Hackshaw v Shaw - [1984] HCA 84

HIGH COURT OF AUSTRALIA

Gibbs C.J., Murphy, Wilson, Deane and Dawson JJ.

DIANNE MAREE HACKSHAW v. GEORGE SHAW
(1984) 155 CLR 614
11 December 1984

Negligence

Negligence—Premises—Injury to entrant—Liability of occupier—Duty of care—Trespasser—Special duties owed by occupier to different classes of entrant—Whether general duty of care may co-exist with special duty—Trespass on farm to steal petrol—Shot fired by occupier at thief's vehicle—Passenger injured—Occupier unaware of passenger's presence—Contributory negligence.

Decisions

GIBBS C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria, which, by a majority (Young C.J. and McInerney J., Gobbo J. dissenting) allowed an appeal by the defendant (the present respondent) in an action brought by the plaintiff to recover damages for personal injuries and dismissed the plaintiff's cross appeal.

2. The circumstances of the case were unusual. The defendant was the owner of a farm at Korong Vale in Victoria. He did not live on the farm but went there to work each day. On the farm there was a petrol tank and pump, installed for the purpose of refuelling any motor vehicles used on the farm. For at least a year before December 1978 the defendant had been plagued by thefts of his petrol. He put expensive locks on the petrol tank, but they were cut off. He wired up the hose, but that did not stop the thefts. He complained to the police but they told him that he would have to get further evidence, such as a description of the car used in the thefts, before they could act. So, after a theft on the night of 3 December 1978, the defendant decided to lie in wait for the thieves. On the night of 10 December, the defendant, accompanied by his wife, hid near the bowser. The defendant was armed with a rifle and a shotgun. His plan was that if a car was driven onto the farm he would fire at it and immobilise it, and in that way discover the identity of the thief.

3. At about 10.00 p.m. on the night one, Cox, driving a stolen car, went to the defendant's farm. He was accompanied by the plaintiff, a girl of sixteen with whom he was associating. As the car approached the gate leading to the farm, Cox turned off the headlights. The car was stopped, Cox opened the gate and then drove the car (with the lights still off) onto the property and across a paddock and stopped it alongside the petrol tank. Cox got out of the car and began to pump petrol into the car. At this point there arose a conflict of testimony. The plaintiff said that when Cox got out of the car, she also got out and stood beside the front passenger side door. A shot was then fired and she got back into the car and lay down on the front seat. She then felt a burning feeling in her arm. She was not sure when Cox got back into the car. Other shots were fired as Cox drove away. On the other hand, the defendant (whose evidence was in general corroborated by that of his wife) denied that anyone other than Cox got out of the car and said that he did not know that anyone but Cox was in the car that night. It is evident from the jury's answers that they accepted the defendant's evidence on those matters. The defendant said that he fired his rifle at the engine of the car from a distance of about 30 yards and that as he did so he called out to the driver to abandon the car. He said that when he fired he could not see anyone in the car. It was a dark night. When asked whether he could see quite clearly through the window of the car, the defendant replied, "I couldn't see that clear but there was no one there." Cox then ran around in front of the car and the defendant, who was by now running towards the car, fired a second shot at the car. It was probably this shot that penetrated the car door and struck the plaintiff. Cox got into the car and began to turn it and to put it in motion. The defendant, whose rifle had jammed, then fired a number of shots from the shotgun, flattening a tyre and breaking the windscreen on the passenger's side of the car. He said that he was a good shot and that had he wished to shoot Cox he could have done so. Cox did not give evidence at the trial.

4. The plaintiff gave evidence that she did not know that the car was stolen or that Cox intended to steal petrol. She did not know why he turned off the lights of the car or why he drove onto the defendant's land.

5. The plaintiff's statement of claim alleged that the shooting was intentional or, alternatively, that the defendant was reckless or, in the further alternative, negligent. Although the allegation that the shooting was intentional was not pursued, the plaintiff claimed in trespass as well as in negligence. The learned trial judge charged the jury that the burden lay on the defendant to disprove negligence. In so far as the claim was for damages for trespass, the charge proceeded on the view of the law taken by Windeyer J. in McHale v. Watson (1964) 111 CLR 384, at pp 388-389, where it was held that in an action for trespass to the person, based upon battery by a blow or a missile, the defendant must prove that he did not intend to hit the plaintiff and that he was not negligent in delivering the

blow or discharging the missile. The decision of Windeyer J. in that case was affirmed, but the question where the onus of proof lay was not decided on appeal: see (1966) 115 C.L.R. 199 . The conclusion reached by Windeyer J. finds support in earlier authority, and his decision on the point has since been followed in South Australia, although not in running down cases: Venning v. Chin (19 74) 10 SASR 299; (1975) 49 ALJR 378, at p 379 ; West v. Peters (1976) 18 SASR 338 ; Lord v. Nominal Defendant (1979-80) 24 SASR 458 . However a different view has been expressed in England: Fowler v. Lanning (1959) 1 QB 426 ; Letang v. Cooper (1965) 1 QB 232 . This latter view appears to me, as at present advised, to be the preferable one, but, perhaps unfortunately, we are not now called upon to resolve this difference of opinion. The inconvenience of the rule to which the learned judge gave effect in his charge is obvious in a case where trespass and negligence are relied on in the alternative, since a jury would almost certainly be confused by a direction that in relation to one cause of action the defendant bears the onus of disproving negligence and in relation to the other the plaintiff bears the onus of proving it. In fact the learned trial judge omitted to tell the jury that in a case based on negligence the onus of proof lies on the plaintiff. That meant that there was a misdirection. However no appeal was taken on that ground to the Full Court of the Supreme Court and counsel for the defendant informed us, as he informed the Full Court, that no retrial is sought on the ground of misdirection unless the Court interferes with the finding of contributory negligence.

6. The allegation that the shooting was reckless may have been intended to serve as a basis for fixing liability on the defendant as an occupier to the plaintiff as a trespasser on his land, although no reference to the fact that the plaintiff was a trespasser appears in the pleadings of either party. Since the allegation was negatived by the jury, the question need not be pursued. A number of questions were left to the jury and they were answered as follows:

> "1. Did a shot fired by the defendant on 10 December 1978 cause injury to the plaintiff? Yes.
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> 2. Prior to the firing of the shot:
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> (a) did the defendant know or believe that a person other than Cox was in the car? No.
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> (b) did the defendant know or believe that a person other than Cox might be in the car? No.
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> (c) should the defendant have known or believed that a person other than Cox was in the car? No.
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> (d) should the defendant have known or believed that a person other than Cox might be in the car? Yes.
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> 3. Did the defendant fire the rifle knowing the bullet might strike some person other than Cox, but not caring whether or not it did strike him or her? No.
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> 4. If the defendant knew or believed or should have known or believed that someone other than Cox was or might have been in the car, was he guilty of negligence in firing the shot which caused injury to the plaintiff? Yes.
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> 5. If yes to question 1 and one or both of questions 3 or 4 at what sum do you assess compensatory damages? $17,000.

6. If yes to question 3 is the plaintiff entitled to exemplary damages? No.

7. If yes to question 6 at what sum do you assess exemplary damages? Unanswered.

8. Was the plaintiff guilty of contributory negligence? Yes.

9. If yes to question 8, to what extent is it just and equitable to reduce the plaintiff's Plaintiff 40% damages having regard to her to blame; share of the responsibility Defendant 60% of her injuries? to blame."

7. Judgment was thereupon entered for the plaintiff for $10,200, with interest agreed at $650 and costs.

8. Since the suggestion that the defendant intended to shoot the plaintiff was abandoned, the plaintiff could succeed in trespass only if the shot which struck her was fired negligently. Apart, possibly, from the question which party bore the onus of proof, there was no difference except in name between the cause of action in trespass and that in negligence. The jury, by its answer to question 4, found that the defendant was negligent in firing the shot which caused the injury to the plaintiff. That finding gives rise to two questions. The first is whether the defendant owed to the plaintiff, a trespasser of whose presence the defendant was unaware, the duty of care now recognized by the common law, i.e., the duty to "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour": Donoghue v. Stevenson (1932) AC 562, at p 580. The second is whether the answer of the jury to question 4, which in effect finds that the defendant failed to perform that duty, can be sustained, having regard to the other answers given by the jury and to the evidence.

9. The rules of the common law which govern the duty of an occupier to the various classes of persons who may enter the occupier's land, including trespassers, form part of the law of negligence. It would no doubt have been possible, after the House of Lords in Donoghue v. Stevenson had stated a general principle by which it can be decided in what circumstances a duty of care arises, to treat the question whether an occupier is liable for injuries suffered on his premises as depending on that general principle and not on special rules. Windeyer J., in Voli v. Inglewood Shire Council (1963) 110 CLR 74, at p 89, thought that the trend of judicial authority was in that direction, but in Munnings v. Hydro-Electric Commission (1971) 125 CLR 1, at p 25, he felt bound to acknowledge that the trend had been stopped short by the judgment of the Privy Council in Commissioner for Railways v. Quinlan (1964) AC 1054 . When, in Herrington v. British Railways Board (1972) AC 877 , the House of Lords reconsidered the earlier authorities which governed the duty of an occupier to a trespasser, and relaxed the strictness of the earlier rules laid down in Robert Addie &Sons (Collieries) v. Dumbreck (1929) AC 358 , their Lordships still did not find it possible to apply to such a case the general principles stated in Donoghue v. Stevenson and to make the liability of the occupier depend on whether it was reasonably foreseeable that his act or omission would be likely to injure a trespasser. There were thought to be considerations which, in the well known words of Lord Wilberforce in the later case of Anns v. Merton London Borough (1978) AC 728, at p 752, ought to reduce or limit the scope of the duty of care towards the class which consisted of trespassers. The nature of those considerations was summed up by Lord Reid in Southern Cement Ltd. v. Cooper (1974) AC 623, at pp 643-644, by saying that "the neighbourhood relationship has been forced on the occupier by the trespasser and it would therefore be unjust to subject him to the full obligations

resulting from it in the ordinary way". In that case the duty of the occupier towards a trespasser was said to be based on considerations of humanity: a concept which it is unnecessary to discuss, since the finding made by the jury in this case was that the defendant was negligent, and not that he acted in disregard of humanity. It was held that the occupier must act with due regard to the trespasser's safety once the occupier knows, or as good as knows, that he is on the land; he will as good as know if the trespasser's presence is extremely likely (see at pp.639-640). When one considers what is foreseeable in the future rather than whether the trespasser is already on the land, the duty is not limited to cases where the coming of trespassers is extremely probable, or more probable than not. Lord Reid said, at p.644:

> "The only rational or practical answer would seem to be that the occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at least to give consideration to the matter when he knows facts which show a substantial chance that they may come there."

10. 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 CLR 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.) (1959) 101 CLR 135, at p 144. The fact that the plaintiff who was a trespasser might still be a "neighbour" within the principle of Donoghue v. Stevenson was recognized in three cases decided before Commissioner for Railways v. Quinlan: Thompson v. Bankstown Corporation (1953) 87 CLR 619 , Rich v. Commissioner for Railways (N.S.W.) and Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 CLR 274 .

11. It is unnecessary to review these cases, which have been so often discussed, but it may be profitable to cite some passages from the judgments in them. First, in Thompson v. Bankstown Corporation, Kitto J., at pp 642-643, very clearly explained the distinction which has been drawn by this Court:

> "The respondent's contention appears to assume
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> that the rule of law which defines the limits of the duty owed by an occupier to a trespasser goes so far as to provide the occupier with an effective answer to any assertion by the trespasser that during the period of the trespass the occupier owed him a duty of care. The assumption is unwarranted, for the rule is concerned only with the incidents which the law attaches to the specific relation of occupier and trespasser. ... It would be a misconception of the rule to regard it as precluding the application of the general principle of M'Alister (or Donoghue) v. Stevenson, to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord Atkin's sense

of the word ... The facts of the case must therefore be further examined for the purpose of considering whether there was another relation between the parties giving rise to such a duty of care that the jury could properly find a breach of it to have been a cause of the appellant's injuries."

12. In Commissioner for Railways (N.S.W.) v. Cardy Dixon C.J. said, at p 286:

"The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it recognizes that nevertheless a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence."

Later he said, at p.286:

"In principle a duty of care should rest on a

man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge."

In the same case Fullagar J. said, at p.296:

"An occupier is not expected to anticipate the entry of a trespasser, or the passage of a trespasser across his land, and he owes to a trespasser no special duty analogous to that which he owes to an invitee or a licensee, and no duty of care whatever is imposed upon an occupier by the relationship of occupier and trespasser. But, when we have said this, we have, in my opinion, said all that ought to be taken to be meant, or can today be taken to be meant, by such statements as that a trespasser enters at his own risk. There is no special duty, but 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."

These cases support the conclusion that the special principle which is concerned with the incidents which the law attaches to the specific relation of occupier and trespasser does not either abrogate or supersede the general law of negligence which applies where the parties, although occupier and trespasser, stand in some other relation which gives rise to a duty of care.

13. In Commissioner for Railways v. Quinlan the Judicial Committee rejected the view that a general duty of care can coexist with the limited duty owed to a trespasser. Their Lordships regarded it as plain that the accepted formulation of the occupier's duty to a trespasser is intended to be an exclusive or comprehensive definition and said, at p.1074:

> "... so long as the relationship of occupier and trespasser is or continues to be a relevant description of the relationship between the person who injures or brings about injury and the person who is injured - an important qualification - the occupier's duty is limited in the accepted terms. It is so limited because the character of trespassing is such that the law does not think it just to require the occupier to speculate about or to foresee the movements of a trespasser ...".

Their Lordships examined and criticized the judgments in the three Australian cases to which I have referred and said that the passage from the judgment of Kitto J. which I have cited "can be read as suggesting that an occupier owes a duty of care or 'foreseeingness' towards a trespasser that is both undefined in extent or content and is inconsistent with the established law ..." (see at p.1080). They made the further comment, at p.1081:

> "... for the moment it is sufficient to say that their Lordships cannot find any line of reasoning by which the limited duty that an occupier owes to a trespasser can co-exist with the wider general duty of care appropriate to the Donoghue v. Stevenson formula: and, 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."

14. In Munnings v. Hydro-Electric Commission, this Court again considered the question in the light of that decision of the Judicial Committee. All the members of the Court regarded it as consistent with the judgment in Commissioner for Railways v. Quinlan to hold that the special rules which govern the duty of occupiers to trespassers apply only to those cases where the defendant's liability can be attributed only to his occupation of the land and his activities thereon and that in cases where the relationship of the occupier and the trespasser was not relevant to liability the general duty of care could arise: see at pp.11, 15, 28, 39, 48-49.

15. In Southern Cement Ltd. v. Cooper their Lordships again referred to the Australian decisions, and said, at p 645:

> "Australian courts have tended to proceed on
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> somewhat different lines, perhaps in order to avoid restrictions flowing from the decisions in Addie's 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. Their Lordships believe that the above reformulation of the law would achieve results not substantially different from those achieved by recent decisions of the High Court."

16. The last case to be considered is Public Transport Commission (N.S.W.) v. Perry (1977) 137 CLR 107 . The question there was whether a carrier by rail owed a duty to take reasonable care for the safety of a passenger who, while standing on a platform of a railway station, fell involuntarily onto the rails and was struck by a train. The majority of the Court answered the question in the affirmative. It was argued on behalf of the Public Transport Commission that the plaintiff was a trespasser on the rails. Barwick C.J., who accepted that view, regarded it as impossible, in the light of the decisions of the Judicial Committee, to find concurrent duties, one that of an occupier to a trespasser and one the general duty of care. The duty of the occupier in his opinion depended on the legal relationship of the plaintiff to the carrier; there was no room for the general duty of care: see especially at pp.119, 123-124. The other members of the Court took a different view. They held that the plaintiff was not a trespasser, so that the question for their decision was whether an occupier of land may owe a general duty of care to a person lawfully on the land. That question was answered in the affirmative. I said, at pp.130-131:

"The special rules which the common law has

evolved to govern the liability of an occupier of premises to a person who sustains injury while on those premises do not in every case state exhaustively the nature of the occupier's duty to the person who has come on to his premises. The relationship between the parties may be such as to give rise to a duty upon the occupier to take reasonable care for the safety of the other person. If the relationship between the parties imposes upon the occupier this general duty of care, which may be higher than that which he owes in his capacity as occupier, the fact that he is an occupier does not relieve him of the higher duty. The two duties exist concurrently."

I cautiously left open the question whether the occupier might owe similar concurrent duties to a trespasser. Stephen J., after saying that an occupier of premises may owe to an invitee or licensee two duties of care existing concurrently, neither displacing the other (see at pp.138-139), went on to deal with the case of trespasser and said, at pp.139-140:

"The case of the unlawful entrant is a

distinct one. If his entry be by stealth and unanticipated, entry alone will not cast any duty of care whatever upon the occupier. His arrival on the premises not being authorized, known or anticipated no duty in respect of the state of the premises will arise upon entry and he will in no sense be any 'neighbour' of the occupier. Once his presence is known the position changes and a duty, which has been described as one of common humanity, is cast upon the occupier. In the view which I take of this case the precise ambit of that duty need not concern me. ... It is in the realm of precautions

> against the as-yet-unidentified entrant that difficult questions of degrees of reasonable anticipation arise, coupled as they necessarily are with fears of unduly burdening occupiers for the benefit of future trespassers."

Mason and Jacobs JJ. expressly dealt with the question that falls for decision in the present case. They said, at pp.146-147:

> "Further, even if the respondent be
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> categorized merely as a trespasser, it does not follow that a duty of care arose only when the driver actually knew that she, a human being, was on the railway line in the path of his train. The duty of an occupier to a trespasser is higher than that in the circumstances which the jury could have found to have existed in this case. Cases such as Commissioner for Railways v. Quinlan deal with the duty of care owed to persons whom the occupier may suspect will come upon the land 'at some time or another' (see Southern Portland Cement Ltd. v. Cooper (at p.639)). The question with which we now deal is different, namely, the duty which arises when something is brought to the notice of an occupier or his servant which would lead an ordinary man to suspect that a person, albeit a trespasser, may actually be upon the land and in a position where a continuation of the occupier's activity is likely to cause death or very serious injury if the suspicion turns out to be a reality. We have no doubt that there then arises a duty
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> of care on the part of the occupier towards the person whom an ordinary man would suspect to be actually upon the land and in a situation where the activities of the occupier or his servant, if pursued, will probably kill or seriously injure that person."

17. 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.

18. In the present case there can be no doubt that the actions of the plaintiff placed him under a duty of care which arose, not from the fact that he was an occupier, but from the fact that by discharging his firearms he was actively creating a present danger which he should reasonably have foreseen would be likely to result in injury to persons in the vicinity unless he took care to prevent it. To whom was that duty owed? Clearly enough he would have owed to the plaintiff the duty to take reasonable care in the use of his firearms if he had known that she was in or near the car. But the defendant did not know of the presence of the plaintiff. There are statements in the cases to the effect that the occupier's duty to a trespasser depends on knowledge, but that is not an exclusive statement of the basis of the duty of an occupier who is committing positive and dangerous acts. In general a defendant who performs a dangerous act owes a duty to persons who, he can reasonably foresee, are likely to be injured by it, even if he is unaware of their presence. The driver of a motor vehicle will be liable for the consequences of his negligence to passengers in another vehicle with which he collides, even if he did not know and had no reason to believe that they were in the

vehicle. When the dangerous act is performed by the defendant on his own land, and the plaintiff is a trespasser, the position is different. Although, as I have said, the duty is not created by the relationship of occupier and trespasser, the fact that the plaintiff is a trespasser is not irrelevant. The presence and movements of the trespasser may have been unknown and unpredictable and the defendant may have had no reason to know or suspect that any trespassers would be on his land, where they had no business to be. In deciding whether the defendant in a case such as the present owes a duty to the unseen trespasser I do not consider that the tests suggested by Lord Reid in Southern Cement Ltd. v. Cooper should be adopted. Those tests were formulated for use in cases where the question is whether a duty is owed by an occupier, in his character of occupier, to a trespasser. Where the duty arises from the fact that the defendant is committing a series of lethal acts, the ordinary test should be applied - was the presence of the trespasser reasonably foreseeable? It would however not be enough that there existed a bare theoretical possibility that a trespasser might be present. In the context of a case such as the present, in deciding whether the presence of the trespasser was reasonably foreseeable it is useful to apply the practical test suggested by Mason and Jacobs JJ. in Public Transport Commission (N.S.W.) v. Perry - are there circumstances which would lead an ordinary man to suspect that someone was actually upon the land and in a situation where the activities of the occupier, if pursued, would probably kill or seriously injure that person? On the facts of this case the question whether that test
is answered is a difficult one. The jury has, however, given an answer to it. The jury has found that the defendant should have known or believed that a person other than Cox might be in the car. If, by that answer, the jury meant no more than that there was a bare or theoretical possibility that the plaintiff might be in the car, the circumstances would not give rise to a duty of care on the part of the defendant. If, on the other hand, it meant that there were circumstances which should have led the defendant to suspect that the plaintiff might be there, then the finding of negligence made in the answer to question 4 is supportable. I consider that the jury should be taken to have given the answer in the latter sense. It would be obvious that a theoretical possibility existed that someone might be in the car. It would have been pointless for the judge to ask, and for the jury to answer, such a question, which indeed could have only one answer. The question was not asked in terms of possibility. Further the jury was, in my opinion, entitled to infer that there were circumstances which should have led the defendant to suspect that someone besides Cox might be in the vehicle. It is true that there was no sign of movement or other indication of the presence of the plaintiff. However, when at night a vehicle is driven onto land in the circumstances in which that was done in this case, and the darkness makes it impossible to see whether there is anyone else in the vehicle, the very presence of the vehicle is a circumstance that should lead a reasonable man to suspect that there may be someone in it as well as the driver. For these reasons I have concluded, although not without hesitation, that the jury was entitled to answer question 2(d) as it did, and that the answer given by the jury to that question provides sufficient support for the finding of negligence made in answer to question 4.

19. The question whether the plaintiff was guilty of contributory negligence can be shortly answered. The jury may well have been sceptical of the plaintiff's evidence that she thought that Cox was simply taking her for a drive, having regard to the distance which they travelled (over twenty miles). However that may be, it was open to the jury to infer that the plaintiff, notwithstanding her denials, knew, once Cox drove onto the farm, that he was doing so for an illegal purpose. She should not have accompanied him, however difficult it may have seemed to her to avoid doing so. A person who enters another's property at night, in the company of someone who intends to commit a crime, cannot be said to be taking reasonable care of her own safety. The apportionment of blame by the jury was within its discretion.

20. I sympathize with the defendant, who resorted to self-help when the police could not assist him in preventing the repeated thefts from his farm. However, for the reasons I have given, I consider that the appeal should be allowed, and the judgment of the trial judge restored.

MURPHY J. The respondent Mr Shaw was an owner and occupier of a farm which had a petrol bowser. Over a period there had been a number of thefts of his petrol from the bowser. He decided to ambush the next thief and waited in hiding, on the night in question, armed with a rifle and a shotgun. A young man, intending to steal petrol, drove a car up to the bowser. The appellant, Miss Hackshaw, a young woman, was a passenger in the car. When the driver got out of the car, Mr Shaw, who claimed to be an expert marksman, came out of hiding, and fired a number of bullets and shots into the car, severely injuring the appellant.

2. The jury found that the respondent injured the appellant by firing into the car at a time when he should have known or believed that a person might be in it, and in doing so was guilty of negligence. The finding of negligence was justified. It was not necessary that he knew or believed that a person probably was in the car; that misconception was exploded in Wyong Shire Council v. Shirt (1980) 146 CLR 40 ; see also Commonwealth v. Introvigne (1982) 41 ALR 577 at 592.

3. The fact that Mr Shaw was the occupier of the land on which he and the car were, and that the plaintiff was there as a trespasser with another who was attempting to steal, does not relieve Mr Shaw of liability. The respondent relied on cases such as Commissioner for Railways v. Quinlan (1964) AC 1054 , but these over-protect occupiers of land and should not be followed. The Australian line of cases - Commissioner for Railways v. Cardy (1960) 104 CLR 274 ; Commissioner for Railways v. Anderson (1961) 105 CLR 42 ; Public Transport Commission v. Perry (1977) 137 CLR 107 - represent the common law in Australia.

4. It is not necessary to hold that the respondent's duty or standard of care was higher than in ordinary negligence, but in my opinion it was. I find it almost absurd to regard this as an ordinary case of negligence. The injury was not caused by someone shooting rabbits or even practising firing at trees and injuring a trespasser by accident. The car was not a disused one, it had just been driven onto the land. Mr Shaw was not defending himself. Firing bullets at a car in such circumstances is not merely extra-hazardous, it is ultra-hazardous. In Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle (1940) 64 CLR 514 (Carlyle's case), Mr Justice Dixon observed that "the reasonable care required by the law means a standard of diligence growing in strictness as the danger increases" (p. 534). The judgments in that case show that a very high degree of diligence is required when dealing with what were described as things "dangerous in themselves" such as loaded firearms, explosives or poisons. Even if the classification of things as dangerous in themselves is left aside, that case and a wealth of others make clear that engaging in extra-hazardous conduct imposes a very high standard of care approaching, even if it does not attain, strict or absolute liability. In Carlyle's case, Mr Justice Starke used expressions such as "consummate care", "a degree of diligence so stringent as to amount practically to a guarantee of safety" (p.522). Firing bullets at a car in the circumstances here was dangerous to the extreme, and reasonable care required that Mr Shaw make certain that no one was in the car before he fired at it. The standard of diligence required was so strict that it is splitting hairs to distinguish this from a case of strict or absolute liability.

5. The plaintiff was entitled to succeed.

6. It is necessary to divorce the question of contributory negligence from that of participation in an offence. On this aspect I agree with Mr Justice Gobbo of the Supreme Court. I take the view that

there was no evidence which would sustain the verdict of contributory negligence. To be seated in a car, even in the circumstances of this case, should not be taken to expose one to the risk that an occupier, even one who had been provoked by repeated thefts of his petrol, would engage in the brutality of firing at a car without making certain that no one was in it.

7. The appeal should be allowed, judgment for the appellant plaintiff restored, but the damages should not be reduced for contributory negligence.

WILSON J. This is an appeal brought by special leave from a decision of the Full Court of the Supreme Court of Victoria. The question of substance is whether the respondent was negligent in discharging a firearm in consequence of which the appellant suffered injury. The circumstances in which the firearm came to be discharged may be stated shortly.

2. The respondent is a farmer, working a property of about 324 hectares in a fairly isolated part of Victoria, about 35 kilometres from Boort. At the material time he did not reside on the property. In consequence of a series of night-time thefts of petrol from a tank on his farm the respondent spent several evenings on the property in the hope of catching the thief or securing evidence leading to his identification. He had sought police assistance but had been advised to obtain some evidence on which police action could be taken.

3. On the evening of 10 December 1978 the respondent was lying in wait on the farm at a spot about thirty metres from the petrol tank. It was a dark night. He was armed with both a rifle and a shotgun and was accompanied by his wife. At about 10 p.m. a car, driven by a youth named Cox, entered the property and pulled up beside the petrol tank. The lights of the car were extinguished before it entered the property.

4. Cox got out of the car, untied the wiring intended to secure the petrol hose against unauthorized use and commenced to pump petrol from the farm tank into the car's tank. The respondent then fired a rifle shot towards the front of the car intending, as he said, to immobilize it so that it could not be driven away. At the same time he called out to the driver to get off the property. The respondent then started to run towards the car and fired another rifle shot as he ran. The first shot in fact struck the car in the vicinity of the engine but the second went through the passenger's side front door of the car and struck the appellant in the right arm. At that time she was curled up in a ball on the front seat of the car.

5. After firing the second shot the respondent found that the rifle had jammed. He thereupon ran back to his hiding place, collected the shotgun and discharged a further five shots at or into the car as Cox drove away. Later that evening the car was found abandoned a short distance away. It was subsequently found to have been stolen.

6. The appellant, Ms. Hackshaw, was almost 17 years old at the time of the incident. She lived with her parents in Boort and she had been friendly with Cox for some time. Cox lived at Ballarat but had made a habit of visiting her at weekends. At the trial Ms. Hackshaw testified that after the evening meal on the Sunday in question she agreed to go with Cox for a drive before he returned to Ballarat. He was driving a white Holden which he informed her he had bought during the previous week for $500. On each of the two previous weekends he had been driving different cars, each of which he told her had been loaned to him.

7. The appellant gave evidence that on the evening in question Cox drove towards Mr. Shaw's farm.

As he approached a gate into the property he switched off the headlights. She said she asked him what he was doing but he did not answer the question. He entered the property and drove some distance. When he stopped the vehicle he got out and moved to the rear of the car. She said she then got out of the passenger's side front door to see what he was doing. Shortly thereafter she heard the sound of a shot and someone call out. She immediately scrambled back into the car and made herself as inconspicuous as possible on the front seat. Her feet were tucked under her and the whole of her body was below the level of the window. Whilst she was in this position she felt a searing pain in her arm. It is common ground that the second shot fired by Mr. Shaw penetrated the passenger's side front door and caused the injury to her arm.

8. The appellant instituted proceedings in the Supreme Court of Victoria, seeking damages for trespass to the person and for negligence. The respondent denied both claims. He testified to his belief that the driver was alone in the car: at no time did he see or hear anything to indicate the presence of another person. His sole purpose in discharging the firearms was to immobilize the vehicle so that he would have some evidence to present to the police. It is not now suggested for the appellant that the shot which caused her injury was fired by the respondent with the intention of injuring her, and as will be seen, the jury rejected the allegation that it was reckless.

9. With respect to the claim in negligence, the learned trial judge directed the jury on the basis of a general duty of care arising in accordance with Lord Atkin's statement in Donoghue v. Stevenson (1932) AC 562, at p 580. In the course of his charge, his Honour said:

> "If the plaintiff's presence was known to the defendant, or the defendant should have realized that the plaintiff might be there, then the defendant owed a duty to the plaintiff to exercise care in the use of that gun; and if in firing the gun that was a breach of that duty, then he would be liable to pay damages for negligence. ... If he did not know that she was there would a reasonable man, in those circumstances, have apprehended the possibility of a person being there, and the possibility of injury to that person in firing that second shot."

10. So far as material, the questions left to the jury and the jury's answers were as follows:

> "1. Did a shot fired by the defendant on 10th December, 1978 cause injury to the plaintiff? Answer: Yes.
>
> 2. Prior to the firing of the shot
>
> (a) did the defendant know or believe that a person other than Cox was in the car?
>
> Answer: No.
>
> (b) did the defendant know or believe that a person other than Cox might be in the car?
>
> Answer: No.

(c) should the defendant have known or believed that a person other than Cox was in the car?

Answer: No.

(d) should the defendant have known or believed that a person other than Cox might be in the car?

Answer: Yes.

3. Did the defendant fire the rifle knowing the bullet might strike some person other than Cox but not caring whether or not it did strike him or her? Answer: No.

4. If the defendant knew or believed or should have known or believed that someone other than Cox was or might have been in the car was he guilty of negligence in firing the shot which caused injury to the plaintiff? Answer: Yes."

...

8. Was the plaintiff guilty of contributory negligence? Answer: Yes.

9. If yes to question 8 to what extent is it just and equitable to reduce the plaintiff's damages having regard to her share of the responsibility for her injuries? Answer: The plaintiff: what percentage to blame - 40%. The defendant: what percentage to blame - 60%."

In the result judgment was entered for the plaintiff for $10,200 plus interest and costs.

11. Mr. Shaw appealed and Ms. Hackshaw cross-appealed to the Full Court, the former against the judgment and the latter against the finding of contributory negligence and the quantum of damages. By majority (Young C.J., McInerney J., Gobbo J. dissenting) the appeal was allowed and the cross appeal was dismissed. Judgment was entered for Mr. Shaw. Thereafter special leave was granted to enable Ms. Hackshaw to appeal to this Court. In the course of the hearing that leave was rescinded to the extent that it authorized an appeal on the ground that the jury's award of damages was unreasonably low.

12. It is the reference in the judge's charge to "the possibility of a person being there" which focusses the crucial issue in the appeal, namely, whether in all the circumstances the respondent owed a duty of care to the appellant by reason of the jury's finding that a reasonable man would have apprehended the possibility that she was in the car. If that question be answered in the affirmative, there can be no doubt that the jury's finding of negligence is correct whatever be the preferred description of the standard of care for which the duty calls. Whether it be the duty to take reasonable care towards a neighbour (Donoghue v. Stevenson) or the supposedly lesser duty of common humanity owed to a trespasser (Herrington v. British Railways Board (1972) AC 877), the respondent's conduct would be found wanting.

13. Counsel for the respondent argues that the appellant was a trespasser and that any duty owed to her by the respondent must be found in the principles applicable to the relationship of an occupier of land to a trespasser. He relies on the decision in Commissioner for Railways v. Quinlan (1964) AC

1054 for the proposition that an occupier is under no duty to a trespasser of whose actual presence he neither knows nor ought to know. The jury having found expressly that the respondent neither knew nor ought to have known that the appellant was in the car, those findings resolve the action of negligence in his favour. It is a necessary part of the argument to make good the further proposition that the relationship of occupier to trespasser is the only relevant relationship, there being no room as a matter of law for any liability arising out of the more general relationship of neighbour to neighbour as expounded by Lord Atkin in Donoghue v. Stevenson, at p 580.

14. It is unnecessary to consider the first limb of the argument at any length because, as will appear, I find the answer to the second limb to be determinative of this aspect of the appeal. However, I would say that the former proposition is not merely correct but finds confirmation in the subsequent decision of the Privy Council in Southern Portland Cement Ltd. v. Cooper (1973) 129 CLR 295 , where their Lordships distinguished between the responsibility of an occupier towards a trespasser who is actually present and one in respect of whom there is a substantial chance that he will come in the future.

15. There have been a number of decisions of this Court over the past thirty years in which it has been recognized that the special rules which have been developed to express the liability of an occupier towards the various categories of entrants to his land may not be exhaustive of the sources of his liability to persons who suffer injury on the land. In Thompson v. Bankstown Corporation (1953) 87 CLR 619, at pp 642-643, Kitto J., speaking of the rule of law which defines the limits of the duty owed by an occupier to a trespasser, said:

> "It would be a misconception of the rule to regard it as precluding the application of the general principle of M'Alister (or Donoghue) v. Stevenson (1932) AC 562 , to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour in Lord Atkin's sense of the word: see Transport Commissioners of New South Wales v. Barton (1933) 49 C.L.R. 114, at pp. 122, 127 et seq.".

See also Rich v. Commissioner of Railways (N.S.W.) (1959) 101 CLR 135 ; Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 CLR 274 ; Munnings v. Hydro-Electric Commission (1971) 125 CLR 1 .

16. In Quinlan, at pp. 1079-1086, their Lordships discuss the first three of these cases. They were unable to accept the references therein to the existence of a general duty of care standing alongside the duty of an occupier to a trespasser. The decisions in Rich and Cardy were found acceptable on the basis that the facts were such as to place the injured plaintiffs in the category of licensee rather than trespasser. As to the decision in Thompson, it was said, at p. 1080:

> "Their Lordships have no doubt that Thompson's
>
> case was correctly decided. It was one of those in which the court, for sufficient reason, is able to hold that, as regards the accident and the injury caused, the relation of occupier and trespasser does not bear upon the situation of the parties."

Then, after referring to the proposition of Kitto J., which I have cited, their Lordships, at p. 1081 explained that they

> "cannot find any line of reasoning by which the limited duty that an occupier owes to a trespasser can co-exist with the wider general duty of care appropriate to the Donoghue v. Stevenson formula: and, 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."

17. In Cooper, their Lordships reformulated the law with respect to the duty resting on an occupier to avoid injury arising from the condition of the premises to trespassers when he knows facts which show a substantial chance that they may come on to his land. At pp. 309-310, their Lordships acknowledged that the Australian courts have tended to proceed on somewhat different lines, leading 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" and expressed the view that the wider reformulation rendered unnecessary the imposition of "two separate parallel duties".

18. This case does not require a detailed examination of the decisions of the Privy Council in Quinlan and Cooper. It is sufficient for me to say that I do not find them seriously at odds with the acknowledgment by this Court of the existence in appropriate circumstances of a Donoghue v. Stevenson duty of reasonable care resting on an occupier towards a person who may be described as a trespasser on his property. Their Lordships clearly found it confusing to speak of two duties having different incidents and consequences standing side by side or coexisting. But they also clearly recognized that the circumstances could result in the general duty of care displacing the special rule applicable to an occupier because "the relation of occupier and trespasser does not bear upon the situation of the parties".

19. The possibility that the precise formulation of the liability of an occupier to licensees or invitees which is recognized in the cases may be displaced or overlaid in particular circumstances by the general duty to take reasonable care is well recognized: Caterson v. Commissioner for Railways (1973) 128 CLR 99 ; Public Transport Commission (N.S.W.) v. Perry (1977) 137 CLR 107, at pp 130-132, 137-139 . The relevant principle was stated by Stephen J. in Perry, at p 138, as follows:

> "An invitee or licensee who enters upon the
>
> property of another does not thereby forfeit the benefit of having owed to him, by those who are in a state of proximity to him and should foresee the consequences which their conduct may have upon him, the neighbourly duty to take reasonable care for his safety. He remains entitled once on the premises, as he was off them, to have this duty performed by those with whom he is in the necessary relationship of proximity."

His Honour recognized that the case of an unlawful entrant was a distinct one. As to such an entrant, he said, at pp. 139-140:

> "If his entry be by stealth and unanticipated, entry alone will not cast any duty of care whatever upon the occupier. His arrival on the premises not being authorized, known or anticipated no duty in respect of the state of the premises will arise upon entry and he will in no sense be any 'neighbour' of the occupier. Once his presence is known the position changes and a duty, which has been described as one of common humanity, is cast upon the occupier."

Stephen J. did not pursue the question because he was not concerned with the duty of an occupier to a trespasser. The duty of common humanity to a known or anticipated trespasser is that which was discussed by the House of Lords in Herrington and by the Privy Council in Cooper. As I have said, the problem in the present case is not the content of the duty but its relevance.

20. The circumstances of the present case are quite extraordinary. They bear no resemblance to cases in which courts have ordinarily been required to expound and apply the principles governing the liability of an occupier to a person trespassing on his land. It is not a case of injury arising from some danger inherent in the static condition of the premises. It is not a case of injury occasioned incidentally by the occupier's conduct of operations on the land. Here the respondent engaged in positive and inherently dangerous actions intended to discourage a nocturnal trespasser whose presence was known from continuing a trespass and thereby to prevent the theft of his property. The observed trespasser, Cox, was not injured. Whether his escape from injury was due to good fortune or bears out the adamant assertion of the occupier that he had no intention of hitting him is a question which it is unnecessary to pursue. Had Cox suffered injury, there could have been no doubt that at the very least the respondent was in breach of the duty of common humanity owed towards a known trespasser. Unfortunately, the appellant, of whose presence the respondent did not know and in the light of the jury's findings should not have known, was hit by a bullet as she lay hidden in the car.

21. In my opinion, the conduct of the respondent was such as to render inapplicable to this case the special rules governing the liability of an occupier to a trespasser. Had they been applicable, those rules in the light of the jury's findings must have led to the conclusion that the respondent was under no duty at all to the appellant. This was the conclusion of the majority of their Honours in the Full Court. But, with all respect to their Honours, however relevant and appropriate the rules may be to the case where a trespasser suffers injury through the dangerous condition of the premises or by reason of activities carried on by the occupier in the exercise of his rights of occupation, they bear little relation to positive acts of misfeasance on the part of the occupier occasioned by the actual presence of trespassers. The effect of those acts of misfeasance in a context where the parties are brought into the necessary state of proximity is to render the relationship of occupier to trespasser irrelevant to any determination of the rights and liabilities of the parties save in so far as all the circumstances must be taken into account in applying the general principles of the law of negligence. I therefore see the question as being whether in all the circumstances the respondent was in a relevant state of proximity to the appellant and should have foreseen the risk of injury to which his conduct exposed her. It also follows from what I have said that provided a prima facie duty of care is found to arise, I do not think that there are any considerations of public policy which

"ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case (1970) A.C. 1004, per Lord Reid at p. 1027. ": per Lord Wilberforce in Anns v. Merton London Borough Council (1978) AC 728, at p 752.

22. The jury found that the respondent should have known or believed that a person other than Cox might be in the car and, that being the case, that he was guilty of negligence in firing the shot which caused injury to the appellant. Provided there is evidence to support them, the first of these findings satisfies the element of proximity and the second, inter alia, the element of reasonable foreseeability of the risk of injury. In my opinion, having regard to the evidence, it was open to the jury to reach these conclusions.

23. The salient features of the evidence can be recapitulated briefly. It was a dark night. There was no moon and no lighting of any kind. The respondent lay in wait on his property, accompanied by his wife. He was armed with a rifle and a shotgun. The respondent saw the car enter the property without the aid of its headlights and eventually stop adjacent to the petrol tank. He saw the driver alight and commence pumping petrol into the car. He said that he did not see the girl. He heard no conversation between the driver and anyone in the car. He fired a shot. He did not hear any scream or other protest following the first shot. The jury must have believed the respondent rather than the appellant on the conflict of testimony as to whether at any time she opened the passenger's door and emerged from the car. But there was ample evidence from which the jury could conclude that he fired the shots without knowing whether or not the driver was accompanied by another person. He said he looked at the vehicle to see if there was anyone inside before he fired the first shot. At that time he was still about thirty yards away. When asked whether he could see quite clearly through the window he replied:

"I couldn't see that clear but there was no one there."

Until the first shot was fired the presence of the respondent was not known to the trespassers and there was no reason for the appellant to hide in the car by crouching down on the seat. It was open to the jury to find that he fired the first shot at the car without satisfying himself whether a second person was in the car or in its vicinity. The respondent then started running towards the car and fired the second shot as he ran. At that time his state of knowledge as to the presence of a person in the car was unchanged. It was this shot which penetrated the door of the vehicle and struck the appellant. It was open to the jury to find that in discharging the second shot the respondent was in breach of his duty to take reasonable care to avoid causing harm to his "neighbour", namely, a person whom he ought to have known might be in the car at which he directed the shot.

24. In the course of argument, some attention was directed to the question whether knowledge merely of the possibility that someone was in the car was sufficient to establish the requisite relationship of proximity between the respondent and the appellant. There may be a question as to the proper construction of the jury's answer to question 2(d). Gobbo J. considered that the question was not simply asking whether the presence of another person in the car was possible and construed it as asking whether in the circumstances as they existed for the respondent there was a substantial chance that another person might be present in the car. I do not find it necessary to choose between these two formulations because it seems to me that in every case the existence of the requisite

relationship is a question of fact and also one of degree. There will often be a correlation between the inherent danger of the activity which occasions the injury and the finding of a relationship which gives rise to a duty of care. In the present case, I find the necessary relationship to be established by the jury's finding.

25. One may readily sympathize with the predicament in which the respondent found himself with repeated thefts of his property at night in an isolated area in circumstances where he was left to fend for himself. He intended by his actions to scare off the intruder and to obtain evidence on which the police could take action. But clearly, in endeavouring to protect his property and obtain evidence, he went too far. The law cannot condone or excuse such conduct. Even at a time when the law jealously safeguarded the rights of property owners it was recognized, as Erle C.J. said in Potter v. Faulkner (1861) 1 B &S 800, at p 805 (121 ER 911, at p 913) that:

> "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons."

26. It remains to consider the question of contributory negligence. The jury found this issue against the appellant and reduced her damages by 40%. The finding was challenged on appeal. It was not necessary for the majority to consider the question but Gobbo J. took the view that the finding could not stand. His Honour said:

> "I am unable to see how there was anything that the plaintiff (appellant) could do to take adequate precautions for her own safety once the car stopped at the petrol tank but before the first shot was fired."

So far as it goes, this view is consistent with that expressed by Lord Kilbrandon (with whom Lord Cross and Lord Salmon agreed, Lord Wilberforce and Lord Simon of Glaisdale contra) in Westwood v. Post Office (1974) AC 1 , that trespassing is not, without more, an act of negligence. The question here is whether there was more than a mere trespass. The learned trial judge, after hearing argument, put the case of contributory negligence to the jury on three bases. First, that she had acted in concert with Cox in a criminal enterprise at least to the extent that her presence and behaviour had encouraged the crime. Secondly, that she had failed to remove herself from the scene as soon as she became aware of Cox's plans. Thirdly, that she had failed to make her presence known after the first shot was fired. With respect to the first basis, the judge directed the jury that there was insufficient evidence to entitle it to find that she was a party to the planning of the crime. That direction may have reflected a generous view of the evidence, having regard to the fact that the vehicle was stolen and to the different vehicles in which Cox had visited her over the previous weekends coupled with the length of the journey from the girl's home to the farm and to the circumstances in which it was undertaken. Be that as it may, his Honour focussed the attention of the jury on the circumstances leading up to the theft of petrol from the time the headlights of the car were switched off and the car entered the property and was driven across a paddock to pull up beside the tank. He very fairly outlined to the members of the jury the alternative views suggestive of her guilt or innocence respectively that could be taken of these circumstances. He directed them that she would be guilty of contributory negligence on this first basis if they found that by her presence and attitude she intentionally encouraged or aided and abetted the commission of the

crime. With respect to both the first and second bases, he cautioned the jury against relying merely on a passive response on her part to the whole enterprise evidenced, for example, by her failure to remove herself from the scene at that hour of the night and from her failure, if any, to register a complaint with him about his conduct. The third basis of the allegation of contributory negligence was also put very fairly by his Honour. He cautioned the members of the jury against employing the wisdom of hindsight, reminded them that she was a girl sixteen years of age in frightening circumstances and said that they must decide whether her decision to hide rather than to reveal her presence was in all the circumstances one which could be said to constitute a failure to take reasonable care for her own safety.

27. If the second and third bases stood alone I would agree with Gobbo J. that there was no evidence on which the jury could reasonably have found the appellant guilty of contributory negligence. However, the first ground raises a matter of some substance. It involved the consideration by the jury of all the circumstances, including the testimony of the appellant herself. In my opinion, it was open to the jury to conclude that she was aiding and abetting Cox in the theft of the petrol and that by so doing in the circumstances that attended the theft she failed to take reasonable care for her own safety. With respect to the percentage of contributory negligence, this was within the range of the jury's discretion and I would not interfere with its conclusion.

28. I would therefore allow the appeal on liability and dismiss the appeal on contributory negligence. The judgment founded on the verdict of the jury should be restored.

DEANE J. The facts involved in this appeal are set out in other judgments. Except to the extent necessary for discussion, I shall refrain from recanvassing them. No doubt because of the somewhat uncertain state of the law, the issues have changed in, and in the passage between, the different Courts to the extent that what was presented at first instance as a case of trespass to the appellant's person has become primarily an action in negligence for injury sustained by the appellant while herself a trespasser. The jury's findings that the respondent should have known or believed that a person "might be in the car" at which the respondent fired and that the respondent was "guilty of negligence in firing the shot which caused injury" to the appellant are now unchallenged. That being so and as the matter has been argued by both sides in this Court, the appeal raises for consideration a question concerning the extent of the liability under the common law in Australia of an occupier of land in respect of injury to a trespasser on that land. For the respondent, it is submitted that the only common law duty owed by an occupier to a trespasser is a duty to refrain from the unjustified and wilful or wantonly reckless infliction of injury. In support of that submission, the respondent relies upon the decision and reasons of the Judicial Committee of the Privy Council in Commissioner for Railways v. Quinlan (1964) AC 1054 .

2. Quinlan was technically a trespasser when the truck he was driving on a level crossing over the defendant Commissioner's railway line was struck by a steam train whose driver had failed to give an adequate warning signal of its approach around a bend. The Judicial Committee held that the liability of an occupier of land to a trespasser for injury sustained on the land was essentially as laid down by the House of Lords in Robert Addie &Sons (Collieries) v. Dumbreck (1929) AC 358 , namely, liability for injury "due to some wilful act involving something more than the absence of reasonable care" in the sense that there "must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser" (Addie, at p.365). In so holding, their Lordships rejected a movement in judgments in this Court towards treating the liability of an occupier of premises for accidental injury sustained by another - be he invitee, licensee or trespasser - on those premises as governed by the ordinary

principles of the law of negligence. That movement could be traced through, inter alia, the joint judgment of Dixon C.J. and Williams J. and the judgment of Kitto J. in Thompson v. Bankstown Corporation (1953) 87 CLR 619, esp. at pp 628-630 and 642-643, the judgments of Fullagar J. and of Windeyer J. in Rich v. Commissioner for Railways (N.S.W.) (1959) 101 CLR 135, esp. at pp 143-145 and 158-159, the judgments of Dixon C.J., of Fullagar J. and of Windeyer J. in Commissioner for Railways (N.S.W.) v. Cardy (1960) 104 CLR 274, esp. at pp 286,291-299 and 316-317, the judgments of Fullagar J. and of Kitto J. in Commissioner for Railways (N.S.W.) v. Anderson (1961) 105 CLR 42, esp. at pp 55-57 and 58-59 and the judgment of Windeyer J. in Voli v. Inglewood Shire Council (1963) 110 CLR 74, esp. at pp 88-89 . Its starting point was the proposition that the isolation of occupier's liability by the House of Lords in Addie's Case, which had been accepted in this Court (see Lipman v. Clendinnen (1932) 46 CLR 550, at p 555 and Transport Commissioners of New South Wales v. Barton (1933) 49 CLR 114), required to be at least "re-examined and tested" in the light of the reorientation of "the whole law of negligence" which had been effected by Donoghue v. Stevenson (1932) AC 562 (see, per Fullagar J., Cardy's Case, at p 291). At its heart, there lay the insistance by Fullagar J., particularly in his judgment in Cardy (at pp.294ff.), that the rules defining the "special duties" which an occupier owes to an invitee or licensee upon his land should be seen as not creating "special duties lying outside the general law of negligence" but as extensions or qualifications of the general rule "concerned only with laying down the standard of care appropriate to two special classes of case" and the perception that a trespasser can, in the words of Kitto J. in Thompson (at p.643), be "also the occupier's neighbour, in Lord Atkin's sense of the word" with the result that he is owed a duty of care under the ordinary law of negligence.

3. In Quinlan, their Lordships commented (at p. 1081) that they could not "find any line of reasoning by which the limited duty that an occupier owes to a trespasser can co-exist with the wider general duty of care appropriate to the Donoghue v. Stevenson formula". Their Lordships referred (at p 1084) in dismissive terms to Sir Wilfred Fullagar's judgment in Cardy:

> " Admittedly, passages occur in one or two of the other judgments that suggest that a trespasser can somehow become the occupier's 'neighbour,' within the meaning of the somewhat overworked shorthand of Donoghue v. Stevenson, by the mere fact that he or other trespassers (it must be the class, not the individual, that matters for this purpose) are in the habit of trespassing and that the occupier has notice of their habit. 'In such cases,' it is said, 'it seems hardly possible to classify or enumerate the factors which will be relevant to the question whether by act or omission the defendant has fallen short of the standard of care of the reasonable man'".

In place of the trend in judgments in this Court towards a consistent jurisprudence of negligence, their Lordships emphasized the mechanical and inflexible theory formulated in Addie's Case (the "absolutely rigid line": per Viscount Dunedin, Addie's Case, at p.371) according to which the exclusive criterion of an occupier's liability in negligence was which of the alternative categories of "invitee", "licensee" or "trespasser" was best able to accommodate, or be made to accommodate, the particular plaintiff. Their Lordships introduced a limited element of foreseeability and the notion of a limited duty of care into what they called (at p.1084) "the general formula as laid down in Addie's Case" by indicating that the limited duty under it could arise not only when the occupier knew facts which made it extremely likely that a trespasser had already arrived but immediately it became "extremely likely" that he would come in the future (see particularly at pp.1076-1078,1086 and cf. Southern Portland Cement Ltd. v. Cooper (1974) AC 623, at pp 638-639). Otherwise, they described (at p 1074) that "formula" as "an exclusive or comprehensive definition of the duty" and

were at pains to stress (at pp. 1084-1085) its exclusionary nature:

> "If on the evidence a plaintiff is a trespasser, a person present without right or licence, the occupier's duty to him is determined by the general formula as laid down in Addie's case. That formula may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation, and, in the case of children, it will not preclude full weight being given to any reckless lack of care involved in allowing things naturally dangerous to them to be accessible in their vicinity. What the law does not admit, however, is that a trespasser, while incapable of being described otherwise than as a trespasser should be elevated to the status of an ordinary member of the public to whom, if rightfully present, the occupier owes duties of foresight and reasonable care. It does not alter a trespasser's description merely to christen him a 'neighbour'. If this additional duty of care were to be thought to be imposed upon the occupier by the circumstance that, to his knowledge, there is a likelihood of the trespasser's presence on the land - and it does not seem that any other circumstance is regarded as critical for the purpose - their Lordships consider that the law, as established, would not so much be applied or developed as contradicted".

4. The Judicial Committee's decision and reasoning in Quinlan was received unenthusiastically both in this country and elsewhere. In this country, it was, for example, described by Professor Fleming (The Law of Torts, 3rd ed. (1965), p.434) as "unfortunately" slamming the door on the trend of judgments in this Court (see, also, Professor Morison, "Trespassers in the Wilderness", Australian Law Journal, vol.38 (1965), 331). In the United Kingdom, the Court of Appeal declined to follow it (Kingzett v. British Railways Board, The Solicitors' Journal, vol.112 (1968), 625). Speaking for a unanimous Court, Lord Denning M.R., who had previously (Videan v. British Transport Commission (1963) 2 QB 650, at p 664) referred to Thompson, Rich and Cardy as an "illuminating trilogy of cases" which had made "manifest" that a trespasser could also be a neighbour, reiterated the view that, if an occupier knows or ought to know that trespassers are likely to be affected by what he is doing, he owes them the common duty of care, no more and no less. In a part of his judgment which is not quoted in the summary in The Solicitors' Journal (see, per Edmund Davies L. J., Herrington v. British Railways Board (1971) 2 QB 107, at p 131), Lord Denning said of Quinlan:

> "They declined to accept the foreseeability test for trespassers. But the Privy Council case has, in its turn, been much criticised, and I must, in this court, decline to follow it. So I apply here the foreseeability test".

In Herrington, Salmon L.J., in the course of one of the most lucid of modern statements of the law of negligence since those of Fullagar J., referred (at p.123) to the "trilogy of cases" in this Court and commented (at p.124) that he had "the misfortune to disagree with much of the reasoning in Quinlan's Case by which we are not bound".

5. The Privy Council's establishment, for this country, of the "general formula as laid down in Addie's Case" as the "exclusive or comprehensive" determinant of the liability of an occupier for accidental injury to a trespasser was regressive and unfortunate. Both Addie's Case and Quinlan, like

the judgments of the majority of their Lordships in London Graving Dock Co. Ltd. v. Horton (1951) AC 737 which concerned an occupier's duty to an invitee, lie ill with the recognition, in Donoghue v. Stevenson, of the underlying unity of the law of negligence. Even more important, the appearance of certainty in a fragmented part of the law achieved by the adoption of the Addie "formula" came, in so far as this country was concerned, at too high a price in terms of inflexibility and the divorce of the content of law from the standards of the community which it exists to serve. Nonetheless, I would be hesitant to reopen the rejection by the Privy Council of the prior trend of authority in this Court were it not for four distinct developments which combine to undermine the reasoning and probably the decision in Quinlan's Case. It will subsequently be necessary to examine those developments in some detail. It suffices, at this stage, merely to identify them. The first is the recognition of the prima facie general applicability of the ordinary principles of the law of negligence at least in respect of physical injury to person or property. The second is that it is now accepted that the fact that a defendant was an occupier of premises upon which an invitee or a licensee sustained injury is not, in itself, a ground of exemption from liability under those ordinary principles. The third development is the view expressed by at least a majority of the House of Lords in Herrington v. British Railways Board (1972) AC 877 that the reasoning in Addie's Case was mistaken or has become obsolete (per Lord Reid, at p 898; per Lord Morris of Borth-y-Gest, at p. 911; per Lord Pearson, at p.923; per Lord Diplock, at pp.934-935). The last of the four developments is the decision in Southern Portland Cement Ltd. v. Cooper where, on appeal from this Court, the Judicial Committee effectively rejected much of the reasoning in Quinlan. The combined effect of those developments and associated matters is, in my view, such as to require the Court to face the general problem of defining the nature and scope of the duty which, under the contemporary common law of this country, an occupier of premises owes to a trespasser upon them. In the forefront of that problem there lie the related questions of the extent of the residual authority of Quinlan's Case and the extent to which the trend of authority which was to be discerned in judgments in this Court prior to Quinlan should now be accepted as reinstated. While considerable guidance is to be derived from the judgment in Southern Portland Cement Ltd. v. Cooper, the convenient starting point is the reasoning underlying that previous trend of authority in this Court. In the process of identifying the components of that reasoning, it will be necessary to quote at unusual length from what appear to me to be the critical passages in the pre-Quinlan cases. It is only by so doing that it is possible to convey something of the overall sweep and force of the legal reasoning by induction and deduction that was involved in the careful, and sometimes changing, development and exposition of the relevant aspects of the common law of negligence which those judgments contained.

6. There is an inter-relation between judgments in the group of five cases in the Court to which reference has been made (Thompson, Rich, Cardy, Anderson and Voli). In itself, this inter-relation is significant in that it is illustrative of the search for unity of principle (cf. per Fullagar J., Cardy, at pp.291-292). Cardy was a trespasser. Thompson and Rich were treated as trespassers. Anderson and Voli were invitees. Each succeeded on the appeal to this Court. In each appeal, that success was wholly or partly attributable to the application of the ordinary principles of the law of negligence as distinct from the doctrinaire content of some exclusive "formula" made rigidly applicable by reference to which particular legal label was held to be appropriate to identify the character in which the plaintiff was present upon the premises.

7. In Thompson, the Court did not disturb the Supreme Court's finding that the infant plaintiff was a trespasser upon the defendant council's electricity pole which he was climbing with the aid of his bicycle. That was not however seen as being decisive of the case. "A man or child may be infringing upon another's possession of land or goods at the time he is injured and it will be no bar to his

recovery, if otherwise he can make out the constituent elements of a cause of action" (per Dixon C.J. and Williams J., at p.628). Having identified "the true question" in the case as being "whether the plaintiff acting as he did falls within the scope of the defendant's duty of care", Dixon C.J. and Williams J. defined (at p.630) that duty in terms which equated it with the ordinary duty of care under the law of negligence:

> "In a passage in his opinion in Bourhill v. Young (1943) A.C. 92, at p. 104, Lord Macmillan says 'The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed'. This passage was cited and used as the test by Lord Thankerton and by Lord Macmillan himself in Glasgow Corporation v. Muir (1943) AC 448, at pp 454,457. Lord Macmillan's phrase 'the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed', has, as the opinions in the two cases seem to show, no meaning very different from Lord Atkin's description in M'Alister (or Donoghue) v. Stevenson, at p.580, viz. 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'".

Of at least equal importance is the passage from the judgment of Kitto J. in Thompson (at pp.642-643) upon which Fullagar J. was subsequently to place reliance in his judgments in Rich (at pp.144-145) and Cardy (at p.298) and to part of which reference has already been made. That passage from Kitto J's judgment reads:

> " The respondent's contention appears to assume that the rule of law which defines the limits of the duty owed by an occupier to a trespasser goes so far as to provide the occupier with an effective answer to any assertion by the trespasser that during the period of the trespass the occupier owed him a duty of care. The assumption is unwarranted, for the rule is concerned only with the incidents which the law attaches to the specific relation of occupier and trespasser. It demands, as Lord

Uthwatt said in Read v. J. Lyons &Co. Ltd. (1947)

> AC 156, at p 185, a standard of conduct which a reasonably-minded occupier with due regard to his own interests might well agree to be fair and a trespasser might in a civilized community reasonably expect. It would be a misconception of the rule to regard it as precluding the application of the general principle of M'Alister (or Donoghue) v. Stevenson, to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord Atkin's sense of the word: see Transport Commissioners of New South Wales v. Barton. The facts of the case must therefore be further examined for the purpose of considering whether there was another relation between the parties giving rise to such a duty of care that the jury could properly find a breach of it to have been a cause of the appellant's injuries."

As will subsequently be seen, the notion that the "special" or "limited" duties owed by an occupier qua occupier were different in nature from the ordinary Donoghue v. Stevenson duty was to be denied in Cardy, Anderson and Voli. With it, there was also to go the need to maintain a functional distinction between the duty of an occupier qua occupier and the ordinary duty of care which might otherwise arise by reason of some more involved relationship between occupier and visitor.

8. The plaintiff in Rich was treated as a trespasser upon the railway crossing where she was struck by a train. Again, that was not seen as being, in itself, decisive of the case. Fullagar J. (at p.144) confined the "authorities of which Indermaur v. Dames (1866) LR 1 CP 274, (1867) LR 2 CP 311 an d Gautret v. Egerton (1867) LR 2 CP 371 are leading examples" to those cases "where a plaintiff who has entered on premises occupied by a defendant suffers injury through some danger or defect in the premises themselves". Otherwise, liability was to be determined by reference to whether there was "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". Windeyer J's approach was similar. His Honour said (at p. 159):

> "The rules concerning the duties of occupiers are part of the law of negligence. The duty to a trespasser is a duty to a person who may also be a neighbour in the sense in which Lord Atkin used the word in discussing the extent of the duty of care in Donoghue v. Stevenson. Without repeating it, I would respectfully adopt what my brother Kitto said on this matter in his judgment in Thompson v. Bankstown Corporation."

The reference to Kitto J's judgment in Thompson is to the passage which is set out above.

9. In Cardy's Case, the injured boy was a trespasser on the defendant's land when he put his feet into hot ashes which were concealed under a surface crust. Dixon C.J. (at pp.285-286) and Fullagar J. (at pp.292-294) firmly rejected the approach of imputing to him a licence which clearly enough he did not have. A majority of the Court (Dixon C.J., Fullagar and Windeyer JJ.) held that the plaintiff was entitled to recover damages for breach by the defendant Commissioner of a duty of care owed to the plaintiff under the general law. With the benefit of hindsight, the critical judgment is that of Fullagar J. His Honour approached the question of the liability of an occupier for injury sustained on his land by a trespasser from the vantage point provided by a consideration of the liability of an occupier under the general law to a person lawfully on his land otherwise than in the exercise of an independent proprietary interest, that is to say, to an invitee or a licensee. Explaining the nature of the liability to a lawful visitor, his Honour said (at p.294):

> " The rules for which we refer primarily to Indermaur v. Dames and Gautret v. Egerton 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. There is, in English law, as Lord Atkin has said, 'some general conception of relations giving rise to a duty of care' (1932) A.C., at p.580. That general conception is stated by his Lordship in words now too famous to need quoting: Donoghue v. Stevenson. The standard of care required by the common law - the standard, departure from which, where the duty exists, constitutes actionable negligence - is stated in the equally famous words of Alderson B. in Blyth v. Birmingham Waterworks Co. (1856) 11 Ex 781, at p 784 (156 ER 1047, at p 1049). The important

> point for present purposes is that what we call shortly the duty of care arises from a de facto relationship. That relationship (as Lord Atkin pointed out after referring to Heaven v. Pender (1883) 11 QBD 503 and Le Lievre v. Gould (1893) 1 QB 491 may, and very often does, consist of mere physical proximity. But the relationships which give rise to the duty are of infinite variety, their only common characteristic being that which is stated by Lord Atkin in the passage referred to above. One such relationship is that which subsists
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> 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".

Fullagar J. stressed (at p.295) three general conclusions of legal principle:

> "First, the duty to an invitee and the duty to a licensee are both correctly described as duties of care. It is convenient enough to speak of them as special duties, but they are not special duties lying outside the general law of negligence. The rules are concerned only with laying down the standard of care appropriate to two special classes of case. Secondly, those rules are concerned only with cases where a visitor has suffered harm through some dangerous condition of the premises. Thirdly - and this may be regarded as a corollary - they do not abrogate or supersede the general law of negligence as affecting an occupier in relation to either an invitee or a licensee."

One sees here the movement away from treating any "special duty" owed by an occupier qua occupier as a logically prior duty in respect of the state of premises upon which a distinct and different ordinary common law duty of care might be superimposed. His Honour had come to see the duty of care which an occupier owes to a person lawfully upon his land as that which he owes under the common law as explained in Donoghue v. Stevenson. Any "special duties" which he owes to such a person merely by reason of the fact of his occupation should not be seen as different in nature from that ordinary common law duty of care. The rules which define those special duties, like the special duties themselves, lie within, and not outside, "the general law of negligence". That this is the proper import of his Honour's comments is confirmed by his exposition and development of the law in Anderson's Case.

10. The plaintiff in Anderson was an invitee. Notwithstanding that Kitto J. differed from Fullagar J. as to the ultimate question of fact in the case, he expressed his concurrence with the latter's expression of the relevant principles of law. In his judgment, Fullagar J. appears to me plainly to indicate the complete absorption of the "special duty" of an occupier qua occupier to a person lawfully upon premises into the ordinary Donoghue v. Stevenson duty of care. In the focal passage of his judgment, his Honour said (at p 56):

> "The concept of negligence, as a breach of a duty to use reasonable care, was long since well known in the common law. Willes J. was saying (in Indermaur v. Dames (1866) LR 1 CP 274, at pp 287-288) that, with respect to dangers existing on premises, such a duty of care arose from the relation of occupier and invitee, explaining what that duty would normally involve, and giving examples of the steps which would normally

> amount to a performance of that duty. 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".

The effect of this passage was not only to place within the ordinary principles of the law of negligence the cases and "special rules" relating to an occupier's liability to a person lawfully upon premises but also to identify the significance of those cases and "special rules" with respect to the basic questions of law (proximity and foreseeability of risk) and fact (breach of duty to take reasonable care) which arise under those principles.

11. In Cardy's Case, as has been seen, Fullagar J. had stressed that the rules governing the "special duties" of an occupier to a person lawfully on his land "do not abrogate or supersede the general law of negligence as affecting an occupier in relation to either an invitee or a licensee". His Honour proceeded (at pp.294ff.), by analogy, to apply the same general principle in respect of the proposition that an occupier qua occupier "owes no duty of care to a trespasser" and to conclude that the absence of any such duty of care on the part of an occupier qua occupier to a trespasser did not preclude the application of the principles laid down in Donoghue v. Stevenson. The fact that a plaintiff is a trespasser will be relevant to, and may well be decisive of, the question whether the defendant was under a relevant duty of care. If, however, all the circumstances including that fact are such as to give rise to a duty of care towards a trespasser under general principles, the fact of trespass will not preclude the implication of such a duty. In the passage from which their Lordships had quoted in Quinlan in their dismissive reference to this judgment, Fullagar J. said (at pp.298-299):

> " The circumstances which may justify the conclusion that an occupier has committed, by act or omission, a breach of a general duty of care in relation to an invitee or a licensee or a trespasser are, to use Lord Macmillan's words, 'various and manifold'. So far as trespassers are concerned, the questions of duty and breach generally arise (and perhaps can only arise) where the occupier or his servants know that a trespasser is on the land, or that trespassers are in the habit of entering upon the land, and in a high proportion of cases the plaintiff trespasser is a child. In such cases it seems hardly possible to classify or enumerate the factors which will be relevant to the question whether by act or omission the defendant has fallen short of the standard of the reasonable man ... The fact that the plaintiff is a trespasser is, of course, always itself a relevant factor, and among the most important of other factors will commonly be the comparative slightness or seriousness of the risk and the comparative simplicity or difficulty of taking effective precautions. ...The standard of care does not vary according to the age of the trespasser, but the fact that he is a young child will often be a relevant matter both because a child is less likely than an adult to realize that he is where he has no business to be, and because a precaution, such as a warning notice, which might be effective in the case of an adult, could not be expected to be effective in the case of a child".

12. Quite deliberately, Fullagar J. and Kitto J. had moved not towards a revolution of the law of negligence but towards what they saw as an exposition of the full unifying effect that Donoghue v. Stevenson, properly understood, had had upon that law. Windeyer J. drew the threads of that movement together in Voli's Case (at pp 88-89) in a judgment with which the other members of the Court (Dixon C.J. and Owen J.) concurred:

> " Turning now to the claim against the Shire Council: this was put in various ways based upon the well-known formulations of the duty of the occupier of premises to visitors who come there in differing rights and for varying purposes. These rules do not of themselves provide a final answer in all cases. In some cases a lawyer thinks at once of Indermaur v. Dames, and only later of Donoghue v. Stevenson. But, 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. The judgments in Commissioner for Railways (N.S.W.) v. Cardy provide recent illustrations of this tendency. How the visitor comes to be upon the premises is always an important fact. But it is not necessarily decisive. It seems better to appreciate that the ultimate question is one of fact and governed by general rules, than to create new categories and distinctions".

The one qualification which I would respectfully make to Windeyer J's summary of the then trend of judicial authority is to his Honour's statement that the special rules concerning invitees, licensees and others are ultimately "subservient" to the general principles of the law of negligence. That statement is capable of being read as indicating a reluctance to take the step of identifying the duty owed by an occupier to invitees, licensees and trespassers under the so-called "special rules" with the ordinary common law duty of care. While I do not think that that is the true purport of the statement, I would prefer to say that the trend of judicial authority in this Court was, to adapt the words of Fullagar J. in Anderson's Case (see above), towards seeing those "special rules" as explaining and exemplifying the application of those general principles to particular categories of case.

13. If the trend of authority in this Court is accepted as reinstated as a result of developments in the law since Quinlan, the liability of the respondent to the appellant in the present case falls to be decided by the application of the ordinary principles of the law of negligence to the particular circumstances of the case. The more important of the relevant developments in the law have already been identified. It becomes necessary to consider them in somewhat more detail for the purpose of determining both the extent to which they have effectively removed the restraints imposed by Quinlan and the extent to which they have confirmed, or removed obstacles to the acceptance of, the reasoning and conclusions in judgments in this Court in the series of cases before Quinlan.

14. The starting point of that reasoning in this Court was, as has been said, the proposition that Donoghue v. Stevenson had effected a reorientation of "the whole law of negligence" and that, in the

context of that reorientation, the isolation of occupier's liability by Addie's Case required to be "re-examined and tested" (see Cardy, at p.291). That proposition was controverted by the acceptance in Quinlan of the adjusted Addie's Case "formula" as providing an authoritative and comprehensive definition of an occupier's liability to a trespasser and with the passing view expressed by the Judicial Committee (Quinlan, at p. 1084) that the "shorthand of Donoghue v. Stevenson" had, in 1964, already been "somewhat overworked". Subsequent authority has confirmed the correctness of the starting point of the reasoning of this Court and established that, to the extent that it denied the validity of that starting point, the judgment in Quinlan should no longer be accepted. The prima facie general application of the ordinary principles of common law negligence as explained by Lord Atkin in Donoghue v. Stevenson has now been accepted in the United Kingdom, in this country and in other parts of the common law world (see, e.g., Anns v. Merton London Borough Council (1978) AC 728, at pp 751-752 ; Scott Group Ltd. v. McFarlane (1978) 1 NZLR 553, at pp 572-575,583- 584 ; Wyong Shire Council v. Shirt (1980) 146 CLR 40, at pp 44 ff.; Junior Books Ltd. v. Veitchi Co. Ltd. (1983) 1 AC 520, at pp 535,539-542 and 549 ; McNamara v. Electricity Supply Board (1975) IR 1 ; Jaensch v. Coffey, (1984) 58 ALJR 426, at pp 428,431ff., 440 ; and, generally, the cases mentioned in J. Cadenhead, "Recent Trends in 'Negligence'", Canterbury Law Review, vol.2 (1983), 25). Provided the requisite relationship of proximity exists, a person is under a prima facie common law duty to take reasonable care in the presence of a reasonably foreseeable real risk of injury to another (see, generally, Jaensch, at pp.440ff.). There is no general rule which precludes a duty of care arising under those ordinary principles in favour of a person merely because he is engaged in tortious conduct. The fact that a person is engaging in such conduct may well be a relevant consideration; it does not, however, make him an outlaw. Prima facie, those ordinary principles of common law negligence are applicable to determine whether the circumstances of a particular case are such as to place an occupier of premises under a duty of care to one who is upon them either lawfully or in the character of a trespasser.

15. The proposition which constituted the second step in the previous reasoning in this Court has also been confirmed by subsequent authority. It is that occupation of land does not, in itself, constitute a ground of exemption from liability under the ordinary principles of the law of negligence: that those ordinary principles are applicable in respect of the liability of an occupier, at least to an invitee or licensee, in respect of a mishap on his land. That proposition has been said in this Court by the present Chief Justice to be "incontestably correct" (Public Transport Commission (N.S.W.) v. Perry (1977) 137 CLR 107, at p 131 and see, also, at pp 138-139, 146-147). It has also been accepted in the Privy Council (see Commissioner for Railways v. McDermott (1967) 1 AC 169, at pp 186-187) and in the House of Lords where the contrary proposition has been described as "heresy" (see Herrington (1972) A.C., at p. 907 and also at p. 913). To the extent that London Graving Dock Co. Ltd. v. Horton might still represent authority to the contrary, the dissenting judgments of Lord MacDermott and Lord Reid in that case are, at least in this country, to be preferred. In that regard, it is relevant to note that the majority decision in Horton's Case was, after the Third Report (Occupiers' Liability to Invitees, Licensees and Trespassers) of the English Law Reform Committee, reversed in England by the Occupiers' Liability Act 1957 (U.K.), s.2(4)(a).

16. It cannot be said that subsequent developments have established as "incontestably" correct the next step in the process of reasoning, that is, that what were commonly referred to as the "special duties" which an occupier owed to an invitee or a licensee are, on analysis, properly to be seen as instances of the ordinary common law duty to take reasonable care in circumstances involving the particular relationship of occupier and lawful visitor. The force of the reasoning which leads to that conclusion has not however been weakened by subsequent developments. Indeed, a denial of that reasoning and conclusion necessarily involves the renunciation of the origins of the ordinary

common law duty of care in that that ordinary duty was largely founded by Lord Atkin in Donoghue v. Stevenson on the judgment of Lord Esher (then Brett M.R.) in Heaven v. Pender, at pp 508-509 where, in an action by an employee of an independent contractor against the occupier of premises, Lord Esher had formulated a "larger proposition" of the liability of an occupier to an invitee which he expressly identified as being "the same proposition" as that which covered "the similar legal liability inferred in the cases of collision and carriage":

> "The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger".

17. 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, e. g., per Pearson L.J., Videan, at p.678) and learned writings (see, e.g., G. Hughes, "Duties to Trespassers: A Comparative Survey and Revaluation", Yale Law Journal, vol.68 (1959), 633, at 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 characterization 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. In so far as subsequent authority is concerned, the considerations which led to the rejection of its use as a line of demarcation between distinct and concurrent duties in the case of a trespasser in both the Court of Appeal and House of Lords in Herrington (see (1971) 2 Q.B., at pp.130,140; (1972) A.C., at pp.909-910, 929,942) and in the Privy Council in Cooper (at p.645) are also applicable to its use as such a line of demarcation in the case of a lawful visitor.

18. It is true that one can find statements in judgments in this Court, both before and after Quinlan, which support the view that the "special duties" of an occupier qua occupier are distinct from, and may exist concurrently with, the ordinary common law duty of care. Statements to that effect in cases before Quinlan must, however, be seen as having been overtaken by the clear recognition in Cardy and Anderson that these "special duties" were properly to be seen as the ordinary duty of care resulting from the application of the principles of negligence to a particular category of case. Statements to that effect in judgments in this Court subsequent to Herrington and Cooper (see Perry, at pp.132, 138-139) were made in a context where what was involved was the imposition of the ordinary Donoghue v. Stevenson duty upon an occupier and should not be seen as involving a considered denial of the process of assimilation of the particular principles governing the duty of an occupier qua occupier with the principles constituting the ordinary common law of negligence which can be traced through the prior judgments in the Court. The same can be said of comments to

the like effect in the judgment in McDermott (at pp.186-187) where their Lordships, in the interval between Quinlan and Herrington, plainly recognized (at p.189) the practical difficulty in attempting to distinguish between an ordinary duty of care in respect of activities upon land and a special duty in respect of the static condition of land.

19. It follows that there no longer exists any proper basis for a refusal to accept as authoritative the statements in the judgments in this Court before Quinlan to the effect that the rules concerning the liability of occupiers are part of the general law of negligence and 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. Those statements should again be accepted as correct. In that regard, it is relevant to note the close correspondence between the effect of those statements in the earlier cases in this Court before Quinlan and the views expressed by Lord Denning in the House of Lords in Wheat v. E. Lacon &Co. Ltd. (1966) AC 552 le ss than two years after the decision in Quinlan. In the context of observations on the Occupiers' Liability Act 1957 (U.K.) with which Lord Pearce expressed (at p.587) his agreement, Lord Denning said (at pp.577-578):

> "...by the year 1956 the distinction between invitees and licensees had been reduced to vanishing point. The duty of the occupier had become simply a duty to take reasonable care to see that the premises were reasonably safe for people coming lawfully on to them: and it made no difference whether they were invitees or licensees: see Slater v. Clay Cross Co. Ltd. (1956) 2 QB 264,269 . The Act of 1957 confirmed the process. It did away, once and for all, with invitees and licensees and classed them all as 'visitors'; and it put upon the occupier the same duty to all of them, namely, the common duty of care. This duty is simply a particular instance of the general duty of care which each man owes to his 'neighbour'."

20. One comes now to the critical question for the purposes of the present case. Can a trespasser upon premises be at the same time the occupier's neighbour in Lord Atkin's sense? In this Court, that question had been answered in the affirmative by Kitto J. in Thompson. That answer was, as has been seen, accepted and developed by other members of the Court as the final step in the process of absorbing the occupier's "special duties" to an invitee and a licensee and "limited duty" to a trespasser into the general fabric of the ordinary law of negligence: by Fullagar J. in Rich, in Cardy and (with the concurrence of Kitto J.) in Anderson and by Windeyer J. in Rich and (with the concurrence of Dixon C.J. and Owen J.) in Voli. It was denied by the Privy Council in Quinlan. In what has been written above, I have expressed the view that developments since Quinlan have either confirmed or reinstated the starting point of that reasoning and its earlier steps. It has been seen that much of what was said in Quinlan can no longer be accepted. It becomes necessary to consider whether the final step remains reversed by Quinlan or other subsequent authority.

21. One thing at least is clear. The acceptance in Quinlan of the adjusted Addie's Case "formula" as "an exclusive or comprehensive definition" of the occupier's duty to a trespasser is no longer good law. It was rejected by the House of Lords in Herrington and by the Judicial Committee in Cooper after a period of judicial undermining which reflected the perception of its lack of sound basis in principle and its conflict with acceptable social standards. It and the associated formulae defining an occupier's liability to a visitor by reference to rigid distinctions between invitee, licensee and

trespasser may have seemed appropriate to a social structure based largely on land holdings, particularly in the context of a heritage tracing back to feudal times. They were, however, simply inadequate for the requirements of justice in a modern industrialized urban society where the boundary between invitee, licensee and trespasser is likely to be at best blurred and where the trespasser may be unconscious of any wrong-doing or on an errand of mercy while the confidence man or thief may enter in the guise of an invitee (cf. Kermarec v. Compagnie Generale Transatlantique (1959) 358 US 625, at pp 630-631 ; Munnings v. Hydro-Electric Commission (1971) 125 CLR 1, at p 24). It was never appropriate even to the rural parts of this country where the size of land holdings, the comparative unproductiveness of land and local attitudes are liable to make both "occupation" of land and the notion that a wayfarer or visitor who is not an invitee or a licensee is a trespasser somewhat unreal and where there remain significant areas in which it would be more than somewhat unreal and quite unjust to determine the existence and content of a duty of care by reference to whether an aboriginal plaintiff, to whom notions of personal ownership or occupation by others of particular parts of his communal environment are likely to be culturally incongruous, came upon land which might lie within his inherited spiritual custodianship as "invitee", "licensee" or "trespasser".

22. In Herrington, their Lordships were not concerned with the question whether the duties of an occupier to a visitor should be absorbed generally by the ordinary law of negligence. The enactment of the United Kingdom Occupiers' Liability Act 1957 (U.K.) had converted the occupier's ordinary duty to a lawful visitor into a statutory one and, by so doing, had effectively isolated any common law duty to a trespasser. The United Kingdom Parliament's "silence" on the subject of the duty owed to a trespasser in that Act was seen by at least most of their Lordships as a factor militating against the wholesale rejection of the view accepted in Addie's Case that the occupier's duty to a trespasser was to be seen as separate and distinct from his duty to a lawful visitor (see (1972) A.C., per Lord Reid, at pp.897-898; per Lord Morris of Borth-y-Gest, at pp.903-904; per Lord Wilberforce, at pp. 912,921). In those circumstances, it is not surprising that the common law duty to a trespasser was defined by a majority, and arguably all, of their Lordships in Herrington in terms which assimilated it neither to the statutory common duty of care nor to the duty of care under the ordinary common law principles of negligence. It is, however, relevant to note that one finds, in some of the speeches in Herrington, express acceptance of the proposition that the fact that a man or a child is a trespasser does not necessarily preclude him or her from being a neighbour (see per Lord Morris of Borth-y-Gest, at pp.908-909) albeit an "under-privileged" one (see per Lord Pearson, at p.924). It is also relevant to note that some passages of the speech of Lord Morris of Borth-y-Gest go a long way towards assimilating the occupier's duty of care to a trespasser with the ordinary common law duty of care (see at pp.907ff.).

23. The Privy Council's decision in Southern Portland Cement Ltd. v. Cooper is of more direct significance for present purposes. The case involved the duty of an occupier to a trespasser in New South Wales where no "Occupiers' Liability" legislation had or has been enacted. Their Lordships rejected the Addie and Quinlan comprehensive formulations of the occupier's duty to a trespasser as too narrow: "It is not enough to say that he must not act recklessly or maliciously. His duty must be formulated in broader terms" (at p.643). They also firmly rejected the notion that there were two distinct duties, existing side by side, falling upon an occupier towards a trespasser or potential trespasser: "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" (at p.645). So much is supportive of what had been said in this Court in the judgments prior to Quinlan. It is in the formulation "in wider terms" of the occupier's duty to a trespasser that an element of ambiguity is encountered. In the context of the differing views which

four of their Lordships had expressed in either the Court of Appeal or House of Lords in Herrington, it is possible that that element of ambiguity was intended or unavoidable.

24. There are passages in the judgment in Cooper (see at pp.644B-645D) which, if read in isolation, might seem to indicate the rejection by their Lordships of the applicability of the ordinary principles of the law of negligence to govern the occupier's liability to a trespasser (cf., per Barwick C.J., Perry, at pp.115ff.). In those passages, the hypothetical "reasonable man" placed in the situation of the defendant appears to be supplanted by the "humane man with the financial and other limitations" of the defendant (cf. Lord Reid's "conscientious humane man" in Herrington (1972) A.C., at p.899) and the occupier's duty is defined without express reference to the concept of "reasonable foreseeability" which lies at the heart of the ordinary law of negligence. Those passages in the judgment must however be read in the context of the passage which had immediately preceded them (at pp.643-644):

> "Next, their Lordships have in mind the classic passage from Lord Atkin's speech in Donoghue v. Stevenson (1932) A.C. 562,580 :
>
> 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.
>
> But in applying that passage to trespassers it must be remembered that the neighbourhood relationship has been forced on the occupier by the trespasser and it would therefore be unjust to subject him to the full obligations resulting from it in the ordinary way" (underlining added).

25. On balance, it appears to me that their Lordships' judgment in Cooper is consistent with the earlier identification in this Court of the duty of an occupier to an actual or potential trespasser as the ordinary common law duty of care. On that approach, the relevant passages (at pp.644-645) are properly to be seen as identifying factors and considerations which are of particular relevance in "applying ...to trespassers" the principles set out in the quoted passage from Donoghue v. Stevenson. That passage is the classic statement of the ordinary principles of the modern law of negligence. The ordinary common law duty of care is the duty which may arise from its application to the circumstances of the particular case. The emphasis on the consideration that the trespasser has forced the "neighbourhood relationship" upon the occupier (see above) can be seen as echoing Fullagar J's comment in Cardy (at p.299) that the fact that a plaintiff is a trespasser is "of course, always itself a relevant factor". Indeed, the reference to the "neighbourhood relationship" being forced upon the occupier underlines that what is involved is the application of the ordinary principles to a particular category of case. Their Lordships' insistence (Cooper, at p.645) on the "all-embracing" nature of the relevant considerations can readily be seen as echoing Fullagar J's statement (Cardy, at p.298) that it seems hardly possible to classify the relevant factors. Their statements (at p.644) that the occupier must consider "the degree of likelihood of trespassers coming" and "the degree of hidden or unexpected danger to which they may be exposed if they come" and that the occupier is entitled to pay regard to the disadvantage to him if he takes or

refrains from action for the benefit of trespassers correspond with Fullagar J's statement that "among the most important of other factors will commonly be the comparative slightness or seriousness of the risk and the comparative simplicity or difficulty of taking effective precautions" (at p.299). In the context of the judgment in Cooper, the intrusion of the "humane man" is not inconsistent with the duty owed by an occupier to a trespasser being the ordinary common law duty of care. References to the "humane man" and "common humanity" are not inappropriate in describing the reasonable care which should be exercised by the reasonable man of the common law when it is reasonably foreseeable that his actions or omissions are likely to injure a trespasser who has forced a relationship of proximity upon him. As Lord Salmon, who was a member of the Board in Cooper, had pointed out when a member of the Court of Appeal in Herrington ((1971) 2 Q.B., at p.122), the concept of owing your neighbour a duty of reasonable care itself springs from the impulse of common humanity. With due respect to those who have seen the matter differently however, I consider that to "define a legal duty ... as a duty to treat a man with common humanity can, perhaps, be criticised as imposing too wide and vague an obligation" (per Salmon L.J., Herrington (1971) 2 Q. B., at p.122) and that the persona of the "humane" or the "conscientious humane" man should be sent packing from the fields of negligence as an unwanted immigrant.

26. In the result, the developments of the law since Quinlan have effectively removed all obstacles to the renewed acceptance in this Court of the exposition of the principles governing the nature of the liability of an occupier to a visitor which are to be found in the judgments of Fullagar J. in Cardy and Anderson and in the judgment of Windeyer J. in Voli. Those statements should now again be seen as authoritatively stating for this country the relevant principles of the common law governing occupier's liability. 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. 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. Where the visitor is lawfully upon the land, the mere relationship between occupier on the one hand and invitee or licensee on the other will of itself suffice to give rise to a duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to him or her. When the visitor is on the land as a trespasser, the mere relationship of occupier and trespasser which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may, as a matter of law, supply the requisite degree of proximity or give rise to a reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence.

27. Whether, when a duty to take reasonable care exists, reasonable care has been taken is a question of fact to be answered in the context of the "all-embracing" considerations to which the Judicial Committee referred in Cooper and to which Fullagar J. had referred in Cardy. As Salmon L.J. observed in the course of his judgment in Herrington ((1971) 2 Q.B., at p.120):

" What is reasonable care is only such care as is reasonable in all the circumstances of the case. The circumstances vary infinitely from case to case. Foreseeability of the likelihood of injury, the degree of risk, the gravity of the injury, are all circumstances which have to be assessed by the court and weighed against the burden which would be incurred by an occupier in taking steps to prevent injury before the court can decide whether or not negligence has been made out. The circumstance that the plaintiff is a trespasser, and the sort of trespasser he is, must clearly be of great importance."

28. The view has been expressed that to extend the ordinary duty of care to a trespasser or to equate the duty of care owed to a trespasser with that owed to an invitee or a licensee would cast an unduly onerous burden upon the occupier of land (cf., e.g., McMahon, "Herrington and Trespassers in Ireland" (1975) 91 L.Q.R. 323 and the 1975 Report of the Sub-Committee of the Chief Justice's Law Reform Committee (Victoria) under the Chairmanship of Nelson J. but note the contrary conclusion reached in the Supplementary 1982 Report of the Sub-Committee, under the Chairmanship of O'Bryan J., which was adopted by the Victorian Parliament). That view fails however to pay sufficient regard to the importance which may attach to the circumstances of the plaintiff's presence on premises in relation to the questions whether the necessary proximity of relationship existed between him and the defendant occupier, whether there had been reasonable foreseeability of a real risk of relevant injury and whether, if a duty of care had arisen, the defendant's response to it had, in all the circumstances, satisfied the requirement of reasonable care. To recognize that the ordinary principles of the law of negligence apply to govern the existence and content of a duty of care to a trespasser is not to equate the duty of care to a trespasser with that to an invitee or licensee in the sense of saying that the one will exist whenever the other would exist or that the particular content of one will be the same as would be the content of the other. To the extent that it remains appropriate to draw distinctions, for the purposes of the common law of negligence, by reference to the broad categories of "invitee", "licensee" and "trespasser", it is probably accurate to say that an occupier's duty to a "trespasser" cannot "exceed his duty to a licensee" (see Cooper, at p.643) in the sense that a duty of care to a trespasser is less likely to exist and is likely to be less onerous than would be the duty owed in otherwise corresponding circumstances to a licensee. Such broad categories are however inappropriate to provide a sound basis for such generalizations. A trespasser may be a burglar, a traveller in difficulty, a person on an errand of mercy, a person who walks on another's land believing it to be his own, a person who honestly follows a mistaken direction or accepts an unauthorized invitation, a person who cannot see or a child who cannot understand. To classify "all these persons under one doctrinal rubric ... makes no sense" (see G. Hughes, op. cit., at p.688 and cf. per Windeyer J., Cardy, at p.319).

29. In the present case, the relationship between the respondent and the appellant clearly transcended the mere relationship of occupier and trespasser. The basic relationship between the respondent and the appellant was that between an occupier of land who commences to fire a rifle into a car driven by a trespassing thief and a passenger who lies huddled in the car. Not surprisingly, it has not been suggested that there is any overriding general rule which precludes a general duty of care in relation to the use of a rifle arising under ordinary principles in favour of a person in the company of a thief. It has been seen that there is no overriding rule of law which precludes such a duty of care arising in favour of a trespasser. That being so, the question whether the respondent owed a relevant duty of care falls to be determined by reference to whether the requisite relationship of proximity existed between the appellant and the respondent and to whether there was a

reasonably foreseeable risk of relevant injury to the appellant or to a member of a class which included her. Once the facts are ascertained, both those questions are questions of law. As was pointed out in Jaensch (at p.439), the fact that an act of one person can be reasonably foreseen as "likely to injure" another is an indication, and sometimes an adequate indication, that the requirement of "proximity" is satisfied. It is plain enough in the present case that, if there was reasonable foreseeability of injury to a class of person of which the present appellant was a member, the requisite element of proximity existed between the appellant and the respondent at the time the respondent fired his rifle into the car in which she lay hidden. Indeed, it is difficult to conceive a more obvious example of direct proximity than that which exists between the person who discharges a lethal weapon and a person who in fact is, and is reasonably foreseeable as being, in the line of fire.

30. The question whether there was a reasonably foreseeable risk of relevant injury must, as has been said, be answered in the light of all relevant circumstances. Two factors or considerations are, however, of particular importance in the present case. They militate in opposite directions. The first is the manner in which the appellant came to be on the respondent's land. The other is what the respondent had seen and could see at the time he fired the second rifle shot at the car.

31. The appellant was on the respondent's land as a trespasser. She came at night as a passenger in an unlit car. The driver was a youth who was in the process of stealing the respondent's petrol when the respondent fired the first shot from his rifle. The appellant was not, on the learned trial judge's direction to the jury which is not challenged, implicated in the proposed theft of petrol at least up until the time when the car came to the respondent's property: on her account, she did not even then understand why her companion switched off the car lights and drove onto the property. The second shot was aimed by the respondent at the car for the purpose of immobilising it. The firing of that second shot at the car obviously involved a significant likelihood of death or injury to anyone in the car. The question whether there was reasonable foreseeability of a real risk of injury to the appellant or to a class of persons of which she was a member turns ultimately on whether it was, in the circumstances in which the respondent was placed, reasonably foreseeable that someone was in the car.

32. The respondent was neither taken by surprise nor forced to defend himself. He was lying in armed ambush for a petrol thief or petrol thieves whom he expected to come. When the darkened car drove onto his property, there was an obvious possibility that it might contain a passenger as well as a driver. There was an obvious likelihood that any passenger in the car would duck down out of the line of sight when the first rifle shot was fired. Nothing that had occurred up to the time when the first shot was fired had excluded a real risk or likelihood of the presence of a passenger. The appellant claimed that she got out of the car and, when the first shot was fired, got back in it to hide. Even if that evidence be rejected, there is nothing to suggest that she had huddled down on the front seat before she was frightened by the firing of the first shot. The explanation of why the respondent had not seen her before he fired that first shot is provided by his own evidence: "I would be about 30 yards away"; "I couldn't see that clear"; "It was dark, you know, it wasn't broad daylight"; "Well I didn't get much time, did I, but there was no one to be seen"; and, perhaps most important, "I couldn't see the driver in the car, until he got (out)" coupled with the respondent's evidence that, after the driver had got out and while he was at the petrol tank, the respondent had "concentrate(d) all (his) attention" on the driver and "did not take (his) eyes off him". In these circumstances, nothing had occurred to remove the reasonable foreseeability of the presence of a passenger in the car or the reasonable foreseeability of a real risk of injury to any such passenger if a rifle was fired at the car. It follows that the respondent was, in relation to firing the rifle, under a duty to take

reasonable care to avoid physical injury to any person who, to paraphrase the jury's finding which is not challenged, might, as he "should ... have known or believed", be in the car.

33. As has been said, no attack is made upon the jury's finding that the respondent was guilty of negligence in firing the shot which caused injury to the plaintiff. That finding, in the context of the learned trial judge's summing up to the jury including his emphasis on the respondent's right to take reasonable steps to protect his property, amounted to a finding, as a matter of fact, that the respondent was in breach of the duty to take reasonable care. That being so, the appellant is at the least entitled to an order restoring the verdict in her favour which she obtained on the trial.

34. There remains to be considered the question of contributory negligence. I am conscious of the force of the considerations that led Gobbo J. in the Full Court of the Supreme Court to reach the conclusion that the jury's finding of contributory negligence should be set aside. On balance however, I consider that that finding was properly open. Notwithstanding her evidence to the contrary, it was open to the jury to come to the conclusion on all the evidence that, while the plaintiff had not been a party to the planning of the theft of petrol, she had remained in the car as an uncomplaining companion of the driver when he drove the darkened car onto the respondent's property in the course of conduct which was obviously at least unlawful. Such a conclusion, combined with the absence of evidence of fear or attempted dissuasion of the driver or of any warning cry, provided an adequate foundation for the jury's finding of contributory negligence. The apportionment of blame between the appellant and the respondent of 40% and 60% respectively was within the permissible range and should not be disturbed.

35. Brief mention should be made of three further matters. The first is that, since the occurrence of the events giving rise to this case, the Victorian Parliament became the only Australian Legislature to introduce a statutory common duty of care on the part of "an occupier" in relation to the state of premises. That statutory duty is "to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises" (see Occupiers' Liability Act 1983 (Vict.), s.2(2); Wrongs Act 1958 (Vict.), s.14B(3)). It is unnecessary to consider here the extent, if at all, to which those statutory provisions have altered the content of the law in Victoria. The second matter is that, as has been said, the case for the appellant was advanced at first instance as a case of trespass to the person. While, in this Court, the case was argued primarily as an action in negligence, the appellant did not abandon her claim in trespass. In view of the conclusion that I have reached on the question of negligence, it is unnecessary that I give separate consideration to that claim or to the question whether, in the circumstances of the present case, an action based on trespass to the person properly lies concurrently with the more appropriate action in negligence (cf. Venning v. Chin (1974) 10 SASR 299, at pp 306-308 ; RJ. Bailey, "Trespass, Negligence and Venning v. Chin", Adelaide Law Review, vol.5 (1973-1976), 402, at pp 415ff.). The third matter is related to the second. It is that I have been concerned lest the respondent might have been prejudiced in the conduct of his case at first instance by reason of the late emergence of the appellant's claim in negligence. No objection has, however, been raised on that ground and both parties have conducted the appeal in this Court on the basis that it should be finally determined on the arguments presented. In all the circumstances, that is the course which should be followed (cf. Cardy, at p.287; Cooper, at pp.645-646).

36. I would allow the appeal, set aside the judgment and orders of the Full Court of the Supreme Court of Victoria and restore the judgment founded on the jury's verdict at first instance.

DAWSON J. The appellant, who was the plaintiff in the action, sued the defendant for damages for trespass to the person and for negligence. The claim arose out of an incident in which the defendant shot the plaintiff in the arm. The case was tried by a jury which returned a verdict in favour of the appellant. Damages were assessed at $17,000 but were reduced because of the contributory negligence of the plaintiff. She was awarded the sum of $10,200.

2. The defendant was a farmer who lived at Wedderburn, but travelled each day to his farm, which was at Koorong Vale, about eight miles away. On the farm was a 250 gallon petrol tank and pump which the defendant used to fuel farm vehicles. From about 1977 the defendant had been troubled from time to time by the theft of petrol from the farm tank. The pump was operated by hand and the defendant put expensive locks on it, but these were broken by thieves. He wired up the hose, but this, too, was of no avail. The nearest police station was some miles from the farm but the defendant told a local policeman of the thefts and told him that he had tried to trace the tracks of vehicles which had been used. The policeman told the defendant " ... you get some better evidence and get the car and I'll do the rest."
A week before the incident in which the plaintiff was
injured, the defendant left his property on a Sunday evening, having wired up the hose of the petrol pump, only to find on Monday morning that the hose was out and petrol was all over the ground. The defendant waited every night during the next week to see if he could catch the thief. On Sunday, 10 December 1978, the defendant, armed with a shot gun and a rifle, came back to his property in the evening with his wife. Concealed by an old water tank, the defendant waited. At about 10 p.m. he saw the lights of a car coming down the road towards the gate of the property. As it neared the gate the lights went out. The gate was opened and the car entered the paddock where the petrol tank was. It pulled up beside the petrol tank and, according to the defendant, someone got out of the driver's side and walked around the back of the car to the pump. After interfering with the wiring of the hose, he put the hose in the petrol tank of the car and started pumping. The defendant said that there was no sign of anyone else and no one else got out of the car.

3. The defendant said that he " ... fired a shot at the car and yelled at the same time to piss off and leave the car." He said that he tried to hit the motor in order to split the block and render the car undrivable. It appears that in fact the bullet went through the front mudguard. He then intended going to the police and showing them that the car was there. The intruder ran around in front of the car and the defendant fired another shot at the car which was intended to frighten him. The defendant said that he was a good shot and could have hit the man if he had wanted to. So far as the defendant was aware, there was no other person in the car. The defendant's rifle then jammed and he ran back and picked up his shot gun. By this time the intruder was in the car attempting to make a getaway. The defendant ran up to the car and fired one shot at the wheel, which flattened the tyre, and then fired another shot. He called out a number of times to the intruder to stop. The defendant fired a shot at the windscreen of the car on the passenger side as it was coming towards him and then fired two more shots at the rear of the car as it was making off across the paddock. At no time, according to the defendant, was he aware of any other person in the car than the driver.

4. The plaintiff, who at the time was 16 years of age, lived with her parents at Boort, a town some 22 miles from the defendant's farm. She had developed an association with a youth named Robert Cox who lived at Ballarat but stayed with the plaintiff and her parents at Boort during week-ends. On the week-end on which the shooting took place, Cox turned up in a white Holden motor car which was in fact stolen. On the Sunday night after dinner the plaintiff went for a drive with Cox. She said they had just "gone driving" and that she did not know that the car was stolen. She said that she was unaware of any plan on Cox's part to steal petrol from the defendant's property.

5. As Cox drove into that property, he switched off the lights of the car. The plaintiff said she did not understand why Cox went into the property or why he switched off the lights. She said that when the car stopped, Cox went to the back of the car and that she also got out of the car and stood beside the front passenger side door. She said that as soon as she heard the first shot fired, she immediately climbed back into the car and huddled on the front passenger seat below the line of the window. She denied that at any time before she was injured she knew that Cox was attempting to steal petrol.

6. The plaintiff pleaded her claim in trespass to the person and negligence in the alternative. The learned trial judge accepted the view expressed by Windeyer J. in McHale v. Watson (1964) 111 CLR 384 that in cases involving a battery by a blow or missile, liability for trespass to the person is not strict but arises only where the act which is said to constitute the trespass was either intentional or negligent and it is not for the plaintiff to prove intent or negligence, but for the defendant to prove absence of intent and negligence on his part. In expressing this view, Windeyer J. relied upon Stanley v. Powell (1891) 1 QB 86 and Weaver v. Ward (1617) Hob 134 (80 ER 284) and made reference to decisions in this country in Blacker v. Waters (1928) 28 SR (NSW) 406 and Williams v. Milotin (1957) 97 CLR 465 . He rejected the conclusion reached by Diplock J. in Fowler v. Lanning (1959) 1 QB 426 that it is for the plaintiff to prove intent or negligence, a conclusion which was accepted and developed by the Victorian Supreme Court in Kruber v. Grzesiak (1963) VR 621 and the Court of Appeal in Letang v. Cooper (1965) 1 QB 232 . It is not necessary in this case to examine more closely this divergence of authority. See the discussion in (1966) 5 M.U.L.R. 158. The case went to the jury upon the basis that there was no intentional shooting and, although there was obvious difficulty in directing a jury that, on the one hand, the defendant is required to prove the absence of negligence on his part in order to avoid liability in trespass, on the other hand the onus of proving negligence in the alternative claim rests upon the plaintiff, the relevant evidence was before the jury and the result can hardly have depended upon where the onus of proof lay. In fact, the trial judge neglected to direct the jury that the burden of proof in the alternative claim of negligence rested upon the plaintiff, but this could not and did not provide any basis for complaint by the plaintiff.

7. Although more than one issue was raised by the defendant in his defence and dealt with at the trial of the action, the argument before us (apart from the question of contributory negligence) did not extend beyond a consideration of the defendant's liability, if any, having regard to the answers which were given by the jury to the questions asked of them and having regard to the fact that the plaintiff was at the time she sustained her injury a trespasser upon land occupied by the defendant. The latter fact, whilst it appears not to have been admitted or even raised in the pleadings, was not contested before us nor was it contested that the plaintiff's claim be dealt with upon that basis. It was also assumed, as is clearly correct, that negligence in so far as it may be required to be proved or disproved to establish liability for trespass to the person, is such negligence as constitutes fault at law and is not coextensive with the modern tort of negligence which, apart from anything else, is unlike trespass in that it is derived from case and requires damage to be established. See McHale v. Watson, at p 388. All of this has limited relevance because, as the argument has proceeded before us, and despite the way in which the case was pleaded, the outcome of the case is dependent upon whether the relationship of occupier and trespasser, or some other relationship, gave rise to a duty of care which the defendant failed to observe. These issues should have emerged clearly at the trial, but they do not appear to have done so, largely, it seems, because of the manner in which the case was pleaded.

8. The questions which the trial judge put to the jury, and the answers which they gave, are as

follows:

"1. Did a shot fired by the defendant

on 10th December, 1978 cause injury to the plaintiff? Yes.

2. Prior to the firing of the shot:

(a) did the defendant know or believe that a person other than Cox was in the car? No.

(b) did the defendant know or believe that a person other than Cox might be in the car? No.

(c) should the defendant have known or believed that a person other than Cox was in the car? No.

(d) should the defendant have known or believed that a person other than Cox might be in the car? Yes.

3. Did the defendant fire the rifle knowing the bullet might strike some person other than Cox, but not caring whether or not it did strike him or her? No.

4. If the defendant knew or believed or should have known or believed that someone other than Cox was or might have been in the car, was he guilty of negligence in firing the shot which caused injury to the plaintiff? Yes.

5. If yes to question 1 and one or both of questions 3 or 4 at what sum do you assess compen- satory damages? $17,000.

6. If yes to question 3 is the plaintiff entitled to exemplary damages? No.

7. If yes to question 6 at what sum do you assess exemplary damages? Unanswered.

8. Was the plaintiff guilty of contributory negligence? Yes.

9. If yes to question 8, to what extent is it just and equitable to reduce the plaintiff's damages having regard to her share of the responsibility of her injuries? Plaintiff 40% to blame. Defendant 60% to blame."

9. It would be superfluous to do more than touch upon the vicissitudes which have led to the currently accepted formulations of the duty owed by an occupier to trespassers on his land. The strict rule, last propounded in Robert Addie &Sons (Collieries) v. Dumbreck (1929) AC 358 , was that an occupier is liable only for wilful injury to a trespasser or for behaviour showing a reckless disregard for his safety. This rule reflected a concern that the right to occupy and exploit land should be unimpeded by regard for the safety of intruders and it drew no distinction between innocent and reprehensible trespassers. The harshness of the approach was mollified in cases where the intrusions, particularly by children, were repeated and known to the occupier, by regarding the intruder as having entered under an implied, or imputed, licence. See, e.g., Cooke v. Midland Great Western Railway of Ireland (1909) AC 229 ; Lowery v. Walker (1911) AC 10 ; Hardy v. Central London

Railway Company (1920) 3 KB 459 ; Adams v. Naylor (1944) KB 750, at pp 760-765; (1946) AC 543 ; Edwards v. Railway Executive (1952) AC 737, at pp 746-747 . In the case of children, the presence of an allurement on the land, whilst perhaps not converting temptation into invitation, nevertheless facilitated the implication or imputation of a licence or even the finding of an independent duty of care. See United Zinc Co. v. Britt (1921) 258 US 268, at p 275 per Holmes J.

10. In a number of cases in this Court attempts were made to explain the liability which the law imposed upon occupiers in terms which, it was hoped, would command intellectual assent and which could be referred directly to basal principle: Commissioner for Railways (N.S.W.) v. Cardy (1 960) 104 CLR 274, at p 285 per Dixon C.J. The explanation extended not only to the cases involving implied or imputed licences, but also to the reconciliation of cases such as Excelsior Wire Rope Co. v. Callan (1930) AC 404 with Robert Addie &Sons (Collieries) v. Dumbreck and was expressed in terms which were consistent with the abstraction in Donoghue v. Stevenson (1932) AC 562 of the modern principle of a duty of care based upon a relationship of proximity. The principal cases in this Court comprise the trilogy of Thompson v. Bankstown Corporation (1953) 87 CLR 619 , Rich v. Commissioner for Railways (N.S.W.) (1959) 101 CLR 135 and Commissioner for Railways (N.S.W.) v. Cardy. The reasoning in these cases acknowledged that the duties of an occupier which were recognized in Indermaur v. Dames (1866) LR 1 CP 274; (1867) LR 2 C.P 311 a nd Gautret v. Egerton (1867) LR 2 CP 371 extend only to invitees and licensees and stop short of trespassers. However, those duties, whilst they were aspects of the developing law of negligence, were thought to be concerned only with the defective or dangerous condition of the premises themselves. To speak of these duties is, it was said, to speak of duties arising out of the occupation of premises. So it is that the principle which states that an occupier owes no duty of care to a trespasser (a duty to refrain from wilful injury or from reckless behaviour towards a trespasser known to be present not being regarded as a duty of care) was said to be concerned with the incidents which the law attaches to the relationship of occupier and trespasser. The fact that a plaintiff was a trespasser is, however, upon this line of reasoning, no bar to recovery if he can otherwise make out a cause of action. And he will make out a cause of action if he establishes negligence upon the basis of a sufficiently proximate relationship to give rise to a duty of care predicated upon the foreseeability of harm. The relationship giving rise to such a duty will be a relationship extending beyond that existing between an occupier and a trespasser, although, of course, the character of the intruder as a trespasser will be an important factor in determining whether the wider relationship exists and, if it does, the content of the duty of care.

11. Soundly based and attractive as that approach may seem, it did not find favour with the Privy Council. In Commissioner for Railways (N.S.W.) v. Quinlan (1964) AC 1054 it was held that an occupier's duty to a trespasser was exclusively and exhaustively stated in the terms propounded in Robert Addie &Sons (Collieries) v. Dumbreck. Moreover, it was said that the rule there laid down was not confined to the condition of the land itself but extended to the occupier's activities upon the land. This was a reaffirmation of the principle that the "owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him'; but otherwise a man 'trespasses at his own risk.'": Latham v. R Johnson &Nephew, Limited (1913) 1 KB 398, at p 411 per Hamilton L.J. However, whilst it was held that an occupier's knowledge of a trespasser's presence is required before an occupier can be said to act wilfully towards him in disregard of his presence, it was conceded that in limited circumstances knowledge of a trespasser's presence may be imputed to an occupier. Those circumstances were said to be where the occupier "as good as knows" that the trespasser is there. In addition, it was recognized that reckless disregard might comprehend the likely as well as the actual presence of a trespasser on the land provided that his presence is "extremely likely". As was pointed out later in Southern

Cement Ltd. v. Cooper (1974) AC 623, at p 629, this latter concession, of necessity, contemplated the formulation of an occupier's liability to trespassers in terms of a duty of care rather than a duty merely to refrain from malicious injury, and this was going further than anything which had been said in Robert Addie &Sons (Collieries) v. Dumbreck. That duty of care was eventually said to arise in the context of the requirements of "common humanity" rather than in the context of ordinary notions of reasonable foreseeability, but I shall turn to that in a moment. I merely pause to recognize that when the Privy Council spoke in Quinlan's Case of the relevance of the likelihood of the presence of trespassers, they were unavoidably speaking in terms of some sort of foreseeability which was wider than anything for which Robert Addie &Sons (Collieries) v. Dumbreck stood.

12. And so it was that the law developed in Herrington v. British Railways Board (1972) AC 877 and Southern Cement Ltd. v. Cooper.

13. The former case made it clear that, unless a strained interpretation were given to recklessness, Robert Addie &Sons (Collieries) v. Dumbreck did not deal adequately with an occupier's obligation towards a trespasser and did not provide an all-embracing code covering the relationship between the two. It was held that an occupier did owe a duty of care to a trespasser where common humanity demanded it and the content of that duty of care was dictated by the same conception. Perhaps, although I am by no means sure that it is so in many cases, the result is a less onerous duty of care owed in more limited circumstances than would be the case if the ordinary principles of foreseeability and reasonable care were applied as they apply in the tort of negligence. If that is so, then that result is justified by the fact that a trespasser's relationship with an occupier is forced upon the occupier against his will, in contrast with the voluntary assumption of the relationship of a neighbour as described in Donoghue v. Stevenson. Nevertheless the question may be posed whether the practical result is really any different from that which would be achieved if the ordinary tests of reasonable foreseeability and reasonable care were applied, bearing in mind that the fact that an intruder was a trespasser would have a bearing upon both the foreseeability of harm to him and the standard of care required. See Southern Cement Ltd. v. Cooper, at pp 643-644. What may be reasonably foreseeable or reasonable care in the case of someone lawfully upon land may not be reasonable in the case of a trespasser. This is what Barwick C.J. had in mind when, in Munnings v. Hydro-Electric Commission (1971) 125 CLR 1, at p 11, he spoke of a general duty of care arising from a relationship which existed in addition to the relationship of occupier and trespasser. He said:

> "Though the rigid categories of invitee, licensee and trespasser may not be applicable as such there must remain a quantitative element both in the extent of the foreseeability and of the reasonable steps required to fulfil any resultant duty arising from the circumstances in which the injured person came upon the scene."

14. It is also, I think, the notion which was developed by Dixon C.J. in Commissioner for Railways (N.S.W.) v. Cardy, at pp 285-286, when enunciating the principle which was eventually rejected in Quinlan's Case. He said:

> "Such a recognition of principle by no means

> involves the imposition upon occupiers of premises of a liability for want of care for the safety of trespassers. What it does is to confine the duty of licensors to its true province, the case of a voluntary or gratuitous grant of an advantage to another consisting in the use of or entry upon premises and to recognize that it is the grant that forms the source of the limited duty. The rule remains that a man trespasses at his own risk and the occupier is under no duty to him except to refrain from intentional or wanton harm to him. But it recognizes that nevertheless a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence. The duty may be limited to perils of which the persons so using the premises are unaware and which they are unlikely to expect and guard against. The duty is measured by the nature of the danger or peril but it may, according to circumstances, be sufficiently discharged by warning of the danger, by taking steps to exclude the intruder or by removal or reduction of the danger. ... In principle a duty of care should rest on a
>
> man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continued existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or of averting the danger or of bringing it to their knowledge."

15. I have no difficulty in reading the passage which I have just cited as requiring no more nor less than common humanity would dictate and I venture to suggest that it comprehensively and succinctly expresses what is at the heart of the decision in Herrington v. British Railways Board, however it may be individually expressed in the various speeches.

16. In Herrington, Lord Wilberforce remarked, at p.919, that, whilst it may be dangerous to attempt too precise a definition of an occupier's liability to a trespasser, "the expedient of recoiling upon the comfortable concept of the reasonable man is hardly good enough. It evades the problem by throwing it into the lap of the judge." I have some difficulty in accepting without question that the application of the standard of the reasonable man is necessarily inappropriate in the context of an occupier's liability to trespassers, when that standard is applied daily and without difficulty in the multifarious circumstances which give rise to actions in negligence. However, his Lordship's remark does, perhaps, throw light upon the reason why modern doctrines have developed as they have. Against a background of concern which the common law has had for the tenure of land, there has been a reluctance to develop broad formulations which might cast onerous obligations upon landholders and a tendency to particularize in the form of rules those considerations, more or less obvious, which would have to be borne in mind in the application of a broad standard. In the same vein, Lord Reid, in Herrington, at p.898, suggested that the absence of juries in actions by trespassers may have something to do with the tendency to which I have referred. He pointed to the Occupier's Liability (Scotland) Act 1960, which provides that the care which an occupier is required to show to a person entering his land (which includes a trespasser) in respect of dangerous activities on it shall be "such care as in all the circumstances of the case is reasonable to see that the person will not suffer injury or damage by reason of any such danger." Of this provision, his Lordship remarked:

> "That may work satisfactorily where actions for
>
> damages for failure to exercise such care are generally decided by juries. Juries do not give reasons and so no verdict of a jury can establish a precedent. But in England such actions are decided by judges who must give reasons and whose decisions can be the subject of appeal. No doubt if the matter were left at large in this way a body of case law with regard to the position of trespassers would develop over the years. The matter would in one form or another come before this House before very long and some authoritative guidance would then emerge. But I would not create such a period of uncertainty if that can be avoided and I think it can be avoided."

The difficulty to which his Lordship refers may be a practical one, but, if I may say so with respect, it is not immediately apparent to me that decisions of fact arrived at by the application of a broader standard should create any precedent or that the difficulty, if it exists, should be overcome by imposing strictures upon the fact-finding function of a trial judge in the form of detailed rules of law. Considerations which would form the basis of constructive comment in a charge to a jury should not cause difficulty if they form the basis of a decision by a trial judge sitting alone. But this is a digression (although juries have not disappeared in these actions here) and I shall not pursue it further.

17. The initial inquiry which this case requires is whether, in all the circumstances, the defendant owed the plaintiff any duty of care at all. It is quite clear that the defendant did not know of the presence of the plaintiff at the time he injured her and that he did not shut his eyes to her presence. He neither knew nor as good as knew she was there. This conclusion is required by the jury's answers that the defendant did not know or believe that a person other than Cox was in the car, nor should he have known or believed that to be so. But that is not the end of the inquiry. There is the question whether the defendant ought to have taken into account the possibility of the plaintiff's presence. It would appear from Southern Cement Ltd. v. Cooper that the extreme probability or extreme likelihood of the plaintiff's presence is no longer the test. The required degree of foreseeability could, perhaps, be expressed in humanitarian terms - the presence of the trespasser must be sufficiently likely to make it callous to act in disregard of it - but the Privy Council, at p. 644, avoided express reference to common humanity when it said:

> "The only rational or practical answer would seem to be that the occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound at least to give consideration to the matter when he knows facts which show a substantial chance that they may come there."

18. That passage is, of course, generally expressed, but it is useful, having regard to the answers of the jury in this case, in its reference to the entitlement of an occupier to neglect a bare possibility. More pertinent to the particular facts of this case are, perhaps, the remarks of Mason and Jacobs JJ. in Public Transport Commission (N.S.W.) v. Perry (1977) 137 CLR 107, at p 147 :

> "We have no doubt that there then arises a duty

> of care on the part of the occupier towards the person whom an ordinary man would suspect to be actually upon the land and in a situation where the activities of the occupier or his servant, if pursued, will probably kill or seriously injure that person. If a man is out shooting on his land and something comes to his notice which would ordinarily lead to a suspicion that a human being may well be actually in the line of fire, he cannot escape liability by saying 'Perhaps I had reason to suspect that something which could well be a human being was actually in the line of fire but I did not know positively that what I had observed was a human being. Therefore it was not incumbent on me to alter my shooting pattern in any way nor to take any step to negative the possibility that it might be a human being in my line of fire'."

19. In this case there was nothing in the evidence to suggest that the defendant should have suspected that there was someone other than Cox in the car. There was the evidence of the plaintiff that she got out of the car, but the jury by its answers clearly accepted the defendant's statements that he saw only Cox. There was a possibility that there was another person in the car, but it was no more than a bare possibility and the jury recognized this by denying in their answers that the defendant should have known or believed that a person other than Cox was in the car. There was nothing which should have led the defendant to suspect that the plaintiff was in his line of fire.

20. As I conceive it, the law does not require an occupier of land to take steps for the safety of a trespasser on his land except where there are facts to suggest that a trespasser who is present or is likely to be present will suffer some serious harm as a result of the occupier's activities on the land of which, or of the danger of which, the trespasser could reasonably be expected to be unaware. I may add that, to my mind, such a test is both humane and reasonable having regard to the fact that it is predicated upon a relationship between the two which involves the trespass of one upon the property of the other. The application of that test produces the result that in this case the defendant, as the occupier of his land, was under no duty to take steps for the safety of the plaintiff. The only basis upon which the result could be said to be otherwise is the answer of the jury that the defendant should have known or believed that a person other than Cox might be in the car. It is difficult to conceive how the jury could have answered differently, for it is obvious that any reasonable person must have recognized the theoretical possibility of the presence of another person. But there was nothing to suggest that as a fact to the defendant and the next answer given by the jury was that the defendant did not fire the rifle knowing the bullet might strike some person other than Cox, but not caring whether or not it did strike him or her.

21. There was, of course, the affirmative answer of the jury to the question "If the defendant knew or believed or should have known or believed that someone other than Cox was or might have been in the car, was he guilty of negligence in firing the shot which caused injury to the plaintiff?" That, however, was not a question which could assist in determining the existence of the relevant duty and the actual question which is asked appears to be based upon the assumption that a duty of care on the part of the defendant arose if he knew or ought to have known that someone other than Cox might have been in the car. Such is not the case. No doubt the answer of the jury is explained by the charge of the learned trial judge, which was in terms of the possible, rather than the likely, presence of the plaintiff. It contained the following direction:

> "If you think that he should have regarded the presence of someone in the car as a reasonable possibility then as I have said, in law he would owe a duty of care to that person. To fire a shot at the side of the car in those circumstances you may well think would be a breach of that duty. Therefore members of the jury it seems to me that the next critical question of fact is; if he did not realize she was there, should he have realized that it was possible that someone else was there. If you are satisfied that he should have realized that, or he fails to satisfy you to the contrary, then it seems to be obvious that he was in breach of the duty of care he owed to anyone who may have been in that car."

Obviously that was a misdirection which left the jury with little alternative but to return the verdict which they did. But the misdirection and the jury's answer as a whole indicate that it was a wrong verdict which cannot be sustained.

22. The final matter with which I must deal is whether it is possible to regard the defendant as owing a wider duty of care - in this case it would be in negligence - than that flowing from the relationship between occupier and trespasser. In my view, it is not possible. As I have already pointed out, at one time the decisions of this Court pointed in the direction of the subordination of "the categorical rules of occupier's liability to the general and more generous doctrines of the law of negligence and of a common duty of care based on foreseeability of harm." See Munnings v. Hydro-Electric Commission, per Windeyer J. at p 25. But that time has passed with the decision in Quinlan's Case. That decision has been accepted, as it had to be, by this Court and it has passed into our jurisprudence. See Munnings v. Hydro-Electric Commission, at pp 10-11, 15, 25, 39. It is clear that Quinlan's Case denied the possibility of concurrent duties of care arising out of the relationship of occupier and trespasser.

23. Their Lordships could hardly have been more explicit when they said, at p.1081, that they could not "find any line of reasoning by which the limited duty that an occupier owes to a trespasser can co-exist with the wider general duty of care appropriate to the Donoghue v. Stevenson formula". In rejecting that notion, their Lordships also rejected the reasoning based upon it in Thompson v. Bankstown Corporation, but they nevertheless accepted the correctness of the decision in that case. In doing so, they accepted, as has been pointed out in Munnings v. Hydro-Electric Commission, that if, in addition to the relationship of occupier and trespasser, there is some other relationship which gives rise to a wider duty of care, then that duty of care will prevail notwithstanding that the relationship of occupier and trespasser also exists. Thompson's Case itself provides an example of such an additional relationship, for, in that case, if the defendant was an occupier and the plaintiff a trespasser, the defendant was also an electricity authority bringing electricity into proximity with the public, of whom the plaintiff was a member, and because of that relationship the defendant owed a duty to take reasonable care to avoid harm to those whom it ought reasonably to have foreseen might be injured by coming into contact with the electricity.

24. In Public Transport Commission (N.S.W.) v. Perry it was further recognized that Quinlan's Case and, by that time, Southern Cement Ltd. v. Cooper, left no room, in the case of an occupier, for any general duty of care towards a trespasser such as is owed to a neighbour in a public place, although it was again pointed out that if the relevant relationship is other than that of occupier and trespasser, there may be some such duty of care. As Gibbs J. put it, at pp.130-131:

"The special rules which the common law has

evolved to govern the liability of an occupier of premises to a person who sustains injury while on those premises do not in every case state exhaustively the nature of the occupier's duty to the person who has come on to his premises. The relationship between the parties may be such as to give rise to a duty upon the occupier to take reasonable care for the safety of the other person. If the relationship between the parties imposes upon the occupier this general duty of care, which may be higher than that which he owes in his capacity as occupier, the fact that he is an occupier does not relieve him of the higher duty."

25. It may be, and I suspect that it is so, that the present position, in the light of the explanation of Quinlan's Case in Southern Cement Ltd. v. Cooper, is little different in practical result from the position adopted in the trilogy of decisions in this Court to which I have referred. But it is not, in my view, possible simply to go back to those decisions and re-assert the views expressed in them. To do so would be to do violence to the subsequent decisions, including decisions of this Court. Moreover, to do so would be to disregard the reason which lies behind the currently accepted view that the relationship of occupier and trespasser requires a different treatment from other relationships. That reason, to which I have already referred, was expressed by the Privy Council in Southern Cement Ltd. v. Cooper, at p 642, as follows:

"The fundamental difference between the relationship of occupier and trespasser and other relationships which give rise to a duty of care is that the occupier's relationship with a trespasser is forced on him against his will, whereas other relationships are generally undertaken voluntarily. So it cannot be said in this case that a man ought not to enter into a relationship with others unless he has the ability and resources necessary for the proper performance of the duties which that relationship entails."

Even if the gap between the general duty of care imposed by the law relating to negligence and the duty of care owed by an occupier to a trespasser is narrowing, it still remains, and it seems to me to be wiser to allow the law to develop in the direction which it has taken, rather than to disrupt it by reinstating discarded notions. The old, rigid formula of Robert Addie &Sons (Collieries) Ltd. v. Dumbreck no longer correctly or comprehensively states the law and if there is a distinction between the dictates of common humanity and those of reasonableness towards a trespasser, it will in many cases, perhaps more and more, not be critical. I do not think that it is critical in this case.

26. Turning to this case, I am unable to see that the relationship between the defendant and the plaintiff was other than that of occupier and trespasser. The fact that the defendant was engaged in the activity of discharging firearms at the relevant time did not convert his relationship with the plaintiff into something different. Moreover, the plaintiff was a trespasser of whose presence the defendant was unaware. The defendant was, of course, under a duty towards Cox, of whose presence he was aware, although, because Cox was stealing petrol, the defendant may or may not have been entitled to arrest him by immobilizing his car. See Crimes Act 1958 (Vic.), s.458. But that can have no bearing upon the defendant's relationship with the plaintiff. She was a trespasser on his land and if he owed her any duty of care it was the duty which an occupier owes to a trespasser of whose presence he is unaware. In the circumstances and having regard to the answers given by the jury,

there was no duty in this case because those circumstances were not such as to suggest to the defendant the likelihood of the presence of the plaintiff.

27. It only remains for me to add that the law has now been altered in Victoria, although the alteration has no application in this case. The Wrongs Act 1958 has been amended by the Occupiers' Liability Act 1983, which provides that an occupier of premises owes a duty to take such care as is, in all the circumstances of the case, reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises. A number of matters are set out which are required to be considered in determining whether the duty of care laid down has been discharged. This legislation goes further than the English Occupiers' Liability Act 1957, which dealt with invitees and licensees by grouping them together as visitors and requiring a common duty of care towards them, but left the position of trespassers unaltered. It is more akin to the Scottish legislation, to which I have already referred. The common law continues to apply in the other Australian States.

Orders

Appeal allowed with costs.

Set aside the judgment of the full Court of the Supreme Court of Victoria and in lieu thereof order that the appeal to that Court be dismissed with costs and that the cross appeal to that Court be dismissed with costs.

Cited by:

Samuel Panebianco v Kalmar Equipment (Australia) Pty Ltd [2025] FWC 1876 -
T2 (by his tutor T1) v State of New South Wales [2024] NSWSC 1347 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Scaroulis v Victorian YMCA Community Programming Pty Limited [2024] VCC 406 (09 April 2024) (Manova J)

> (1985) ALJR 492 ; *Fox v Percy* [2003] HCA 22; *Bradshaw v McEwans* (1951) 217 ALR 1; *Hackshaw v Shaw* (1984) 155 CLR 614 ; *Venues NSW v Kane* [2023] NSWCA 192; *East Metropolitan Health Service v Ellis* [202 0] WASCA 147; *Cotton on Group v Golowka* [2022] VSCA 279; *Munday v St Vincent's Hospital Pty Ltd* [2 021] VSCA 170; *Roads and Traffic Authority v Royal* (2008) 245 ALR 653; *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243

Scaroulis v Victorian YMCA Community Programming Pty Limited [2024] VCC 406 (09 April 2024) (Manova J)

> 240 At common law, an occupier owes a duty to lawful visitors to take reasonable care to avoid a foreseeable risk of injury materialising. [133]
>
> *via*
>
> [133] For example, Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 665

Sivonen v Smith [2023] NSWSC 984 (29 September 2023) (Harrison AsJ)

> 113. Such a duty to take reasonable care would have involved avoiding a "not insignificant" risk that could reasonably be foreseen and avoided. The measure of the discharge of such a duty,

at common law, was what a reasonable person would, in the circumstances, do by way of response to foreseeable risk: *Hackshaw v Shaw* (1984) 155 CLR 614 . This measure is now prescribed by s 5B of the CLA .

Gomez v Woolworths Group Limited [2023] NSWDC 221 -
Devic v AMP Capital Investors Limited [2022] NSWDC 371 (26 August 2022) (Weinstein SC DCJ)

19. This case concerns the obligations of an occupier to a lawful entrant onto its premises. It is admitted that the defendant was the occupier of the subject premises and that the plaintiff was a lawful entrant onto them. The defendant concedes that it owed the plaintiff a duty of care as a lawful entrant onto premises that it occupied and that the scope and the content of that duty of care comprised of a duty to take reasonable care to prevent foreseeable risk of injury to such entrants. I accept that this concession fairly states the law as set out in *Australia n Safeway Stores v Zaluzna* (1987) 162 CLR 479, adopting the comments of Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-663 . I observe that in *Modbury Triangle Shopping Centre Pty Limited v Anzil* (2000) 205 CLR 254 at 292, Hayne J said:

> The occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land. It is these powers of control which establish the relationship between occupier and entrant "which of itself suffices to give rise to a duty...to take reasonable care to avoid a foreseeable risk of injury".

Khanna v Woolworths Group Limited (no 2) [2021] NSWDC 567 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Shoveller v Dak-Wal Constructions Pty Ltd (No 3) [2021] NSWSC 352 (08 April 2021) (Rothman J)

47. Hackshaw v Shaw (1984) 155 CLR 614 at 662-3 ; Baker v Gilbert [2003] NSWCA 113 at [30] ; and see previous reference to Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479; [1987] HCA 7 .

Williams v Wollongong City Council [2020] NSWDC 564 -
Baker v Bunnings Group Limited [2020] NSWDC 310 -
Kljusuric v Gajjh United Pty Ltd [2020] ACTMC 14 -
Whitton v Dexus Funds Management Limited [2019] NSWDC 579 -
State of New South Wales v Ouhammi [2019] NSWCA 225 (11 September 2019) (Basten and Brereton JJA, Simpson AJA)

184. There were, however, hints (without any clear contention) in the applicant's written submissions to the effect that *Blacker* and *Croucher* ought not to be followed. After referring to *Croucher* , the submissions described the proposition for which *Blacker* and *Croucher* stand as "a matter of debate". The submissions then referred to *Fowler v Lenning* [1959] 1 QB 426 (in which Diplock J discussed at length a number of issues, including onus of proof); to the judgment of Gibbs CJ in *Hackshaw v Shaw* (1984) 155 CLR 614; [1984] HCA 84, expressing a preference for the approach taken in *Fowler* ; and to a judgment of Kirby P in *Platt v Nutt* (1989) 12 NSWLR 231. It may be noted that no other Justice in *Hackshaw* adopted the tentative views expressed by Gibbs CJ, and the judgment of Kirby P in *Platt* was a dissenting one. The position in NSW is, therefore, that the test stated in *Blacker* and subsequently affirmed (*inter alia*, in *Croucher*) remains operative. Once it was established that Senior Constable Johnson had caused the cell door to close on the respondent's thumb, the onus shifted to the applicant to disprove fault.

State of New South Wales v Ouhammi [2019] NSWCA 225 -
State of New South Wales v Ouhammi [2019] NSWCA 225 -

Bevan v Coolahan [2019] NSWCA 217 -
Harford v Hallmark Construction Pty Ltd [2019] NSWSC 371 (17 April 2019) (Fagan J)

53. Hallmark admits it was an occupier of the building site although it alleges Copeland was also an occupier of the immediate area in which the accident occurred. The question whether Hallmark owed to persons who might enter the site a duty to exercise reasonable care to avoid injury that might result from the condition of the site is to be decided in accordance with the general principle stated *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7. There, Mason, Wilson, Deane and Dawson JJ adopted this passage from the judgment of Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614; [1984] HCA 84 at 662-663 :

> in an action in negligence against an occupier ... [a]ll 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.

Harford v Hallmark Construction Pty Ltd [2019] NSWSC 371 -
State of New South Wales v Charter Hall Retail Management Limited (formerly Macquarie Countrywide Management Limited) [2019] NSWDC 95 (25 March 2019) (Scotting DCJ)

136. What was reasonable depends on the circumstances of Mr McMullen's entry to the Shopping Centre: *Zaluzna* at 488. The duty to take reasonable care required the occupier to protect Mr McMullen, or the class of person of which he was a member, from a "not insignificant" risk which could reasonably be foreseen and avoided. The measure of the discharge of the duty, at common law, was what a reasonable person would, in the circumstances, do by way of response to the foreseeable risk: *Hackshaw v Shaw* (1984) 155 CLR 614 at 663 per Deane J . The measure is now prescribed by s 5B *Civil Liability Act 2002* .

Reynolds v City of Sydney Council [2018] NSWDC 334 (14 November 2018) (Russell SC DCJ)

59. Section 5B can be seen to reflect the common law as to the standard of care (that is, the measure of the discharge of the duty of care) applicable which is what, if anything, a reasonable person in the defendant's position would, in the circumstances, do by way of response to the foreseeable risk: *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614 at 662-663 ; Australian Safeway Stores Pty Limited v Zaluzna [1987] HCA 7; (1987) 162 CLR 479 at [488] ; *Neindorf v Junkovic* at [8] .

Trajkovski v Ballgate Pty Limited [2018] NSWDC 308 -
Oakley v Collins [2018] NSWDC 141 (08 June 2018) (Russell SC DCJ)

101. Section 5B can be seen to reflect the common law as to the standard of care (that is, the measure of the discharge of the duty of care) applicable to an occupier which is what, if anything, a reasonable person in the occupier's position would, in the circumstances, do by way of response to the foreseeable risk: Hackshaw v Shaw [1984] HCA 84 ; (1984) 155 CLR 614 at 662-663 ; Australia Safeway Stores [at 488]; Neindorf v Junkovic at [8].

Mair v Rhodes and Beckett [2018] VSC 132 (29 March 2018) (Digby J)

124. In *Shevill v Builders Licensing Board* ,[199] Gibbs CJ observed:

> We are of course concerned only with a case in which it is admitted that there was a valid and binding contract. Such a contract may be repudiated if one party renounces his liabilities under it - if he evinces an intention no longer to be bound by the contract *(Freeth v. Burr*) or shows that he intends to fufil the contract only in a manner substantially inconsistent with his obligations and not in any other way. In such a case the innocent party is entitled to accept the repudiation, thereby discharging himself from further performance, and sue for damages. [200]

via

[200] Ibid 625-26 (citations omitted). See, also, *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 155 CLR 623 , 634.

Bridge v Coles Supermarkets Australia Pty Ltd (No 3) [2017] NSWSC 1800 -
Five Star Medical Centre Pty Limited v Kempsey Shire Council [2017] NSWDC 250 (13 September 2017) (Judge D. Russell)

104. Section 5B can be seen to reflect the common law as to the standard of care (that is, the measure of the discharge of the duty of care) applicable to an occupier which is what, if anything, a reasonable person in the occupier's position would, in the circumstances, do by way of response to the foreseeable risk: *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614 at 662-663 ; *Australia Safeway Stores* [at 488]; *Neindorf v Junkovic* at [8] .

Bruce v Apex Software Pty Limited trading as Lark Ellen Aged Care [2017] NSWDC 237 -
Fatma Abdel Razzak v Coles Supermarkets Australia Pty Ltd [2017] NSWDC 183 -
Leman v HV Operations Pty Limited [2017] NSWDC 113 -
Ratewave Pty Ltd v BJ Illingby [2017] NSWCA 103 -
Australian Securities and Investments Commission v Drake (No 2) [2016] FCA 1552 -
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 -
Vincent v Woolworths Limited [2015] NSWSC 435 -
Hennessy v Patrick Stevedores Operations [2014] NSWSC 1716 (02 December 2014) (Campbell J)

79. Since the decision of the High Court of Australia in *Australian Safeway Foods Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488, it has been recognised by the common law in Australia that an occupier of land owes a duty to take reasonable care to avoid a foreseeable risk of injury to persons lawfully upon the land. Four Justices approved of the statement of principle by Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 663 in the following terms:

> 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.

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 (26 May 2014) (McColl, Barrett and Ward JJA)

11. Section 5B can be seen to reflect the common law as to the standard of care (that is, the measure of the discharge of the duty of care) applicable to an occupier which is what, if

anything, a reasonable person in the occupier's position would, in the circumstances, do by way of response to the foreseeable risk: *Hackshaw v Shaw* [1984] HCA 84; *(* 1984) 155 CLR 614 (at 662 - 663) per Deane J; *Australian Safeway Stores* (at 488); *Neindorf v Junkovic* (at [8]).

Merle Marie McMorrow v Todarello Pty Limited trading as the Fruit House Faulconbridge [2014] NSWDC 75 (28 April 2014) (Knox SC DCJ)

116. The defendant's duty is to those coming onto premises to ensure safe walkways, including adequate egress and ingress unencumbered by inappropriate or encroaching items - *Australia n Safeways Store Pty Ltd v Zaluzna* [1987] HCA 7. The duty extends to protect entrants from the risks of injury which could be foreseen and avoided - *Hackshaw v Shaw* [1984] HCA 84 .

Grills v Leighton Contractors Pty Ltd (No 2) [2013] NSWSC 1951 -
ANZ Banking Group Limited v Guijar [2013] FCCA 2215 -
McDonald v Australian Tourist Park Management Pty Ltd [2013] NSWDC 201 -
MOSKIOS v Bishay [2013] FCCA 3 -
MOSKIOS v Bishay [2013] FCCA 3 -
Smith v Body Corporate for Professional Suites Community Title Scheme 14487 [2013] QCA 80 -
Smith v Body Corporate for Professional Suites Community Title Scheme 14487 [2013] QCA 80 -
Smith v Body Corporate for Professional Suites Community Title Scheme 14487 [2013] QCA 80 -
Belinda Budich v Knightly Holdings Pty Ltd [2013] NSWDC 27 -
Austin v The Electricity Networks Corporation [No 2] [2013] WADC 41 (27 March 2013) (Eaton DCJ)
Hackshaw v Shaw [1984] HCA 84 ; (1984) 155 CLR 614
Homestyle Pty Ltd v Perrozzi

Austin v The Electricity Networks Corporation [No 2] [2013] WADC 41 -
Austin v The Electricity Networks Corporation [No 2] [2013] WADC 41 -
Vourvahakis v Marrickville Metro Shopping Centre Pty Limited [2013] NSWDC 73 -
Kingi-Rihari v Millfair Pty Ltd t/as the Arthouse Hotel [2012] NSWSC 1592 -
Strike v Fiji Resorts Limited [2012] NSWSC 1271 -
Graham v Welch [2012] QCA 282 -
Graham v Welch [2012] QCA 282 -
Johnson v Buchanan [2012] VSC 195 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Smith v Body Corporate for Professional Suites [2012] QDC 49 (30 March 2012) (Robin QC DCJ)

8. The parties agreed that the test for liability of the defendant is that propounded by Mason J (Stephen J and Aickin J agreeing) in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 :

> "A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone* (42), may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.

> In deciding whether there has been a breach of the duty of care the tribunal fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the

> degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

and by Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 622-63 endorsed by four judges in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 :

> "... 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."

National Australia Bank Limited v Oberg [2012] FMCA 233 (27 March 2012) (Barnes FM)

8. As Buchanan J stated in *Eykamp v Deputy Commissioner of Taxation* (2010) 8 ABC(NS) 105; [2010] FCA 797 at [7] :

> *Under an earlier definition in the [*Bankruptcy*] Act considered in the* Sandell v Porter *(1966) 155 CLR 666 it was necessary for a debtor to be able to pay debts as they fell due out of the debtor's own money. Such moneys extended to those capable of being procured by sale, by mortgage or pledge of assets of the debtors within a relatively short time. A more flexible position now obtains. I note that in* International Alpaca Management Pty Ltd v Ensor *(1999) FCA 72, Katz J favoured the view that the necessity to pay a debt from a person's own money continued to be an important element in the scheme established under the Act (see, eg, S1 to 4(3)(a) of the Act). However, with respect, so far as it concerns consideration of whether a person is, or is not, solvent, I prefer the view taken by Palmer J in* Lewis v Doran *(2004) 184 FLR 454 at [116] (see on appeal* Lewis v Doran *(2005) 219 ALR 555 at 109-112) to which I subscribed, with the agreement of Marshall and Tracey JJ in* Whitton *at 34 to 38. Accordingly it would not be impermissible to pay regard to the fact that Mrs Eykamp could raise sufficient money to pay the debt, whether or not that was the direct result of sale, mortgage or pledge of her assets. However, whatever mechanism is employed to secure the necessary funds, and satisfy the court that it provides adequate evidence of solvency, it remains necessary that it produce results* ***within a realistic timeframe*** *(* Sandell v Porter *at 670 ,* Hall v Poolman *(2007) NSWSC 1330; 65 ACSR 123 at [187]).* (Emphasis added).

Novakovic v Stekovic [2012] NSWCA 54 -
National Australia Bank Limited v Oberg [2012] FMCA 233 -

National Australia Bank Limited v Oberg [2012] FMCA 233 -
Littlejohn v Julia Creek Town and Country Club Inc [2011] QDC 116 (23 June 2011) (Baulch SC DCJ)

36. Since the decision in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 it has been clear that the duty of an occupier is a duty of care under the ordinary principles of negligence. A pre-requisite of such a duty is that there is to be a necessary degree of proximity of relationship. [1]

via

[1] See *Hackshaw v Shaw* (1984) 155 CLR at 662 to 663

Wright v Perpetual Limited [2011] NSWDC 37 (15 June 2011) (Levy SC DCJ)

50. The defendants properly conceded that the plaintiff was owed a relevant duty of care. This required that the defendants take reasonable care to protect entrants onto the premises from risks that could be foreseen and avoided : *Stojan (No 9) Pty Ltd v Kenway* [2009] NSWCA 364 per McColl JA at [90] , citing *Hackshaw v Shaw* [1984] HCA 84, (1984) 155 CLR 614 at page 663. The measure of the discharge of that duty was what a reasonable person would, in the circumstances, do by way of response to becoming aware of a risk that was foreseeable : *Stoja n (No 9) Pty Ltd* , at [90] .

Curzons v Motor Accident Commission [2011] SADC 103 (29 April 2011) (Boylan J)

51. Such a construction accords with cases at common law where liability is excluded on the basis of the plaintiff's illegal conduct: *Gala v Preston* (1990-91) 172 CLR 243 (a continuing offence of illegal use of a motor vehicle) and *Hackshaw v Shaw* (1984) 155 CLR 614 (a continuing offence of trespass.) Sometimes, the element of contemporaneity will cause little difficulty – as in the cases to which I have just referred. Other cases may not be so easily resolved but, in my view, the facts must, upon analysis, demonstrate such contemporaneity for the defence to succeed.

Novakovic v Stekovik [2011] NSWDC 253 -
Wakeling v Coles Group Limited [2011] NSWDC 20 -
Horne v Gilshenan & Luton [2010] QDC 491 -
Liebeck v Dawsal Pty Limited [2010] ACTSC 141 -
Jajieh v Woolworths Ltd [2010] NSWDC 239 -
Jajieh v Woolworths Ltd [2010] NSWDC 239 -
Slaveski v State of Victoria [2010] VSC 441 -
AJH Lawyers Pty Ltd v Hamo [2010] VSCA 222 -
Young v Masselos & Co [2010] NSWDC 169 (13 August 2010) (Levy SC DCJ)

119. The law concerning the content of the duty owed by an occupier of premises is well settled. It requires that reasonable care be taken in all the circumstances in the face of a foreseeable risk : *Aust ralian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7 per the majority at [11] to [12]; (1987) 162 CLR 479 at p 488 following *Hackshaw v Shaw* [1984] HCA 84 per Deane J at [26] ; (1984) 155 CLR 614 , at pp 662 – 663 . In this case, in addition, an analysis of the liability of the occupier is required to be undertaken within the legislative framework of the *CL Act*.

Young v Masselos & Co [2010] NSWDC 169 -
Young v Masselos & Co [2010] NSWDC 169 -
Young v Masselos & Co [2010] NSWDC 169 -
Elphick v Westfield Shopping Centre Management Co Pty Ltd [2010] NSWDC 152 (30 July 2010) (Hungerford ADCJ)
Hackshaw v Shaw [1984] HCA 84; (1984) 155 CLR 614
Leighton Contractors Pty Ltd v Fox

Elphick v Westfield Shopping Centre Management Co Pty Ltd [2010] NSWDC 152 -
Gaskin v Ollerenshaw [2010] NSWSC 791 (16 July 2010) (Garling J)

> 202 The obligation of an occupier of premises to a person who is lawfully upon the land is one to take reasonable care to avoid a foreseeable risk of injury to the plaintiff: **Hackshaw v Shaw** (1984) 155 CLR 614 at 662 – 663 per Deane J ; **Australian Safeway Stores Pty Limited v Zaluzna** (1987) 162 CLR 479 at 488 per Mason, Wilson, Deane and Dawson JJ; and **Baker v Gilbert** [2003] NSWCA 113 at [29] per Ipp JA, Hodgson and Tobias JJA agreeing; **Uniting Church in Australia Property Trust v Takacs** [2008] NSWCA 141 per Hodgson JA at [29] .

Freudenstein v Marhop Pty Ltd [2010] NSWSC 724 (08 July 2010) (Kirby J)
Hackshaw v Shaw [1984] HCA 84; (1984) 155 CLR 614
Phillis v Daly

Freudenstein v Marhop Pty Ltd [2010] NSWSC 724 -
Caldwell v Coles Supermarkets Pty Limited [2010] NSWDC 136 -
Caldwell v Coles Supermarkets Pty Limited [2010] NSWDC 136 -
Borg v The Owners of Strata Plan 64425 [2010] NSWDC 203 -
Borg v The Owners of Strata Plan 64425 [2010] NSWDC 203 -
De Marco v Italo-Australian Club (ACT) Ltd [2010] ACTSC 28 (09 April 2010) (Master Harper)

> 77. The duty of the defendant to the plaintiff was that of an occupier to an entrant, namely to take such care for her safety as was reasonable in the circumstances, and to protect her from risks of injury which could be foreseen and avoided: *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 ; *Hackshaw v Shaw* (1984) 155 CLR 614 at 663. The standard or content of the duty is to be determined according to what the reasonable person would have done in response to a foreseeable risk, including consideration of the probability of the risk being realised, the magnitude of the consequences, and the cost or inconvenience of remedying the risk: *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J. An occupier of premises is required to take only such care as is reasonable in the circumstances, not to make the premises as safe as reasonable care and skill on the part of anyone can make them: *Jones v Bartlett* , above, at 193 per Gaudron J. It is incumbent on the Court to identify with precision what would have been a reasonable response, in accordance with *Wyong Shire Council v Shirt* considerations, to a foreseeable risk of harm: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 611-612 per Gummow and Hayne JJ. These questions must be considered from the defendant's perspective, with its state of knowledge prior to the incident, to assess whether the defendant acted as a reasonably prudent person would have done: *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Neindorf v Junkovic* (2005) 222 ALR 631 per Hayne J at [93] .

Spackman v Stevens [2010] QDC 118 (31 March 2010) (Robin QC DCJ)

> 34. Mr Howe's supplementary written submissions of 26 February 2010 contain an additional reference bearing on the liability issue, *Palmer v Finnegan* (2010) QSC 64, a collapsing balcony railing case. Significant in the defendants' avoidance of liability was a lack of warning. The legal principle applied in such cases (the relevant one here) is the dictum of Deane J in *Hacks haw v Shaw* (1984) 155 CLR 614 reproduced in the headnote in *Zaluzna* :
>
> > "It is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or both of a special duty qua occupier and a general duty of care was owed. It is necessary to determine only 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 entrant or to the class of person of which the entrant is a member. The measure of the discharge of the duty is what a reasonable man would do in the circumstances by way of response to the foreseeable risk."

Spackman v Stevens [2010] QDC 118 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Alzawy v CPT Custodian Pty Ltd [2009] NSWDC 304 -
Alzawy v CPT Custodian Pty Ltd [2009] NSWDC 304 -
Schneider v State of New South Wales [2009] NSWDC 108 (16 October 2009) (Levy SC DCJ)
Hackshaw v Shaw [1984] HCA 84
J Blackwood & Son v Skilled Engineering

Schneider v State of New South Wales [2009] NSWDC 108 (16 October 2009) (Levy SC DCJ)

> 77. The law concerning the content of the duty owed by an occupier of premises is well settled and requires that reasonable care be taken in all the circumstances in the face of a foreseeable risk : *Aust ralian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7 per the majority at [11] to [12]; (1987) 162 CLR 479 at p 488 following *Hackshaw v Shaw* [1984] HCA 84 per Deane J at [26] ; (1984) 155 CLR 614 per Deane J at pp 662 – 663 .

Schneider v State of New South Wales [2009] NSWDC 108 -
Condos v Clycut Pty Ltd [2009] NSWCA 200 -
Wynn Tresidder Management v Barkho [2009] NSWCA 149 -
Wynn Tresidder Management v Barkho [2009] NSWCA 149 -
Coggins v Ourimbah-Lisarow RSL Club Ltd [2009] NSWDC 84 -
Coggins v Ourimbah-Lisarow RSL Club Ltd [2009] NSWDC 84 -
Thirlway v Parnell LP Gas Systems Pty Ltd [2009] WADC 36 -
Rouvinetis v Varady [2009] NSWSC 109 (05 March 2009) (Schmidt AJ)

> 22 The test as to whether it could be claimed that the defendants owed Mr Rouvinetis any duty of care was discussed by the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479. There, at [11] *Mason* CJ, *Wilson*, *Deane* and *Dawson* JJ adopted the observations of *Dean* J in *Hack shaw v Shaw* (1984) 155 CLR 614 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 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."

Rouvinetis v Varady [2009] NSWSC 109 -
Transfield Services (Australia) v Hall [2008] NSWCA 294 -

14. The applicable principles were conveniently collected by Palmer J in *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* : [22]

> (i) whether or not a company is insolvent for the purposes of the Corporations Act (Cth), ss 95A, 459B, 588FC or 588G(1)(b) , is a question of fact to be ascertained from a consideration of the company's financial position taken as a whole: *Sandell v Porter* , *Pegulan Floor Coverings Pty Ltd v Carter* (1997) 24 ACSR 651; 15ACLC 1,293 and *Fryer v Powell* (2001) 159 FLR 433;
>
> (ii) in considering the company's financial position as a whole, the Court must have regard to commercial realities. Commercial realities will be relevant in considering what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security and when such realisations are achievable: *Sandell v Porter* , *Taylor v Australia and New Zealand Banking* (1988) 13 ACLR 780, *Re Newark Pty Ltd* (in liq) [1993] 1 Qd R 409 and *Sheahan v Hertz* (1995) 16 ACSR 765.
>
> (iii) in assessing whether a company's position as a whole reveals surmountable temporary illiquidity or insurmountable endemic illiquidity resulting in insolvency, it is proper to have regard to the commercial reality that, in normal circumstances, creditors will not always insist on payment strictly in accordance with their terms of trade but that does not result in the company thereby having a cash or credit resource which can be taken into account in determining solvency: *Bank of Australasia v Hall* (1907) 4 CLR 1,514 at 1,528 ; *Re Norfolk Plumbing Supplies Pty Ltd v Commonwealth Bank of Australia* (1992) 6 ACSR 601 (at 615 ; 169); *Taylor v Australia and New Zealand Banking* (at 784 ; 811); *Guthrie (as liq of ULT Ltd (rec apptd) (in liq)) v Radio Frequency Systems Pty Ltd* (2000) 34 ACSR 572 at 575 ;
>
> (iv) the commercial reality that creditors will normally allow some latitude in time for payment of their debts does not, in itself, warrant a conclusion that the debts are not payable at the times contractually stipulated and have become debts payable only upon demand: *Standard Chartered Bank of Australia Pty Ltd Nos. 1 & 2 v Antico* (1995) 38 NSWCR 290 (at 331); *Hall v Press Plumbing* (Federal Court of Australia 20 September 1994, unreported); *Melbase Corporation Pty Ltd v Sequenhoe Ltd* (1995) 17 ACSR 18 (at 199 ; 832–833); *Carrier Air Conditioning Pty Ltd v Kurda* (1993) 11 ACSR 247 (at 253 ; 777–778); *Cuthbertson and Richards Sawmills Pty Ltd v Thomas* (1 998) 28 ACSR 310 (at 320); *Lee Kong v Pilkington (Australia) Ltd* (1997) 25 ACSR 103 (at 112 ; 1,568);
>
> (v) in assessing solvency, the court acts upon the basis that a contract debt is payable at the time stipulated for payment in the contract unless there is evidence, proving to the court's satisfaction, that: there has been an express or implied agreement between the company and the creditor for an extension of the time stipulated for payment; or there is a course of conduct between the company and the creditor sufficient to give rise to an estoppel preventing the creditor from relying upon the stipulated time for payment; or there has been a well established and recognised course of conduct in the industry in which the company operates, or as between the company and its creditors as a body, whereby debts are payable at a time other than that stipulated in the creditors' terms of trade or are payable only on demand: *Re Newark* (at 414–415); *Standard Chartered Bank v Antico* (at 331); *Melbase* (1995) 28 ACSR 310; *Cuthbertson v Thomas* ; *Fryer v Powell* (at 444–445);
>
> (vi) it is for the party asserting that a company's contract debts are not payable at the times contractually stipulated to make good that assertion by satisfactory evidence: *Fryer v Powell* (at 444–445); *Melbase* ; *Cuthbertson v Thomas* .

Sandell v Porter (1966) 155 CLR 666 ; *Capital Finance Australia Limited v Tolcher* [2007] FCAFC 185; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *BP Australia Ltd v Brown* (2003) 58 NSWLR 322, considered.

Sheahan Pty Ltd v Murdock & Gediz P/L [2008] SADC 5 -
Sheahan Pty Ltd v Murdock & Gediz P/L [2008] SADC 5 -
Marshall v Townsend [2008] SADC 1 (15 January 2008) (Shaw J)

LeCornu Furniture and Carpet Centre Pty Ltd v Hammill (1998) 70 SASR 414; *Cox Constructions Pty Ltd v Dawes* (1999) 73 SASR 557; *Vairy v Wyong Shire Council* (2005) 221 ALR 711; *Hackshaw v Shaw* (1964) 155 CLR 614 ; *Wyong Shire Council v Shirt* (1980) 146 CLR 40 ; *Brodie v Singlton Shire Council* (2001) 206 CLR 572 ; *Wheat v E. Lacon & Co Ltd* [1966] AC 552; *Monaghan v Wardrope & Carroll Ltd* (1970) SASR 575; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *Neindorf v Junkovic* (2005) 222 ALR 631; 180 ALJR 341; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Van der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204; *Complete Scaffold Services Pty Ltd v Adelaide Brighton Cement Ltd* [2001] SASC 199; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Leichardt v Municipal Council of Montgomery* [2007] HCA 6; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Calin v The Greater Union Organisation Pty Ltd* (1991) 173 CLR 33; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 ; *Northern Sand Blasting Pty Ltd v Harris* (1997) 188 CLR 313; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1; *Chappel v Hart* (1998) 195 CLR 232; *Thompson v Woolworths (Queensland) Pty Limited* [2005] HCA 19; *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; *Pennington v Norris* (1956) 96 CLR 10; *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529; *Commissioner of Railways (Qld) v Ruprecht* (1979) 142 CLR 563 ; *Commissioner of Railways v Halley* (1978) 20 ALR 409; *Glavinas v Holdens Motor Company Limited* [Unreported, Supreme Court of SA Bollen J, 25 October 1991]; *Ragnelli v David Jones (Adelaide) Pty Ltd* (2004) 90 SASR 232; *Chicco v City of Woodville* (1989) 150 LSJS 89; *Reed v Peridis* [2005] SASC 136, considered.

Marshall v Townsend [2008] SADC 1 -
Marshall v Townsend [2008] SADC 1 -
Marshall v Townsend [2008] SADC 1 -
Irwin v Salvation Army (NSW) Property Trust [2007] NSWDC 266 -
Irwin v Salvation Army (NSW) Property Trust [2007] NSWDC 266 -
Stanoevski v The Owners of Stirling Village SP 11718 [2007] WADC 205 (22 November 2007) (Sleight DCJ)

Hackshaw v Shaw (1984) 155 CLR 614

Stanoevski v The Owners of Stirling Village SP 11718 [2007] WADC 205 -
Stanoevski v The Owners of Stirling Village SP 11718 [2007] WADC 205 -
Lloyd v Noosa North Shore Caravan Park [2007] QDC 302 (16 November 2007) (Searles DCJ)

15. Given the concession by the defendant as to the existence of the requisite duty to the plaintiff both in contract and at common law, the sole issue between the plaintiff and the defendant on liability is whether or not there has been breach of that duty. The contractual duty of care is concurrent and co-extensive with the duty of care in tort for the purposes of s 5 of the *Law Reform Act* 1995 in that the plaintiff relies on the same facts or matters in both causes of action. The question then is what would a reasonable person have done in the circumstances of the defendant by way of response to the admitted foreseeable risk of injury to the plaintiff. See *Hackshaw v Shaw* [2] .

via

[2] (1984) 155 CLR 614 at 666 per Deane J adopted by the majority in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479

Lloyd v Noosa North Shore Caravan Park [2007] QDC 302 (16 November 2007) (Searles DCJ)

15. Given the concession by the defendant as to the existence of the requisite duty to the plaintiff both in contract and at common law, the sole issue between the plaintiff and the defendant on liability is whether or not there has been breach of that duty. The contractual duty of care is concurrent and co-extensive with the duty of care in tort for the purposes of s 5 of the *Law Reform Act* 1995 in that the plaintiff relies on the same facts or matters in both causes of action. The question then is what would a reasonable person have done in the circumstances of the defendant by way of response to the admitted foreseeable risk of injury to the plaintiff. See *Hackshaw v Shaw* *[2]* .

Lloyd v Noosa North Shore Caravan Park [2007] QDC 302 -
Markey v Scarboro Surf Life Saving Club Inc [2007] WADC 194 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 (22 August 2007) (Wheeler JA)

40. The standard of care (that is, the measure of the discharge of the duty of care) applicable to an occupier is what, if anything, a reasonable person in the the occupier's position would, in the circumstances, do by way of response to the foreseeable risk. See ***Hackshaw v Shaw*** (1984) 155 CLR 614 at 662 663 ; ***Australian Safeway Stores*** at 488 ; ***Neindorf v Junkovic*** (2005) 80 ALJR 341 at 345 [8] .

Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 -
Lloyd v Noosa North Shore Caravan Park [2007] QDC 281 (21 August 2007) (Searles DCJ)

15. Given the concession by the defendant as to the existence of the requisite duty to the plaintiff both in contract and at common law, the sole issue between the plaintiff and the defendant on liability is whether or not there has been breach of that duty. The contractual duty of care is concurrent and co-extensive with the duty of care in tort for the purposes of s 5 of the *Law Reform Act* 1995 in that the plaintiff relies on the same facts or matters in both causes of action. The question then is what would a reasonable person have done in the circumstances of the defendant by way of response to the admitted foreseeable risk of injury to the plaintiff. See *Hackshaw v Shaw* *[2]* .

via

[2] (1984) 155 CLR 614 at 666 per Deane J adopted by the majority in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479

Lloyd v Noosa North Shore Caravan Park [2007] QDC 281 -
Lloyd v Noosa North Shore Caravan Park [2007] QDC 281 -
Sahas v Watch Tower Bible and Tract Society of Australia [2007] WADC 74 (21 May 2007) (Eaton DCJ)

14. Early in the line of cases which support the view that I hold is the case of ***Westralian Caterers Pty Ltd v Eastment Ltd*** (1992) 8 WAR 139 in which Malcolm CJ said at p 145 :

> "The common law, as it was then understood to be, had developed special rules regarding the duty of care owed by an occupier to persons entering his premises depending on whether the entrant was a contractual visitor, invitee, licensee or a trespasser. In *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 the High Court of Australia held that the relevant duty of care should be based on the principle stated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580. In doing so, it abandoned the artificial distinctions and special risks regarding the duty of care which have been developed in the line of cases from *Indemaur v Dames* (1866) LR 1 CP 274 at 288 per Lillee J to *London Graving Dock Co Ltd v Morton* [1951] AC 727. This result flowed from *Hackshaw v Shaw* (1984) 155 CLR 614 and *Papatonakis v Australian Telecommunication Commission* (1985) 156 CLR 7. The purpose of the *Occupiers Liability Act* was to achieve by statute what was achieved by the development of the common law by 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 West 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. In my opinion, a breach of the duty as formulated in the *Occupiers' Liability Act* provides an example of negligence *per se* as 'statutory negligence' as it has sometimes been called: cf *David v Brittanic Merthyr Coal Co* [1909] 2 KB 146 at 164 per Fletcher Mou lton LJ. The statute defines the content of the relevant duty for the purposes of determining whether the occupier is liable in damages for negligence."

Russell v Rail Infrastructure Corporation [2007] NSWSC 402 (30 April 2007) (Bell J)

71 I consider that the defendant was subject to a duty to take reasonable care to avoid physical injury to persons, including trespassers, coming into the railway corridor: **Hackshaw v Shaw** (1984) 155 CLR 614 ; **Austrade & Safeway Stores Pty Ltd v Zaluzna** (1987) 162 CLR 479; **Ryan v State Rail Authority of New South Wales** [1999] NSWSC 1236; **State Rail Authority v Madden** [2001] NSWCA 252 and **Edson** . I do not understand the decision in **Mawlodi v State Rail Authority (NSW)** [2001] NSWCA 415 to be to the contrary. In that case the question posed by Meagher JA (with whose judgment the other members of the Court concurred) was, (at [6]): "whether things being what they were the SRA had any duty to take further measures to ensure the safety of trespassers on its property". His considered the primary judge was right to find that the SRA did not; it had erected a fence and put in place a system for regular inspection and repair of that fence.

Russell v Rail Infrastructure Corporation [2007] NSWSC 402 (30 April 2007) (Bell J)
Hackshaw v Shaw (1984) 155 CLR 614
Joslyn v Berryman

Sauer v Australian Capital Territory [2007] ACTSC 18 -
Sauer v Australian Capital Territory [2007] ACTSC 18 -
JULIE Posetti v Kosciuszko Thredbo Pty Ltd [2007] ACTSC 4 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 (05 October 2006) (Handley JA at 1; Ipp JA at 67; Tobias JA at 325)

224. In *Edson v Roads & Traffic Authority* I said at 68,440, [104] :

"Where the exigencies of life and human nature combine to cause large numbers of persons to take grave risks in utilising areas under the control of a statutory authority, the community expects that the authority itself will take reasonable steps to limit the harm likely to result. It was the very function of the RTA, after all, to promote traffic safety. Considerations of

common humanity would require the RTA to act: cf *Hackshaw v Shaw* [(1984) 155 CLR 614] (at 674 per Dawson J)."

Morgan v Owners of Strata Plan 13937 & anor [2006] NSWSC 1019 (29 September 2006) (Brereton J)
Hackshaw v Shaw (1984) 155 CLR 614
Jones v Bartlett

Morgan v Owners of Strata Plan 13937 & anor [2006] NSWSC 1019 (29 September 2006) (Brereton J)

32 The duty of the Owners to Mr Morgan was that general duty of care owed by occupiers to entrants, to take such care as is reasonable in the circumstances for their safety, and to protect them from risks of injury which can be foreseen and avoided [*Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *Hackshaw v Shaw* (1984) 155 CLR 614, 663]. However, the content of that duty varies according the circumstances of the entrant's presence on the premises, the obviousness of the risk, the probability of the risk occurring, the magnitude of the consequences, and the cost or inconvenience of taking steps to remove, avoid or avert it [*Wyong Shire Council v Shirt* (1980) 146 CLR 40]. An occupier of premises is required to take only such care as is reasonable in the circumstances, not to make the premises as safe as reasonable care and skill on the part of anyone can make them [*Jones v Bartlett* (2000) 205 CLR 166, 177, 184-5 (Gleeson CJ); *Wilkinson v Law Courts Limited* [2001] NSWCA 196, [21] (Heydon JA)]. One must not slide from determination that a risk of injury exists to a consideration of preventability: a defendant will be liable only if its failure to eliminate the risk shows a want of reasonable care for the safety of the entrant [*Tame v State of New South Wales* (2002) 211 CLR 317, [99] (McHugh J); *Cafest v Tombleson* [2003] NSWCA 210 (Meagher JA)]. The content of a duty of care in a particular case cannot therefore adequately or usefully be described simply as one to take reasonable care to avoid a foreseeable risk of injury to a person in the situation of the plaintiff, as that leaves open the content of the term 'reasonable' and thus the content of the duty, without which the issue of breach cannot be determined [*Jones v Bartlett* (2000) 205 CLR 166, 213 [166] - [167] (Gummow and Hayne JJ)]. So it is essential to identify with precision, by reference to considerations of the nature of those indicated in *Wyong Shire Council v Shirt* , what was a reasonable response to the risk of harm that existed [*Graham Barclay Oysters Pty Ltd v Ryan* (2 002) 211 CLR 540, 611-2 [192] (Gummow and Hayne JJ)], a judgment which is to be made having regard the situation before, not after, the accident [*Vairy v Wyong Shire Council* [2005] HCA 62, [49], [126]]. It is necessary to consider these questions from the perspective of the defendant, with its state of knowledge, and ask whether the defendant acted as a reasonably prudent person ought to have acted [*Woods v Multi-Sport Holdings Ltd* (2002) 208 CLR 460].

Stingel v Clark [2006] HCA 37 -
Stingel v Clark [2006] HCA 37 -
Nairn v The Board of Management of Warren District Hospital [2006] WADC 97 -
Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 (07 April 2006) (Beazley JA at 1; Ipp JA at 2; Hunt AJA at 170)

104 I have pointed out that the obvious risks involved in crossing the freeway by the path were not deterring the local inhabitants, of which many were children. The RTA could not assume that most persons would take reasonable care for their own safety. I do not think that in this case the obviousness of the risk was of such significance and importance as to be effectively conclusive. Where the exigencies of life and human nature combine to cause large numbers of persons to take grave risks in utilising areas under the control of a statutory authority, the community expects that the authority itself will take reasonable steps to limit the harm likely to result. It was the very function of the RTA, after all, to promote traffic safety. Considerations of common humanity would require the RTA to act: cf ***Hackshaw v Shaw*** (at 674 per Dawson J).

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 -

Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Murphy v Burnett Shire Council [2006] QDC 20 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2006] WADC 7 -
Primrose v KLEPEACH Pty Ltd t/as McDonalds Rockingham [2005] WADC 260 (22 December 2005) (Groves DCJ)
Hackshaw v Shaw (1984) 155 CLR 614
Jaenke v Hinton (1995) A Torts Reports 81-368

Primrose v KLEPEACH Pty Ltd t/as McDonalds Rockingham [2005] WADC 260 -
Primrose v KLEPEACH Pty Ltd t/as McDonalds Rockingham [2005] WADC 260 -
Neindorf v Junkovic [2005] HCA 75 (08 December 2005) (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ)

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

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

Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Di Vincenzo v McKrill [2005] WASCA 222 (22 November 2005) (Steytler P; Roberts-Smith JA; Miller AJA)
Hackshaw v Shaw (1984) 155 CLR 614
Indermaur v Dames (1866) LR1CP 274

Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Gillam v Serco Australia Pty Limited [2005] WADC 171 -
Gillam v Serco Australia Pty Limited [2005] WADC 171 -
Gillam v Serco Australia Pty Limited [2005] WADC 171 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Perrozzi v Homestyle Pty Ltd [2005] WADC 145 (03 August 2005) (Muller DCJ)

11. The defendant accepted that it was an occupier of the premises within the meaning of s 2 of the *Occupiers' Liability Act 1985* . In ***Australian Safeway Stores Pty Ltd v Zaluzna*** (1987) 162 CLR 479 the High Court confirmed that the duty of care owed by an occupier under the relevant legislation and the duty of care owed under the common law was the same. In reaching this conclusion the High Court adopted the statement of Deane J in ***Hackshaw v Shaw*** (1984) 155 CLR 614 at 622 as follows:

> "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."

Perrozzi v Homestyle Pty Ltd [2005] WADC 145 -
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 -
Dawson v McLernon [2005] FMCA 721 (20 May 2005) (McInnis FM)
Sandal v Porter (1966) 155 CLR 666
Wren v Mahoney

Dawson v McLernon [2005] FMCA 721 -
Rough v Grommen [2005] QDC 108 -
Rough v Grommen [2005] QDC 108 -
Bark v Tylor [2005] WADC 59 -
McFarlane v The State of Western Australia [2004] WADC 245 -
Ragnelli v David Jones (Adelaide) Pty Ltd [2004] SASC 393 (02 December 2004) (Doyle CJ; Duggan and Gray JJ)

74. Recent developments of the common law with respect to occupier liability can be traced to the judgment of Deane J in *Hackshaw v Shaw [2]* . That case concerned the duty owed by an occupant to a trespasser. Deane J observed: [3]

> [I]t 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. Where the visitor is lawfully upon the land, the mere relationship between occupier on the one hand and invitee or licensee on the other will of itself suffice to give rise to a duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to her or him. When the visitor is on the land as a trespasser, the mere relationship of occupier and trespasser which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may, as a matter of law, supply the requisite degree of proximity or give rise to a reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence.

> Whether, when a duty to take reasonable care exists, reasonable care has been taken is a question of fact to be answered in the context of the "all-embracing" considerations to which the Judicial Committee referred in *Cooper* and to which Fullagar J. had referred in *Cardy* . As Salmon L.J. observed in the course of his judgment in *Herrington*:
>
> > "What is reasonable care is only such care as is reasonable in all the circumstances of the case. The circumstances vary infinitely from case to case. Foreseeability of the likelihood of injury, the degree of risk, the gravity of the injury, are all circumstances which have to be assessed by the court and weighed against the burden which would be incurred by an occupier in taking steps to prevent injury

> before the court can decide whether or not negligence has been made out. The circumstance that the plaintiff is a trespasser, and the sort of trespasser he is, must clearly be of great importance."

Ragnelli v David Jones (Adelaide) Pty Ltd [2004] SASC 393 (02 December 2004) (Doyle CJ; Duggan and Gray JJ)

75. In 1987 these observations of Deane J were adopted and applied by the majority of the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna* [4] . In that case, Ms Zaluzna was injured when she slipped in the foyer area of a supermarket in Victoria. The vinyl tiled floor of the foyer had become moist as a result of wet weather. Ms Zalunza sought damages from the occupiers of the supermarket, alleging breach of the duty owed by an occupier to an invitee. In their joint judgment Mason, Wilson, Deane and Dawson JJ observed: [5]

> The recent review of relevant authority undertaken by Deane J in *Hackshaw* , and by Mason J in *P apatonakis*, prepares the way for a more definitive statement on this aspect of the law of negligence in Australia. In *Papatonakis* 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 (NSW) v Anderson* . In that regard, the dissenting judgments of *Lord MacDermott and Lord Reid in London Graving Dock Co Ltd v Horton* 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 (UK), s 2(4)(a)."
>
> Mason J in *Papatonakis* 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 *Inder maur v Dames* formulation, is no more and no less than the ordinary duty of reasonable care."

Ragnelli v David Jones (Adelaide) Pty Ltd [2004] SASC 393 -
Ragnelli v David Jones (Adelaide) Pty Ltd [2004] SASC 393 -
Ragnelli v David Jones (Adelaide) Pty Ltd [2004] SASC 393 -
Ragnelli v David Jones (Adelaide) Pty Ltd [2004] SASC 393 -
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 -
Lynch v Kinney Shoes [2004] QSC 370 -
Lynch v Kinney Shoes [2004] QSC 370 -
Junkovic v Neindorf [2004] SASC 325 (15 October 2004) (Doyle CJ; Nyland and Gray JJ)

86. Recent developments of the common law with respect to occupier's liability can be traced to the judgment of Deane J in *Hackshaw v Shaw [11]* . That case concerned the duty owed by an occupant to a trespasser. Deane J observed: [12]

> [I]t 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. Where the visitor is lawfully upon the land, the mere relationship between occupier on the one hand and invitee or licensee on the other will of itself suffice to give rise to a duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to her or him. When the visitor is on the land as a trespasser, the mere relationship of occupier and trespasser which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may, as a matter of law, supply the requisite degree of proximity or give rise to a reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence.

> Whether, when a duty to take reasonable care exists, reasonable care has been taken is a question of fact to be answered in the context of the "all-embracing" considerations to which the Judicial Committee referred in *Cooper* and to which Fullagar J. had referred in *Cardy*. As Salmon L.J. observed in the course of his judgment in *Herrington*:
>
> > "What is reasonable care is only such care as is reasonable in all the circumstances of the case. The circumstances vary infinitely from case to case. Foreseeability of the likelihood of injury, the degree of risk, the gravity of the injury, are all circumstances which have to be assessed by the court and weighed against the burden which would be incurred by an occupier in taking steps to prevent injury before the court can decide whether or not negligence has been made out. The circumstance that the plaintiff is a trespasser, and the sort of trespasser he is, must clearly be of great importance."

via

[12] (1984) 155 CLR 614 at 662

Junkovic v Neindorf [2004] SASC 325 -
Junkovic v Neindorf [2004] SASC 325 -
Junkovic v Neindorf [2004] SASC 325 -
Junkovic v Neindorf [2004] SASC 325 -

Junkovic v Neindorf [2004] SASC 325 -
Junkovic v Neindorf [2004] SASC 325 -
Granger v Cameron & Anor No. DCCIV-98-87 [2004] SADC 64 (28 April 2004)

330. If I am wrong in that, then I respectfully adopt the remarks of Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 662/63, approved as they were in *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479 at 488:

> *"... 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 considering that question of proximity, I return to the principle conveniently expressed by Deane J in *Sutherland Shire Council v Heyman* (supra) at 497:

> *"The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connexion or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case."*

Also in the joint judgment of Gleeson CJ, Gaudron, McHugh, Hayne & Callinan JJ in *Sullivan v Moody* (supra), at paragraph 50:

> *"Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle."*

Tea Tree Plaza Nominees Pty Ltd v Gaulke No. Scciv-03-1469 [2004] SASC 28 -
Thompson v Woolworths (Q'land) P/L [2003] QCA 551 (12 December 2003) (de Jersey CJ, Williams JA and McMurdo J,)

49. Since the reform of occupier's liability in *Australian Safeway Stores* , an occupier has a duty of care according to what Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 described as the ordinary general principles of negligence. The *measure* or *content* of that duty in a particular case involves a distinct question, which is one of fact, being what, in the circumstances, a reasonable person would do in response to the foreseeable risk. On the question of whether there is a duty of care, the nature and extent of the risk is relevant in the consideration of whether the risk was reasonably foreseeable. But the fact that the risk is from conduct which is unlikely or foolhardy does not prevent it from being reasonably foreseeable. It is a foreseeable risk although it exists from the potential for others to fail to take care for their own safety: *McLean v Tedman* (1984) 155 CLR 305 at 211 ; *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at 445 per Brennan CJ and 491 per Hayne J. It is enough that the risk is not far fetched or fanciful: *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48 per Mason J; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 where Mason CJ, Deane, Dawson, and Gaudron JJ said at 430-431 :

> "*Foreseeability*
>
> In view of the division of opinion between the judges who have dealt with the case in the courts below, it is clear that the question of foreseeability is one of the critical issues in the case. Ultimately, having read and reviewed the relevant evidence given at trial and the reasons for decision of the trial judge and of the members of the Full Court, we are left in no doubt that the trial judge was correct in concluding that the risk of injury to those diving from the rock ledge was reasonably foreseeable. As he said, "it may have reasonably been considered foolhardy or unlikely" for a person to dive as the appellant did. But, as he recognized, that was not the relevant question: a risk may constitute a foreseeable risk even though it is unlikely to occur (16). It is enough that the risk is not far-fetched or fanciful (16)."

Jenkins v Sydney Markets Limited [2003] NSWSC 1162 (09 December 2003) (Shaw J)

40 There is no dispute that the defendant would owe a duty of care to prevent foreseeable injury to the plaintiff, as an occupier of the markets, over elements of the markets in which the defendant had exercised control or had the power to exercise control over its operations. The test for a duty of care is based upon control in all the circumstances as described in *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-663 approved in *Australian Safeway Stores Pty Limited v Zaluzna* (1987) 162 CLR 479. Further:

> 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.

Jenkins v Sydney Markets Limited [2003] NSWSC 1162 -
O'Meara v Dominican Fathers [2003] ACTCA 24 (05 December 2003)
Hackshaw v Shaw (1984) 155 CLR 614 considered

O'Meara v Dominican Fathers [2003] ACTCA 24 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
Craigie v Fluor Daniel Pty Ltd [2003] WADC 254 (27 November 2003) (Muller DCJ)
Hackshaw v Shaw (1984) 155 CLR 614
Martin v Thorn Lighting Industries Pty Ltd

Craigie v Fluor Daniel Pty Ltd [2003] WADC 254 (27 November 2003) (Muller DCJ)

Hackshaw v Shaw (1984) 155 CLR 614
Martin v Thorn Lighting Industries Pty Ltd

Craigie v Fluor Daniel Pty Ltd [2003] WADC 254 -
Bernardus Hubertus Van Stokkum and the People Named in Schedule A v The Finance Brokers Supervisory Board [2003] WASC 204 -
Hoyts Pty Ltd v Burns [2003] HCA 61 (09 October 2003) (McHugh, Gummow, Kirby, Hayne and Callinan JJ)

32. The respondent sued the appellant in negligence. To establish the duty of care, and to define its scope, she alleged that she was an entrant on the appellant's premises pursuant to a contract negotiated for reward with the appellant. In these circumstances (which were not disputed) the duty owed by the appellant to the respondent was that of ensuring that "the premises are as safe for [the mutually contemplated] purpose as reasonable care and skill on the part of any one can make them" [9] . That explanation of the warranty relating to the safety of premises implied in a contract between an occupier and a person who enters under the contract has been accepted by this Court as a correct statement of the law [10] . It has also been accepted (and was not challenged in this appeal) that the restatement of the principles of the common law governing the liability of an occupier of premises [11] has not replaced the particular duty owed to entrants pursuant to contract [12] .

via

[11] As in *Hackshaw v Shaw* (1984) 155 CLR 614 ; *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 and *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

Hagger v City of Fremantle [2003] WADC 206 -
Hagger v City of Fremantle [2003] WADC 206 -
Taouk v Waste Recycling & Processing Service of NSW [2003] NSWCA 273 (25 September 2003) (Sheller, Beazley and McColl JJA)

1 Hackshaw v Shaw (1984) 155 CLR 614 at 663 ; Australian Safeway Stores Pty Ltd v

Taouk v Waste Recycling & Processing Service of NSW [2003] NSWCA 273 -
Duval v Pederson [2003] WADC 197 -
Lynn v Apex Holiday Centre (Incorporated) [2003] WADC 169 -
Lynn v Apex Holiday Centre (Incorporated) [2003] WADC 169 -
Avanes v Club Marconi of Bossley Park Social Recreational and Sporting Centre Ltd [2003] NSWCA 184 (11 July 2003) (Sheller, Ipp and Tobias JJA)

15 In his reasons for judgment Judge Delaney quoted the well known passage from the judgment of Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 . The duty of care owed by an occupier to those persons who come upon the occupier's premises was authoritatively stated by the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479. At 488 the majority adopted the following statement of Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-3 :

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

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

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 (04 July 2003) (McPherson and Jerrard JJA and Atkinson J,)
Hackshaw v Shaw (1984) 155 CLR 614 , applied

Aquilina v Beenleigh Greyhound Race Club Inc [2003] QCA 270 (04 July 2003) (McPherson and Jerrard JJA and Atkinson J,)

13. It must be accepted that an occupier of premises has a duty of care to an invitee such as Mr Aquilina. This is no more or no less than the ordinary duty of reasonable care. [1] As the learned trial judge found, the requirement that the occupier in this case exercise reasonable care to ensure the track is safe for use by members of the public did not require every foreseeable risk to be countered. In the case of grassy slopes, members of the public can be expected to take reasonable care for their own safety when walking [2] . His Honour also correctly held that in considering the content of the duty of care that the racing club was entitled to act on the expectation that the respondent would exercise reasonable care for his own safety when walking [3] . No error of law has been demonstrated in his Honour's reasoning.

via

[1] *Hackshaw v Shaw* (1984) 155 CLR 614 ; *Papantonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 20, 32 ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at [12], [19] .

Thompson v Woolworths [2003] QDC 152 (18 June 2003) (Samios DCJ)
Hackshaw v Shaw (1984) 155 CLR 614, 663 *McLean v Tedman* (1984) 155 CLR 306, 311-312, 315 *McPherson v Whitfield* (1996) 1 Qd R 474 *O'Brien & O'Brien v TF Woollam & Son Pty Ltd* (2001) QSC 217 *O'Shea v Permanent Trustee Co of New South Wales Ltd* (1971) Qd R 1, 11 *Woods v Multi-Sport Holdings Pty Ltd* (2001-2002) 208 CLR 460, 472, 473, 478, 499-500, 502

Thompson v Woolworths [2003] QDC 152 -
Trevor Howse Associates P/L v Dessmann and Anor Quadrant Research Services P/L v Dessman and Anor [2003] NSWCA 148 -
Trevor Howse Associates P/L v Dessmann and Anor Quadrant Research Services P/L v Dessman and Anor [2003] NSWCA 148 -
Baker v Gilbert [2003] NSWCA 113 (23 May 2003)

29. The paramount principles governing the liability of Mr Baker are those stated in the judgment of Deane J in ***Hackshaw v Shaw*** (1984) 155 CLR 614 at 662 to 663 and approved by the majority of the High Court in ***Australian Safeway Stores Pty Limited v Zaluzna*** (1986) 162 CLR 479 at 488. Deane J said at 663 :

"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 pre-requisite 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".

While the significance of "proximity" has been questioned, the law is clear that the duty of care of an occupier arises in accordance with the ordinary principles of negligence and breach of that duty depends on what a reasonable person, in the circumstances, would do by way of response to the foreseeable risk

Baker v Gilbert [2003] NSWCA 113 -
Baker v Gilbert [2003] NSWCA 113 -
McKrill v Lincoln Constructions (WA) Pty Ltd [2003] WADC 84 (11 April 2003) (Yeats DCJ)

Hackshaw v Shaw (1984) 155 CLR 614

Mulligan v Coffs Harbour City Council [2003] NSWSC 49 (14 March 2003) (Whealy J)
Hackshaw v Shaw (1984) 155 CLR 614 at 662-663
Romeo v Conservation Commission (NT)

Mulligan v Coffs Harbour City Council [2003] NSWSC 49 -
Vairy v Wyong Shire Council [2002] NSWSC 881 (20 December 2002) (Bell J)

147 I accept Mr Semmler's submission that liability under the modern law of negligence does not depend upon the payment of an entry fee. However, I do not approach the determination of the issues raised in this case upon a view that there is no distinction to be drawn between the content of the reasonable response of a council to the foreseeable risk of injury arising out of the operation of a municipal swimming pool and the content of the reasonable response of a council to the foreseeable risk of injury associated with a natural formation in a reserve the subject of its care, control and management. In this respect I have regard to the observations of Hayne J in *Romeo* at [15 7] emphasising that what is reasonable must be judged in the light of all of the circumstances including in a particular case whether the danger was hidden or obvious and whether it is one created by the action of the authority or a naturally occurring one. His Honour continued:

> "But all of these matters (and I am not to be taken as giving some exhaustive list) are no more than particular factors which *may* go towards judging what reasonable care on the part of a particular defendant required. In the end, that question, what is reasonable, is a question of fact to be judged in all of the circumstances of the case (*Herrington v British Railways Board* [1971] 2 QB 107 at 120 per Salmon LJ cited, with approval in *Hackshaw* (1984) 155 CLR 614 at 663 , per Deane J).

Wilbe v the City of Munno Para No. Scciv-02-428 [2002] SASC 425 -
Council of the City of Gold Coast v Stocks [2002] QDC 304 -
Thompson v City of South Perth [2002] WADC 141 (18 July 2002) (Muller DCJ)
Hackshaw v Shaw (1984) 155 CLR 614
MacPherson v City of Stirling, unreported; DCt of WA; Library No D980324;

Thompson v City of South Perth [2002] WADC 141 -
Thompson v City of South Perth [2002] WADC 141 -
Lake Macquarie City Council v McKellar [2002] NSWCA 90 -
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 -
Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 -
Burns v Hoyts Pty Ltd [2002] NSWCA 5 (08 February 2002) (Sheller and Heydon JJA, Ipp AJA)

> 19 The plaintiff relied upon the oft quoted statement of Mason J (as his Honour then was) in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 based on what Lord Reid had said in the *"Wagon Mound" (No 2)* [1967] 1 AC 617 at 643-4 . The defendant accepted it owed a duty of care to the plaintiff while she was on the premises of the Bankstown cinema complex. "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": *Hackshaw v Shaw* (1984) 155 CLR 614 at 663 ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488. Judge Gibb cited *Wyong Shire Council v Shirt* but was diverted by the plaintiff's submission that it was not apposite because the defendant had invited the plaintiff into premises maintained for profit that were "inherently dangerous". Judge Gibb did not address the question whether a reasonable person in the position of the defendant would have foreseen that some patrons returning to their seats in the dark might have assumed that the seats were still down as they left them because they did not know or realise that the seats were automatically retractable.

Burns v Hoyts Pty Ltd [2002] NSWCA 5 -
City of Ballarat v Perovic [2001] VSCA 222 -
Sinclair v Caloundra Sub-Branch RSL Services Club Inc [2001] QDC 196 -
Sinclair v Caloundra Sub-Branch RSL Services Club Inc [2001] QDC 196 -
Coffs Harbour City Council v Backman [2001] NSWCA 202 (29 June 2001) (Handley and Stein JJA, Grove AJA)
- *Hackshaw v Shaw* (1984) 155 CLR 614 applied

Coffs Harbour City Council v Backman [2001] NSWCA 202 (29 June 2001) (Handley and Stein JJA, Grove AJA)

> 37 In *Hackshaw v Shaw* (1984) 155 CLR 614 at 662 - 663 Deane J said:
>
> > ... 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. Where the visitor is lawfully upon the land, the mere relationship between occupier on the one hand and invitee or licensee on the other will of itself suffice to give rise to a duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to her or him. When the visitor is on the land as a trespasser, the mere relationship of occupier and trespasser which the trespasser has imposed upon the occupier will not satisfy the requirement of proximity. Something more will be required. The additional factor or combination of factors which may, as a matter of law, supply the requisite degree of proximity or give rise to a reasonably foreseeable risk of relevant injury are incapable of being exhaustively defined or identified. At the least they will include either knowledge of the actual or likely presence of a trespasser or reasonable foreseeability of a real risk of such presence . (emphasis added)

Coffs Harbour City Council v Backman [2001] NSWCA 202 -
Coffs Harbour City Council v Backman [2001] NSWCA 202 -
Treloar v Dache-Haven Pty Ltd [2001] QDC 44 (06 April 2001) (McGill DCJ.)

29. It was foreseeable that a person might slip and fall in the premises: Phillis v. Daly (1988) 15 NSWLR 65 at 74. People can suffer serious injuries as a result of falling. and indeed if the person happened to be in the vicinity of the top of stairs, might as a result of the slip fall down the stairs. That follows inevitably from the circumstances that people do slip and fall from time to time, and that falls down stairs can cause injury, indeed serious injury. But it does not necessarily follow that an occupier is negligent for failing to have a particularly slip resistance surface on any flooring where people are likely to be walking. The question is, what would a reasonable man do in the circumstances by way of response to the foreseeable risk: Hackshaw v. Shaw (1984) 155 CLR 614 at 666 per Deane J, adopted by the majority in Zalu zna at p. 488.

Treloar v Dache-Haven Pty Ltd [2001] QDC 44 -
Sault v City of Melville [2001] WADC 51 -
Marinkovich v Morkim Pty Ltd [2001] WASC 46 -
Marinkovich v Morkim Pty Ltd [2001] WASC 46 -
Oates v BUTTERLY [2000] WASCA 406 -
Vaughan v Du Zebra Pty Ltd [2000] QSC 412 -
Jones v Bartlett [2000] HCA 56 -
Drotem Pty Ltd v Manning [2000] NSWCA 320 -
Vaughan v Du Zebra Pty Ltd [2000] QSC 412 -
Australian Postal Corporation v Gallard [2000] NSWCA 316 (03 November 2000)

10. The liability of an occupier is simply a duty to take reasonable care to avoid a reasonably foreseeable real risk of injury: *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-3 per Deane J , approved by Mason, Wilson, Deane and Dawson JJ in *Australian Safeways Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479. Neither those cases nor any other good authority supports the proposition that the defendant could not be liable unless it knew of, or had reason to suspect, unsafeness in the ramp. It is true that *Stannus v Graham* demonstrates that an occupier may in some circumstances be able to avoid liability by pointing to a lack of notice of a defect or of a factor creating suspicion of the defect. Thus Handley JA said that there was no evidence in that case that the occupier had reason to suspect any movement in the step (at 61,594). But he also said that it "was not ... established that a close inspection by an expert the day before this accident would have revealed that it was likely to move in the near future" (at 61,565). The case is thus radically different from the present, since an inspection before the accident by a competent expert such as Dr Coyle would have revealed the defect. *Stannus v Graham* is also different from the present case in that the present case does not concern a feature of the relevant land which had been stable but unexpectedly moved; rather it concerned a feature

which had had the defects identified by Dr Coyle for years. Further, *Stannus v Graham* is not authority for the proposition that the defendant had no duty to inspect its premises for unsuspected defects. Handley JA denied that "an occupier of residential property has a duty to inspect the premises for the purpose of discovering unsuspected defects". But the present defendant was not an occupier of residential property: it occupied property over which multitudes of people passed daily. A ramp is something which in the mind of a reasonable occupier would raise the risk of falls by slipping as a possibility to be investigated.

O'Callaghan v Commonwealth of Australia [2000] WADC 259 (20 October 2000) (Nisbet DCJ)

7. In the circumstances I have little difficulty in finding that the defendant owed the plaintiff a duty of care to ensure that its premises were reasonably safe for use in the manner in which the defendant could reasonably foresee them being used. The question then becomes: did the defendant breach its duty of care? In this regard the plaintiff brought his claim in negligence as well as under the *Occupiers Liability Act* (1985) (WA). This is just as well because the Commonwealth is not bound by state legislation which would adversely affect its property, revenue or prerogatives: ***Trade Practices Commission v Manfal Pty Ltd and Ors*** (1990) 97 ALR 231 at 240. Accordingly the question of breach or no breach falls to be determined according to the common law rules of negligence (since ***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520). What then did the defendant have to do to make its premises safe? "... what a reasonable man would in the circumstances do by way of response to the foreseeable risk." (***Hackshaw v Shaw*** (1984) 155 CLR 614 at 662).

O'Callaghan v Commonwealth of Australia [2000] WADC 259 -
Carrier v Bonham [2000] QDC 226 -
Ordukaya v Hicks [2000] NSWCA 180 -
Ordukaya v Hicks [2000] NSWCA 180 -
Critchley v Cross [2000] NSWSC 6 (08 February 2000) (Studdert J)

53 In *Zaluzna* Mason, Wilson, Brennan, Deane and Dawson JJ adopted the statement of principle of Deane J in *Hackshaw* . Their Honours said at p 488 :

Critchley v Cross [2000] NSWSC 6 -
Critchley v Cross [2000] NSWSC 6 -
Critchley v Cross [2000] NSWSC 6 -
Critchley v Cross [2000] NSWSC 6 -
Critchley v Cross [2000] NSWSC 6 -
Cossens v Townsville Turf Club Inc [2000] QSC 59 -
Ryan v State Rail Authority of New South Wales [1999] NSWSC 1236 -
Ryan v State Rail Authority of New South Wales [1999] NSWSC 1236 -
Prast v Town of Cottesloe [1999] WADC 116 -
Prast v Town of Cottesloe [1999] WADC 116 -
Gladys Joyce Fitzpatrick v Maroochy Shire Council [1999] QDC 236 (02 September 1999)

Apart from that, it is not sufficient merely to show a foreseeable risk of injury. Before breach of the duty of care may be established a number of other matters must be considered. "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": *Hackshaw v. Shaw* (1984) 155 CLR 614 at 663 per Deane J .

Elliott v Minister for Transport for the State of Western Australia [1999] WASCA 134 -
Elliott v Minister for Transport for the State of Western Australia [1999] WASCA 134 -
Jones v Persal & Co [1999] QDC 189 -
Tippett & Ors v Fraser & Ors No. Scgrg-97-418 Judgment No. S267 [1999] SASC 267 (07 July 1999)

67 In the present case, there is a sufficient degree of proximity of relationship between Mr and Mrs Tippett on the one hand and the first defendants on the other to establish a duty of care on the part of the first defendant. to Mr and Mrs Tippett: Hackshaw v Shaw (1984) 155 CLR 614 at p663.

Tippett & Ors v Fraser & Ors No. Scgrg-97-418 Judgment No. S267 [1999] SASC 267 -
Allen v Taylor [1999] NSWCA 135 -
Allen v Taylor [1999] NSWCA 135 -
Allen v Taylor [1999] NSWCA 135 -
Allen v Taylor [1999] NSWCA 135 -
Hetherington v Mirvac Pty Limited [1999] NSWSC 443 -
TC v State of New South Wales [1999] NSWSC 31 -
Toutounji v the Girl Guides Association (SA) Inc No. Scgrg-98-336 Judgment No. S6954 [1998] SASC 6954 -
Cutts v O'Neil & Dann No. Scgrg-98-719 Judgment No. S6921 [1998] SASC 6921 (13 November 1998)

93. Section 17E makes provision for the exclusion of conflicting common law principles. There is nothing in this case which calls s17E into operation. The principles of the law of negligence to which s.17C(1) refers were expressed by the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 when the court applied the observations of Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 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."*

The duty required of the defendants was to take reasonable care to protect the plaintiff from risks of injury which could be foreseen and avoided. When considering whether the defendants had discharged their duty of care, regard must be had to the observations of Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 :

> *"A risk of injury which is quite unlikely to occur, such as that which happened in Bolton v Stone [1951] A.C. 850, may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.*
>
> *In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.*
>
> *The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of*

duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors".

These remarks are not intended to establish a régime of strict liability. The duty of care to one's neighbour was not elevated to an obligation to be an insurer for one's neighbour. Instead, the remarks identify whether a breach of the duty has occurred by reference to the response of a reasonable person.

Scarf v State of Queensland [1998] QSC 233 -
Scarf v State of Queensland [1998] QSC 233 -
Cutts v O'Neil & Anor No. DCCIV-97-1080 Judgment No. D3813 [1998] SADC 4003 -
Toutounji v Waldorf School & Girl Guides Assoc No. DCCIV-96-1467 Judgment No. D3765 [1998] SADC 3765 (26 February 1998)

In **Australian Safeway Stores**, the majority, at 488, approved the statement of Deane J. in **Hacksha w v Shaw** (1984) 155 CLR 614 at 662-663 **:**

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)

99. In the Court of Appeal [141] , it appears to have been accepted that simply to apply the *Aiken* t est for the ascertainment of the existence, and measure, of the Commission's duty of care would have been erroneous following the rejection by this Court of the old categories for the legal liability of occupiers of land [142] and the acceptance that such liability was to be determined by the application of the general principles of the law of negligence [143] . Certai nly, the Court of Appeal addressed itself correctly to this development of the law and specifically to the application of that law in *Nagle* [144] .

via

[143] *Hackshaw v Shaw* (1984) 155 CLR 614 at 663 per Deane J .

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

118. If the test which the law required in this case was that stated by Deane J in *Hackshaw v Shaw* [177] , adopted in *Zaluzna* [178] and applied by the majority in *Nagle* [179] , it was a prerequisite of a duty of care that there had to be the necessary degree of proximity between the parties. The touchstone of the existence of proximity was that there was reasonable foreseeability of a real risk of injury to a person such as the appellant. Questions of legal policy, reflecting the need sometimes to limit the imposition of a duty of care to that which is fair and reasonable, have also been recognised by this Court [180] . Although this last consideration is sometimes overlooked, it should not be, for the law of negligence must ultimately respond to common notions of fairness and justice. If foreseeability and proximity, alone, take the law into the imposition of duties of care which are unfair, unreasonable and unrealistic, the time will have come to re-express the preconditions for the existence of the duty in a way more harmonious with such considerations.

Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
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 .

Lennard v Ansett Transport Industries (Operations) P/L [1997] QSC 144 -
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39 (14 August 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)

[135] See *Hackshaw v Shaw* (1984) 155 CLR 614 at 663 per Deane J ; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 487-488 per Mason, Wilson, Deane and Dawson JJ.

Kranich v The Minister of Education No. DCCIV-96-1119 Judgment No. D3590 [1997] SADC 3590 -
Mason v Mason [1997] 1 VR 325 -
Joseph Dilettoso v Strata Corporation 10135 Inc No. SCGRG 95/1451 Judgment No. 5283 Number of Pages 4 Negligence Dangerous Premises [1995] SASC 5283 (21 October 1995)

Negligence - Dangerous premises - Liability of occupier to a trespasser - whether presence of trespasser reasonably forseeable - nature or extent of the danger. Wrongs Act sl7c, sl7c(6), sl7e, sl7b, sl7c(1),sl7e(2), referred to. Eyres v Butt (1986) 2 Qld R 243, distinguished. Indermaur v Dames (1866) LR 1 CP 274 discussed. Hackshaw v Shaw (1984) 155 CLR 614 ; Australian Safeway Stores v Zaluzna (1987) 162 CLR 479 , considered.

Joseph Dilettoso v Strata Corporation 10135 Inc No. SCGRG 95/1451 Judgment No. 5283 Number of Pages 4 Negligence Dangerous Premises [1995] SASC 5283 -
Harris v Northern Sandblasting [1995] QCA 413 -
Belsand Pty Ltd v Bridgeland Securities Ltd [1995] FCA 360 -
Belsand Pty Ltd v Bridgeland Securities Ltd [1995] FCA 360 -
Kulczycki v Metalex Pty Ltd [1995] 2 VR 377 (10 February 1995) (Tadgell, Nathan and Ashley JJ)

I think that a solution consistent with principle is this: The law recognises that risk of injury may be foreseeable although it is unlikely; see, eg, Council of the Shire of Wyong v Shirt (1980) 146 CLR 40 , Hackshaw v Shaw (1984) 155 CLR 614 and McLean v Tedman (1984) 155 CLR 306 McLean at 311. In Shirt, Mason J said this (at 47-48) concerning foreseeability of risk of injury and the adequacy of response: A risk of injury which is quite unlikely to occur, such as that which happened in Bolton v Stone [1951] A.C. 850 , may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is

far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.

Zalewski v Turcarolo [1995] 2 VR 562 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Nagle v Rottnest Island Authority [1993] HCA 76 (21 April 1993) (Mason Cj, Brennan, Deane, Dawson and Gaudron JJ)

4. The relevant duty (if any) is one owed by the Board, a public authority, to the plaintiff as a member of the public coming upon the foreshore of the Basin as of right. If this case were to be decided on the simple footing that the Board was the occupier of Rottnest and the plaintiff's damage was caused by the condition of the area occupied, it would be necessary to adopt the approach taken by Deane J. in Hackshaw v. Shaw ((14) (1984) 155 CLR614 , at pp 662-663 .) and adopted by the majority of this Court in Australian Safeway Stores Pty. Ltd. v. Zaluzna ((15) (1987) 162 CLR479, at p 488.):

Nagle v Rottnest Island Authority [1993] HCA 76 (21 April 1993) (Mason Cj, Brennan, Deane, Dawson and Gaudron JJ)

7. The trial judge recorded that it was not seriously suggested that the ordinary principles with regard to liability of occupiers of land in negligence did not apply to public authorities ((7) See Sutherland Shire Council v. Heyman (1985) 157 CLR 424, per Gibbs CJ at p 445 ; Voli v. Inglewood Shire Council (1963) 110 CLR 74 .) or that, in actions in negligence against an occupier of land such as the Board as occupier of the Reserve, the law was other than as stated by Deane J. in Hackshaw v. Shaw ((8) (1984) 155 CLR 614 , at pp 662-663 , adopted in Australian Safeway Stores Pty. Ltd. v. Zaluzna (1987) 162 CLR 479, per Mason, Wilson, Deane and Dawson JJ. at p 488.) In conformity with the statement, his Honour recognized that, as a prerequisite to the existence of a duty of care, there must be a necessary degree of proximity of relationship and that the touchstone is that, in all the circumstances, there may be a real risk of injury to the visitor or to the class of which the visitor is a member. In relation to the question whether there was a real risk of injury, his Honour concluded:

Calin v Greater Union Organisation Pty Ltd [1991] HCA 23 -
Lippl v Haines 18 NSWLR 620 -
Lippl v Haines 18 NSWLR 620 -
Rehrmann v Carins [1989] TASSC 124 -
Chordas v Bryant [1988] FCA 753 -
Phillis v Daly 15 NSWLR 65 (16 November 1988) (Samuels, Mahoney and McHugh JJA)

"... 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 [other areas] to simplify the operation of the law to accord with the statement of Deane J in Hackshaw at 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.'

Phillis v Daly 15 NSWLR 65 -
Phillis v Daly 15 NSWLR 65 -
Hawkins v Clayton [1988] HCA 15 -
Large v O'Brien, Thomas and Goss [1987] TASSC 106 -
Western Suburbs Hospital v Currie 9 NSWLR 511 (03 July 1987) (Kirby P, McHugh JA and McLelland A-Ja)

> By the time of the hearing before this Court, the High Court of Australia had delivered its judgment in Australian Safeway Stores Pty Ltd v Zaluzna (1987) 61 ALJR 180; 69 ALR 615. In that case, the High Court by majority (Mason CJ, Wilson, Deane and Dawson JJ; Brennan J dissenting) followed the way prepared by earlier judgments for a "more definitive statement on this aspect of the law of negligence in Australia" (ibid at 181; 617). The Court referred to what Deane J had said in Hackshaw v Shaw (1984) 155 CLR 614 at 642-643 and what Mason J, as he was then, said in Papatonak is v Australian Telecommunications Commission (1985) 156 CLR 7 at 14-20 : see also suggestions in this Court in Gorman v Williams (1985) 2 NSWLR 662 at 665.

Western Suburbs Hospital v Currie 9 NSWLR 511 (03 July 1987) (Kirby P, McHugh JA and McLelland A-Ja)

> Hackshaw v Shaw (1985) 155 CLR 614 at 662-663 Hackshaw v Shaw (1985) 155 CLR 614 at 662-663

Western Suburbs Hospital v Currie 9 NSWLR 511 -
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Western Suburbs Hospital v Currie 9 NSWLR 511 -
Williams v Hobart Public Hospitals Board [1987] TASSC 77 -
Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 (10 March 1987) (Mason, Wilson, Brennan, Deane and Dawson JJ)

> 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:

Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 -
Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 -
Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 -
Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 -
Puflett v Proprietors of Strata Plan No 121 17 NSWLR 372 (12 February 1987) (Lee J)

> I have already held that it has not been proved that there was any malfunction of the lift. In my view the plaintiff has failed to establish that the body corporate was in breach of the duty cast upon it as licensor. Counsel for the plaintiff next contended that the body corporate owed the plaintiff the general duty of care arising on the neighbour principal expounded by Lord Atkin in Donoghue v Stevenson [1932] AC 562. The question whether there can be a general duty of care in an occupier in addition to the duty owed arising from mere occupation has been discussed in several cases in recent times. I refer to the following cases: Public Transport Commission of New South Wales v Perry (1977) 137 CLR 107; Papatonakis v Australian Telecommunications Commission (1985) 156 CLR 7; Hackshaw v Shaw (1984) 155 CLR 614 ; Morris v State Rail Authority of New South Wales (1985) 2 NSWLR 24; Gorman v Williams (1985) 2 NSWLR 662.

Puflett v Proprietors of Strata Plan No 121 17 NSWLR 372 (12 February 1987) (Lee J)

Public Transport Commission of New South Wales v Perry (1977) 137 CLR 107 Papatonakis v Australian Telecommunications Commission (1985) 156 CLR 7 Hackshaw v Shaw (1984) 155 CLR 614 Gorman v Williams (1985) 2 NSWLR 662 Public Transport Commission of New South Wales v Perry (1977) 137 CLR 107 Papatonakis v Australian Telecommunications Commission (1985) 156 CLR 7 Hack shaw v Shaw (1984) 155 CLR 614 Gorman v Williams (1985) 2 NSWLR 662

Puflett v Proprietors of Strata Plan No 121 17 NSWLR 372 (12 February 1987) (Lee J)

In Hackshaw v Shaw the plaintiff was a trespasser upon the defendant's land having come there by car. The defendant fired a rifle shot in the direction of the car, a shot which struck the plaintiff. The court held that the duty owed by the defendant was not limited to that owed to a trespasser but arose from the action of the defendant in actively creating a danger which he should reasonably have foreseen to result in injury to the plaintiff unless he took care to prevent it.

Puflett v Proprietors of Strata Plan No 121 17 NSWLR 372 -
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Puflett v Proprietors of Strata Plan No 121 17 NSWLR 372 -
Brady v Girvan Bros Pty Ltd 7 NSWLR 241 -
Gorman v Williams 2 NSWLR 662 (09 August 1985) (Kirby P, Samuels and McHugh JJA)
Hackshaw v Shaw (1984) 59 ALJR 156 ; 56 ALR 417 Hackshaw v Shaw (1984) 59 ALJR 156 ; 56 ALR 417

Gorman v Williams 2 NSWLR 662 -
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Gorman v Williams 2 NSWLR 662 -
Sutherland Shire Council v Heyman [1985] HCA 41 -
MORRIS V STATE RAIL AUTHORITY OF NEW SOUTH WALES 2 NSWLR 24 (07 June 1985) (Hope, Samuels and McHugh JJA)
Hackshaw v Shaw (1984) 59 ALJR 156 ; 56 ALR 417 Papatonakis v Australian Telecommunications Commission (1985) 59 ALJR 201 ; 57 ALR 1 Hackshaw v Shaw (1984) 59 ALJR 156 ; 56 ALR 417 Papaton akis v Australian Telecommunications Commission (1985) 59 ALJR 201 ; 57 ALR 1

MORRIS V STATE RAIL AUTHORITY OF NEW SOUTH WALES 2 NSWLR 24 (07 June 1985) (Hope, Samuels and McHugh JJA)
Anns v Merton London Borough Council [1978] AC 728 . Australian Consolidated Press Ltd v Uren (1967) 117 CLR 221 ; [1969] 1 AC 590 . British Railways Board v Herrington [1972] AC 877 . Commissione r for Railways (NSW) v Anderson (1961) 105 CLR 42 . Commissioner for Railways (NSW) v Cardy (19 60) 104 CLR 274 . Commissioner for Railways (NSW) v McDermott (1966) 40 ALJR 1 ; [1967] 1 AC 169 . Commissioner for Railways (NSW) v Quinlan [1964-5] NSWR 157 ; [1964] AC 1054 . Donoghue v Stevenson [1932] AC 562 . Hackshaw v Shaw (1984) 59 ALJR 156 ; 56 ALR 417 . Le Lievre v Gould [1893] 1 QB 491 . Munnings v Hydro-Electric Commission (1971) 125 CLR 1 . Palsgraf v Long Island R Co 248 NY 243 (1928) . Papatonakis v Australian Telecommunications Commission (1985) 59 ALJR 201 ; 57 ALR 1 . Public Transport Commission (NSW) v Perry (1977) 137 CLR 107 . Read v J Lyons & Co Ltd [19 47] AC 156 . Rich v Commissioner for Railways (NSW) (1959) 101 CLR 135 . Southern Portland Cement Ltd v Cooper [1974] AC 623 . Thompson v Bankstown Municipal Council (1953) 87 CLR 619 .

MORRIS V STATE RAIL AUTHORITY OF NEW SOUTH WALES 2 NSWLR 24 -
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