty of care to Ms Gomez, and the primary judge so found: at [126]. There is no dispute that the content of the duty owed by the occupier of premises is to exercise reasonable care to prevent foreseeable and not insignificant risks of harm to persons coming on to the premises, and that duty includes the obligation to take precautions that a reasonable person in the circumstances would take by way of response to the risk that a person may slip on the floor: *Civil Liability Act 2002* (NSW), s 5D ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7 ; *Jackson v McDonald's Australia Ltd* [2014] NSWCA 162 at [82] ; *Woolworths Ltd v McQuillan* [2017] NSWCA 202 at [25] .

Jackson v Furner [2024] NSWCA 66 -
Black Head Bowling Club Ltd v Harrower [2023] NSWCA 267 -
Disorganized Developments Pty Ltd v South Australia [2023] HCA 22 -
Townsville City Council v Hodges [2023] QCA 136 -
Ryan v Dearden [2023] QCA 20 -
Ryan v Dearden [2023] QCA 20 -

14. The appellants' duty of care to the respondent, as a lawful entrant on the property, was simply "to take reasonable care to avoid a foreseeable risk of injury": *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 ; [1987] HCA 7 . The obligation to take reasonable care is to be "contrasted with an obligation to prevent harm occurring to others": *Roads and Traffic Authority (NSW) v* ***Dederer*** (2007) 234 CLR 330; [2007] HCA 42 at [51] per Gummow J. An occupier is not an insurer of entrants: *Kocis v SE Dickens Pty Ltd* [1998] 3 VR 408 at 429 per Hayne JA, *Shoalhaven City Council v Pender* [2013] Aust Torts Reports 82-135; [2013] NSWCA 210 at [49] per McColl JA. The reasonableness of an occupier's conduct is measured on the expectation that an entrant will take reasonable care for their own safety: *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29 at [163] per Gaudron, McHugh and Gummow JJ; *Dederer* at [45] per Gummow J.

Russell v Carpenter [2022] NSWCA 252 -
Prouten v Chapman [2021] NSWCA 207 -
Prouten v Chapman [2021] NSWCA 207 -
Prouten v Chapman [2021] NSWCA 207 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 (30 June 2021) (Murphy JA, Mitchell JA, Vaughan JA)

85. In ***Hackshaw*** , Deane J (in a judgment which presaged the change of the common law in ***Australian Safeway Stores Pty Ltd v Zaluzna*** [108]) went further and concluded that the special duties owed by occupiers were, moreover, to be understood as part of the general law of negligence. His Honour said: [109]

> If there be any acceptable basis in principle for a conceptual differentiation between the 'special duties' of an occupier to a lawful visitor and the ordinary common law duty of care, it must be found in a distinction between the state or 'static condition' of premises on the one hand and activities upon premises on the other. It has, however, been demonstrated both in judgments (see, eg, per Pearson LJ, ***Videan***) and learned writings (see, eg, G Hughes, 'Duties to Trespassers: A Comparative Survey and Revaluation', Yale Law Journal, vol 68 (1959), pp 697 698) that to treat any such distinction as a rigid barrier between different duties is in its own way as artificial and unsatisfactory as is the determination of the existence and scope of a duty of care by reference to rigid and possibly forced characterisation of a visitor as invitee, licensee or trespasser. The general notion of the distinction between the static condition of land and activities upon it may well be material in determining whether the necessary relationship of proximity exists under ordinary principles and, if it does, the content of any relevant duty of care. As a rigid line of demarcation between different and independent duties however, it is arbitrary and largely unworkable and should be rejected for reasons both of principle and of policy.
>
> ...
>
> It follows that there no longer exists any proper basis for a refusal to accept as authoritative ... that the rules concerning the liability of occupiers are part of the general law of negligence and that the socalled 'special duties' owed by an occupier to a person lawfully upon his land are instances of the duty of care arising under that general law in the circumstances of the relevant category of case.
>
> ...
>
> That being so, it is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both of a special duty qua occupier and an ordinary duty of care was owed. All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. (footnote omitted)

The common law since 1987

Garnett v Qantas Airways Ltd [2021] WASCA 110 (30 June 2021) (Murphy JA, Mitchell JA, Vaughan JA)

116. The High Court's decision in ***Australian Safeway Stores*** did not overrule the principle adopted in ***Watson*** . [144]

Garnett v Qantas Airways Ltd [2021] WASCA 110 (30 June 2021) (Murphy JA, Mitchell JA, Vaughan JA)

92. In ***Westralian Caterers Pty Ltd v Eastment Ltd*** ,[122] the predecessor to this court said that the purpose of the OLA was to achieve by statute what was ultimately achieved by the development of the common law by the High Court in ***Australian Safeway Stores*** . Malcolm C J (Franklyn & Murray JJ agreeing) said: [123]

> The purpose of the *Occupiers' Liability Act* was to achieve by statute what was achieved by the development of the common law by the decisions of the High Court. The statutory provisions did not create a new cause of action for breach of statutory duty. *What they did was to replace the former common law rules regulating the standard of care owed by occupiers to persons entering the premises in given situations, by a single standard of care in terms of the general duty of care referred to in* ***Donoghue v Stevenson*** .
>
> *In other words, the statute did no more than reform the content of the duty of care at common law in the case of occupiers for the purpose of the common law action for negligence. Thus, s 5(4) sets out a number of considerations relevant to 'determining whether an occupier of premises has discharged his duty of care'. That duty of care is the duty, the content of which has been defined by the statute, but only for the purposes of simplifying the law governing the cause of action in negligence against occupiers.* There is nothing in the statute which would have the effect that the cause of action in negligence at common law against occupiers has been converted into a cause of action for breach of statutory duty.
>
> The Western Australian *Occupiers' Liability Act* is based on the *Occupiers' Liability Act 1957* (UK) and the *Occupiers' Liability (Scotland) Act* 1960. *In any action in which the duty of care provided for in the Act is relied upon, the question will be whether the occupier has taken reasonable care in all the circumstances. This is, in effect, the same question as arises in any ordinary negligence case.* (emphasis added)

Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 -
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Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Coffs Harbour City Council v Polglase [2020] NSWCA 265 -
Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 (25 February 2020) (Macfarlan and White JJA, Simpson AJA)

63. The reference in ground 3 to “any relevant duty of care” is misplaced. As noted above, the appellant did not challenge the primary judge’s finding that the appellant owed Mr McMullen the duty of care of an occupier. The appellant owed a duty to take reasonable care to avoid risk of injury to entrants. The extent of that obligation would take into account the exercise of reasonable care by the entrant (*Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7 ; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [47] per Gummow J).

Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

221. His Honour referred to his earlier decision in *Harris* and continued (at [198]):

> ... even if I did not assume that 'the state of the premises' in s 168 extended to the presence of dogs in the common areas of Warrock Court, there would exist a duty that extended to the presence of animals on the property. The relationship between occupier and entrant in relation to a foreseeable risk of injury is an established one: Australian *Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 . There was a foreseeable risk of injury in the common areas of Warrock Court from animals resident in the units of the property. I concluded in *Harris* that s 168 'was not intended to limit in any significant way the rights of entrants against occupiers' and it is therefore possible for there to be a duty of care that exists beyond the scope of s 168 . As a result, 'it does not really matter whether the 'state of the premises' extends beyond physical features of the premises because s 168 does not limit the causes of action that may be brought against an occupier' and the 'test to be applied under s 168 a nd under the common law is, in substance, the same': *Harris* at [146].

Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Hawkesbury Sports Council v Martin [2019] NSWCA 76 -
Bruce v Apex Software Pty Ltd [2018] NSWCA 330 (18 December 2018) (Meagher, Leeming and White JJA)

9. Although ground 1 of the amended notice of appeal contends that the primary judge erred in failing sufficiently to define the scope of the duty of care, the argument in support of that ground is directed to emphasising the matters to be considered in assessing what the exercise of reasonable care required of the occupier of a "high care nursing home" in the circumstances of this case. It was not controversial that the duty engaged was to exercise reasonable care so that the premises, including the outside areas providing access to and from the car park, were safe for pedestrian and other users: *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 ; [1987] HCA 7 ; *Thompson v Woolworths (Q'land) Pty Ltd* (20 05) 221 CLR 234 at [24]; [2005] HCA 19. Whether there was a breach of that duty must be considered by reference to the provisions of the *Civil Liability Act* , and in particular s 5B (as was emphasised in *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [27]; [2009] HCA 48).

Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Woolworths Ltd v McQuillan [2017] NSWCA 202 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Tran v Vo [2017] NSWCA 134 -
Ratewave Pty Ltd v BJ Illingby [2017] NSWCA 103 -
Day v Woolworths Ltd [2016] QCA 337 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
ALDI Foods Pty Ltd v Young [2016] NSWCA 109 -
Australia and New Zealand Banking Group Ltd v Haq [2016] NSWCA 93 -
Schultz v McCormack [2015] NSWCA 330 (23 October 2015) (McColl and Macfarlan JJA, Beech-Jones J)

> 62. Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 ; (1987) 162 CLR 479 (at 488); Roads and Traffic Authority of New South Wales v Dederer [2007] HCA 42; (2007) 234 CLR 330 ("Dederer") (at [45]).

Sharp v Parramatta City Council [2015] NSWCA 260 -
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 -

Stenning v Sanig [2015] NSWCA 214 (27 July 2015) (Macfarlan, Hoeben and Gleeson JJA)

19. In reaching that decision, his Honour relied upon two statements of principle. The first was that of the plurality (Mason, Wilson, Deane and Dawson JJ) in *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479 at 488 where their Honours said:

> "12 In the circumstances of the present case, the fact that the respondent was a lawful entrant upon the land of the appellant establishes a relationship between them which of itself suffices to give rise to a duty on the part of the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent. ..."

Fabre v Lui [2015] NSWCA 157 (10 June 2015) (Basten, Macfarlan and Meagher JJA)

Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7; 162 CLR 479
Bevillesta Pty Ltd v Liberty International Insurance Company [2009] NSWCA 16
Glasgow Corporation v Muir [1943] AC 448
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 239
Jones v Bartlett [2000] HCA 56; 205 CLR 166
Jones Lang LaSalle (NSW) Pty Ltd v Taouk [2012] NSWCA 342
Joslyn v Berryman; Wentworth Shire Council v Berryman [2003] HCA 34; 214 CLR 552
Laresu Pty Ltd v Clark [2010] NSWCA 180
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39; 188 CLR 313
Roads and Traffic Authority of New South Wales v Dederer [2007] HCA 42; 234 CLR 330
Sakoua v Williams [2005] NSWCA 405; 64 NSWLR 588

Fabre v Lui [2015] NSWCA 157 -
Victorian YMCA Community Programming Pty Ltd (ACN 092 818 445) v Nillumbik Shire Council , Victorian WorkCover Authority , , Victorian YMCA Community Programming Pty Ltd (ACN 092 818 445) and Nillumbik Shire Council [2014] VSCA 197 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 (07 May 2014) (McColl, Basten and Emmett JJA)

60. In considering the degree to which the appellant and respondent departed from the standard of what is reasonable, it is necessary to have regard to the duty of care the appellant owed the respondent: *Astley v Austrust Ltd* (at [30]). That subject received no consideration at trial (or in the parties' submissions on appeal), it presumably having been common ground that the appellant, as occupier, owed the respondent as entrant a duty to take reasonable care to prevent injury to him on the assumption he was using reasonable care for his own safety: *Australian Safeways Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 (at 488) per Mason, Wilson, Deane and Dawson JJ; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42 ; (2007) 234 CLR 330 (at [45]) per Gummow J;

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98 -
Baggs v University of Sydney Union [2013] NSWCA 451 -
Coles Supermarkets Australia Pty Ltd v Meneghello [2013] NSWCA 264 -
Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

48. The respondent did not contend at trial, or on appeal, that the appellant owed him any duty of care higher than that of an ordinary occupier of land. That duty required the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent arising from the physical state of its land on the assumption that he used reasonable care for his safety: *Australian Safeways Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 (at 488) per Mason, Wilson, Deane and Dawson JJ; *Roads and Traffic Authority of New South Wales v Dederer* [2007]

HCA 42; (2007) 234 CLR 330 (at [45]) per Gummow J. The basis of the appellant's duty, as an occupier in relation to the physical state or condition of the ramp, was its control over, and its knowledge (actual or constructive), of the state of the ramp: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 (at [18]) per Gleeson CJ.

Shoalhaven City Council v Pender [2013] NSWCA 210 -
Smith v Body Corporate for Professional Suites Community Title Scheme 14487 [2013] QCA 80 (12 April 2013) (Margaret McMurdo P and Fraser JA and Fryberg J,)

42. The trial judge recorded that it was common ground that the test for deciding whether the respondent was negligent was that which Mason J propounded in the well known passage in *Wyong Shire Council v Shirt* : [48] the risk of injury to the plaintiff, or a class of persons including the plaintiff, which eventuated must be foreseeable, in the sense that the risk must be real and not far-fetched or fanciful, even if extremely unlikely; if the risk is foreseeable, the question is what a reasonable person in the defendant's position would do in response to the risk, taking into account its magnitude and probability, the expense, difficulty and inconvenience of taking alleviating action, and any other conflicting responsibilities of the defendant. The parties also agreed that the test was that identified by Deane J in *Hackshaw v Shaw* , [49] namely, that "[t]he measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk".

via

[49] (1984) 155 CLR 614 at 662-63, endorsed in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488.

Wright v KB Nut Holdings Pty Ltd [2013] QCA 66 -
Wright v KB Nut Holdings Pty Ltd [2013] QCA 66 -
Wright v KB Nut Holdings Pty Ltd [2013] QCA 66 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Jones Lang LaSalle (NSW) Pty Ltd v Taouk [2012] NSWCA 342 (24 October 2012) (McColl and Meagher JJA, Sackville AJA)

68. The duty of care of an occupier such as Wilson was to take reasonable care for the safety of users of the car park so that they were not exposed to any unreasonable risk of physical injury, including from slipping on the car park surface: *Zaluzna* at 488 ; *Thompson v Woolworths (Q'land) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [27] . That duty was not concerned with unreasonable risks of slipping on some substances only or on substances from some sources and not others. It was directed to the risk of slipping by reason of the presence of any substances on the car park surface, a risk that Wilson's witnesses acknowledged.

Jones Lang LaSalle (NSW) Pty Ltd v Taouk [2012] NSWCA 342 -
Graham v Welch [2012] QCA 282 -
Graham v Welch [2012] QCA 282 -
Sibraa v Brown [2012] NSWCA 328 (12 October 2012) (Campbell and Hoeben JJA, Tobias AJA)

56. After referring to the formulation in ***Zaluzna*** of the duty of care of an occupier being to do what a reasonable person would, in the circumstances, do by way of response to a foreseeable risk, he continued, at [8] :

"The same problems of everyday living that were sought to be addressed by the old, categorical approach to liability still had to be accommodated by the new approach. Those practical realities include the following. Not all people live, or can afford to live,

in premises that are completely free of hazards. In fact, nobody lives in premises that are risk-free. Concrete pathways crack. Unpaved surfaces become slippery, or uneven. Many objects in dwelling houses could be a cause of injury. People enter dwelling houses for a variety of purposes, and in many different circumstances. Entrants may have differing capacities to observe and appreciate risks, and to take care for their own safety. An ordinary kitchen might be reasonably safe for an adult, and hazardous to a small child. The expression 'reasonable response in the circumstances' raises a question of normative judgment which has to grapple with all the practical problems that the law had earlier attempted to solve ... The problems did not disappear. They now require consideration under a somewhat different rubric. The fundamental problem remains the extent to which it is reasonable to require occupiers to protect entrants from a risk of injury associated with the condition of the premises. That problem is no longer addressed by prescriptive legal rules which attempt to establish precise and different standards of care for different classes of entrant. Yet the problem remains."

Sibraa v Brown [2012] NSWCA 328 -
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 (09 August 2012) (Beazley, Macfarlan and Hoeben JJA)

56. In relation to the occupiers, his Honour said:

"129I think that the first and second defendants were negligent. They owed a duty to lawful entrants to "take reasonable care to avoid a foreseeable risk of injury to the person concerned" (*Australia Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479 at 488).

130I think their duty of care extended to taking reasonable precautions to ensure the safe passage of patrons up and down the stairs in circumstances, as I have oft repeated, where it was reasonably foreseeable that drinks might be spilt on the stairs. There was no evidence of any cleaning or inspection system. There was no evidence of any warnings about taking drinks between stairs. There was no control over persons using the stairs. The fact that the liquid may only have fallen on the stairs even moments before the plaintiff slipped, in my view, does not assist the first and second defendants. Their negligence was in allowing a situation to exist in which the stairs might become wet and if they did, could then pose a hazard to users of the stairs." (Red AB 66W-67H)

Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 (09 August 2012) (Beazley, Macfarlan and Hoeben JJA)

67. The occupiers accepted the following statements of principle: "The occupier of business premises owes a duty to a customer or other lawful entrant to take reasonable care to avoid a foreseeable risk of injury to the person concerned" (*Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479 at 488); and "The occupier is required to exercise reasonable care to prevent injury to a customer or lawful entrant using reasonable care for his or her own safety" (*Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 at 345-346 [45]); *Arabi v Glad Cleaning Service Pty Ltd* [2010] NSWCA 208 at [34] per Sackville AJA, with whom Hodgson JA and Harrison J agreed).

MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110 (21 May 2012) (Pullin JA, Newnes JA, Murphy JA)

46. The main significance of the OLA is that the common law rules which set different standards of care depending upon the classification of the entrant as an invitee or licensee no longer apply. Even if the OLA had not been passed, the same effect was brought about by the High Court in ***Australian Safeway Stores Pty Ltd v Zaluzna*** [1987] HCA 7; (1987) 162 CLR 479, 487 488 , holding that the old common law rules no longer applied.

MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110 -
Miljus v Watpow Constructions Pty Ltd [2012] NSWCA 96 -
Novakovic v Stekovic [2012] NSWCA 54 (27 March 2012) (McColl and Whealy JJA, Tobias AJA)

38. The respondents, as occupier of the land onto which the appellant entered, owed her a duty to take reasonable care to prevent injury to her on the assumption she was using reasonable care for her own safety: *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 (at 487-488) per Mason, Wilson, Deane and Dawson JJ; *Jones v Bartlett* ; [2000] HCA 56; (2000) 205 CLR 166; *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; (2007) 234 CLR 330 (at [47]) per Gummow J. There was no suggestion that the appellant had fallen short of the last requirement.

Novakovic v Stekovic [2012] NSWCA 54 -
Strong v Woolworths Ltd [2012] HCA 5 (07 March 2012) (French CJ, Gummow, Heydon, Crennan and Bell JJ)

3. Woolworths appealed to the New South Wales Court of Appeal (Campbell JA, Handley AJA and Harrison J). It was not in question that Woolworths owed a duty to take reasonable care for the safety of persons coming into the sidewalk sales area [1] . Nor was it in question that, on the day of the appellant's fall, Woolworths did not have any system in place for the periodic inspection and cleaning of the sidewalk sales area. The Court of Appeal held that the appellant had failed to prove that Woolworths' negligence was a cause of her injury. The appeal was allowed, the judgment was set aside and the proceedings were dismissed.

via

[1] *Australian Safeway Stores Pty Limited v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7 .

Julia Creek Town and Country Club Inc v Littlejohn [2012] QCA 16 -
Amaca Pty Ltd v King [2011] VSCA 447 -
Turjman v Stonewall Hotel Pty Ltd [2011] NSWCA 392 (21 December 2011) (Bathurst CJ, Allsop P, Beazley and Giles JJA, Sackville AJA)

71. Stonewall did not challenge that it was in breach of its *Australian Safeway Stores Pty Ltd v Zaluzna* duty of care in failing adequately to brief Byatt with the Harper e-mail and information as to the activities being carried on at the hotel (I will hereafter refer to this as the relevant information). The appellants did not contend that it breached that duty of care in some other manner. The issue on appeal was factual causation.

Turjman v Stonewall Hotel Pty Ltd [2011] NSWCA 392 -
Turjman v Stonewall Hotel Pty Ltd [2011] NSWCA 392 -
Turjman v Stonewall Hotel Pty Ltd [2011] NSWCA 392 -
Loose Fit Pty Limited v Marshbaum [2011] NSWCA 372 -
Elphick v Westfield Shopping Centre Management Company Pty Ltd [2011] NSWCA 356 (25 November 2011) (Young and Whealy JJA, Sackville AJA)

61. Against this background, decided cases have shown at times an uncertainty of approach. This uncertainty has, in a number of respects, been resolved by recent decisions of the High Court of Australia. The primary judge referred to several of these in his reasons for decision. However, it may be convenient to summarise in very brief form the principles I see as being relevant to the resolution of the issues here. This is not intended to be an exhaustive summary, or, for that matter, a comprehensive analysis. The relevant principles in the present matter are, as I see them, as follows:

(a) The duty of care owed by Westfield to Mr Elphick was that of an occupier. This duty was succinctly stated in *Australian Safeways Stores Pty Limited v Zaluzna* (1987) 162 CLR 479 at 488 :-

> ... the fact that [injured person] was a lawful entrant upon the land of the [occupier] establishes a relationship between them which of itself suffices to give rise to a duty on the part of the [occupier] to take reasonable care to avoid a foreseeable risk of injury to the [injured party].

(b) This duty, in circumstances where the occupier engages an independent contractor to carry out aspects of its enterprise, does not give rise to a duty of care towards an employee of the independent contractor akin to the duty of an employer to his employee (see *Leighton Contractors v Fox* at [48]:-

> The relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken.)

(c) In certain circumstances, the duty to take reasonable care will, however, extend to responsibilities involved in the system of work utilised by the independent contractor. Whether this is so or not will depend on a fact-intensive investigation to determine whether there is the necessary interdependence of the activities carried out in the enterprise under consideration. As Mason J said in *Brodribb* at 31 :-

> The interdependence of the activities carried out in the forest, the need for co-ordination by Brodribb of those activities and the distinct risk of personal injury to those engaged in the operations, called for the prescription and provision of a safe system by Brodribb. Omission to prescribe and provide such a system would expose the workers to an obvious risk of injury. Although the obligation to provide a safe system of work has been regarded as one attaching to an employer, there is no reason why it should be so confined. If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, he has an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system. Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines.

(d) Where, however, the occupier has engaged the services of an independent contractor whose task it is to control its employee's systems of work without supervision by the occupier, there may, depending once again on a fact-sensitive enquiry, be no liability imposed on the occupier for a failure by the independent contractor to control its own system of work. As Brennan J said in *Brodribb* at 47 - 48 :-

> The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organized and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility.

State of Queensland v Heraud [2011] QCA 297 -
State of Queensland v Heraud [2011] QCA 297 -
Burton v Brooks [2011] NSWCA 175 -
Burton v Brooks [2011] NSWCA 175 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 (20 April 2011) (Martin CJ; McLure P; Mazza J)

Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 ; (1987) 162 CLR 479

Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Shire of Manjimup v Cheetham [2010] WASCA 225 (29 November 2010) (Buss and Newnes JJA; Mazza J)

Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 ; (1987) 162 CLR 479

Shire of Manjimup v Cheetham [2010] WASCA 225 -
Shire of Manjimup v Cheetham [2010] WASCA 225 -
Kempsey Shire Council v Baguley [2010] NSWCA 284 -
Kempsey Shire Council v Baguley [2010] NSWCA 284 -
Arabi v Glad Cleaning Service Pty Ltd [2010] NSWCA 208 -
Arabi v Glad Cleaning Service Pty Ltd [2010] NSWCA 208 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Shaw v Thomas [2010] NSWCA 169 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
CSL Australia Pty Ltd v Formosa [2009] NSWCA 363 -
CSL Australia Pty Ltd v Formosa [2009] NSWCA 363 -
Condos v Clycut Pty Ltd [2009] NSWCA 200 (16 July 2009) (McColl JA at 1; Campbell JA at 95; Macfarlan JA at 96)

61. Clycut was the owner and, as the primary judge found, the occupier of the Centre. As I observed recently, with Tobias and Young JJA's concurrence, in *Wynn Tresidder Management v Barkho* [2009] NSWCA 149:

> "59 As I have said, it was common ground that the appellant was the occupier of the Centre. This status arose from its care, control and management of the premises. By virtue of its power of control, it owed the respondent, as a lawful entrant to the Centre, a duty to take reasonable care to avoid a foreseeable risk of injury. The measure of the discharge of its duty was what a reasonable person would, in the circumstances, do by way of response to the foreseeable risk: *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 (at 487 - 488) per Mason, Wilson, Deane and Dawson JJ, approving the observations of Deane J in *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614 (at 662 – 663); see also *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 (at [17] – [18]) per Gleeson CJ (Gaudron J agreeing (at [42])); (at [60]) per Kirby J; (at [112]) per Hayne J (Gaudron J agreeing (at [42])); (at [138]) per Callinan J; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 234 CLR 330 (at [45]) per Gummow J (Heydon J agreeing)."

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

87. The majority of the High Court in *Nagle* spoke of a generalized duty of care to members of the public who made use of facilities under the management and control of a statutory authority to take reasonable steps to avoid foreseeable risk of injury to those persons. [109] T he generalized standard of care was formulated as the response by a reasonable person in the circumstances to a foreseeable risk. [110] In *Zaluzna* the same sort of duty was said to be owed by an occupier to visitors.

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Wynn Tresidder Management v Barkho [2009] NSWCA 149 -
Wynn Tresidder Management v Barkho [2009] NSWCA 149 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 (04 December 2008) (McMurdo P, Fraser JA and Mackenzie AJA,)

27. It is not necessary to consider whether these matters formed a sufficient foundation for a finding that the respondent owed the appellant a duty of care. The trial and the appeal were conducted on the premise that the respondent did owe the appellant a duty of care. Further, it appears from the trial judge's analysis, and particularly from his Honour's references to *Nei ndorf v Junkovic* , that his Honour assumed (generously to the appellant, in my opinion) that the respondent owed the appellant the duty of care that would have been owed by the respondent had it occupied the driveway, namely a duty of care under the ordinary principles of negligence to take reasonable care for the safety of entrants. [17]

via

[17] *Neindorf v Junkovic* (2005) 222 ALR 631 at [6] per Gleeson CJ, at [90] per Hayne J, at [113]-[114] per Callinan and Heydon JJ; [2005] HCA 75 ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7 .

Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -
New South Wales v West [2008] ACTCA 14 (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

188. It should be noted that *Hargrave v Goldman* was taken on appeal to the Privy Council which affirmed the decision of the High Court (see *Goldman v Hargrave* (1966) 115 CLR 458). The Board observed that modern textbooks of authority on the law of torts endorsed the development towards a 'measured duty of care by occupiers to remove or reduce hazards to their neighbours'. *Goldman v Hargrave* was, of course, decided before *Australian Safeway Stores Propriety Limited v Zaluzna* (1987) 162 CLR 479 and *Burnie Port Authority v General Jones Limited*.

Imbree v McNeilly [2008] HCA 40 -
Talbot-Price v Jacobs [2008] NSWCA 189 (12 August 2008) (Ipp JA ; McColl JA; Basten JA)
Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 ; 162 CLR 479
Jones v Bartlett

Talbot-Price v Jacobs [2008] NSWCA 189 -
Watch Tower Bible Society and Tract Society of Australia v Sahas [2008] WASCA 51 -
Watch Tower Bible Society and Tract Society of Australia v Sahas [2008] WASCA 51 -

Watch Tower Bible Society and Tract Society of Australia v Sahas [2008] WASCA 51 -
Caftor Pty Ltd (ACN 008 598 089) t/as Mooseheads Bar and Cafe v Matthew Brenden Kook [2007] ACTCA 19 -
Caftor Pty Ltd (ACN 008 598 089) t/as Mooseheads Bar and Cafe v Matthew Brenden Kook [2007] ACTCA 19 -
Caftor Pty Ltd (ACN 008 598 089) t/as Mooseheads Bar and Cafe v Matthew Brenden Kook [2007] ACTCA 19 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 (30 August 2007) (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ)

49. In simple and complicated cases alike, one thing is fundamental: while duties of care may vary in content or scope, they are all to be discharged by the exercise of *reasonable* care. In *Vairy v Wyong Shire Council*, McHugh J explained [62] :

> "[T]he duty in negligence is generally described as a duty to take reasonable care. In some areas of the law of negligence, however, the duty is expressed in more limited and specific terms. Until the decision of this Court in *Zaluzna* [63] , for example, the duty owed to entrants upon privately owned land varied according to the category of the entrants. They were classified as invitees, licensees and trespassers. Similarly, the duty in respect of negligent statements is more specific and limited than a simple duty to take reasonable care in all the circumstances of the case. In negligence cases involving physical injury, however, the duty is always expressed in terms of reasonable care. As Prosser and Keeton have pointed out, 'the duty is always the same – to conform to the legal standard of reasonable conduct in the light of the apparent risk' [64]."

His Honour dissented from the outcome in *Vairy* , but that does not qualify the cogency of the above observations.

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 -
John Fairfax Publications Pty Ltd v Gacic [2007] HCA 28 -
Skulander v Willoughby City Council [2007] NSWCA 116 (18 May 2007) (Mason P; Beazley JA; Basten JA)

36 In ***Hill v Chiaverini*** [2004] NSWCA 265 at [29]-[31] I said (with the concurrence of McColl JA and Hislop J):

> *The plaintiff was a lawful entrant to commercial premises owned and occupied by the defendants. There was an undoubted duty to take reasonable care, bearing in mind that what is reasonable* "will vary with the circumstances of the plaintiff's entry upon the premises" *(* ***Australian Safeways Stores Pty Ltd v Zaluzna*** *(1987) 162 CLR 479 at 487-8). A finding of breach requires a conclusion that the occupier has acted unreasonably in responding to the foreseeable risk of injury, having regard to the well-known considerations referred to in* ***Wyong Shire Council v Shirt*** *(1980) 146 CLR 40 at 47-8 .*
>
> *In determining what the defendants were required to do, acting reasonably, the occupiers could take into consideration what*

Mahoney JA described in ***Phillis v Daly*** *(1988) 15 NSWLR 65 at 74 as* "the law's expectation that the plaintiff would take reasonable care for [her] own safety" *(see also* ***Francis v Lewis*** *[2003] NSWCA 152).*

This is not to assert that occupiers may ignore the fact that accidents occur due to entrants' inadvertence. Some criticism was directed at the trial judge's statement that "much emphasis has been placed in recent authorities on the requirement that plaintiffs act reasonably" *. In my view, this was a fair observation based upon recent appellate jurisprudence as to the content of the duty of care and issues of breach in various circumstances (cf Liftronic Pty Ltd v Unver (2001) 179 ALR 321 at 333 [60] , Brodie v Singleton Shire Council , Ghanto us v Hawkesbury City Council (2001) 206 CLR 512 at 580 [160] , Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460 at 474 [44]-[45] , University of Wollongong v Mitchell [2003] NSWCA 94 at [33] , Van der Sluice v Display Craft Pty Ltd [2002] NSWCA 204 at [74] , Richmond Valley Council v Standing [2002] Aust Torts Reports ¶81-679 at [29], Francis at [40] , Waverley Municipal Council v Swain [2003] NSWCA 61 at [114] , Temora Shire Council v Stein [2004] NSWCA 236).*

New South Wales Department of Housing v Hume [2007] NSWCA 69 (28 March 2007) (Beazley JA ; McColl JA Basten JA)

58. Gaudron J said (at [92]) that "there [was] no basis for the imposition of a higher duty of care on a landlord than is cast on an occupier of premises" and, referring to *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 , that "[a]s the occupier of premises is only required to take such care as is reasonable in the circumstances ... a landlord should not be subjected to a higher duty to make premises as safe for residential use as reasonable care and skill on the part of anyone can make them."

New South Wales Department of Housing v Hume [2007] NSWCA 69 (28 March 2007) (Beazley JA ; McColl JA Basten JA)

Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 ; (1987) 162 CLR 497
Baulkam Hills Shire Council v Pascoe

New South Wales Department of Housing v Hume [2007] NSWCA 69 -
New South Wales Department of Housing v Hume [2007] NSWCA 69 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

176. There can be no question that had the appellant been undertaking the work itself, the breaking of the lid, its replacement, and concealment by carpet, would have constituted misfeasance. It is also clear that the appellant did not, indeed it could only have done so in certain circumstances, and on certain conditions, give Roan any exclusive use, occupation and control of the footpath [243] . Whilst it is true that since *Australian Safeway Stores Pty Ltd v Zaluzna* [244] the law of negligence in relation to occupiers has been altered [245] by the abolition of the imposition of a special duty upon them, rights and obligations of occupation, and therefore also of control, remain circumstances relevant to the existence and content of their duties of care.

via

[245] See the discussion of the occupiers' liability cases culminating in *Zaluzna* in Balkin and Davis, *Law of Torts*, 3rd ed, (2004) at 242-250 [7.37]-[7.40].

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

153. Further, it may also be noted that Mason J gave a third example of nondelegable duty in *Kondis* – the liability owed by an occupier of land to those who were then classified as invitees. Classification of entrants, as invitees, licensees or trespassers, has since been discarded as a consideration relevant to the definition of the content of the duty of care owed by an occupier of land to entrants to the land [219] . Whether, or in what circumstances, this particular form of nondelegable duty survives this reexpression of the occupier's duty of care to entrants are questions that do not arise directly in the present matter. Nor do similar questions about the nature or extent of duties owed by hospitals to patients or by school authorities to pupils arise. It is sufficient to notice that decisions of this Court after *Kondis* , in particular *Scott v Davis* [220] and *New South Wales v Lepore* [221] , point out the many difficulties that lie behind adopting principles cast in terms of nondelegable duties. Not least of these difficulties is that a nondelegable duty is a form of strict liability and *Burnie Port Authority v General Jones Pty Ltd* , in its treatment of the rule in *Rylands v Fletcher* , shows the disfavour with which strict liability is now viewed [222] .

via

[219] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 .

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

179. The principle is open, I think, to a similar, even stronger, criticism than the ones to which the distinction between misfeasance and non-feasance was subjected. It is that the identification of what should be regarded as merely casual or collateral is an exceedingly difficult one to make. In his reasons for judgment the Chief Justice describes the creation here of the concealed trap as an "apparently low-level and singular act of carelessness" [247] , an equally apt description of which would be, to use the language of *Halsbury*, a "merely 'casual' or 'collateral'" act of negligence. That the distinction is an uncertain one, and further, that some of the cases said to ground the principle can be explained on other bases will be apparent from an examination of several of the cases which I will undertake shortly. But before doing that I would point out that the fact that this Court was prepared to sweep away in *Brodie* the distinction at common law between misfeasance and non-feasance, and in *Zaluzna* , the exceptional duty owed by occupiers, provides reason for a similar initiative to reformulate the law with respect to road authorities to render any distinction between casual and collateral, or non-casual and non-collateral, no longer decisive.

Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 (19 January 2007) (Martin CJ)

37 In ***Neindorf*** , Gleeson CJ noted, at 345 [8] , that the expression "reasonable response in the circumstances", in the context of the generalised standard of care which has developed in the common law relating to occupiers' liability, raises a question of normative judgment which has to grapple with all the practical problems that the law had earlier attempted to solve by reference to the legal framework which existed before the High Court's decision in ***Australian Safeway Stores*** . As his Honour said:

> "People enter dwelling houses for a variety of purposes, and in many different circumstances. Entrants may have differing capacities to observe and appreciate risks, and to take care for their own safety. ... The problems did not disappear [with the

High Court's decision in *Australian Safeway Stores*]. They now require consideration under a somewhat different rubric. The fundamental problem remains the extent to which it is reasonable to require occupiers to protect entrants from a risk of injury associated with the condition of the premises. That problem is no longer addressed by prescriptive legal rules which attempt to establish precise and different standards of care for different classes of entrant. Yet the problem remains."

Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 (19 January 2007) (Martin CJ)

34 As I have mentioned, an occupier owes a duty of care to any person whose presence on the premises, either individually or as a member of a class, is reasonably foreseeable in respect of risks of physical injury arising out of the condition of the premises. See ***Australian Safeway Stores*** at 488 ; ***Phillis v Daly*** (1988) 15 NSWLR 65 at 76 ; ***Modbury Triangle Shopping Centre Pty Ltd v Anzil*** (2000) 205 CLR 254 at 263 [17], 289 [102] .

Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 (05 October 2006) (Handley JA at 1; Ipp JA at 67; Tobias JA at 325)

51. The appeal should also succeed on wider grounds. In the cases since *Zaluzna* (1987) 162 CLR 479 that have come before the higher courts arising out of diving accidents on public land outside enclosed and controlled swimming pools, the plaintiff's complaint has been that there was no or no sufficient warning of the danger of diving: *Public Trustee v Sutherland SC* (1 992) 75 LGRA 278 (NSWCA); *Nagle* (1993) 177 CLR 423; *Swain v Waverley Municipal Council* (200 5) 79 ALJR 565; *Vairy* (2005) 80 ALJR 1; *Mulligan* (2005) 80 ALJR 43 and *Berrigan Shire Council v Ballerini* [2005] VSCA 159 (special leave refused 16 December 2005). This does not involve the reversal of a credit-based finding. The plaintiff did not give direct evidence of his reaction to a triangular section on the top of the handrail or pool type fencing or both. A finding on causation in his favour requires the drawing of inferences.

Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Stingel v Clark [2006] HCA 37 -
Hetherington v Belyando Shire Council [2006] QCA 209 -
Ryu v Karadjian [2006] NSWCA 144 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Snelgar v Westralia Airports Corporation Pty Ltd [2006] WASCA 83 (23 May 2006) (Steytler P)
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479
Benmax v Austin Motor Co Ltd

Snelgar v Westralia Airports Corporation Pty Ltd [2006] WASCA 83 -
Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -

Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Barrett v Dubbo City Council [2006] NSWCA 65 -
Booksan Pty Ltd v Wehbe [2006] NSWCA 3 -
McPherson's Ltd v Eaton [2005] NSWCA 435 (16 December 2005) (Mason P, Hodgson and Ipp JJA)
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479
Bendix Mintex Pty Ltd and Ors v Barnes

Davis v Nolras Pty Ltd [2005] NSWCA 379 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
Davis v Nolras Pty Ltd [2005] NSWCA 379 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
Neindorf v Junkovic [2005] HCA 75 (08 December 2005) (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ)

90. The appellant, as occupier of the land on which the respondent entered and was injured, owed the respondent a duty to take reasonable care for her safety [121] . Part 1B of the *Wrongs Act* 1936 (SA) (ss 17B17E) (now Pt 4 of the *Civil Liability Act* 1936 (SA) – ss 1922) which deals with occupiers liability assumes that to be so. Section 17C(1) (now s 20(1)) provides that the liability of an occupier for injury, damage or loss attributable to the dangerous state or condition of premises shall be determined in accordance with the principles of the law of negligence. The determinative question in this case is presented by s 17C(2) [122] : what was the standard of care to be exercised by the appellant?

via

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

Neindorf v Junkovic [2005] HCA 75 (08 December 2005) (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ)

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

Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Sakoua v Williams [2005] NSWCA 405 -
Sakoua v Williams [2005] NSWCA 405 -
Sakoua v Williams [2005] NSWCA 405 -

Sakoua v Williams [2005] NSWCA 405 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 -
Volman T/a Volman Engineering v Lobb; Mobil Oil Australia Pty Ltd v Lobb [2005] NSWCA 348 (31 October 2005)

35. Mr. Quickenden submitted that the tort of negligence had subsumed the tort of public nuisance in respect of personal injury on the highway; or at least that negligence was a necessary element of public nuisance for personal injury on the highway: *Ghantous* , *Cartwright v. McLaine & Long Pty. Ltd.* (1979) 143 CLR 549, *Australian Safeway Stores v. Zaluzna* (1987) 162 CLR 479 , *Burnie Port Authority v. General Jones Pty. Ltd.* (1994) 179 CLR 520, *Dymond v. Pearce* [1972] 1 QB 496. Also, he submitted, there was no public nuisance in this case because the mud was not a substantial and unreasonable interference with the rights of the public; and it was not the responsibility of Volman, which was never the occupier and had left the site. Mr. Quickenden submitted that *Fennell v. Robson Excavations Pty. Ltd* [1977] 2 NSWLR 486 was distinguishable, because that was a case where the contractor had removed support for adjoining land, and it was not a case of personal injury.

Vairy v Wyong Shire Council [2005] HCA 62 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

129. To approach the inquiry about breach in this prospective way is to apply longestablished principle. In *Aiken v Kingborough Corporation* [139] , Dixon J described the test to be applied in determining whether a statutory authority had breached a duty of care owed to a person entering land as being that a member of the public, entering public land as of right, "is entitled to expect care for his safety measured according to the nature of the premises and of the right of access vested, not in one individual, but in the public at large". No doubt this statement of the content of the duty must now be understood, taking proper account of subsequent developments in the common law concerning the duty of care owed to entrants by those who occupy land [140] or have the care, control and management of public land [141] . But those later developments do not affect the conclusion which underpins the passage cited from *Aiken* that the inquiry about breach must be made looking forward, not looking back at what happened to the particular plaintiff. Further, as earlier explained, *Shirt* is consistent with only that approach to the problem. And later decisions of the Court, notably *Romeo* [142] and *Commissioner of Main Roads v Jones* [143] , can be understood only in that way.

via

[140] *Zaluzna* (1987) 162 CLR 479 ; *Jones v Bartlett* (2000) 205 CLR 166.

Vairy v Wyong Shire Council [2005] HCA 62 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

25. As these quotations indicate, the duty in negligence is generally described as a duty to take reasonable care. In some areas of the law of negligence, however, the duty is expressed in more limited and specific terms. Until the decision of this Court in *Zaluzna* [19] , for example, the duty owed to entrants upon privately owned land varied according to the category of the entrants. They were classified as invitees, licensees and trespassers. Similarly, the duty in respect of negligent statements is more specific and limited than a simple duty to take reasonable care in all the circumstances of the case. In negligence cases involving physical injury, however, the duty is always expressed in terms of reasonable care. As Prosser and Keeton have pointed out, "the duty is always the same – to conform to the legal standard of reasonable conduct in the light of the apparent risk." [20]

Vairy v Wyong Shire Council [2005] HCA 62 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

27. The present case fell within the familiar category of cases where the plaintiff was a member of a class of persons to whom the defendant had a duty – according to a body of common law precedent – to take reasonable care for the safety of members of that class. Teachers and students [21] , doctors and patients [22] , occupier and entrant [23] , employer and employee [24] , jailer and prisoner [25] are examples of established categories of cases in which the common law imposes a duty on the former class of person to take care of the latter. Similarly, public authorities and lawful entrants on land under the control of those authorities are another category [26] . But this categorisation of relationships that attract a duty of care is irrelevant to the issue of breach of the standard of care that the duty demands. While the principles laid down in *Wyong Shire Council v Shirt* [27] continue to state the common law of Australia, the standard of care that discharges the duty of reasonable care is determined according to the well-known formula set out in the judgment of Mason J in that case.

via

[23] *Zaluzna* (1987) 162 CLR 479 .

Vairy v Wyong Shire Council [2005] HCA 62 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
State of New South Wales v Watzinger [2005] NSWCA 329 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Ridis v Strata Plan 10308 [2005] NSWCA 246 (01 August 2005) (Hodgson, Tobias and McColl JJA)
Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 ; (1987) 162 CLR 479
Baker v Gilbert

Ridis v Strata Plan 10308 [2005] NSWCA 246 (01 August 2005) (Hodgson, Tobias and McColl JJA)

132 In *Baker v Gilbert* [2003] NSWCA 113 at [30] , Ipp JA (with whom Hodgson and Tobias JJA agreed) reviewed this line of authorities and, in particular, referring to *Short v Barrett* and *Stannus v Graham* , remarked that the statements in those cases concerning the question whether an occupier was liable to inspect their premises for the purposes of discovering unknown and unsuspected defects, were "merely guidelines to be applied in determining what a reasonable person, in the particular circumstances would do in responding to the foreseeable risk (that being the basic test for liability in accordance with *Hackshaw v Shaw* and *Australian Safeway Stores Pty Limited v Zaluzna*)".

Ridis v Strata Plan 10308 [2005] NSWCA 246 -
Ridis v Strata Plan 10308 [2005] NSWCA 246 -
Ridis v Strata Plan 10308 [2005] NSWCA 246 -
Ridis v Strata Plan 10308 [2005] NSWCA 246 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Cruise Group Pty Ltd v Fullard [2005] NSWCA 161 -
Thompson v Woolworths (Qld) Pty Ltd [2005] HCA 19 -

Moyne Shire Council v Pearce [2004] VSCA 246 (22 December 2004) (Batt and Chernov, Jj.A and Gillard, A.J.A)

> 78. As I have stated, I do not read the majority judgment in *Brodie* as support for the proposition that it is a special type of duty of care. Indeed, it may be said that if the High Court intended that there should be a special duty, it would be against the trend of cases over the last 20 years in which the High Court has changed the law with respect to special duties in nuisance and negligence cases. By way of example, I instance the change in the law concerning occupiers' obligations to entrants [55] and the rule in *Rylands v. Fletcher*. [56]

via

[55] See *Australian Safeways Stores Pty Ltd v. Zaluzna* (1987) 162 C.L.R. 479 .

Parissis v Bourke [2004] NSWCA 373 (23 November 2004) (Mason P, Tobias and Bryson JJA)

> 65 A decision whether an occupier is liable in negligence to a person on the occupier's land must be made in accordance with the law as restated in *Australian Safeway Stores Pty Ltd v. Zaluzna* (1987) 162 CLR 479 in the judgments of Mason, Wilson, Deane and Dawson JJ, which establish that the general duty of care under the law of negligence applies to the liability of occupiers; it was their Honours' view that the operation of the law should be simplified to accord with the following statement of Deane J in *Hackshaw v. Shaw* (1984) 155 CLR 614 at 662 to 663 :
>
> > ... it is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both of a special duty *qua* occupier and an ordinary duty of care was owed. All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk.

Parissis v Bourke [2004] NSWCA 373 -
McNally v Spedding; Nobles v Spedding [2004] NSWCA 400 -
McNally v Spedding; Nobles v Spedding [2004] NSWCA 400 -
A V Jennings Ltd v Thomas [2004] NSWCA 309 -
A V Jennings Ltd v Thomas [2004] NSWCA 309 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Turnbull v Alm [2004] NSWCA 173 (26 August 2004) (Giles, Tobias and Bryson JJA)
Australian Safeway Stores Ltd v. Zaluzna (1987) 162 CLR 479
Phillis v. Daly

Turnbull v Alm [2004] NSWCA 173 -
Hill v Chiaverini [2004] NSWCA 265 -
Hill v Chiaverini [2004] NSWCA 265 -
Blacktown City Soccer Club Limited v Hodge [2004] NSWCA 125 (21 April 2004) (Beazley, Santow and Ipp JJA)

Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479
Van Der Sluice v Display Craft Pty Ltd

Blacktown City Soccer Club Limited v Hodge [2004] NSWCA 125 -
Ah Tong v Wingecarribee Council [2003] NSWCA 381 (19 December 2003) (Giles, Ipp and Tobias JJA)
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479
Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council

Ah Tong v Wingecarribee Council [2003] NSWCA 381 (19 December 2003) (Giles, Ipp and Tobias JJA)

2 The claimants' proceedings rested on a duty to take reasonable care to avoid psychiatric injury to them, see for example *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 191 ALR 449. The judge recorded that it was assumed in their favour that the opponent owed a duty to take reasonable care to avoid foreseeable risk of injury to persons using the Mt Gibraltar Reserve, citing in particular *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 . The injury to which that case referred was not psychiatric injury where, as *Tame* and *Annetts* show, special considerations apply in determining the existence of the duty of care. However, the opponent properly acknowledged that the duty of care assumed in favour of the claimants was taken at the trial to have extended to a duty to take reasonable care to avoid psychiatric injury to them, and it did not depart from that stance in the applications.

Ah Tong v Wingecarribee Council [2003] NSWCA 381 -
Nambucca Shire Council v Revell [2003] NSWCA 367 (17 December 2003) (Giles and Ipp JJA, Brownie AJA)
Australia Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 ;

Nambucca Shire Council v Revell [2003] NSWCA 367 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 (12 December 2003) (de Jersey CJ, Williams JA and McMurdo J,)

41. Each of the facts already set out was found by the trial judge. He held that the appellant owed a duty to the respondent as an entrant to its premises, which was a duty to take reasonable care to avoid a foreseeable risk of injury, citing *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488. He concluded that the risk of injury to the respondent from attempting unassisted to move one of these bins was foreseeable. He further concluded that the appellant failed to take reasonable steps to avoid that risk. He found that the appellant should have either eliminated the manual handling of bins by providing vehicular access to the bins away from the laneway, or it should have provided a system by which its employees moved the bins as soon as the Council was finished with them. Neither remedy was said to be expensive or impracticable.

Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
Hoyts Pty Ltd v Burns [2003] HCA 61 -
Taouk v Waste Recycling & Processing Service of NSW [2003] NSWCA 273 (25 September 2003) (Sheller, Beazley and McColl JJA)

Zaluzna (1987) 162 CLR 479 at 488 ; Burns v Hoyts Pty Ltd [2002] NSWCA 5 . Special

Taouk v Waste Recycling & Processing Service of NSW [2003] NSWCA 273 -

Avanes v Club Marconi of Bossley Park Social Recreational and Sporting Centre Ltd [2003] NSWCA 184 -
Avanes v Club Marconi of Bossley Park Social Recreational and Sporting Centre Ltd [2003] NSWCA 184 -
Avanes v Club Marconi of Bossley Park Social Recreational and Sporting Centre Ltd [2003] NSWCA 184 -
Aquilina v Beenleigh Greyhound Race Club Inc [2003] QCA 270 -
Trevor Howse Associates P/L v Dessmann and Anor Quadrant Research Services P/L v Dessman and Anor [2003] NSWCA 148 (13 June 2003) (Meagher and Sheller JJA, Einstein AJA)

36 In *Australian Safeway Stores Pty Ltd v Zaluzna* (1986-1987) 162 CLR 479 , Mason, Wilson, Deane and Dawson JJ, cited the following passage from *Hackshaw v Shaw* (1984) 155 CLR 614:

> "All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendants' occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff... The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member . The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk".
> [*per* Deane J at 662 – 663] [emphasis added]

Trevor Howse Associates P/L v Dessmann and Anor Quadrant Research Services P/L v Dessman and Anor [2003] NSWCA 148 (13 June 2003) (Meagher and Sheller JJA, Einstein AJA)
Australian Safeway Stores Pty Ltd v Zaluzna (1986-1987) 162 CLR 479
Hackshaw v Shaw

University of Wollongong v Mitchell [2003] NSWCA 94 (30 May 2003) (Meagher and Giles JJA, Gzell J)

26 In the present case there is no room for argument over the existence of a duty of care. The appellant as occupier of the theatre owed to entrants to the theatre a duty to take reasonable care to avoid a foreseeable risk of injury: ***Australian Safeway Stores Pty Ltd v Zaluzna*** (1987) 162 CLR 479 at 488.

University of Wollongong v Mitchell [2003] NSWCA 94 -
Baker v Gilbert [2003] NSWCA 113 -
Baker v Gilbert [2003] NSWCA 113 -
Baker v Gilbert [2003] NSWCA 113 -
MacPherson v Proprietors of Strata Plan 10857 & Anor [2003] NSWCA 96 -
Hillcoat v Keymon P/L [2002] QCA 527 -
Lapcevic v Collier [2002] NSWCA 300 -
Postnet Pty Ltd v Wood [2002] ACTCA 5 -
Postnet Pty Ltd v Wood [2002] ACTCA 5 -
Payne v Philaust Investments Pty Ltd [2002] NSWCA 295 -
Payne v Philaust Investments Pty Ltd [2002] NSWCA 295 -
Payne v Philaust Investments Pty Ltd [2002] NSWCA 295 -
Gondoline Pty Ltd v Hansford [2002] WASCA 214 (14 August 2002) (Murray J, Wheeler J, Miller J)

Australian Safeway Stores v Zaluzna (1987) 162 CLR 479

South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205 -
South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205 -
Sault v City of Melville [2002] WASCA 84 (16 April 2002) (Anderson, Steytler and Miller JJ)

Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479
De Vries v Australian National Railways Commission

Sault v City of Melville [2002] WASCA 84 -
Owners - Strata Plan No 13218 v Woollahra Municipal Council [2002] NSWCA 92 (08 April 2002)

120. In *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511, the plaintiff sustained personal injuries as a result of a fall on hospital premises. The trial proceeded on the basis that the occupier's duty of care to an invitee was that laid down in *Indermaur v Dames* (1866) LR 1 CP 274. By the time the appeal was heard, the High Court had decided *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 on 10 March 1987. In that case, building upon *Papatonakis* and *Gorman v Williams* , the High Court terminated the distinction, which, was formerly taken to exist in law between the static condition of land and the dynamic situations affecting it, as a basis for deciding whether a duty of care existed in respect of a lawful entrant upon the land, and defined the new principle. At page 515, in *Currie* , Kirby P said:

"In the present case, although the trial proceeded, and the judgment below was written, by the standard established by Willes J in Indermaur v Dames, it was agreed that there was no reason why this Court should not now proceed, on the appeal, to apply the law as re-stated in Australian Safeway Stores Pty Limited v Zaluzna: cf Eggins v Brooms Head Bowling and Recreational Club Limited ... A general duty of care had been pleaded below. All of the matters of fact relevant to the new, simplified test of Australian Safeway Stores ... had been proved, even though done so at the time for the purpose of attracting the principles in Indermaur v Dames. Applying Australian Safeway Stores ... to the present case there can be no doubt that, in the relevant circumstances, having regard to the nature of the premises as a public hospital and Mrs Currie's entry on them as a visitor, that the hospital owed her a duty of care under the ordinary principles of negligence".

Lake Macquarie City Council v McKellar [2002] NSWCA 90 (02 April 2002)

25. Another approach is to apply what Deane J said in *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-3 as to the modern approach to occupier's liability cases. In *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 the majority approved that approach and said, in words applicable to the present case: "the fact that the respondent was a lawful entrant upon the land of the appellant establishes a relationship between them which of itself suffices to give rise to a duty on the part of the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent."

Beardmore v Franklins Management Services Pty Ltd [2002] QCA 60 (19 March 2002) (McMurdo P, McPherson JA, Ambrose J,)

75. In *Australian Safeway Stores Pty Ltd v Zaluzna* (1986-1987) 162 CLR 479 the High Court of Australia, by majority, adopted and applied the new test for occupier's liability in negligence to lawful entrants propounded by Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 662 – 3 w here after considering whether either one or other or both a special duty and an ordinary duty of care was owed by an occupier to entrants in various categories he observed –

> "All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to

the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk."

Beardmore v Franklins Management Services Pty Ltd [2002] QCA 60 -
Beardmore v Franklins Management Services Pty Ltd [2002] QCA 60 -
Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

106. Fourthly, the appellant paid a fee to enter the respondent's premises and participate in the game in which he was injured. He was therefore an entrant upon the premises as of contractual right. In the traditional formulation [67] , he was entitled to enter and use the premises for the mutually contemplated purpose in accordance with an implied warranty that the premises were as safe for that purpose as reasonable care and skill could make them. In *Calin v Greater Union Organisation Pty Ltd* [68] , this Court explained that the reformulation of the common law in respect of the liability of occupiers to entrants, expressed in *Australian Safeway Stores Pty Ltd v Zaluzna* [69] and the decisions that preceded it [70] , had not overruled the principle governing the liability to contractual entrants stated in *Watson v George* [71] . In the present case, legislation had been enacted in Western Australia to govern occupier's liability [72] . In the way the case was fought, any higher obligations owed because the appellant entered by contractual right were not explored. However, it is self-evident that a commercial enterprise, conducting a leisure business for profit involving specific dangers, is not, in relation to a fee-paying entrant, in the same position as the voluntary organiser of an informal group of amateurs playing an occasional game of cricket on the village green. Nor, for that matter, is it in the same position as a national corporation conducting a major sporting fixture before a stadium audience of thousands, perhaps broadcast to millions, with wide media coverage sold for high fees. By the common law, the duty owed to players adapts to the circumstances. An important consideration in expressing the content of the duty of care, and in determining whether there has been a breach in the particular case, is whether the participants have paid, or been paid, for the sporting activity in question.

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 -
Canterbury Municipal Council v Taylor [2002] NSWCA 24 (05 March 2002) (Spigelman CJ at 1; Ipp AJA at 2; Mathews AJA at 197)
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479
Nagle v Rottnest Island Authority

Canterbury Municipal Council v Taylor [2002] NSWCA 24 -
Burns v Hoyts Pty Ltd [2002] NSWCA 5 -
Burns v Hoyts Pty Ltd [2002] NSWCA 5 -
City of Ballarat v Perovic [2001] VSCA 222 -
Waverley Council v Lodge [2001] NSWCA 439 (29 November 2001) (Meagher and Heydon JJA, Bryson J)
Australian Safeway Stores Pty Ltd v. Zaluzna (1987) 162 CLR 479

Waverley Council v Lodge [2001] NSWCA 439 -
Marrickville Municipal Council v Moustafa [2001] NSWCA 372 (24 October 2001)

37. In *Australian* Safeway, the majority judges, after discussing the question whether an occupier's duty to entrants was a special duty different from the ordinary duty of care, concluded that it should not be so regarded, saying:

"We think it is wholly consistent with the trend of recent decisions of this Court touching the law of negligence, both in this area of an occupier's liability towards entrants on his land and in the areas which were the subject of consideration in San Sebastian Pty Ltd v The Minister *and* Cook v *Cook, to simplify the operation of the law to accord with the statement of Deane J in* Hackshaw

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

In the circumstances of the present case, the fact that the respondent was a lawful entrant upon the land of the appellant establishes a relationship between them which of itself suffices to give rise to a duty on the part of the [occupier] to take reasonable care to avoid a foreseeable risk of injury to the [entrant]" (at 488)

Marrickville Municipal Council v Moustafa [2001] NSWCA 372 (24 October 2001)

38. With the help of the computer searches which are now available I have tried to check High Court decisions since *Australian Safeway* to see if there has been any departure from the chief holding in that case that the ordinary general duty of care is as appropriate in a negligence action against an occupier as in any other negligence action. So far as I have been able to see, that proposition remains fully accepted and acted on in the High Court and is accordingly binding on all Australian courts. The need to be careful about this is the presence in the passage from *Australian Safeway* cited in the preceding paragraph of an endorsement of what Deane J had said in *Hackshaw*, namely that a prerequisite of the ordinary duty of care was that there be the necessary degree of proximity of relationship. Since *Australian Safeway* was decided, the High Court has turned away from proximity as a criterion in the way used by Deane J. The passage cited must therefore be read subject to what the High Court has subsequently said concerning proximity. That qualification however does not affect the continuing authority of the main proposition established by *Australian Safeway* that there is no special duty of care owed by occupiers.

Marrickville Municipal Council v Moustafa [2001] NSWCA 372 -
Marrickville Municipal Council v Moustafa [2001] NSWCA 372 -
Marrickville Municipal Council v Moustafa [2001] NSWCA 372 -
Marrickville Municipal Council v Moustafa [2001] NSWCA 372 -
Marrickville Municipal Council v Moustafa [2001] NSWCA 372 -
Marrickville Municipal Council v Moustafa [2001] NSWCA 372 -
Marrickville Municipal Council v Moustafa [2001] NSWCA 372 -
Coffs Harbour City Council v Backman [2001] NSWCA 202 (29 June 2001) (Handley and Stein JJA, Grove AJA)
- *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 applied

Coffs Harbour City Council v Backman [2001] NSWCA 202 -
Coffs Harbour City Council v Backman [2001] NSWCA 202 -
Brodie v Singleton Shire Council [2001] HCA 29 (31 May 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

146. In *Romeo* [270] , Brennan CJ pointed out that this formulation by Dixon J had reflected what, at the time, was seen as the duty owed by an occupier to an invitee. The duty owed by an occupier of private land to various classes of entrant is now comprehensively formulated in *Australian Safeway Stores Pty Ltd v Zaluzna* [271] . What, for present purposes respecting authorities dealing with roads, follows from that development of the law? Is the measure of the duty of care imposed upon bodies such as the respondent Councils to be found in the formulation in *Aiken* , in that in *Zaluzna* , or in a reconciliation between the two along the lines indicated by Brennan J in *Nagle v Rottnest Island Authority* [272] , and by Toohey and Gummow JJ in *Romeo* [273] ? Are highways such an essential part of the national infrastructure and the respective positions of highway authorities and users so *sui generis* as to render inapt any analogy which sees users as entrants or visitors and authorities as occupiers?

Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Lepore v State of New South Wales [2001] NSWCA 112 -
Seiko Australia Pty Ltd v Da Rin [2001] NSWCA 84 (10 April 2001) (Stein and Giles JJA, Ipp AJA)
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 ;

Seiko Australia Pty Ltd v Da Rin [2001] NSWCA 84 -
Oates v BUTTERLY [2000] WASCA 406 (20 December 2000) (Ipp J, Murray J, Miller J)

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

Alagic v Callbar Pty Ltd [2000] NTCA 15 (08 December 2000) (Angel, Thomas & Riley JJ)

16. *Brannigen* was expressly disapproved by the New South Wales Court of Appeal in *Calvert v Stollznow* [1982] 1 NSWLR 175, where Samuels JA (Moffitt P and Hope JA concurring) held that the patron of a restaurant where no charge is made for entry is in law an invitee whilst entering and remaining in the restaurant and that the *Maclenan* principle did not apply. Samuels JA said (at 177):

> "The essential question is whether a visitor taking a meal in a restaurant is in law an invitee (as the learned judge thought in the present case) or is a contractual entrant and thus entitled to the benefit of a somewhat higher degree of care."

I pause to say that since *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 and more particularly *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 it is both inaccurate and misleading to speak of a contractual entrant being owed a "higher degree of care". This inaccuracy has been expressed in subsequent cases a number of times, see eg. *Dowunder Rock Café Pty Ltd v Roberts* (1998) Australian Torts Reports 81-481 per Charles JA, Winneke P and Buchanan JA concurring. In the *Maclenan* formulation, post *Zaluzna* , the personal contractual obligation of care of the occupier is the same as in tort; the contractual liability nevertheless is broader, the occupier also being responsible for the negligence of others.

Alagic v Callbar Pty Ltd [2000] NTCA 15 -
Alagic v Callbar Pty Ltd [2000] NTCA 15 -
Alagic v Callbar Pty Ltd [2000] NTCA 15 -
Alagic v Callbar Pty Ltd [2000] NTCA 15 -
Ebner v Official Trustee in Bankruptcy [2000] HCA 63 -
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -

Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -
Jones v Bartlett [2000] HCA 56 (16 November 2000) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

249. The respondents pointed out that a change in the expression of the common law, along the lines urged for the appellant, would have very substantial economic, social and even political implications. It would be preferable for such implications to be addressed to the other branches of government than to the courts. It is one thing to abolish or modify an anachronistic immunity [249] or to reformulate past rules of liability in terms of general concepts of broad application [250] . When the encrustations of the common law are revealed as anomalous and unjust, it is proper for courts to return the particular instance to the central doctrine applicable [251] , in this case the common law of negligence. However, these legitimate functions of judicial exposition and refinement would be exceeded were this Court to travel significantly beyond the obligations which the present common law and such legislation as has been enacted impose upon landlords. Except where legislation imposes a duty with which the landlord must comply, the common theme of contemporary obligations is to hold back from imposing absolute liability. Moreover, it is to limit the statutory obligations of landlords to the standard of reasonable care [252] . It is to impose common law standards of a similar character. Such standards exclude liability for latent defects of which a landlord has no notice and is reasonably unaware.

via

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

Jones v Bartlett [2000] HCA 56 (16 November 2000) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

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

via

[214] *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 16-20 ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 484488 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Northern Sandblasting* (1997) 188 CLR 313 at 396 ; cf Swanton, "'Another Conquest in the Imperial Expansion of the Law of Negligence': *Burnie Port Authority v General Jones Pty Ltd*", (1994) 2 *Torts Law Journal* 101; Swanton and McDonald, (1998) 72 *Australian Law Journal* 345 at 348.

Jones v Bartlett [2000] HCA 56 (16 November 2000) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

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

Drotem Pty Ltd v Manning [2000] NSWCA 320 -
Jones v Bartlett [2000] HCA 56 -
Jones v Bartlett [2000] HCA 56 -
Jones v Bartlett [2000] HCA 56 -
Jones v Bartlett [2000] HCA 56 -
Jones v Bartlett [2000] HCA 56 -
Jones v Bartlett [2000] HCA 56 -
Australian Postal Corporation v Gallard [2000] NSWCA 316 -
City of Rockingham v Curley [2000] WASCA 202 (04 August 2000) (Wallwork J, Murray J, Anderson J)
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479
Barrett v Enfield LBC

City of Rockingham v Curley [2000] WASCA 202 -
Ordukaya v Hicks [2000] NSWCA 180 (19 July 2000)

Northern Sandblasting Pty Limited v Harris , (1997) 188 CLR 313, distinguished; *Australian Safeway Stores Pty Limited v Zaluzna* (1987) 162 CLR 479 , applied.

Ordukaya v Hicks [2000] NSWCA 180 -
Ordukaya v Hicks [2000] NSWCA 180 -
Ordukaya v Hicks [2000] NSWCA 180 -
Stanton v Marino [2000] NSWCA 134 (25 May 2000) (Powell, Giles and Fitzgerald JJA)

9 The defendants submitted that this was an unsound basis for their liability. The defendants' duty was to take reasonable care to avoid a foreseeable risk of injury to persons entering upon the property, see *Australian Safeway Stores Ltd v Zaluzna* (1987) 162 CLR 479 . While finding overall that there was not a safe means of access, the trial judge identified as the particular failures in that duty that the defendants should have warned of "possible problems" and should have provided a handrail. The drop to the lower level was visible to the plaintiff and was seen by him, and apart from the loose rock there was no other problem of causal significance to the plaintiff's fall of which the defendants should have warned. As to the handrail, the plaintiff had something to hold on to if he had wished, the pool fence, and in any event the cause of his fall was not that he did not have something to hold on to but that the rock moved under his foot.

Stanton v Marino [2000] NSWCA 134 (25 May 2000) (Powell, Giles and Fitzgerald JJA)
Australian Safeway Stores Ltd v Zaluzna (1987) 162 CLR 479 ;

Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 -
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 -
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 -
Secretary to the Department of Natural Resources and Energy v Harper [2000] VSCA 36 -
Secretary to the Department of Natural Resources and Energy v Harper [2000] VSCA 36 -
New South Wales v Broune [2000] NSWCA 3 -
Greater Bendigo City Council v Miles [2000] VSCA 10 -
Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59 (10 November 1999) (Gleeson Cj, gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

33. To say there is nothing to preclude the existence of a common law duty of care on the part of the Authority to waterside workers is, however, not to say anything as to the content of that duty. Ordinarily, a duty of care is expressed in terms of a duty to take those steps that a reasonable person, in the position of the person who owes the duty of care, would take to avoid a foreseeable risk of injury to another [22] . However, a public body or statutory authority cannot properly be equated with a natural person. Nor is a public body with the powers and functions of the Authority properly to be equated with a reasonable employer of waterside labour and subjected to the same duty of care.

via

[22] See *Cook v Cook* (1986) 162 CLR 376 at 382 per Mason, Wilson, Deane and Dawson JJ; *Australi an Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 per Mason, Wilson, Deane and Dawson JJ ; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 429-430 per Mason CJ, Deane, Dawson and Gaudron JJ.

Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
Newcastle Entertainment Security Pty Ltd v Simpson [1999] NSWCA 351 -
Fabian v Welsh [1999] QCA 365 (07 September 1999) (McMurdo P. Derrington J. Chesterman J.)

13. In the present case, learned counsel for the appellant made reference to local government by-laws applying in an area which required dog owners to control them so that they would not cause harm to people. He wisely refrained from continuing to rely upon a claim of breach of statutory duty, but used this subordinate legislation as setting a social pattern that would justify abandonment of the *Searle v Wallbank* rule in accordance with this change in social views. Interesting as this is, the subject need not be addressed. Further, it is not suggested that the standard of care required by the by-law sets the standard for common law liability.

Fabian v Welsh [1999] QCA 365 (07 September 1999) (McMurdo P. Derrington J. Chesterman J.)

8. The respondents relied primarily upon the immunity of the owner of a domesticated animal that strays onto the highway, save where the animal has a known propensity to be vicious or mischievous in a way that causes the relevant harm. This principle was stated in *Searle v Wallbank* [1] and applied in Australia in *SGIC (SA) v Trigwell* . [2] Learned counsel for the appellant argued that this principle has been overtaken by the general approach of the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna* [3] , *San Sebastian Pty Ltd v The Minister* [4] , *Cook v Cook* [5] , and *Burnie Port Authority v General Jones Pty Ltd.* [6] Although these do not deal with

a *Searle v Wallbank* situation, he pointed out its tendency to bring formerly disparate principles

within the unified general principle of the law of negligence; and he advocated the extension of that

process to this principle also.

via

[3] (1986-7) 162 CLR 479 , 488.

Fabian v Welsh [1999] QCA 365 -
Fabian v Welsh [1999] QCA 365 -
Fabian v Welsh [1999] QCA 365 -
Fabian v Welsh [1999] QCA 365 -
Allen v Taylor [1999] NSWCA 135 -
Allen v Taylor [1999] NSWCA 135 -
Vehicles Pty Ltd and Morton Engineering Co Pty Ltd v Wheeler [1998] QCA 122 (12 June 1998) (McPherson JA. Thomas J. Lee J.)

Wheeler (Australian Safeway Stores Pty Ltd v. Zaluzua (1986-1987) 162 C.L.R. 479).

Austin v Bonney [1998] QCA 8 (12 February 1998)

Stores Pty Ltd v Zaluzna [21] , and replaced by more general rules applicable to the law of negligence,

via

[21] (1987) 162 CLR 479 .

Austin v Bonney [1998] QCA 8 (12 February 1998)

Stores Pty Ltd v Zaluzna [21] , and replaced by more general rules applicable to the law of negligence,

Austin v Bonney [1998] QCA 8 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 (02 February 1998) (Brennan Cj,toohey, Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

21. In *Nagle v Rottnest Island Authority* [40] the plaintiff dived off a rock ledge at the edge of a swimming area known as the Basin on Rottnest Island and struck his head on a submerged rock. Mason CJ, Deane, Dawson and Gaudron JJ held that the Board which had control of the Island and which encouraged the public to swim in the Basin was under a duty of care expressed in these terms [41] :

> "As occupier under the statutory duty already mentioned, the Board, by encouraging persons to engage in an activity, came under a duty to take reasonable care to avoid injury to them and the discharge of that duty would naturally require that they be warned of foreseeable risks of injury associated with the activity so encouraged."

Finding that it was foreseeable that a swimmer might dive into the water and strike a submerged rock, their Honours held that a failure to warn of the danger of diving was a breach of the Board's duty of care [42] . Their Honours thought that such a warning would have been likely to alert the plaintiff to the risk and thereby avoid the risk of injury. In determining the measure of the Board's duty, the majority treated the case as though it were identical in principle with cases where a defendant's duty of care arises from the doing of some act that creates or increases a foreseeable risk of damage to another [43] . Taking that approach, their Honours included within the scope of foreseeability "the possibility that one or more of the persons to whom the duty is owed might fail to take proper care for his or her own safety" [44] . That approach conformed to the majority view in *Australian Safeway Stores Pty Ltd v Zaluzna* [45] where the touchstone of the existence of a duty of care owed by an occupier of premises to persons entering thereon was held to be -

> "reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk." [46]

Risks which are foreseeable include risks arising from an entrant's failure to exercise reasonable care for his or her own safety [47] .

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 (02 February 1998) (Brennan Cj,toohey, Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

49. Although Angel J referred to the more recent authorities which apply the ordinary principles of negligence to an occupier of land, in particular *Australian Safeway Stores Pty Ltd v Zaluzna* [72] , his Honour was clearly influenced by the statement of Dixon J in *Aiken v Kingborough Corporation* [73] that:

> "the public authority in control of ... premises is under an obligation to take reasonable care to prevent injury to such a person through dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care".

However, that statement must be read in light of the majority judgment in *Nagle* while that decision stands. As will appear, in light of the majority judgment, the appeal must fail.

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 (02 February 1998) (Brennan Cj,toohey, Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

114. Once the approach required by *Zaluzna* is accepted, the appeal of *Aiken* must, as it seems to me, be rejected. It is a siren song which, if heeded, would create gross inconsistency in an area of the law already marked by "sticky questions" of analysis[171]. There should be no going back to *Aiken.* The application to reargue *Nagle,* in any case a recent decision of the Court reached by a large majority, should be rejected [172] .

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 (02 February 1998) (Brennan Cj,toohey, Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

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via

[72] (1987) 162 CLR 479 .

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 (02 February 1998) (Brennan Cj,toohey, Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

74. The facts are sufficiently set out in other judgments. It is not disputed that the Commission owed the plaintiff a duty of care. For the reasons given by Kirby J, the content of that duty is to be determined in accordance with the principles laid down by this Court in *Nagle v Rottnest Island Authority* [91] . To the extent that *Aiken v Kingborough Corporation* [92] advocates an approach contrary to that subsequently adopted in *Nagle* , the authority of *Aiken* did not survive the reform of occupier's liability which this Court brought about in *Australian Safeway Stores Pty Ltd v Zaluzna* [93] . Because that is so, the judgment of Dixon J in *Aiken* [94] no longer authoritatively states the law regarding a public authority's liability in respect of a person who suffers injury on premises under its control.

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
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Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Pyrenees Shire Council v Day [1998] HCA 3 (23 January 1998) (Brennan Cj,toohey, McHugh, Gummow and Kirby JJ)

244. I would therefore adopt as the approach to be taken in Australia the three-stage test expressed by the House of Lords in *Caparo* [337] . To decide whether a legal duty of care exists the decision-maker must ask three questions:

1. Was it reasonably foreseeable to the alleged wrong-doer that particular conduct or an omission on its part would be likely to cause harm to the person who has suffered damage or a person in the same position [338] ?

2 Does there exist between the alleged wrong-doer and such person a relationship characterised by the law as one of "proximity" or "neighbourhood"[339]?

3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrong-doer for the benefit of such person[340]?

via

[338] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 applying *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-663 per Deane J.

Emery and Emery v Foot and Foot [1997] QCA 404 -
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
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Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 -
Lanestar and Monrest Pty Ltd v Arapower Pty Ltd, Deasy Investments Pty Ltd and Deasy [1996] QCA 466 -
Uniting Church of Australia Property Trust v Dobell [1995] QCA 562 (14 December 1995) (Macrossan CJ. Thomas J. Dowsett J.)

Ltd v. Zaluzna (1987) 162 C.L.R. 479 , 488 , and Nagle v. Rottnest Island Authority (1993) 177

Harris v Northern Sandblasting [1995] QCA 413 (08 September 1995)

" The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk. " (162 C.L.R. at 488)

Harris v Northern Sandblasting [1995] QCA 413 (08 September 1995)

162 C.L.R. 479 . What the Court said in Calin was not particularly helpful to the plaintiff

Gesler and Gesler v FAI General Insurance Co Ltd [1995] QCA 318 (25 July 1995) (McPherson JA. Moynihan J. Ambrose J.)

general duty to take reasonable care: *Australian Safeway Stores Proprietary Limited v. Zaluzna*

Gesler and Gesler v FAI General Insurance Co Ltd [1995] QCA 318 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Nagle v Rottnest Island Authority [1993] HCA 76 -
Nagle v Rottnest Island Authority [1993] HCA 76 -
Calin v Greater Union Organisation Pty Ltd [1991] HCA 23 -