Thompson v Woolworths (Qld) Pty Ltd - [2005] HCA 19

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND HEYDON JJ

THELMA JEAN THOMPSON APPELLANT

AND

WOOLWORTHS (Q'LAND) PTY LIMITED RESPONDENT

Thompson v Woolworths (Q'land) Pty Limited [2005] HCA 19

21 April 2005
B54/2004

ORDER

1. Appeal allowed with costs.

2. *Set aside orders 2 and 3 of the orders of the Court of Appeal of the Supreme Court of Queensland made on 12 December 2003 and in their place order that judgment be entered for the appellant in the sum of $105,327.92.*

3. *Respondent to pay the appellant's costs of the proceedings in the District Court of Queensland.*

On appeal from the Supreme Court of Queensland

Representation:

B W Walker SC with M E Eliadis for the appellant (instructed by Shine Roche McGowan)

J A Griffin QC with M T O'Sullivan for the respondent (instructed by Blake Dawson Waldron)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Thompson v Woolworths (Q'land) Pty Limited

Negligence – Duty of care – Independent contractor delivering goods in pursuit of mutual commercial purpose – Delivery person suffered back injury attempting to move

industrial waste bins blocking supermarket loading dock – Content of duty to exercise reasonable care for safety of entrants – Consideration of aspects of relationship between occupier and entrant.

Negligence – Contributory negligence – Independent contractor – Relevance of failure to wait for assistance before attempting to move bins – Relevance of knowledge of previous injury.

1. GLEESON CJ, McHUGH, KIRBY, HAYNE AND HEYDON JJ. In an action brought in the District Court of Queensland, and heard by Samios DCJ, the appellant, who sustained a back injury while delivering goods to the respondent's store at Stanthorpe, sued the respondent for damages for negligence. She succeeded, and was awarded damages of $157,991.89. An allegation of contributory negligence was rejected [1] . By majority (de Jersey CJ and Williams JA; McMurdo J dissenting) the Court of Appeal of Queensland reversed the primary judge's finding of negligence and ordered that there be judgment for the defendant in the action [2] . The dissenting judge would have upheld the finding of negligence but reduced the judgment by one-third on account of contributory negligence. The primary question in this appeal is whether the Court of Appeal was justified in reversing the primary judge's finding of negligence. There is also a question as to contributory negligence.

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[1] *Thompson v Woolworths* [2003] QDC 152.

[2] *Thompson v Woolworths (Q'land) Pty Ltd* [2003] QCA 551.

The facts

2. The appellant's action arose out of an occurrence in late August 1999. She was unable to identify the precise date. She made no complaint to any employee of the respondent on the day. She first sought medical attention about three weeks later. The appellant had previously injured her back, in another work-related incident, a week or two before the events with which this case is concerned. Both injuries aggravated a pre-existing degenerative condition.

3. **Following paragraph cited by:**

Humphries v Downs Earthmoving Pty Ltd (11 December 2015) (Bowskill QC DCJ)

The appellant suffered the injury the subject of this appeal while she was on premises occupied by the respondent. However, the case is not simply concerned with an occupier's

liability for hazards associated with the static condition of premises. The appellant was on the respondent's premises for a mutual commercial purpose, and was required to conform to certain systems and procedures established by the respondent. The case concerns those systems and procedures, and the risks they involved for persons in the position of the appellant. It is, therefore, necessary to explain the context in which the injury occurred.

4. The appellant and her husband conducted a bread delivery service in the Stanthorpe area pursuant to a contract with Cobbity Farm Bakeries Pty Ltd. They used two vehicles. The appellant's husband drove a van, and delivered mainly to small retailers. The appellant drove a truck. She made daily deliveries to Woolworths' Stanthorpe store. She delivered at some time between 5 am and 5.30 am. The respondent's store was part of a shopping centre complex. Deliveries were made to a loading dock at the end of a lane. The loading dock led to a storeroom which was under the control of a storeman. There was a roller door between the loading dock and the storeroom. The appellant, like other deliverers of supplies, would reverse her truck along the laneway, and unload her goods onto the loading dock, from where they were taken to the storeroom.

5. The respondent's storeman was necessarily involved in that process, for the purpose of agreeing upon the quantities delivered, and, no doubt, seeing that they were appropriately stored. The checking of quantities was done on the loading dock. The storeman was often, but not always, in or around the storeroom or loading dock area when the appellant arrived. Sometimes he was elsewhere, and it was necessary to press a buzzer to attract his attention and bring him to the loading dock. On some occasions it took up to 10 or 15 minutes for the storeman to arrive. The appellant could not unload her bread and depart to do her other deliveries without the presence and co-operation of the storeman. Sometimes the appellant's would be the first of the delivery vehicles to arrive at Woolworths; sometimes others would arrive there before her. If she arrived first, the lane was not wide enough to permit another vehicle to take her place. The appellant was a small woman. Her husband frequently went to Woolworths after doing his first delivery in order to help her unload her truck. Occasionally, he arrived at Woolworths for that purpose before the appellant.

6. In a bay adjacent to the loading dock, there was an area, fenced on three sides, where two industrial waste bins were located. Next to the fenced area was a public parking area. The waste bins, when in use, were placed alongside the loading dock so that Woolworths staff could place waste in them. The bins belonged to the Stanthorpe Shire Council, and were emptied by Council employees on Mondays, Wednesdays and Fridays. The Council truck would reverse up the lane. Council workers would move the bins manually from the fenced area to the lane and place them in front of the loading dock. They would then be emptied mechanically into the Council truck. Routinely, the Council workers would leave the empty bins in the laneway in front of the loading dock without returning them to the fenced area. The bins constituted an obstacle to any delivery vehicle seeking access to the loading dock.

7. The Council truck arrived at varying times between 4 am and 6 am. Whether the Council workers were derelict in their duty to the Council by leaving the empty bins in the laneway, or whether the Council was in breach of some obligation it owed to the respondent, were not questions that were investigated. The respondent's regular storeman, Mr Frank Thompson, acknowledged that his duties included returning the empty bins to the fenced

area. Mr Thompson was away on holidays in August 1999, and his replacement, Mr Bennett, said in evidence that he was "not too sure" whether it was part of his job to move the bins.

8. **Following paragraph cited by:**

   Rabay v Bristow (15 June 2005) (Handley, McColl and Bryson JJA)

The evidence showed that the presence of industrial waste bins in the laneway, blocking access to the loading dock, was a long-standing source of friction between the appellant and employees of the respondent. There was evidence from other delivery drivers, who gave varying accounts of the problem. The bins were large, but were designed to be moved manually. That is how they were moved by the Council employees, the storeman and, not infrequently, delivery drivers themselves. The male witnesses in the case gave evidence of moving the bins without suffering any harm. But they presented a problem to the appellant.

9. **Following paragraph cited by:**

   Marshall v Townsend (15 January 2008) (Shaw J)

What delivery drivers achieved in terms of saving of time by moving the bins is not entirely clear. It was the storeman's job to move them. A driver could not complete the process of delivery without the presence of the storeman. Even if, as sometimes occurred, the storeman was not present when the driver arrived, and even if there was a delay of 10 to 15 minutes in responding to the buzzer, there was no possibility of the driver getting on with his or her rounds until the storeman arrived. Nevertheless, it is clear that, on occasion, if the storeman was not there when a driver arrived, the driver would move the empty bins back to the fenced area and thus clear the path to the loading dock. The drivers obviously thought this saved them some time.

10. Over the months before August 1999, the appellant and her husband complained to the respondent's staff and management about the bins being left in the laneway. Mr Frank Thompson said that the appellant's husband complained to him seven times or more. On 22 May 1999, the appellant noted in her diary: "too heavy for manual moving ... too heavy for me to move by myself." The appellant's husband sometimes moved the bins for her. The appellant said that between March 1998 and August 1999 she moved the bins between 20 and 30 times.

11. A week or two before the incident the subject of this litigation, the appellant was attempting to lift a crate of bread in a shed at her home. She had to reach up to the crate. As she was twisting to lower the crate, she felt a pain in her back. The pain subsided.

12. On the day in question the appellant arrived at the shopping complex at about 5.15 am. No other person was present. The roller door between the loading dock and the storeroom was

down. No storeman came out. There were empty waste bins in front of the loading dock. The appellant reversed her truck along the laneway towards the loading dock. She then left her truck and attempted to move one of the bins. She attempted to push the bin with her arms, but it would not move. She then brought one of her legs into play and as she pushed again she felt pain radiate down her back and leg. The appellant's husband arrived. She told him she had hurt her back. He then moved the bins. The two of them unloaded the bread onto the loading dock. An unidentified "store person" then came out of the storeroom, opened the door, and checked the quantity of bread. No complaint was made by the appellant or her husband to the "store person" or anyone else. After unloading they drove off to continue their deliveries.

The decision of the primary judge

13. **Following paragraph cited by:**

    Cruise Group Pty Ltd v Fullard (02 June 2005)

There were issues at trial as to whether the appellant suffered the injuries she alleged, and as to the extent of those injuries. Those issues were resolved in favour of the appellant, and are not the subject of appeal.

14. **Following paragraph cited by:**

    Rabay v Bristow (15 June 2005) (Handley, McColl and Bryson JJA)

The appellant's case on liability was not that the respondent was vicariously liable for some casual act of negligence on the part of an employee of the respondent, but that there was a systemic failure to exercise reasonable care for the safety of the appellant.

15. An expert witness, Mr McDougall, whose qualifications were in engineering, and who reported on matters of industrial safety, expressed the opinion that the respondent should have conducted an appropriate audit of the extent of manual handling of the waste bins and either eliminated manual handling by providing truck access to the bin storage area through the car park, or introduced effective procedural controls to ensure that the respondent's employees relocated the bins after they were emptied and that delivery drivers were instructed not to move them. The trial judge found that, as between the respondent and the delivery drivers, it was the respondent's responsibility to move the bins. This does not seem to have been disputed. He found that employees of the respondent knew that the bins were an obstacle for delivery drivers, that they knew that drivers often moved the bins, and that they should have expected that the appellant would try to move them. He found that employees of the respondent were aware that moving the bins involved a risk of injury to someone of the appellant's size and strength.

16. The primary judge found that the respondent "was aware of the risk of injury to the [appellant] pushing the bins and that some change ought to be made so that the [appellant] was not placed at risk of injury moving the bins." He held that the respondent "should have as a reasonable person implemented either of the measures identified by Mr McDougall in his evidence as either of those measures was not expensive or difficult or inconvenient to implement." As to the first of the measures recommended by Mr McDougall, there was nothing in the reasons for judgment dealing with the practicability of providing access to the bins through the car park except what is implicit in the statement just recorded. The matter was not explored in evidence in chief or cross-examination.

The decision of the Court of Appeal

17. In the Court of Appeal, McMurdo J, who would have upheld the decision of the primary judge on liability, summarised his conclusions as follows:

> "In the present case, the trial judge found that the risk of injury to the [appellant] was reasonably foreseeable. There is no basis for a challenge to that finding and I do not understand that it is challenged. In the context then of the [appellant] being a permitted entrant to premises in the [respondent's] occupation, the [respondent] owed her a duty to do what was reasonable to avoid the risk of injury from her attempting unassisted to move the bins.
>
> The content of this duty was then affected by a consideration of 'the magnitude of the risk and the degree of 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.' To these considerations can be added others such as the relationship between the parties, but ultimately the factual question is what a reasonable person, in the position of the respondent, would do by way of response to the risk.
>
> The trial judge held that reasonable care required the avoidance of the risk by one of two alternative courses, neither of which was said to be significantly expensive or problematical. In my view there was no error in that factual conclusion. The risk may have been obvious, but the probability of the occurrence of injury was relatively high. To the extent that the [respondent] did anything towards discharging its duty, it knew that this had not avoided the risk, and it knew or should have known that this was because the [appellant], like other drivers, was likely to run the risk of injury through the pressure of meeting the requirements of her work programme. It was, of course, a risk that came from the way in which the [respondent] organised its own business and premises. Because neither of the available steps was taken, the [appellant] remained exposed to the risk and the [respondent's] duty of care was breached." (references to authority omitted)

18. McMurdo J found that there had been contributory negligence. Plainly, the appellant was or ought to have been aware of the risk of injury. McMurdo J did not mention expressly, but no doubt had in mind, not merely the diary note of May 1999 and the appellant's expressions of concern on previous occasions, but also the fact that she knew (and the respondent did not know and could not have known) of her recent back injury. He thought it appropriate that the judgment should be reduced by one-third, to $105,327.92.

19. McMurdo J remarked, in connection with contributory negligence, that the circumstances "at least to some extent" explained why the appellant attempted to move the bins on the day in question. The reservations expressed in that qualification are understandable. Clearly, the appellant believed she was saving some time by moving the bins herself, and the fact that she and other drivers had often moved the bins on other occasions indicates that there must have been something to be gained by doing that. But the gain can hardly have been great, bearing in mind that the appellant was going to have to wait for a storeman before she could depart. The evidence of the appellant and her husband was that, on the day of the injury, they unloaded their bread onto the loading dock before the storeman arrived. Whatever time was involved in moving the bins and unloading, therefore, was saved by not waiting for the storeman to arrive and move the bins himself. That time was never quantified.

20. The majority in the Court of Appeal stressed that the risk to the appellant involved in moving bins was not only foreseeable by the respondent but was foreseen by the appellant. This was not a case of alleged failure to warn. Nevertheless, de Jersey CJ said, the obviousness of the risk was factually significant in deciding what, if anything, reasonableness required of the respondent by way of response to that risk. He treated the question as one of "delineation of the scope of the duty of care owed by the [respondent]" to the appellant, and said:

> "In my view the duty of care owed by the [respondent] to the [appellant] did not embrace the [respondent's] taking steps to protect her from this particular risk. What occurred is explained by the circumstance that the [appellant], an independent contractor vis a vis the [respondent], chose unnecessarily to take that risk, the existence of which was clear to her. It is not explained by any tortious breach on the part of the [respondent].
>
> The learned Judge's factual conclusion that the duty of care owed by the [respondent] extended to protection against this risk was not ... reasonably open."

21. The other member of the majority, Williams JA, said that, as static objects, the bins blocked access to the loading dock, but they did not constitute a risk. No one could trip over them or inadvertently walk into them. "The only risk to the [appellant] came after she made a conscious decision to move, or attempt to move, the bins." He also said:

> "It is clear that as the occupier of the property, and as the entity for whose benefit the bins were on site, the [respondent] had the ultimate responsibility for moving the bins from where they were left by the local authority employees into the latticed area. My concern has been as to whether the [respondent] had a proper system in place to see that that was done. Given the irregular times at which the bins were emptied a reasonable occupier in the position of the [respondent] could really do no more than it had done in that regard. If able bodied delivery drivers did not move the bins for their own convenience without calling for assistance from employees of the [respondent], the bins were moved by employees of the [respondent] as soon as practicable after becoming aware of the fact they needed to be moved. The [appellant's] evidence was that if Frank Thompson saw her attempting to move a bin, he would always move it himself. Any delivery driver, male or female, requiring assistance had only to press the buzzer to call for assistance. A delay of 10 to 15 minutes on occasions was not unreasonable in that regard. The [appellant] in evidence referred to a concern that her place in the

delivery queue would be lost if that was done. That is demonstrably not the case. It would be impossible on the evidence for any other delivery driver to get past her vehicle if it was at the head of the queue and its progress halted by the bins."

22. Williams JA concluded that the evidence did not establish that there was any breach by the respondent of a relevant duty owed to the appellant.

Duty of care

23. **Following paragraph cited by:**

Sawyer v Steeplechase Pty Ltd (10 July 2024) (Crowley J)

124. The Court noted that the issue of liability was not concerned simply with an occupier's liability for hazards associated with the static condition of the premises. That was because the appellant was on the respondent's premises for a 'mutual commercial purpose' and was required to conform to certain systems and procedures established by the respondent. While it was not disputed that the respondent owed the appellant a duty of care, there was disagreement about the appropriate formulation of that duty. [13] On that aspect, the Court relevantly observed: [14]

> The status of the respondent as occupier of the land on which the appellant was injured was one aspect of the relationship that gave rise to a duty of care. It gave the respondent a measure of control that is regarded by the law as important in identifying the existence and nature of a duty of care. There was, however, more to the relationship than that, and, as was agreed on both sides, the problem was not one that concerned only the physical condition of the respondent's premises…
>
> The purpose for which, and the circumstances in which, the appellant was on the respondent's land, constituted a significant aspect of the relationship between them. The appellant, in the pursuit of her own business, was delivering goods to the respondent for the purpose of sale in the course of the respondent's business. To do that, she was required to conform to a delivery system established by the respondent… Since the respondent established the system to which the appellant was required to conform, the respondent's duty covered not only the static condition of the premises but also the system of delivery…
>
> …the respondent established and maintained a system, and its obligation to exercise reasonable care for the safety of people who came onto its premises extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of physical injury.

via

[14] Ibid , 243–244 [24]–[27] (citations omitted).

It was not in question that the respondent owed a duty of care to the appellant, although there was a disagreement about the appropriate formulation of that duty.

24. **Following paragraph cited by:**

Pike v Coles Supermarkets Australia Pty Ltd; Pike v Solomon (23 August 2022) (Walton J)

27. I shall provide extracts of the judgment relevant to the determination of the costs issues:

> 4 Both Coles and the owners filed cross-claims against each other in their respective proceedings ("the cross-claims"). A central issue in the cross-claims was control of the relevant area, in particular, having regard to the terms of the lease under which Coles occupied, at least, the supermarket premises and had some responsibilities with respect to the car park. I will return to the terms of the lease below.
>
> 5 Prior to the hearing, both Coles and the owners resolved the claims brought between them, respectively. As such the cross-claims do not need to be determined. As at the time of the hearing, both Coles and the owners were jointly represented. Hereinafter, Coles and the owners shall be, collectively, referred to as "the defendants".
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> …
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> **CREDIT**
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> **The Evidence of the Plaintiff**
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> **…**
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> *Conclusion*
>
> 163 The defendant correctly submitted that the plaintiff's evidence before and after the surveillance footage reveals a shifting of evidence to adjust to the inconsistencies in her account. So much is evident from both the terms of her answers as I have discussed them and from the manner in which she gave her evidence. As mentioned, her evidence was somewhat [calibrated] to avoid risk before the surveillance footage and further adjusted afterwards.
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> 164 Further, the surveillance footage is often inconsistent with the plaintiff exhibiting pain or physical limitation and demonstrates some resumption of functionality at pre-incident level.

165 Despite the evidence as to the underlying existence of pain there was the absence of facial expressions or the movements of the body demonstrative of pain being felt during the discharge of work.

166 The nature of the work and the activities shown in the footage, all of which are arduous, must raise doubts about the level of pain experienced at the time the footage was taken and the reports of medical professionals as to the same. The contention that the discharge of that work was necessary for financial reasons has a superficial attraction (in the sense of working through the pain) but some doubt must be cast upon that explanation because of her prior evidence of her experience in relatively light work as a bookkeeper (although some medical reasons were advanced for not taking up that work).

167 The credibility of the plaintiff's evidence as to her afflictions is also strained by the volume of work undertaken by her in the absence of her son and the passage of her evidence in which she insinuated her condition had deteriorated since 2017 (see transcript at 107).

168 Her evidence as to her availability for a disability pension must, in the light of the evidence, be doubted.

169 My overall impression is that the plaintiff's evidence as to the extent of her incapacity and as to the extent of the pain she expressed are exaggerated and that her concessions were tailored for the avoidance of exposure as to the true state of her capacity for work (including arduous work). I do not find that the plaintiff's evidence was untruthful as such but that the content and manner of it reflected very poorly upon her as a witness. I consider her to be an unreliable witness. In particular, her evidence is unsatisfactory as to the existence of incapacity and pain. This necessarily impacts her reports to medical professionals as to those states of being from time to time, and overall, suggests that the plaintiff has a capacity for even arduous work from the start of her lawnmowing business, even though she may have suffered some ongoing pain managed by medication..

…

206 The plaintiff's case was that the defendants owed the plaintiff a duty to take reasonable care to ensure that she was not exposed to unnecessary risk of injury. In summary, it is submitted:

> (1) The drainage pipe into which the plaintiff stepped clearly had its cover/cap removed. There was no evidence before the Court of a damaged cover, noting there were no screws in the hole, nor evidence from the defendants as to why or when it was removed. Further, the detritus surrounding the pipe, again, suggest a period of time has past with the cap missing.

(2) The plaintiff did not see the uncapped drainage pipe because, whilst she put her groceries into the passenger front seat, the drainage pipe was initially concealed by the vehicle parked in the western bay.

207 By the close of submissions, the parties were in agreement as to the duty owed by the respective defendants and, in light of the Joint Expert Report, any dispute as to the seriousness of the plaintiff's injuries fell away. As to duty, counsel for the defendant conceded that both sets of defendants owed a duty of care to the plaintiff and the duty arose from "the circumstances in which they were each, in their own way, to some extent, occupiers, in the sense conventionally recognised under the common law". As such, "it could not be said on behalf of either sets of defendants that they had no duty to entrants to that property".

208 The plaintiff drew a distinction between Coles as occupier and the owners as the relevant owners of the premises. However, for the purposes of determining liability, senior counsel for the plaintiff recognised that the submissions advanced for the defendants had, in substance, accepted that Coles was the relevant occupier.

209 Turning to the scope and content of each of the duties, whilst both sets of defendants conceded that Coles had assumed responsibilities for maintenance, subject only to matters of structural or capital repair, it was submitted that the Court should approach questions of liability with respect to Coles and the owners, respectively, "independently". In that respect, it was also submitted "issues about respective responsibilities do not need to be determined on the factual and legal issues in proceedings".

210 It being conceded that the defendants, respectively, owed a duty of care to the plaintiff, the primary area dispute remaining in the plaintiff's liability case was causation. Whilst a joint document was not filed, by closing submissions, counsel for the defendants confirmed the crux of the dispute with respect to liability was one of causation. As to the issue of causation, senior counsel for the defendants submitted:

(1) in relation to Coles, "[liability] arises from whether or not had Coles had a proper system, this risk would have been identified and addressed"; and

(2) in relation to the owners, "there was a sufficient discharge of the duty, in other words there was a duty as owners and to some extent occupiers, although having regard to the terms of the lease and the - that are taken through their commercial agents, such reasonable precautions as were required under s 5B of the Civil Liability Act we re taken".

211 Section 5B of the Civil Liability Act 2002 (NSW) requires that the risk of injury, if appropriate precautions were not taken, be foreseeable and not

insignificant. In the plaintiff's submission there can be little issue but that that risk was clearly foreseeable. The relevant risk of harm in this matter was identified as the risk that a person such as and including the plaintiff could step into a hole such as that that was uncovered and sustain injury. The defendants conceded that risk was foreseeable and not insignificant.

212 The position of the defendants is that the defendants, in their respective capacities, had taken reasonable precautions, which constituted an adequate response to the risk and there is no breach of duty by either Coles or the owners. However, the defendants concede that risk was foreseeable and not insignificant.

…

DUTY OF CARE

215 As mentioned, it was uncontroversial that the defendants as the occupiers of the car park at the time of the incident, the defendants each owed a duty of care to the plaintiff. The duty owed by an occupier is to exercise reasonable care so that the premises are safe for pedestrians and other users: Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 at [488] ; Thompson v Woolworths (Q'land) Pty Limited (2005) 221 CLR 234 a t [24] .

216 I find that the defendants owed a duty to the plaintiff at the time of the incident as occupiers of the car park.

…

BREACH OF DUTY

…

Defendants' Submissions

…

243 The defendants have properly conceded the question of breach with respect to Coles. The provisions of cl 29.7(a) of the lease plainly provide that Coles was required, at its expense, to repair and maintain the car park.

244 The risk of harm in this matter is the risk that a person would step into a hole that was uncovered and thereby sustain injury. The hole was located in the car park and, self evidently from the photos of the hole after the incident, was in need of maintenance or repair.

245 The reasonable precautions to be taken by Coles in that respect, having regard to its obligations under the lease involved, in order to properly maintain and repair the car park, regular inspection of it.

246 Thus, a system of inspection by means of cleaners or other persons to inspect the car park would have been required as reasonable precautions. There would seem to be no dispute that a daily inspection would have been reasonable, workable and appropriate in that respect.

247 There was no evidence of a system of inspection by Coles, but there was evidence of Coles being aware and reminded of its obligations in that respect before the incident as to the state of disrepair of the car park and Coles' responses taking steps under the lease. The hole into which the plaintiff stepped was indicative of a state of disrepair. Coles was required to take reasonable steps to effect maintenance and repair of the car park.

248 In those circumstances, it may be concluded that Coles failed to take reasonable precautions, either by failing to have and applying any system of inspection, maintenance and repair, or adopting a system which was wholly inadequate in its terms or application in that respect for the purposes of s 5B of the Civil Liability Act .

249 I consider the submissions of the owners to be correct in this respect, namely, the owners had adequately discharged their duty to take reasonable precautions for the purposes of s 5B . The owners were owners of commercial property which was leased to a large commercial operator with specific obligations to maintain the car park. They reminded and pressed Coles to fulfil those obligations and with reasonable frequency, inspected the condition of the property to ensure the obligations were met and took steps to remediate the property including the car park either directly or through the contractor.

…

CAUSATION…

Defendant Submissions: Causation

258 The only aspect that arises for determination in relation to the liability assessment of Coles' position is under s 5D of the Civil Liability Act and that is causation. The question, in that respects is as follows:

> (1) what reasonable precautions should have been taken because, without assessing that, the Court cannot proceed to properly consider the question of causation; and
>
> (2) if those precautions had been taken, is it reasonably likely that the risk of harm would have been avoided.

259 As to the issue of causation, with respect to Coles, counsel for the defendants submitted:

> (1) The finding should be that a reasonable precaution that should have been taken by Coles, having regard to its obligations under cl 29 in the lease, would have been to perform some sort of inspection

of the car park. In my submission, it being a car park, a reasonable system of inspection would have been either through cleaners or through inspectors per se to have patrolled the car park at least once per day.

(2) The causation submission is simply that had that been done, the risk would have necessarily been obviated. In the absence of any evidence as to how long the risk had been present, the Court could not confidently conclude that it would have been. Reliance was placed upon Strong.

(3) It was contended that caution should be taken when assessing the time based upon the photograph of the hole, namely, "approximately an hour after the event, that there was a detritus visible in and around the hole to suggest that it had been uncapped for a period of time". It was submitted: "one cannot say with any confidence from that photograph, or from any other evidence, whether the hole had been uncovered for days, or hours or minutes before the accident, and so in those circumstances the Court would not be satisfied in relation to the matter of causation".

261 As to the issue of causation, with respect to the owners, counsel for the defendants submitted:

(1) First, regard must be had to the relevant obligations of the owners. In that respect, it was contended, in light of the obligations imposed by the lease upon Coles, the obligation upon the owners "would have been lesser". This is because, the issue of maintenance was "largely delegated". It was contended the owners' duty "would have been no more than to, if you like, oversee that process by conducting less regular inspections itself".

(2) Secondly, as to the duty to conduct such inspections, it was contended that was done through the owners' commercial agents. Reference in that respect was made to the evidence of Ms Skinner; she conducted such inspections on a "monthly" basis.

(3) Therefore, it was submitted, one must doubt whether whatever system should have been adopted by the owners, directly or through their agents, would have detected the risk.

Conclusion: Causation

262 Attention was directed by the parties to the judgment of the High Court in Strong. In that matter, the appellant suffered serious spinal injury when she slipped and fell while at a shopping centre. At the time she was in the sidewalk sales area outside the entrance to a Big W store. That area was under the care and control of the first respondent, Woolworths Limited.…

269 There is no evidence as to when the hole into which the plaintiff stepped became uncovered or broken. The evidence reveals that in the late

afternoon of 20 January 2015 the plaintiff stepped into the hole which, at that time, had no cover. A photograph of the hole in that state was taken a short time later.

270 I accept, as submitted by the defendants, that caution should be exercised in drawing inferences from the bare fact of a photograph of the hole. Particular caution of should be taken in drawing an inference that, because no screws were apparent in the screw holes or broken pieces of the cover visible, that Coles had, in fact, removed the broken cover and had failed to replace it, thereby ending any real issue as to causation.

271 However, in my view, the fact that the photograph illustrated that the hole was open, there were no apparent screws or broken pieces of the cover remaining and the considerable debris between the two concentric rings of the hole leads to the reasonable inference that the hole had been exposed at least for a period greater than the day of the incident. There is no contradictory evidence. It follows that I am satisfied, on the balance of probabilities, that the hole had been open at least since the previous day or although most likely for a longer period sufficient to enable the cover or broken cover and screws to be removed and for the debris to accumulate in the hole.

272 In those circumstances, and as properly conceded by senior counsel for the defendant, the judgment in Strong does not defeat the plaintiff's case against Coles on the issue of causation. The hole into which the plaintiff inadvertently stepped was a danger of which the defendants ought to have been aware and ought to have covered or guarded so that persons could not accidentally step into it. The precautions which I found to be reasonably required by Coles would then have obviated or mitigated the risk of harm.

273 Thus, factual causation for the purposes of s 5D of the Civil Liability Act has been established. In failing to cover the hole or in failing to barricade of the hole whilst it was uncovered, Coles is guilty of negligence.

274 The scope of liability issue did not arise in this case. In any event, it is appropriate for the scope of the occupier Coles' liability to extend to the harm caused to the plaintiff given that the car park was, in essence, provided by the occupier to members of the public for the purposes of accessing the Coles' store (which the plaintiff did).

275 It is strictly unnecessary to consider the question of causation with respect to the owners given my earlier finding. However, it may be observed that the obligation upon the owners would have been less than that falling upon Coles because, as senior counsel for the defendants contended, the issue of maintenance was largely delegated to Coles. The obligation to oversee the process fell upon the owners by way of an overview of the process to ensure compliance with the lease. A duty to conduct inspections in that context was done through the owner's commercial agents. This was done on a monthly basis. Significant doubt must be held as to whether the

conduct of inspections on that basis would have detected the risk of harm and whether the plaintiff's established factual causation with respect to the owners.

Conclusion: Liability

276 It follows that Coles is liable in negligence for any injuries, loss or damage occasioned to the plaintiff arising out of the incident. The issue of contributory negligence was ultimately not pursued by the defendants in final submissions though they pleaded the same in their defences. I make no finding of contributory negligence.

277 Given the conclusions earlier reached with respect to the owners, I do not find the owners liable in negligence with respect to the incident.

278 I note that the position adopted by the defendants results in the cross-claims falling away.

279 I will now turn to the question of damages.

...

Consideration re Medical Evidence and Capacity of the Plaintiff in the Light of the Surveillance Footage

431 The plaintiff underwent back surgery by Dr Davidson on 6 November 2013 at Nepean Hospital. That surgery was undertaken after a long history of the plaintiff suffering back pain (particularly since 2005) and imaging showing a central and right sided disc protrusion causing nerve root compression. The plaintiff underwent a bilateral LS/51 microdiscectomy and nerve root decompression.

432 The operation was substantially successful. Dr Davidson reported that the plaintiff had a complete resolution of her sciatica, but had some ongoing pain including hip pain. I have some doubt about the plaintiff's evidence of complete recovery of her back problems after this operation given that she complained about back and hip pain six weeks after the surgery (even though the sciatica had been resolved), there was an ongoing record of back and buttock pain in 2014 and her GP's notes of January 2015 refer to "exacerbate lower back" (after walking into an open plastic drain).

433 As a result of the incident, the plaintiff suffered serious injury which Dr Davidson felt was not contributed to by her previous surgery. The injury suffered was evidenced by a right-sided L5 pars deficit with a grade 1 spondylolisthesis.

434 In June 2016, some 18 months after the incident, Dr Tait performed an LS/51 posterior lumbar interbody fusion for isthmic spondylolisthesis with radiculopathy.

438 In April 2017, Dr Tait stated that he was disappointed with the results 10 months after the plaintiff's operation. The plaintiff described pain at

various locations of her body including the lumbosacral junction and left lower limb pain.

439 On 11 July 2017, Dr Ho identified the continuance of failed back surgery syndrome and a L4/5 disc protrusion. The plaintiff was 'coping' with resilience and ongoing opioids and an antineuropathic pain agent.

440 On 17 July 2017, Dr Tait reported that the plaintiff was still very much debilitated by her symptoms. He stated that the plaintiff reported back pain at the lumbosacral junction which was worse on the right side. Dr Tait referred to Dr Ho as managing the pain.

441 In July 2017, the plaintiff commenced her lawn mowing business which involved voluminous and arduous work involving significant lifting and bending as demonstrated by the surveillance footage before the Court.

442 The plaintiff was cross-examined about being "debilitated" by her symptoms at this time as referred to in Dr Tait's report and, in particular, as to her reporting that bending set off the pain. I have earlier referred to the plaintiff's unsatisfactory evidence in this respect in the light of the surveillance footage which, inter alia, depicts at about this time (and in subsequent years) the plaintiff bending whilst undertaking mowing work without any bending avoidance behaviour. That aspect of the work together with other aspects of the work such as lifting mowers raises significant doubts about the extent of any incapacity suffered by the plaintiff and the assertion of pain or at least the extent of the pain referred to by the plaintiff as referred to earlier in this judgment in discussing the Markus ruling, the credit of the plaintiff and the review of the medical evidence. It may be noted that at this time, Dr Tait stated that there was no explanation for the plaintiff's ongoing symptoms.

447 In December 2017, Dr Giblin issued a report with respect to the plaintiff which contained, inter alia, a heading "Present Disability". In this section of the report, he indicated that the plaintiff had reported that she was mowing lawns three times a week for an hour under heavy medication. She apparently reported that what used to take half an hour, now took an hour. That reporting did not reflect, on the surveillance material, the manner in which the plaintiff undertook her continuing mowing business at that time.

448 That said, Dr Giblin took the view that, even at the reported level of mowing activity, the repetitive bending and heavy lifting involved in mowing should have the plaintiff looking for "an alternative career". It may also be noted in this respect that Dr Giblin's report and his subsequent report in 2020 are the first reports to recognise, to some degree, the work actually being undertaken by the plaintiff.

449 It may also be noted that Dr Giblin's report in 2020 again refers to the plaintiff undertaking mowing tasks by doing three to five jobs a week for approximately one hour each. Dr Giblin maintained the view that the plaintiff had persistent pain and discomfort which possibly related to the L4 /L5 level of her spine and that she remained unfit for work that involved

repetitive bending and heavy lifting. Again, the surveillance evidence revealed a fitness for the heavy mowing work at a very strenuous level requiring strength and agility proximate in time to this report.

450 Dr Stephen concluded an examination of the plaintiff on 23 January 2018. He reported that the plaintiff walked without a limp, there were no inconsistencies, her lumbar posture was normal, there was no muscle wasting in the lower limbs and that the plaintiff had a fair range of lumbar movement. He also reported that hip movements were in the normal range and that numbness in the foot was reported.

451 Dr Stephen opined that the plaintiff had sustained a large haematoma of the right outer leg which left a minor soft issue deformity. He found that the plaintiff had sustained a persistent and severe recurrence of her lower back and right leg pain which she claimed was much improved after the operation performed in 2013 (in fact, she claimed that it was entirely absent).

452 Dr Stephen opined that the incident was a significant contributing factor to the plaintiff's current impairment and disability. He considered that the prognosis was not good but that her condition was unlikely to be improved by further surgery.

453 In the Joint Conclave Report, Dr Giblin and Dr Stephen opined that the plaintiff had undergone a difficult operation after the incident which was not successful and that she continued to have back and right leg pain. She also complained of numbness in the right foot and left leg pain.

454 In the joint report, the doctors indicated that the plaintiff had complained about ongoing back pain and that her lawn mowing business was limited by her symptoms. The doctors indicated that there appeared to be developing a solid fusion and some narrowing of the L4/5 disc with possible impingement on the L4/5 root. It was also reported that the plaintiff had sustained a persistent and severe occurrence of her lower back pain and right leg pain and that the surgery in 2017 had not improved her symptoms. Both experts opined that the incident was a major contributing factor to the plaintiff's current impairment and disability and that her prognosis was not good. There was a disagreement as to whether surgery would be of some assistance.

459 It is perhaps understandable that the treating and examining doctors may have taken, at face value, the statements by the plaintiff as to the extent of her pain and suffering. She experienced a serious injury and underwent surgery, although there were aspects of the opinions of the doctors querying why the operation had not better resolved the plaintiffs back and leg condition.

460 However, the medical opinions were given either without knowledge of the nature and volume of the work performed by the plaintiff in the mowing business at the time of the medical evaluations or based on an inadequate understanding of those considerations and volume of work performed or its actual nature. (For example, Dr Stephen referred to pushing

a mower and Dr Giblin, “mowing” although he refers to the avoidance of a career involving bending or heavy lifting).

461 I have found the plaintiff’s evidence to be unreliable. The surveillance footage reveals a person capable of arduous work involving bending and heavy lifting. It is demonstrative of strength and a fluidity of movement. The unreliability of the plaintiff’s evidence also undermines her account as to the suffering of pain or suffering to the degree she reported to the doctors providing reports. The work shown in the surveillance footage is hard work, inconsistent with the suffering of acute back and leg pain. Furthermore, the surveillance footage does not show a restriction in movement or objective signs of pain. I do not consider the period of the surveillance to be unrepresentative of the plaintiff’s work given the amount of the footage, period of time over which it was conducted and the consistency of the observations of the plaintiff.

462 I consider that, even in the absence of cross-examination of the doctors providing medical reports in the proceedings, the weight that may be given to medical reports in these circumstances must be significantly reduced insofar as they are based, as they substantially were, upon the self-reporting of the plaintiff as to her work activities, her capacity for the same (or assumed capacity) and the level of pain she suffered whilst undertaking the physical activity which is her business and work. This is particularly so given the volume of work undertaken by the plaintiff over an extended period. Overall, I agree with the submission of the defendant that a significant part of the plaintiff’s case depended upon her credibility as a witness.

463 I do not find that the plaintiff does not suffer any ongoing back and leg pain deriving from the incident., There is in prospect some ongoing pain in the plaintiff’s back and leg which may modestly impact the plaintiff’s future career earning prospects, for which I have made provision in the head of damages. However, as I have stated, her assertions are significantly exaggerated when viewed in the light of the evidence before the Court such that the weight of the medical opinions predicated upon her accounts of the severity of her condition is significantly reduced. The plaintiff has a capacity to work, even to undertake arduous work, with pain managed adequately by medication.

Heads of Damages

Schedule of Damages

464 The plaintiff relied upon an amended Schedule of Damages (see p 703 and following of the Court Book). By an email dated 6 November 2020, the defendant provided an amended Schedule of Damages.

…

Conclusion: Non-Economic Loss

473 My views in this respect broadly accord with the defendants having in mind my earlier conclusion as to her capacity since the incident on the impact of any pain or suffering in its aftermath.

474 In my view, the plaintiff's non-economic loss should be assessed at 29% of the most extreme case.

…

Economic Loss

Plaintiff's Submissions

…

481 At the time the plaintiff returned to her lawn mowing and gardening business in about May 2015, she performed 3 to 6 jobs per week at $50 per job. This amounted to gross weekly earnings of between $150 to $300 per week.

482 Reducing the weekly income of $2,100 by $334 leaves a taxable income of $1,766 per week. On current tax rates that would amount to $1,310 net per week.

483 However, the particulars relied upon by the plaintiff provide a significant margin for the fact that the business was being built up and other such vicissitudes. Accordingly, for the period up to the present the claim proceeds on a basis that she would have earned $800 net per week. The plaintiff does not seek to resile from that claim.

484 In relation to the future, the claim, more realistically, is based upon a net loss of earnings of $1,250 per week. This is amply justified by the evidence.

…

Domestic Assistance

Plaintiff's Submissions

…

Conclusion

531 I accept that, as contended for the plaintiff, there are aspects of Ms Zeman's report which should be viewed with considerable caution and afforded little weight particularly as opinions of a medical character.

532 Nonetheless, in my view, the evidence does not ultimately support any claims for domestic assistance for the past. There may have been some periods where she required gratuitous assistance in this regard, but having regard to her work history, it has not been established that there have been any periods of 6 hours per week for 6 months in accordance with the statutory threshold.

533 I have already found that the evidence of the plaintiff's son as to domestic assistance may be doubted. His statements of what chores he did, and more importantly why, cannot be reconciled with the plaintiff's demonstrated strong physical capacity in 2015, and since 2016: His estimates of time spent years earlier, as a teenager, were unconvincing.

534 There is no basis to conclude that the plaintiff will require any domestic assistance in the future, paid or otherwise. She continues to regularly perform tasks in her work as or more onerous that any household chores.

535 I agree that, even the occupational therapist's modest allowances for assistance, were too much. Ms Zeman was however correct in using the fact that the plaintiff could do paid gardening work as an objective indicator, rather than simply accepting the plaintiff's statements. Ms Zeman's assessments as to the plaintiff's lawn mowing work are compatible with the findings in this judgment as to the plaintiff's capacity.

537 Any claim for past domestic assistance by the plaintiff would, in my view, be at best for closed periods and would no surpass the threshold under s 15(3) of the Civil Liability Act . I do not consider the plaintiff will require further domestic assistance.

…*Out of Pocket Expenses*

....

Conclusion

541 Past out of pocket expenses have been covered by Coles in the sum of $137,941. The payment of those expenses should be allowed. I do not consider there is a basis for further expenses. The position as to Medicare amounts will need further consideration.

…*Treatment expenses/Future Out of Pocket Expenses*

Plaintiff's Submissions

…

Conclusion

544 The evidence does not establish that future surgery is necessary because of the accident, or likely to be offered to the plaintiff, or likely to be chosen by the plaintiff. The joint report of the medical experts was divided on the need for this treatment] and the plaintiff has expressed reluctance.

545 Otherwise, the plaintiff continues to take medication, as she did for many years prior to the accident.

546 As noted, Coles has already paid an amount of $137,941.80 to or on behalf of the plaintiff in relation to past out of pocket expenses with respect

to the accident. Coles has also paid a $20,000 ex gratia lump sum, without admission of liability. These sums need to be accounted for in any damages award.

547 The defendant accepted that an allowance should be made for future medical expenses against the chance that the accident related condition may flare up and require medical or GP visits. It has allowed for $2,000.

Conclusion

548 In my view, an allowance of $8,000 should be made for future out of pocket expenses.

CONCLUSION

549 Coles is liable in negligence for any injuries, loss or damages occasioned to the plaintiff arising from her fall at the car park outside a Coles supermarket on 20 January 2015.

550 I do not find the owners liable in negligence.

551 No issue of contributory negligence arises in the proceedings. By virtue of arrangements between the defendants, the cross-claims have fallen away.

552 The Court has made determinations as to each head of damage contested in the proceedings which are specified in the section of my judgment bearing that heading.

553 At the conclusion of the hearing, the amount of Medicare charges remained uncertain. The Court indicated that, in that light, some further steps may be required before judgment in order to determine the quantum of damages. The Court has not received any update in that respect.

554 The defendants should bring in short minutes of order reflecting this judgment, after discussion with the plaintiff, as to Medicare charges. There is liberty to have the matter listed in the event of any dispute as to those charges or the form of the short minutes of order. Costs shall be reserved.

Pike v Coles Supermarkets Australia Pty Ltd; Pike v Solomon (19 November 2021) (Walton J)
Garnett v Qantas Airways Ltd (30 June 2021) (Murphy JA, Mitchell JA, Vaughan JA)
Bowman v Nambucca Shire Council (21 August 2020) (Walton J)
Bowman v Nambucca Shire Council (21 August 2020) (Walton J)
El Hallak v Sydney Trains (21 July 2020) (Abadee DCJ)

97. It is first necessary to consider the existence and scope of a duty of care. Sydney Trains was, relevantly, an occupier and the plaintiff was an entrant on the property. It is well-established that an occupier of premises has a duty to exercise reasonable care so that the premises are safe for pedestrians in the position of the plaintiff [5] . The obligation is, as the

defendant submits, to exercise reasonable care to prevent injury to entrants to the premises using reasonable care for their own safety [6] . Nevertheless, the relationship between occupier and entrant typically gives rise to the existence of a duty and, in this case, the entrant here was supplying a service for the benefit of the occupier in the course of which he was required to work on a platform which, it can be posited, contained a hazard. An occupier should not be relieved of responsibility where, for reasons of inadvertence or otherwise, a worker suffers injury by reason of his or her contact with the hazard. It was not suggested, in this case, that the plaintiff deliberately stepped on the hole. I find that the duty of care was made out.

Breach of duty

via

5. Australian Safeways Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 at 488 ; Thompson v Woolworths (Queensland) Pty Ltd (2005) 221 CLR 234 at [24] .

Mohammed Abed v Canterbury-Bankstown Council (19 March 2020) (Abadee DCJ)
Bruce v Apex Software Pty Ltd (18 December 2018) (Meagher, Leeming and White JJA)
Hennessy v Patrick Stevedores Operations (02 December 2014) (Campbell J)
Lee v Carlton Crest Hotel (Sydney) Pty Ltd (19 September 2014) (Beech-Jones J)
Burton v Brooks (01 July 2011) (Hodgson and Macfarlan JJA, Tobias AJA)
Maricic v Dalma Formwork (Australia) Pty Ltd (30 June 2006) (Beazley JA at 1; Ipp JA at 2; Basten JA at 3)
Lynch v Kinney Shoes (Australia) Ltd (02 September 2005) (McMurdo P, Atkinson and Mullins JJ,)

33. This case concerns the duty of an occupier of a shop to a lawful entrant. Although the common law no longer measures the duty owed according to the category of entrant, [30] the measure of control of the occupier of the premises is one aspect of the relationship that gives rise to a duty of care. [31] It is quite unlike the cases which deal with the question of whether a public authority should be held liable in negligence for failure to warn of conditions brought about by natural phenomena. [32] The duty owed to customers by the occupier of a commercial premises must take into account the risks the commercial environment creates. The test is no longer that found in *Indermaur v Dames* [33] that the occupier's obligation is only to take reasonable care to prevent damage from "unusual danger" of which it knew or ought to have known. [34] The retailer's duty in tort is more akin to, although it has not yet been held to be coincident with, the implied warranty in contract, "that the premises are as safe for the purpose as the exercise of reasonable skill and care can make them." [35]

via

[31] *Thompson v Woolworths (Qld) Pty Ltd* (2005) 214 ALR 452; 79 ALJR 904; [2005] HCA 19 at [24] .

Berrigan Shire Council v Ballerini (22 June 2005) (Callaway, Chernov and Nettle, Jj. A)

The status of the respondent as occupier of the land on which the appellant was injured was one aspect of the relationship that gave rise to a duty of care. It gave the respondent a measure of control that is regarded by the law as important in identifying the existence and nature of a duty of care [3] . There was, however, more to the relationship than that, and, as was agreed on both sides, the problem was not one that concerned only the physical condition of the respondent's premises. There was a time when the common law sought to define with precision the duty of care owed by an occupier of land, and treated the content of the duty as variable according to categories fixed by reference to the status of entrants [4] . The common law has since rejected the approach of seeking to construct a series of special duties by reference to different categories of entrant [5] . The problems involved in the former approach included the rigidity of the classification of entrants, and the artificiality of distinguishing between the static condition of premises and activities conducted on the premises. That is not to say, however, that the law now disregards any aspect of the relationship between the parties other than that of occupier and entrant. On the contrary, other aspects of the relationship may be important, as considerations relevant to a judgment about what reasonableness requires of a defendant, a judgment usually made in the context of deciding breach of duty (negligence).

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[3] *Commissioner for Railways v McDermott* [1967] 1 AC 169 at 186 ; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263 [18], 270 [42], 292 [112] .

[4] See, for example, *Lipman v Clendinnen* (1932) 46 CLR 550 at 554-556 per Dixon J .

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

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25. **Following paragraph cited by:**

Moor v Liverpool Catholic Club Ltd (25 June 2013) (Levy SC DCJ)

Even in the days when the content of an occupier's duty of care was defined by reference to fixed categories, within those categories the requirements of reasonableness were affected by a variety of considerations. Mason J, in *Papatonakis v Australian Telecommunications Commission* [6] , said:

"The content of the occupier's duty to exercise reasonable care for the safety of an invitee must, of course, vary with the circumstances including the degree of knowledge or skill which may reasonably be expected of the invitee and the purpose for which the invitee enters upon the premises."

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[6] (1985) 156 CLR 7 at 20.

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26. **Following paragraph cited by:**

Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)

61. As the High Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) explained in *Thompson v Woolworths (Queensland) Pty Ltd* (at [24] - [27]) the following factors are relevant to the relationship between the parties. First, the status of the appellant as occupier of the land on which the respondent was injured gave the appellant a measure of control that is regarded by the law as important in identifying the existence and nature of a duty of care. Secondly, the purpose for which, and the circumstances in which, the respondent was on the appellant's land. Just as in *Thompson v Woolworths (Queensland) Pty Ltd* the respondent was on the appellant's land delivering goods, in this case fuel, to the appellant for use in the course of the appellant's business. Thus, "[s]ince the [appellant] established the system to which the [respondent] was required to conform, the [appellant's] duty covered not only the static condition of the premises but also the system of delivery": *Thompson v Woolworths (Queensland) Pty Ltd* (at [26]).

Victorian WorkCover Authority v Centro Property Management (Vic) Pty Limited (01 November 2013) (Bell J)
Moor v Liverpool Catholic Club Ltd (25 June 2013) (Levy SC DCJ)
Nikola Boric v M. Vujinovic & Anor t/as Drina Carpentry (20 April 2007) (McGrowdie ADCJ)

71. In *Thompson v Woolworths (Q'land) Pty Limited* [2005] HCA 19 at [26] the Court stated that:

> *"The purpose for which, and the circumstances in which, the appellant was on the respondent's land, constituted a significant aspect of the relationship between them."*

The purpose for which, and the circumstances in which, the appellant was on the respondent's land, constituted a significant aspect of the relationship between them. The appellant, in the pursuit of her own business, was delivering goods to the respondent for the purpose of sale in the course of the respondent's business. To do that, she was required to conform to a delivery system established by the respondent. She was directed by the respondent when, where, and by what method she was to deliver. She was required to arrive between 5 am and 5.30 am, and to drive her truck along the laneway leading up to the respondent's loading dock. She was required to unload at a designated place, where the goods were to be counted and accepted by the respondent's storeman. Since the respondent established the system to which the appellant was required to conform, the respondent's duty covered not only the static condition of the premises but also the system of delivery. Some aspects of what went on were within the independent discretion of the appellant. She was not the respondent's employee. Within a fairly narrow time frame, she could choose when she made her deliveries. She could choose what kind of delivery vehicle suited her purpose. Decisions about the management of the vehicle, and the method of unloading, were largely left to her.

27. **Following paragraph cited by:**

Humphries v Downs Earthmoving Pty Ltd (11 December 2015) (Bowskill QC DCJ)
Central Darling Shire Council v Greeney (16 March 2015) (Macfarlan JA, Sackville AJA and Beech-Jones J)
Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
Jones Lang LaSalle (NSW) Pty Ltd v Taouk (24 October 2012) (McColl and Meagher JJA, Sackville AJA)
Marshbaum v Loose Fit Pty Ltd (11 October 2010) (Hoeben J)
Maricic v Dalma Formwork (Australia) Pty Ltd (30 June 2006) (Beazley JA at 1; Ipp JA at 2; Basten JA at 3)

> 52 The appellant in *Thompson* was involved in making deliveries to the Respondent's premises "in the pursuit of her own business", as an independent contractor. The Court continued, at [27] :
>
> > "Even so, the respondent established and maintained a system, and its obligation to exercise reasonable care for the safety of people who came onto its premises extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of physical injury."

Even so, the respondent established and maintained a system, and its obligation to exercise reasonable care for the safety of people who came onto its premises extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of physical injury. A number of aspects of the facilities and procedures for the delivery of goods into the respondent's store might have involved issues of health and safety. Many, perhaps most, of the people who made the actual deliveries were outside the respondent's

organization, and were not subject to the direct control it exerted over its employees. Even so, they were regular visitors to the premises, for a mutual commercial purpose, and it was reasonable to require the respondent to have them in contemplation as people who might be put at risk by the respondent's choice of facilities and procedures for delivery.

28. The essential issue in the case concerns, not the existence or general nature of the duty owed by the respondent to the appellant, but whether there was a breach of duty.

Breach of duty

29. The appellant does not complain of a failure to warn her of a risk of which she was unaware. On the contrary, her evidence was that she knew of the risk of injury to herself involved in moving the industrial waste bins that sometimes blocked access to the loading dock, and had complained to the respondent about being exposed to that risk. We are not concerned with a question of the kind that arises where a plaintiff asserts that reasonableness required that a defendant warn of a hazard, and the defendant responds by saying that the hazard was so obvious that no warning was required [7] .

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[7] cf *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

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30. Even so, the respondent relies upon the appellant's knowledge of the risk involved in attempting to move the bins herself. Indeed, the respondent points out that in one respect the appellant's knowledge was better than that of the respondent, in that the appellant knew, and the respondent did not know, that the appellant had suffered a recent back injury. As is common, questions of degree of risk are involved. Evidently, the bins were designed to be moved manually, and they were moved routinely by Council workers, the respondent's storemen, and other (male) delivery drivers without injury. Yet the appellant and her husband had told the respondent's employees that she could not move them safely, and Mr Frank Thompson agreed that she should not be moving them. What was involved was not a risk to everybody, but it was a risk to the appellant, and that was a risk of which the respondent was aware.

31. The principal argument for the respondent is that the risk to the appellant arose, not from the respondent's delivery system, and the facilities and procedures associated with that system, but from the appellant's independent and unnecessary conduct in attempting to move the bins herself rather than waiting for a storeman to move the bins for her. This view of the facts is expressed in the passage from the reasons of Williams JA quoted above. Associated with this argument is the proposition that, in truth, the appellant achieved little or nothing by moving the bins. She had to wait for a storeman in any event. She could not leave before a storeman had checked off her delivery. There was no risk of her losing her place in a queue. On this approach, her action was one of pointless impatience. The respondent's system, it is said, did not oblige the appellant to move the bins, and she achieved little by doing so.

32. To say that the system did not oblige the appellant to move the bins involves some over-simplification. The evidence showed that it was not unusual for delivery drivers, including

the appellant, to move the bins themselves. It appears that they believed they were achieving some worthwhile saving of time, presumably because it enabled them to reach the loading dock more quickly, and commence unloading without having to wait for the arrival of a storeman. On a busy delivery run, at an early hour, it was clearly open to the delivery drivers to regard even a modest saving of time as worthwhile. It was open to the primary judge to regard that attitude as reasonable in the circumstances.

33. There was evidence of delays of up to 10 or 15 minutes on the part of storemen when a delivery driver pressed a buzzer to call for a storeman's attendance for the purpose of accepting the delivery. The primary judge found that there was inconsistency between storemen in their responsiveness to the buzzer, and also in their understanding and acceptance of a responsibility to move the bins. He found that there was a reasonable concern on the part of the appellant that she would be delayed for a significant time if she did not move the bins herself. He also found that employees of the respondent, for their own benefit, were prepared to let delivery drivers move the bins rather than do the job themselves. In making those findings, the primary judge had the advantage of seeing and assessing the delivery drivers, including the appellant, and the employees of the respondent.

34. The respondent's system for receiving deliveries from its suppliers, at least up until the time of the appellant's injury, left unresolved the problem created by the Council's method of dealing with the waste bins, that is to say, moving them into the laneway, emptying them, and leaving them obstructing access to the loading dock. That moving the bins could injure a driver of the appellant's stature was foreseeable, and foreseen; as was the risk that drivers of all sizes might attempt to move the bins in order to reduce delay. The respondent's employees would move the bins if asked to do so, but there was no procedure that meant they would always move them promptly, or that established that they, and not the delivery drivers, were to clear the access to the loading dock.

35. **Following paragraph cited by:**

Leibbrandt v City of Joondalup (30 May 2025) (Troy DCJ)
Sivonen v Smith (29 September 2023) (Harrison AsJ)
Gomez v Woolworths Group Limited (21 June 2023) (Dicker SC DCJ)
Pinker v Shire of Boddington (26 April 2023) (Barbagallo DCJ)

> 136. The defendant is therefore entitled to an expectation that an entrant to the premises will take reasonable care for their own safety. Meagher JA explained this in ***Ratewave Pty Ltd v BJ Illingby*** : [106]
>
> > In assessing what reasonableness requires in response to a particular risk of harm, the reasonable person in the occupier's position is entitled to take into account 'with due allowance for human nature, [that] a person he permits to be on his premises will use reasonable care for his own safety. …
> >
> > The weight to be given to that expectation is in each case a matter for factual judgment *Thompson v Woolworths (Q'land) Pty Limited* (2005) 221 CLR 234 at [35] ; [2005] HCA 19 ; and the matters to be considered include the 'obviousness of [the] risk, and the remoteness of the likelihood that other people will fail to observe and

avoid it' (at [36]). The Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) continued (at [37]):

> 'The factual judgment involved in a decision about what is to be reasonably expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any of them is likely to vary according to the circumstances of the case. If the obviousness of a risk, and the reasonableness of an expectation that entrants will take care of their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.'

Liccardy v Daniel Payne t/as Sussex Inlet Pontoons Pty Ltd (05 July 2022) (Judge Levy SC)

147. Those considerations include allowing for the possibility that despite the expectation that the passengers would exercise reasonable care for their own safety, it was possible that one or more of them might be inattentive or act negligently, depending on the circumstances, which here, included the party atmosphere, the consumption of alcohol, and drugs: *Roads & Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42, at [45] ; following *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234, at [35] .

James v USM Events Pty Ltd (14 June 2022) (Brown J)
Pietrobelli v Jewell Family Nominees Pty Ltd (24 May 2022) (Walton J)
Pike v Coles Supermarkets Australia Pty Ltd; Pike v Solomon (19 November 2021) (Walton J)

227. In *Ratewave Pty Limited v BJ Illingby* [2017] NSWCA 103, Meagher JA observed at [54] :

> In assessing what reasonableness requires in response to a particular risk of harm, the reasonable person in the occupier's position is entitled to take into account "with due allowance for human nature, [that] a person he permits to be on his premises will use reasonable care for his own safety": per Mahoney JA in *Phillis v Daly* (1988) 15 NSWLR 65 at 74 ; a passage cited with approval in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [45] fn 69 (Gummow J); [2007] HCA 42 . The weight to be wgiven to that expectation is in each case a matter for factual judgment: *Thompson v Woolworths (Q'land) Pty Limited* (2005) 221 CLR 234 at [35] ; [2005] HCA 19 ; and the matters to be considered include the "obviousness of [the] risk, and the remoteness of the likelihood that other people will fail to observe and avoid it" (at [36]). The Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) continued (at [37]):
>
> > The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be

> given to any of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

Khanna v Woolworths Group Limited (no 2) (20 October 2021) (Dicker SC DCJ)
Williams v Wollongong City Council (24 September 2020) (Dicker DCJ at Wollongong)
Bowman v Nambucca Shire Council (21 August 2020) (Walton J)

317. In *Ratewave Pty Limited v BJ Illingby* [2017] NSWCA 103, Meagher JA observed at [54] :

> [54] In assessing what reasonableness requires in response to a particular risk of harm, the reasonable person in the occupier's position is entitled to take into account "with due allowance for human nature, [that] a person he permits to be on his premises will use reasonable care for his own safety": per Mahoney JA in *Phillis v Daly* (1988) 15 NSWLR 65 at 74 ; a passage cited with approval in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [45] fn 69 (Gummow J); [2007] HCA 42 . The weight to be given to that expectation is in each case a matter for factual judgment: *Thompson v Woolworths (Q'land) Pty Limited* (2005) 221 CLR 234 at [35] ; [2005] HCA 19 ; and the matters to be considered include the "obviousness of [the] risk, and the remoteness of the likelihood that other people will fail to observe and avoid it" (at [36]). The Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) continued (at [37]):
>
> > The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

Baker v Bunnings Group Limited (18 June 2020) (Dicker SC DCJ)

219. In *Jackson v McDonald's Australia Ltd* [2014] NSWCA 162 at [7]- [8] , McColl JA stated as follows:

> "**Duty of care**
>
> 7. It was common ground that McDonald's owed the appellant a duty to take reasonable care to avoid a foreseeable risk of injury to him arising from the

physical state of its land, on the assumption that he used reasonable care for his safety: *Australian Safeways Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 (at 488) per Mason, Wilson, Deane and Dawson JJ; *Roads & Traffic Authorities (NSW) v Dederer* [2007] HCA 42; (2007) 234 CLR 334 (at [45]) per Gummow J. The appellant submitted that Holistic's duty was relevantly identical with McDonald's, a proposition Holistic did not dispute insofar at least as liability to the appellant was concerned.

8. Gleeson JA (with whom Emmett JA and Tobias AJA agreed) addressed the content of the assumption that an entrant uses reasonable care for his or her safety in his pellucid judgment in *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 (at [159]) as follows:

> "[159] The scope of the occupier's duty of care is marked out by the relationship between the occupier and users exercising reasonable care for their own safety. Thus, 'the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case': *Roads and Traffic Authority of New South Wales v Dederer and Another* [2007] HCA 42; 234 CLR 330 at [45] (Dederer). This involves a factual judgment which may depend on the circumstances of the case: T *hompson v Woolworths (Q'land) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [35] ."

Whitton v Dexus Funds Management Limited (18 October 2019) (Dicker SC DCJ)
Hawkesbury Sports Council v Martin (16 April 2019) (Meagher JA and Emmett AJA at [1]; Simpson AJA at [44])
Manmi v Manmi (03 April 2019) (Dicker SC DCJ)
Bruce v Apex Software Pty Ltd (18 December 2018) (Meagher, Leeming and White JJA)
Trajkovski v Ballgate Pty Limited (26 October 2018) (Russell SC DCJ)
Oakley v Collins (08 June 2018) (Russell SC DCJ)
Jennings v George Harcourt Management Pty Ltd (27 February 2018) (McWilliam AsJ)
Bridge v Coles Supermarkets Australia Pty Ltd (No 3) (19 December 2017) (Campbell J)
Five Star Medical Centre Pty Limited v Kempsey Shire Council (13 September 2017) (Judge D. Russell)

99. Gleeson JA in *Reid v Commercial Club (Albury) Limited* [2014] NSWCA 98 said at [159] :

> "The scope of the occupier's duty of care is marked out by the relationship between the occupier and users exercising reasonable care for their own safety. Thus, 'the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case': Roads & Traffic Authority of NSW v Dederer at [45]. This involves a factual judgment

which may depend on the circumstances of the case: Thompson v Woolworths (Queensland) Pty Limited [2005] HCA 19 ; 221 CLR 234 at [35] ."

Bruce v Apex Software Pty Limited trading as Lark Ellen Aged Care (30 August 2017) (Dicker SC DCJ)
Raad v VM & KTP Holdings Pty Ltd (01 August 2017) (Macfarlan and Simpson JJA, Sackville AJA)
Fatma Abdel Razzak v Coles Supermarkets Australia Pty Ltd (22 June 2017) (Russell, DCJ)
Ratewave Pty Ltd v BJ Illingby (19 May 2017) (Macfarlan and Meagher JJA, Fagan J)
Hodgson v Sydney Water Corporation (15 December 2016) (Dicker SC DCJ)
Vincent v Woolworths Ltd (15 March 2016) (McColl, Macfarlan and Ward JJA)

35. The primary judge did not therefore misconstrue s 5B(1)(b) . Nor, in my view, was his application of it shown to be erroneous. His Honour referred, as was appropriate, to the principle that occupiers of property are in general entitled to expect that users of the property will exercise reasonable care for their own safety (see *RTA v Dederer* at [45]) and to the fact that this principle is of varying significance depending upon the circumstances of particular cases (Judgment [30]; *Thompson v Woolworths (Queensland) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [35] ; *RTA v Dederer* at [46]). The principle was applicable in the present case because of the commonplace character of the activity that led to Ms Vincent's accident, namely, her getting up and down from a small step at a time when it was possible that something or someone might be passing behind her.

Humphries v Downs Earthmoving Pty Ltd (11 December 2015) (Bowskill QC DCJ)
Stenning v Sanig (27 July 2015) (Macfarlan, Hoeben and Gleeson JJA)
Murko v Greenfields Narellan Holdings trading as Narellan Town Centre (25 June 2015) (Gibson DCJ)
Scott Lawrence v Giang Thanh Liem Nguyen (24 April 2015) (Hatzistergos DCJ)
Vincent v Woolworths Limited (17 April 2015) (Campbell J)
Jackson v McDonald's Australia Ltd (26 May 2014) (McColl, Barrett and Ward JJA)
Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)

64. Insofar as the respondent is concerned, it is relevant that his relationship with the appellant was not that of an employee, but an entrant: *Thompson v Woolworths (Queensland) Pty Ltd* (at [40]). In that context, perhaps somewhat more emphasis might be placed on his obligation to take reasonable care for his own safety, although what that means will depend upon the circumstances of the case: *Thompson v Woolworths (Queensland) Pty Ltd* (at [35]).

Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)

Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
Reid v Commercial Club (Albury) Ltd (03 April 2014) (Emmett and Gleeson JJA, Tobias AJA)
Moor v Liverpool Catholic Club Ltd (25 June 2013) (Levy SC DCJ)
Laoulach v Ibrahim (16 December 2011) (Giles and Macfarlan JJA, Tobias AJA)
Laresu Pty Ltd v Clark (04 August 2010) (Tobias and Macfarlan JJA, Handley AJA)
Shaw v Thomas (23 July 2010) (Beazley, Tobias and Macfarlan JJA)
North Sydney Council v Binks (18 September 2007) (Beazley JA ; Santow JA ; Basten JA)

When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case. To take a commonplace example, in ordinary circumstances a motorist in a city street, approaching a pedestrian crossing, will reasonably assume that the pedestrians assembled on the footpath will observe the lights which control the crossing. Most people drive as though it may be expected that other road users will be reasonably careful. At the same time, it is often judged reasonable to expect a motorist to allow for the possibility that some other road users will be inattentive or even negligent.

36. **Following paragraph cited by:**

Leibbrandt v City of Joondalup (30 May 2025) (Troy DCJ)
Leibbrandt v City of Joondalup (30 May 2025) (Troy DCJ)
Sivonen v Smith (29 September 2023) (Harrison AsJ)
Blue Op Partner Pty Ltd v De Roma (12 July 2023) (Meagher, Mitchelmore and Kirk JJA)
Blue Op Partner Pty Ltd v De Roma (12 July 2023) (Meagher, Mitchelmore and Kirk JJA)
Houghton v Potts & Anor. (No 2) (22 December 2022) (Chen J)
Russell v Carpenter (08 December 2022) (Meagher, Gleeson and Kirk JJA)

49. In *Thompson v Woolworths (Qld) Pty Ltd* (2005) 221 CLR 234; [2005] HCA 19, at [36] , the High Court said the following:

> The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety.

James v USM Events Pty Ltd (14 June 2022) (Brown J)

Horne v J K Williams Contracting Pty Limited (29 April 2022) (Gibson DCJ)
Singh v Lynch (23 July 2020) (Basten, Leeming, Payne and McCallum JJA, Simpson AJA)

149. In *Kempsey Shire Council v Five Star Medical Centre Pty Ltd* (2018) 99 NSWLR 98; [2018] NSWCA 308 Basten JA, (with whom McColl JA and Simpson AJA agreed on this point) said (at [11]-[12]):

> "[11] The concept of an 'obvious risk' long pre-dated the enactment of the *Civil Liability Act* . However, under the general law, the obviousness of a risk was not an answer to a claim in negligence. Although it was an important consideration in many circumstances, the question to be asked, in all cases, remained what a reasonable response required from the defendant in the particular circumstances [see, for example, *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234; [2005] HCA 19 at [36] (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ)]. The *Civil Liability Act* has changed the law in that respect; subject to the cases excluded by s 5H(2) , s 5 H(1) removes any duty to warn of an obvious risk.
>
> [12] Further, the test of obviousness is objective and does not turn on the subjective knowledge or beliefs of the plaintiff: s 5F(1) . Taken in the context provided by s 5G(2) , that suggests that the risk should be assessed at a reasonable level of generality."

Nihill v Vivien's Model and Theatrical Management (22 April 2020) (Hatzistergos DCJ)
Kempsey Shire Council v Five Star Medical Centre Pty Ltd (13 December 2018) (McColl and Basten JJA, Simpson AJA)
Thompson v J-Corp Pty Ltd (30 November 2018) (Bowden DCJ)
Taylor v Fisher (01 August 2018) (Martin CJ, Murphy JA, Beech JA)

58. The propositions of law summarised by Buss JA in ***Department of Housing and Works v Smith [No 2]*** [18] in relation to the liability of an occupier or lessor are relevant to the second ground of appeal:

> In my opinion, some wellestablished propositions concerning the notion of a 'reasonable person' and the standard of 'reasonableness' generally, under the common law of negligence, remain relevant in considering cases of alleged breach of duty by an occupier or lessor. First, the determination of what, if anything, a reasonable person in the occupier's or lessor's position would have done involves an assessment of what would have been reasonable and practicable for the occupier or lessor to have done. Second, this inquiry is not to be undertaken in hindsight. It is necessary to look forward to identify what a reasonable person would have done, not backward to identify what would have avoided the particular injury. Third, contemporary standards within the community are relevant in determining what is reasonable in the circumstances of a particular case. Fourth, reasonableness may require no response to a foreseeable risk that is not insignificant. Fifth, the occurrence of a foreseeable risk, that was not insignificant, does not establish unreasonableness: see ***New South Wales v Fahy*** (2007) 232 CLR 486 at [7] per Gleeson CJ; at [57] [58] per Gummow and Hayne JJ; ***Neindorf v Junkovic*** (2005)

80 ALJR 341 at [93] per Hayne J; ***Mulligan v Coffs Harbour City Council*** (2005) 223 CLR 486 at [3] per Gleeson CJ and Kirby J; at [50] per Hayne J; ***Vairy v Wyong Shire Council*** (2005) 223 CLR 422 at [126] [129] per Hayne J; ***Thompson v Woolworths (Qld) Pty Ltd*** (2005) 221 CLR 234 at [36] per Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ ; ***Illawarra Area Health Service v Dell*** [2005] NSWCA 381 at [85] per Mason P (Handley JA and Young CJ agreeing); ***Bankstown Foundry Pty Ltd v Braistina*** (1986) 160 CLR 301 at 309 per Mason, Wilson and Dawson JJ.

Miloradovic v Osborne Park Commercial Pty Limited (29 September 2017) (Stevenson DCJ)
Coote (by his next friend Stephen Desmond Coote) v Terry's Crane Hire Pty Ltd (03 March 2017) (Bowden DCJ)
Tarbotton v Citic Pacific Mining Management Pty Ltd (22 December 2015) (Wager DCJ)
The v AEG Ogden (Convex) Pty Ltd (19 April 2011) (Dorney QC DCJ)
Addison v The Owners - Strata Plan No. 32680 (06 October 2010) (Gibson DCJ)

[44] The starting point for consideration of "obvious risk" is *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 221 CLR 234; (2005) 214 ALR 452; (2005) 79 ALJR 904; (2005) Aust Torts Reports 81-795; [2005] HCA 19, where the High Court said at [36] and [37] :

> "[36] The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety. This is not a case about warnings. Even so, it may be noted that a conclusion, in a given case, that a warning is either necessary or sufficient, itself involves an assumption that those to whom the warning is addressed will take notice of it and will exercise care. The whole idea of warnings is that those who receive them will act carefully. There would be no purpose in issuing warnings unless it were reasonable to expect that people will modify their behaviour in response to warnings.
>
> [37] The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness

of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

Thomas v Shaw (26 June 2009) (Kirby J)
Ellis v. Uniting Church in Australia Property Trust (Q) (04 December 2008) (McMurdo P, Fraser JA and Mackenzie AJA,)
Ross v Profile Packaging Pty Limited (24 January 2008) (Schoombee DCJ)
New South Wales Department of Housing v Hume (28 March 2007) (Beazley JA ; McColl JA Basten JA)

95. The circumstances of this accident were highly unusual, but, as the primary judge recognised, not so much as to be described as far-fetched or fanciful: cf *Wyong Shire Council v Shirt* (at 47-48). There was a risk, albeit probably a low one, that a person whose hands were full whether because carrying a child, shopping or some other household items, might stumble and fall on either the porch or steps and be injured because there was no handrail to break the fall. That risk was one of the many encountered in domestic premises, which, as has been frequently emphasised, are not "risk-free": *Thompson v Woolworths (Queensland) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234 at [36] . As Gleeson CJ said in *Jones v Bartlett* (at [23] :

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

Fitzpatrick v Job t/as Jobs Engineering (20 March 2007) (Steytler P)

42. The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response: ***Thompson v Woolworths (Q'land) Pty Ltd*** (2005) 221 CLR 234 at [36] ; ***Dovuro v Wilkins*** (*supra*) at [38]. This does not mean that if whenever a risk is obvious there will be no duty of care or no breach. The High Court in ***Thompson v Woolworths (Q'land)*** (*supra*) said (at [37]):

> "… The weight to be given to any [consideration] is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

Booksan Pty Ltd v Wehbe (21 February 2006)
Doubleday v Kelly (12 May 2005) (Bryson JA, Young CJ in Eq and Hunt AJA)

The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety. This is not a case about warnings. Even so, it may be noted that a conclusion, in a given case, that a warning is either necessary or sufficient, itself involves an assumption that those to whom the warning is addressed will take notice of it and will exercise care. The whole idea of warnings is that those who receive them will act carefully. There would be no purpose in issuing warnings unless it were reasonable to expect that people will modify their behaviour in response to warnings.

37. **Following paragraph cited by:**

Leibbrandt v City of Joondalup (30 May 2025) (Troy DCJ)
Salman v Hornsby Shire Council (No.2) (29 November 2023) (Abadee DCJ)

> 33. Further, to paraphrase what the High Court said in *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 221 CLR 234 at [37] , if an unfulfilled expectation that people take care for their own safety was conclusive against liability in every case, there would be little room for the doctrine of contributory negligence.

James v USM Events Pty Ltd (14 June 2022) (Brown J)
Deans v Maryborough Christian Education Foundation Ltd (03 May 2019) (Sofronoff P and Gotterson and Morrison JJA)
Holland v City of Botany Bay Council (24 August 2017) (Schmidt J)
ALDI Foods Pty Ltd v Young (13 May 2016) (Meagher and Simpson JJA, Adamson J)
Glenn Turner v Harrington Estates (NSW) Pty Ltd t/as Harrington Grove Country Club and Hassell Ltd (06 November 2015) (Hatzistergos DCJ)
Felhaber v Rockhampton City Council (24 February 2011) (McMeekin J)
Hamllton v Duncan (26 May 2010) (Murrell SC DCJ)

Gosling v Lorne Foreshore Committee of Management Inc (08 October 2009) (Ashley, Redlich JJA and Kyrou AJA)
Maricic v Dalma Formwork (Australia) Pty Ltd (30 June 2006) (Beazley JA at 1; Ipp JA at 2; Basten JA at 3)
C G Maloney Pty Ltd v Hutton-Potts (29 May 2006) (Santow JA; McColl JA; Bryson JA)
Shellharbour City Council v Johnson (06 April 2006) (Beazley and Tobias JJA, Hunt AJA)
Bennett v Manly Council and Sydney Water Corporation (04 April 2006) (Hislop J)
Ainger v Coffs Harbour City Council (05 December 2005)
Timberland Property Holdings Pty Ltd v Bundy (30 November 2005) (Handley and Basten JJA, Hunt AJA)
Ashfield Realty Pty Ltd t/as Ray White Ashfield v Gomes (24 June 2005) (Mason P, Ipp and Basten JJA)

> 34 There is also a need to identify the cause of the accident in order to determine if it were reasonably foreseeable and whether it could have been avoided by measures which it was reasonable to expect the defendant to have adopted. In this case, there were no known prior accidents or complaints involving the relevant chairs. If the risk of injury, once properly identified, should have been appreciated by the defendant a question arises as to whether it was limited to a particular use of the chair as seems likely. If so, should that risk also have been appreciated by the plaintiff. As the joint judgment of the members of the High Court in ***Thompson v Woolworths Queensland Pty Limited*** [2005] HCA 19 noted at [37] inadvertence by a user may be something a defendant needs to guard against. Nevertheless, that kind of risk where it materialises invites consideration of contributory negligence. Her Honour's rejection of any failure on the part of the plaintiff to take care for her own safety is hard to follow without knowing what the risk was and how the accident occurred.

Cruise Group Pty Ltd v Fullard (02 June 2005)

> 44. Thus, assuming that the Respondent was inadvertent and failed to take reasonable care for her own safety, there may yet be a duty of care owed by the operator of the vessel to guard against precisely such inadvertence or carelessness. That possibility falls squarely within the circumstances adverted to by the High Court in *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19 at [37] :
>
> "The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

38. **Following paragraph cited by:**

Humphries v Downs Earthmoving Pty Ltd (11 December 2015) (Bowskill QC DCJ)

176. There will be other aspects to the relationship between occupier and entrant, which will affect the content of the duty owed. So, for example, in *Thompson v Woolworths* , it was significant that the plaintiff, in the pursuit of her own business, was delivering goods to the defendant for the purpose of sale in the course of the defendant's business; and to do that, she was required to conform to a delivery system established by the respondent. [237] Accordingly, since the defendant established the system to which the plaintiff was required to conform, the defendant's duty in that case covered not only the static condition of the premises but also the system of delivery. The defendant's obligation to exercise reasonable care for the safety of people who came on to its premises therefore extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of injury. [238] It was the failure on the part of the defendant to have a proper delivery system in place, which lead to the finding of negligence. [239] That was the focus of the breach analysis in circumstances where there were measures that could reasonably have been implemented, which would have averted the risk of harm.

Application in this case – scope of the duty of care owed by Downs Earthmoving – what did "reasonable care" require?

via

[239] *Thompson* at [38] , approving the reasoning of McMurdo J (as his honour then was) in the Court of Appeal (set out at [17]).

There was no sufficient reason for the Court of Appeal to set aside the primary judge's finding of negligence. The question was whether the respondent had a proper delivery system in place. Such a system should have included arrangements for moving the waste bins left in the laneway by the Council workers in order to clear access to the loading dock. The appellant, and the other delivery drivers, had no responsibility to design, and no power to implement, the delivery system operating on the respondent's premises. That power and responsibility belonged to the respondent alone. The respondent, in truth, had no system for that particular

purpose. In practice, the respondent's employees either moved the bins themselves or left it to the delivery drivers to move the bins for them, according to the convenience of the respondent's employees and any other demands upon their time and attention. In the circumstances that prevailed, the respondent knew that, frequently, delivery drivers would move the bins. The respondent knew that not all drivers were capable of doing that without risk of injury. The reasoning of McMurdo J set out above is persuasive. The primary judge's finding of negligence should have been upheld.

Contributory negligence

39. McMurdo J was also correct to conclude that a case of contributory negligence had been established and that the primary judge had erred in failing so to find. The appellant was aware of the risk involved in moving the bins herself. She had recorded in her diary that they were too heavy for her. She and her husband had complained about the matter.

40. **Following paragraph cited by:**

Ellis v Amari Metals Australia Pty Ltd t/as Atlas Steels Pty Ltd (31 August 2020) (Hatzistergos DCJ)
Chaffey v MPM Maintenance Services Pty Ltd & Anor (12 June 2019) (Hatzistergos DCJ)
Carangelo v State of New South Wales (29 May 2015) (Adamson J)
Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
Herbert v Clarendon Homes (NSW) Pty Ltd (23 August 2013) (Beech-Jones J)
Opoku v P and M Quality Smallgoods P/ L and othersOpoku v Kaybron No 6 P/L (14 May 2012) (Adamson J)
Hughes v Tucaby Engineering Pty Ltd (24 August 2011) (McMeekin J)
Sijuk v Ilvariy Pty Limited, trading as, Craftsman Homes (29 April 2010) (Hall J)

> 163 In **Pollard** (supra), the appellant in that case was not the respondent's employee and that, McColl JA noted, different considerations arise in the case of contributory negligence on the part of such persons, citing **Thompson v Woolworths (Queensland) Pty Limited** [2005] HCA 19; (2005) 221 CLR 234 at [40] . In an employment situation, the Court is required to take into account, in determining whether a plaintiff has been guilty of contributory negligence, the fact that the employer had failed to use reasonable care to provide a safe system of work which exposed the plaintiff to unnecessary risks.

Hoad v Peel Valley Exporters Pty Ltd (19 September 2008) (Harrison J)
Pollard v Baulderstone Hornibrook Engineering Pty Ltd (27 May 2008) (Mason P; Beazley JA; McColl JA)

The factors that weighed with the majority in the Court of Appeal, while not sufficient to displace the finding of negligence, were significant for the issue of contributory

negligence. In this regard it is important to remember that, in her relationship with the respondent, the appellant was not an employee but an independent contractor. Different considerations arise in the case of contributory negligence on the part of employees [8] .

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[8] *McLean v Tedman* (1984) 155 CLR 306 at 315 ; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309 ; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 877 [60], 884 [87]; 179 ALR 321 at 333, 344.

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41. Although some saving in time was achieved by the delivery drivers when they moved the bins themselves, it cannot have been great. Furthermore, in the case of the appellant, not only did she have to wait for the storeman before she completed her delivery, she was also accustomed to waiting for her husband to assist her with unloading and, if necessary, with moving the bins. On the occasion in question, the appellant attempted to move the bins without waiting either for the storeman or for her husband. Furthermore, the appellant knew, and the respondent did not know, that she had injured her back only a few days previously.

42. The amount allowed by McMurdo J by way of apportionment should not be disturbed. The orders he proposed should be given effect.

Orders

43. The appeal should be allowed with costs. Orders 2 and 3 of the Court of Appeal should be set aside. In place of those orders it should be ordered that there be judgment for the appellant against the respondent in the action for $105,327.92. The respondent should pay the appellant's costs of the proceedings at first instance. There should be no order as to the costs of the appeal to the Court of Appeal.

Cited by:

Mason-Leonarder v Balfran Removals Pty Ltd (No 2) [2025] ACTSC 363 -
Leibbrandt v City of Joondalup [2025] WADC 31 -
Leibbrandt v City of Joondalup [2025] WADC 31 -
Leibbrandt v City of Joondalup [2025] WADC 31 -
Leibbrandt v City of Joondalup [2025] WADC 31 -
Leibbrandt v City of Joondalup [2025] WADC 31 -
Leibbrandt v City of Joondalup [2025] WADC 31 -
Leibbrandt v City of Joondalup [2025] WADC 31 -
Leibbrandt v City of Joondalup [2025] WADC 31 -
Content removed [2024] NSWSC 1495 -
Sawyer v Steeplechase Pty Ltd [2024] QSC 142 (10 July 2024) (Crowley J)

124. The Court noted that the issue of liability was not concerned simply with an occupier's liability for hazards associated with the static condition of the premises. That was because the appellant was on the respondent's premises for a 'mutual commercial purpose' and was

required to conform to certain systems and procedures established by the respondent. While it was not disputed that the respondent owed the appellant a duty of care, there was disagreement about the appropriate formulation of that duty. [13] On that aspect, the Court relevantly observed: [14]

> The status of the respondent as occupier of the land on which the appellant was injured was one aspect of the relationship that gave rise to a duty of care. It gave the respondent a measure of control that is regarded by the law as important in identifying the existence and nature of a duty of care. There was, however, more to the relationship than that, and, as was agreed on both sides, the problem was not one that concerned only the physical condition of the respondent's premises...
>
> The purpose for which, and the circumstances in which, the appellant was on the respondent's land, constituted a significant aspect of the relationship between them. The appellant, in the pursuit of her own business, was delivering goods to the respondent for the purpose of sale in the course of the respondent's business. To do that, she was required to conform to a delivery system established by the respondent... Since the respondent established the system to which the appellant was required to conform, the respondent's duty covered not only the static condition of the premises but also the system of delivery...
>
> ...the respondent established and maintained a system, and its obligation to exercise reasonable care for the safety of people who came onto its premises extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of physical injury.

via

[14] Ibid , 243–244 [24]–[27] (citations omitted).

Sawyer v Steeplechase Pty Ltd [2024] QSC 142 -
Sawyer v Steeplechase Pty Ltd [2024] QSC 142 -
Sawyer v Steeplechase Pty Ltd [2024] QSC 142 -
Sawyer v Steeplechase Pty Ltd [2024] QSC 142 -
Hornsby Shire Council v Salman [2024] NSWCA 155 -
Salman v Hornsby Shire Council (No.2) [2023] NSWDC 527 (29 November 2023) (Abadee DCJ)

33. Further, to paraphrase what the High Court said in *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 221 CLR 234 at [37] , if an unfulfilled expectation that people take care for their own safety was conclusive against liability in every case, there would be little room for the doctrine of contributory negligence.

Morris v Evolution Traffic Control Pty Ltd [2023] QDC 195 (31 October 2023) (Jarro DCJ)

77. As to the second defendant's position as an occupier or entity in control of a workplace, it was argued by Mr Morris, that, consistent with *Thompson v Woolworths (Qld) Pty Ltd* (2005) 221 CLR 234 , Mr Morris's case had the same dual character, involving the static condition of the roadway trip location, and the absence of the pedestrian traffic lights (which is an unavailable, but not a critical, element of the duty of care matrix) mixed in with the deficient induction, absence of site-specific risk assessment, absence of warnings of the hazard and the circumstances of direct control by the second defendant. Therefore, the second defendant owed duties of care analogous to those of an employer. Also, applying the *Wyong Shire Council v Shirt* calculus, there was a reasonably foreseeable risk of injury. It was a risk of

some magnitude (which the injuries demonstrate). The degree of probability of it occurring was significant and the expense, difficulty and inconvenience of taking action would have been low. There was a breach of the duty of care in failing to provide a safe place and system of work, to conduct a proper and adequate risk assessment and warn the plaintiff of the risk of injury.

Morris v Evolution Traffic Control Pty Ltd [2023] QDC 195 -
Sivonen v Smith [2023] NSWSC 984 -
Sivonen v Smith [2023] NSWSC 984 -
Sanders v Mount Isa Mines Limited [2023] QSC 188 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Gomez v Woolworths Group Limited [2023] NSWDC 221 -
Allen v Merym Pty Ltd t/as EMCO Building [No 3] [2023] WADC 55 -
Allen v Merym Pty Ltd t/as EMCO Building [No 3] [2023] WADC 55 -
Pinker v Shire of Boddington [2023] WADC 47 (26 April 2023) (Barbagallo DCJ)

136. The defendant is therefore entitled to an expectation that an entrant to the premises will take reasonable care for their own safety. Meagher JA explained this in ***Ratewave Pty Ltd v BJ Illingby*** : [106]

> In assessing what reasonableness requires in response to a particular risk of harm, the reasonable person in the occupier's position is entitled to take into account 'with due allowance for human nature, [that] a person he permits to be on his premises will use reasonable care for his own safety. ...
>
> The weight to be given to that expectation is in each case a matter for factual judgment *Thompson v Woolworths (Q'land) Pty Limited* (2005) 221 CLR 234 at [35] ; [2005] HCA 19 ; and the matters to be considered include the 'obviousness of [the] risk, and the remoteness of the likelihood that other people will fail to observe and avoid it' (at [36]). The Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) continued (at [37]):
>
> > 'The factual judgment involved in a decision about what is to be reasonably expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any of them is likely to vary according to the circumstances of the case. If the obviousness of a risk, and the reasonableness of an expectation that entrants will take care of their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.'

Finniss v State of New South Wales (No. 1) [2023] NSWDC 83 -
Finniss v State of New South Wales (No. 1) [2023] NSWDC 83 -
Comino v Kremetis [2023] NSWSC 63 (09 February 2023) (Campbell J)

6. From the original Statement of Claim it is tolerably clear that the plaintiff's case against Killara Feedlot was that it was the occupier of the feedlot responsible for the loading operations and that it owed him a duty of care as an occupier of the premises in the expanded sense discussed by the unanimous High Court in *Thompson v Woolworths* (Qld) Pty Ltd (2005) 221 CLR 234; [2005] HCA 19 at [23]–[27] . Questions of breach, of course, are governed by the provisions of the *Civil Liability Act 2002 (NSW)* . Although the relevant precautions that reasonable care required were said to amount to some 30-odd matters, essentially the focus of the breach question was on the circumstance of the entry into the race of the "rogue steer" while Mr Blair was in the process of securing his truck. In this regard, in general terms, from the pleading the case was put in various ways: a failure to institute and maintain a safe system of loading the cattle; failure to provide safe plant and equipment for the loading operation in as much as the sliding gate separating the race from

the forcing yard was in ways specified in the pleading defective and the man gate by reason of its design and installation did not provide a safe emergency exit from the race in the event of the entry into the race of a rogue or runaway steer; or, alternatively, vicarious liability for the casual negligence of one of Killara Feedlot's stockmen in allowing the steer into the race while Mr Blair was closing the gates of his truck.

Comino v Kremetis [2023] NSWSC 63 -
Karaoglu v Fitness First [2022] NSWSC 1772 -
Karaoglu v Fitness First [2022] NSWSC 1772 -
Karaoglu v Fitness First [2022] NSWSC 1772 -
Karaoglu v Fitness First [2022] NSWSC 1772 -
Houghton v Potts & Anor. (No 2) [2022] NSWSC 1778 -
Fraser v Victorian WorkCover Authority [2022] VCC 2241 (19 December 2022) (Her Honour Judge Robertson)

Cases Cited: *Jones v Dunkel* (1959) 101 CLR 298; *Payne v Parker* [1976] 1 NSWLR 191; *Lui v Guan; Sun Link Group Pty Ltd v Lui* [2019] NSWSC 803; *Kirriwellage v Best & Less Pty Ltd* [2013] VSCA 355; *Mayhe w v Lewington's Transport Pty Ltd* [2010] VSCA 202; *Czatyrko v Edith Cowan University* (2005) 79 ALJR 839; *Fox v Wood* (1981) 148 CLR 438; *Alcoa Portland Aluminium Pty Ltd v Husson* (2007) 18 VR 112; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1; *Roa ds and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; *Iannello v BAE Automation and Electrical Services Pty Ltd* [2008] VSC 544; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *New South Wales v Fahy* (2007) 232 CLR 486; *Hardy v Mikropul Australia Pty Ltd* [2020] VSC 42; *Neindorf v Junkovic* (2005) 80 ALJR 341; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; *Erickson v Bagley* [2015] VSCA 220; *Erickson v Bagley & Anor* [2014] VCC 2126; *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 301; *Allied Pumps Pty Ltd v Hooker* [2020] WASCA 72; *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd* [1983] 2 NSWLR 268; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Romeo v Conservation Commission of The Northern Territory* (1998) 192 CLR 431; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Swain v Waverley Municipal Council* (2005) 220 CLR 517; *Hamilton v NuRoof (WA) Pty Ltd* (1956) 96 CLR 18; *Thompson v Woolworths (Qld) Pty Ltd* (2005) 221 CLR 234 ; *Miletic v Capital Territory Health Commission* (1995) 130 ALR 591; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2)* [1967] 1 AC 617; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; *Griffin v Victorian Workcover Authority* [2016] VSC 101; *Naxakis v Western General Hospital* (1999) 197 CLR 269; *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125; *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939; *Tubemakers of Australia Ltd v Fernandez* (1976) 10 ALR 303; *Bendix Mintex Pty Ltd and Ors v Barnes* (1987) 42 NSWLR 307; *TC v State of New South Wales* [2000] NSWSC 292; *Tabet v Gett* (2010) 240 CLR 537; *Lithgow City Council v Jackson* (2011) 244 CLR 352; *Chappel v Hart* (1998) 195 CLR 232; *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262; *X & Y v Pal (By Her Tutor X)* (1991) 23 NSWLR 26; *Bradshaw v McEwans Pty Ltd* [1951] 217 ALR 1; *Luxton v Vines* (1952) 85 CLR 352

Fraser v Victorian WorkCover Authority [2022] VCC 2241 -
Fraser v Victorian WorkCover Authority [2022] VCC 2241 -
Russell v Carpenter [2022] NSWCA 252 (08 December 2022) (Meagher, Gleeson and Kirk JJA)

49. In *Thompson v Woolworths (Qld) Pty Ltd* (2005) 221 CLR 234; [2005] HCA 19, at [36] , the High Court said the following:

> The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety.

27. I shall provide extracts of the judgment relevant to the determination of the costs issues:

> 4 Both Coles and the owners filed cross-claims against each other in their respective proceedings ("the cross-claims"). A central issue in the cross-claims was control of the relevant area, in particular, having regard to the terms of the lease under which Coles occupied, at least, the supermarket premises and had some responsibilities with respect to the car park. I will return to the terms of the lease below.
>
> 5 Prior to the hearing, both Coles and the owners resolved the claims brought between them, respectively. As such the cross-claims do not need to be determined. As at the time of the hearing, both Coles and the owners were jointly represented. Hereinafter, Coles and the owners shall be, collectively, referred to as "the defendants".
>
> ...
>
> **CREDIT**
>
> **The Evidence of the Plaintiff**
>
> **...**
>
> *Conclusion*
>
> 163 The defendant correctly submitted that the plaintiff's evidence before and after the surveillance footage reveals a shifting of evidence to adjust to the inconsistencies in her account. So much is evident from both the terms of her answers as I have discussed them and from the manner in which she gave her evidence. As mentioned, her evidence was somewhat [calibrated] to avoid risk before the surveillance footage and further adjusted afterwards.
>
> 164 Further, the surveillance footage is often inconsistent with the plaintiff exhibiting pain or physical limitation and demonstrates some resumption of functionality at pre-incident level.
>
> 165 Despite the evidence as to the underlying existence of pain there was the absence of facial expressions or the movements of the body demonstrative of pain being felt during the discharge of work.
>
> 166 The nature of the work and the activities shown in the footage, all of which are arduous, must raise doubts about the level of pain experienced at the time the footage was taken and the reports of medical professionals as to the same. The contention that the discharge of that work was necessary for financial reasons has a superficial attraction (in the sense of working through the pain) but some doubt must be cast upon that explanation because of her prior evidence of her experience in relatively light work as a bookkeeper (although some medical reasons were advanced for not taking up that work).
>
> 167 The credibility of the plaintiff's evidence as to her afflictions is also strained by the volume of work undertaken by her in the absence of her son and the passage of her evidence in which she insinuated her condition had deteriorated since 2017 (see transcript at 107).
>
> 168 Her evidence as to her availability for a disability pension must, in the light of the evidence, be doubted.

169 My overall impression is that the plaintiff's evidence as to the extent of her incapacity and as to the extent of the pain she expressed are exaggerated and that her concessions were tailored for the avoidance of exposure as to the true state of her capacity for work (including arduous work). I do not find that the plaintiff's evidence was untruthful as such but that the content and manner of it reflected very poorly upon her as a witness. I consider her to be an unreliable witness. In particular, her evidence is unsatisfactory as to the existence of incapacity and pain. This necessarily impacts her reports to medical professionals as to those states of being from time to time, and overall, suggests that the plaintiff has a capacity for even arduous work from the start of her lawnmowing business, even though she may have suffered some ongoing pain managed by medication..

...

206 The plaintiff's case was that the defendants owed the plaintiff a duty to take reasonable care to ensure that she was not exposed to unnecessary risk of injury. In summary, it is submitted:

> (1) The drainage pipe into which the plaintiff stepped clearly had its cover/cap removed. There was no evidence before the Court of a damaged cover, noting there were no screws in the hole, nor evidence from the defendants as to why or when it was removed. Further, the detritus surrounding the pipe, again, suggest a period of time has past with the cap missing.
>
> (2) The plaintiff did not see the uncapped drainage pipe because, whilst she put her groceries into the passenger front seat, the drainage pipe was initially concealed by the vehicle parked in the western bay.

207 By the close of submissions, the parties were in agreement as to the duty owed by the respective defendants and, in light of the Joint Expert Report, any dispute as to the seriousness of the plaintiff's injuries fell away. As to duty, counsel for the defendant conceded that both sets of defendants owed a duty of care to the plaintiff and the duty arose from "the circumstances in which they were each, in their own way, to some extent, occupiers, in the sense conventionally recognised under the common law". As such, "it could not be said on behalf of either sets of defendants that they had no duty to entrants to that property".

208 The plaintiff drew a distinction between Coles as occupier and the owners as the relevant owners of the premises. However, for the purposes of determining liability, senior counsel for the plaintiff recognised that the submissions advanced for the defendants had, in substance, accepted that Coles was the relevant occupier.

209 Turning to the scope and content of each of the duties, whilst both sets of defendants conceded that Coles had assumed responsibilities for maintenance, subject only to matters of structural or capital repair, it was submitted that the Court should approach questions of liability with respect to Coles and the owners, respectively, "independently". In that respect, it was also submitted "issues about respective responsibilities do not need to be determined on the factual and legal issues in proceedings".

210 It being conceded that the defendants, respectively, owed a duty of care to the plaintiff, the primary area dispute remaining in the plaintiff's liability case was causation. Whilst a joint document was not filed, by closing submissions, counsel for the defendants confirmed the crux of the dispute with respect to liability was one of causation. As to the issue of causation, senior counsel for the defendants submitted:

> (1) in relation to Coles, "[liability] arises from whether or not had Coles had a proper system, this risk would have been identified and addressed"; and
>
> (2) in relation to the owners, "there was a sufficient discharge of the duty, in other words there was a duty as owners and to some extent

occupiers, although having regard to the terms of the lease and the - that are taken through their commercial agents, such reasonable precautions as were required under s 5B of the Civil Liability Act were taken".

211 Section 5B of the Civil Liability Act 2002 (NSW) requires that the risk of injury, if appropriate precautions were not taken, be foreseeable and not insignificant. In the plaintiff's submission there can be little issue but that that risk was clearly foreseeable. The relevant risk of harm in this matter was identified as the risk that a person such as and including the plaintiff could step into a hole such as that that was uncovered and sustain injury. The defendants conceded that risk was foreseeable and not insignificant.

212 The position of the defendants is that the defendants, in their respective capacities, had taken reasonable precautions, which constituted an adequate response to the risk and there is no breach of duty by either Coles or the owners. However, the defendants concede that risk was foreseeable and not insignificant.

...

DUTY OF CARE

215 As mentioned, it was uncontroversial that the defendants as the occupiers of the car park at the time of the incident, the defendants each owed a duty of care to the plaintiff. The duty owed by an occupier is to exercise reasonable care so that the premises are safe for pedestrians and other users: Australian Safeway Stores Pty Ltd v Zaluzna [1987] HCA 7 at [488] ; Thompson v Woolworths (Q'land) Pty Limited (2005) 221 CLR 234 at [24] .

216 I find that the defendants owed a duty to the plaintiff at the time of the incident as occupiers of the car park.

...

BREACH OF DUTY

...

Defendants' Submissions

...

243 The defendants have properly conceded the question of breach with respect to Coles. The provisions of cl 29.7(a) of the lease plainly provide that Coles was required, at its expense, to repair and maintain the car park.

244 The risk of harm in this matter is the risk that a person would step into a hole that was uncovered and thereby sustain injury. The hole was located in the car park and, self evidently from the photos of the hole after the incident, was in need of maintenance or repair.

245 The reasonable precautions to be taken by Coles in that respect, having regard to its obligations under the lease involved, in order to properly maintain and repair the car park, regular inspection of it.

246 Thus, a system of inspection by means of cleaners or other persons to inspect the car park would have been required as reasonable precautions. There would seem to be no dispute that a daily inspection would have been reasonable, workable and appropriate in that respect.

247 There was no evidence of a system of inspection by Coles, but there was evidence of Coles being aware and reminded of its obligations in that respect before the incident as to the state of disrepair of the car park and Coles' responses taking

steps under the lease. The hole into which the plaintiff stepped was indicative of a state of disrepair. Coles was required to take reasonable steps to effect maintenance and repair of the car park.

248 In those circumstances, it may be concluded that Coles failed to take reasonable precautions, either by failing to have and applying any system of inspection, maintenance and repair, or adopting a system which was wholly inadequate in its terms or application in that respect for the purposes of s 5B of the Civil Liability Act .

249 I consider the submissions of the owners to be correct in this respect, namely, the owners had adequately discharged their duty to take reasonable precautions for the purposes of s 5B . The owners were owners of commercial property which was leased to a large commercial operator with specific obligations to maintain the car park. They reminded and pressed Coles to fulfil those obligations and with reasonable frequency, inspected the condition of the property to ensure the obligations were met and took steps to remediate the property including the car park either directly or through the contractor.

...

CAUSATION...

Defendant Submissions: Causation

258 The only aspect that arises for determination in relation to the liability assessment of Coles' position is under s 5D of the Civil Liability Act and that is causation. The question, in that respects is as follows:

> (1) what reasonable precautions should have been taken because, without assessing that, the Court cannot proceed to properly consider the question of causation; and
>
> (2) if those precautions had been taken, is it reasonably likely that the risk of harm would have been avoided.

259 As to the issue of causation, with respect to Coles, counsel for the defendants submitted:

> (1) The finding should be that a reasonable precaution that should have been taken by Coles, having regard to its obligations under cl 29 in the lease, would have been to perform some sort of inspection of the car park. In my submission, it being a car park, a reasonable system of inspection would have been either through cleaners or through inspectors per se to have patrolled the car park at least once per day.
>
> (2) The causation submission is simply that had that been done, the risk would have necessarily been obviated. In the absence of any evidence as to how long the risk had been present, the Court could not confidently conclude that it would have been. Reliance was placed upon Strong.
>
> (3) It was contended that caution should be taken when assessing the time based upon the photograph of the hole, namely, “approximately an hour after the event, that there was a detritus visible in and around the hole to suggest that it had been uncapped for a period of time”. It was submitted: “one cannot say with any confidence from that photograph, or from any other evidence, whether the hole had been uncovered for days, or hours or minutes before the accident, and so in those circumstances the Court would not be satisfied in relation to the matter of causation”.

261 As to the issue of causation, with respect to the owners, counsel for the defendants submitted:

(1) First, regard must be had to the relevant obligations of the owners. In that respect, it was contended, in light of the obligations imposed by the lease upon Coles, the obligation upon the owners "would have been lesser". This is because, the issue of maintenance was "largely delegated". It was contended the owners' duty "would have been no more than to, if you like, oversee that process by conducting less regular inspections itself".

(2) Secondly, as to the duty to conduct such inspections, it was contended that was done through the owners' commercial agents. Reference in that respect was made to the evidence of Ms Skinner; she conducted such inspections on a "monthly" basis.

(3) Therefore, it was submitted, one must doubt whether whatever system should have been adopted by the owners, directly or through their agents, would have detected the risk.

Conclusion: Causation

262 Attention was directed by the parties to the judgment of the High Court in Strong. In that matter, the appellant suffered serious spinal injury when she slipped and fell while at a shopping centre. At the time she was in the sidewalk sales area outside the entrance to a Big W store. That area was under the care and control of the first respondent, Woolworths Limited....

269 There is no evidence as to when the hole into which the plaintiff stepped became uncovered or broken. The evidence reveals that in the late afternoon of 20 January 2015 the plaintiff stepped into the hole which, at that time, had no cover. A photograph of the hole in that state was taken a short time later.

270 I accept, as submitted by the defendants, that caution should be exercised in drawing inferences from the bare fact of a photograph of the hole. Particular caution of should be taken in drawing an inference that, because no screws were apparent in the screw holes or broken pieces of the cover visible, that Coles had, in fact, removed the broken cover and had failed to replace it, thereby ending any real issue as to causation.

271 However, in my view, the fact that the photograph illustrated that the hole was open, there were no apparent screws or broken pieces of the cover remaining and the considerable debris between the two concentric rings of the hole leads to the reasonable inference that the hole had been exposed at least for a period greater than the day of the incident. There is no contradictory evidence. It follows that I am satisfied, on the balance of probabilities, that the hole had been open at least since the previous day or although most likely for a longer period sufficient to enable the cover or broken cover and screws to be removed and for the debris to accumulate in the hole.

272 In those circumstances, and as properly conceded by senior counsel for the defendant, the judgment in Strong does not defeat the plaintiff's case against Coles on the issue of causation. The hole into which the plaintiff inadvertently stepped was a danger of which the defendants ought to have been aware and ought to have covered or guarded so that persons could not accidentally step into it. The precautions which I found to be reasonably required by Coles would then have obviated or mitigated the risk of harm.

273 Thus, factual causation for the purposes of s 5D of the Civil Liability Act has been established. In failing to cover the hole or in failing to barricade of the hole whilst it was uncovered, Coles is guilty of negligence.

274 The scope of liability issue did not arise in this case. In any event, it is appropriate for the scope of the occupier Coles' liability to extend to the harm caused to the plaintiff given that the car park was, in essence, provided by the occupier to members of the public for the purposes of accessing the Coles' store (which the plaintiff did).

275 It is strictly unnecessary to consider the question of causation with respect to the owners given my earlier finding. However, it may be observed that the obligation upon the owners would have been less than that falling upon Coles because, as senior counsel for the defendants contended, the issue of maintenance was largely delegated to Coles. The obligation to oversee the process fell upon the owners by way of an overview of the process to ensure compliance with the lease. A duty to conduct inspections in that context was done through the owner's commercial agents. This was done on a monthly basis. Significant doubt must be held as to whether the conduct of inspections on that basis would have detected the risk of harm and whether the plaintiff's established factual causation with respect to the owners.

Conclusion: Liability

276 It follows that Coles is liable in negligence for any injuries, loss or damage occasioned to the plaintiff arising out of the incident. The issue of contributory negligence was ultimately not pursued by the defendants in final submissions though they pleaded the same in their defences. I make no finding of contributory negligence.

277 Given the conclusions earlier reached with respect to the owners, I do not find the owners liable in negligence with respect to the incident.

278 I note that the position adopted by the defendants results in the cross-claims falling away.

279 I will now turn to the question of damages.

...

Consideration re Medical Evidence and Capacity of the Plaintiff in the Light of the Surveillance Footage

431 The plaintiff underwent back surgery by Dr Davidson on 6 November 2013 at Nepean Hospital. That surgery was undertaken after a long history of the plaintiff suffering back pain (particularly since 2005) and imaging showing a central and right sided disc protrusion causing nerve root compression. The plaintiff underwent a bilateral LS/51 microdiscectomy and nerve root decompression.

432 The operation was substantially successful. Dr Davidson reported that the plaintiff had a complete resolution of her sciatica, but had some ongoing pain including hip pain. I have some doubt about the plaintiff's evidence of complete recovery of her back problems after this operation given that she complained about back and hip pain six weeks after the surgery (even though the sciatica had been resolved), there was an ongoing record of back and buttock pain in 2014 and her GP' s notes of January 2015 refer to "exacerbate lower back" (after walking into an open plastic drain).

433 As a result of the incident, the plaintiff suffered serious injury which Dr Davidson felt was not contributed to by her previous surgery. The injury suffered was evidenced by a right-sided L5 pars deficit with a grade 1 spondylolisthesis.

434 In June 2016, some 18 months after the incident, Dr Tait performed an LS/51 posterior lumbar interbody fusion for isthmic spondylolisthesis with radiculopathy.

438 In April 2017, Dr Tait stated that he was disappointed with the results 10 months after the plaintiff's operation. The plaintiff described pain at various locations of her body including the lumbosacral junction and left lower limb pain.

439 On 11 July 2017, Dr Ho identified the continuance of failed back surgery syndrome and a L4/5 disc protrusion. The plaintiff was 'coping' with resilience and ongoing opioids and an antineuropathic pain agent.

440 On 17 July 2017, Dr Tait reported that the plaintiff was still very much debilitated by her symptoms. He stated that the plaintiff reported back pain at the

lumbosacral junction which was worse on the right side. Dr Tait referred to Dr Ho as managing the pain.

441 In July 2017, the plaintiff commenced her lawn mowing business which involved voluminous and arduous work involving significant lifting and bending as demonstrated by the surveillance footage before the Court.

442 The plaintiff was cross-examined about being "debilitated" by her symptoms at this time as referred to in Dr Tait's report and, in particular, as to her reporting that bending set off the pain. I have earlier referred to the plaintiff's unsatisfactory evidence in this respect in the light of the surveillance footage which, inter alia, depicts at about this time (and in subsequent years) the plaintiff bending whilst undertaking mowing work without any bending avoidance behaviour. That aspect of the work together with other aspects of the work such as lifting mowers raises significant doubts about the extent of any incapacity suffered by the plaintiff and the assertion of pain or at least the extent of the pain referred to by the plaintiff as referred to earlier in this judgment in discussing the Markus ruling, the credit of the plaintiff and the review of the medical evidence. It may be noted that at this time, Dr Tait stated that there was no explanation for the plaintiff's ongoing symptoms.

447 In December 2017, Dr Giblin issued a report with respect to the plaintiff which contained, inter alia, a heading "Present Disability". In this section of the report, he indicated that the plaintiff had reported that she was mowing lawns three times a week for an hour under heavy medication. She apparently reported that what used to take half an hour, now took an hour. That reporting did not reflect, on the surveillance material, the manner in which the plaintiff undertook her continuing mowing business at that time.

448 That said, Dr Giblin took the view that, even at the reported level of mowing activity, the repetitive bending and heavy lifting involved in mowing should have the plaintiff looking for "an alternative career". It may also be noted in this respect that Dr Giblin's report and his subsequent report in 2020 are the first reports to recognise, to some degree, the work actually being undertaken by the plaintiff.

449 It may also be noted that Dr Giblin's report in 2020 again refers to the plaintiff undertaking mowing tasks by doing three to five jobs a week for approximately one hour each. Dr Giblin maintained the view that the plaintiff had persistent pain and discomfort which possibly related to the L4/L5 level of her spine and that she remained unfit for work that involved repetitive bending and heavy lifting. Again, the surveillance evidence revealed a fitness for the heavy mowing work at a very strenuous level requiring strength and agility proximate in time to this report.

450 Dr Stephen concluded an examination of the plaintiff on 23 January 2018. He reported that the plaintiff walked without a limp, there were no inconsistencies, her lumbar posture was normal, there was no muscle wasting in the lower limbs and that the plaintiff had a fair range of lumbar movement. He also reported that hip movements were in the normal range and that numbness in the foot was reported.

451 Dr Stephen opined that the plaintiff had sustained a large haematoma of the right outer leg which left a minor soft issue deformity. He found that the plaintiff had sustained a persistent and severe recurrence of her lower back and right leg pain which she claimed was much improved after the operation performed in 2013 (in fact, she claimed that it was entirely absent).

452 Dr Stephen opined that the incident was a significant contributing factor to the plaintiff's current impairment and disability. He considered that the prognosis was not good but that her condition was unlikely to be improved by further surgery.

453 In the Joint Conclave Report, Dr Giblin and Dr Stephen opined that the plaintiff had undergone a difficult operation after the incident which was not successful and that she continued to have back and right leg pain. She also complained of numbness in the right foot and left leg pain.

454 In the joint report, the doctors indicated that the plaintiff had complained about ongoing back pain and that her lawn mowing business was limited by her

symptoms. The doctors indicated that there appeared to be developing a solid fusion and some narrowing of the L4/5 disc with possible impingement on the L4/5 root. It was also reported that the plaintiff had sustained a persistent and severe occurrence of her lower back pain and right leg pain and that the surgery in 2017 had not improved her symptoms. Both experts opined that the incident was a major contributing factor to the plaintiff's current impairment and disability and that her prognosis was not good. There was a disagreement as to whether surgery would be of some assistance.

459 It is perhaps understandable that the treating and examining doctors may have taken, at face value, the statements by the plaintiff as to the extent of her pain and suffering. She experienced a serious injury and underwent surgery, although there were aspects of the opinions of the doctors querying why the operation had not better resolved the plaintiffs back and leg condition.

460 However, the medical opinions were given either without knowledge of the nature and volume of the work performed by the plaintiff in the mowing business at the time of the medical evaluations or based on an inadequate understanding of those considerations and volume of work performed or its actual nature. (For example, Dr Stephen referred to pushing a mower and Dr Giblin, "mowing" although he refers to the avoidance of a career involving bending or heavy lifting).

461 I have found the plaintiff's evidence to be unreliable. The surveillance footage reveals a person capable of arduous work involving bending and heavy lifting. It is demonstrative of strength and a fluidity of movement. The unreliability of the plaintiff's evidence also undermines her account as to the suffering of pain or suffering to the degree she reported to the doctors providing reports. The work shown in the surveillance footage is hard work, inconsistent with the suffering of acute back and leg pain. Furthermore, the surveillance footage does not show a restriction in movement or objective signs of pain. I do not consider the period of the surveillance to be unrepresentative of the plaintiff's work given the amount of the footage, period of time over which it was conducted and the consistency of the observations of the plaintiff.

462 I consider that, even in the absence of cross-examination of the doctors providing medical reports in the proceedings, the weight that may be given to medical reports in these circumstances must be significantly reduced insofar as they are based, as they substantially were, upon the self-reporting of the plaintiff as to her work activities, her capacity for the same (or assumed capacity) and the level of pain she suffered whilst undertaking the physical activity which is her business and work. This is particularly so given the volume of work undertaken by the plaintiff over an extended period. Overall, I agree with the submission of the defendant that a significant part of the plaintiff's case depended upon her credibility as a witness.

463 I do not find that the plaintiff does not suffer any ongoing back and leg pain deriving from the incident., There is in prospect some ongoing pain in the plaintiff's back and leg which may modestly impact the plaintiff's future career earning prospects, for which I have made provision in the head of damages. However, as I have stated, her assertions are significantly exaggerated when viewed in the light of the evidence before the Court such that the weight of the medical opinions predicated upon her accounts of the severity of her condition is significantly reduced. The plaintiff has a capacity to work, even to undertake arduous work, with pain managed adequately by medication.

Heads of Damages

Schedule of Damages

464 The plaintiff relied upon an amended Schedule of Damages (see p 703 and following of the Court Book). By an email dated 6 November 2020, the defendant provided an amended Schedule of Damages.

...

Conclusion: Non-Economic Loss

473 My views in this respect broadly accord with the defendants having in mind my earlier conclusion as to her capacity since the incident on the impact of any pain or suffering in its aftermath.

474 In my view, the plaintiff's non-economic loss should be assessed at 29% of the most extreme case.

...

Economic Loss

Plaintiff's Submissions

...

481 At the time the plaintiff returned to her lawn mowing and gardening business in about May 2015, she performed 3 to 6 jobs per week at $50 per job. This amounted to gross weekly earnings of between $150 to $300 per week.

482 Reducing the weekly income of $2,100 by $334 leaves a taxable income of $1,766 per week. On current tax rates that would amount to $1,310 net per week.

483 However, the particulars relied upon by the plaintiff provide a significant margin for the fact that the business was being built up and other such vicissitudes. Accordingly, for the period up to the present the claim proceeds on a basis that she would have earned $800 net per week. The plaintiff does not seek to resile from that claim.

484 In relation to the future, the claim, more realistically, is based upon a net loss of earnings of $1,250 per week. This is amply justified by the evidence.

...

Domestic Assistance

Plaintiff's Submissions

...

Conclusion

531 I accept that, as contended for the plaintiff, there are aspects of Ms Zeman's report which should be viewed with considerable caution and afforded little weight particularly as opinions of a medical character.

532 Nonetheless, in my view, the evidence does not ultimately support any claims for domestic assistance for the past. There may have been some periods where she required gratuitous assistance in this regard, but having regard to her work history, it has not been established that there have been any periods of 6 hours per week for 6 months in accordance with the statutory threshold.

533 I have already found that the evidence of the plaintiff's son as to domestic assistance may be doubted. His statements of what chores he did, and more importantly why, cannot be reconciled with the plaintiff's demonstrated strong physical capacity in 2015, and since 2016: His estimates of time spent years earlier, as a teenager, were unconvincing.

534 There is no basis to conclude that the plaintiff will require any domestic assistance in the future, paid or otherwise. She continues to regularly perform tasks in her work as or more onerous that any household chores.

535 I agree that, even the occupational therapist's modest allowances for assistance, were too much. Ms Zeman was however correct in using the fact that the plaintiff could do paid gardening work as an objective indicator, rather than simply

accepting the plaintiff's statements. Ms Zeman's assessments as to the plaintiff's lawn mowing work are compatible with the findings in this judgment as to the plaintiff's capacity.

537 Any claim for past domestic assistance by the plaintiff would, in my view, be at best for closed periods and would no surpass the threshold under s 15(3) of the Civil Liability Act . I do not consider the plaintiff will require further domestic assistance.

...*Out of Pocket Expenses*

....

Conclusion

541 Past out of pocket expenses have been covered by Coles in the sum of $137,941. The payment of those expenses should be allowed. I do not consider there is a basis for further expenses. The position as to Medicare amounts will need further consideration.

...*Treatment expenses/Future Out of Pocket Expenses*

Plaintiff's Submissions

...

Conclusion

544 The evidence does not establish that future surgery is necessary because of the accident, or likely to be offered to the plaintiff, or likely to be chosen by the plaintiff. The joint report of the medical experts was divided on the need for this treatment] and the plaintiff has expressed reluctance.

545 Otherwise, the plaintiff continues to take medication, as she did for many years prior to the accident.

546 As noted, Coles has already paid an amount of $137,941.80 to or on behalf of the plaintiff in relation to past out of pocket expenses with respect to the accident. Coles has also paid a $20,000 ex gratia lump sum, without admission of liability. These sums need to be accounted for in any damages award.

547 The defendant accepted that an allowance should be made for future medical expenses against the chance that the accident related condition may flare up and require medical or GP visits. It has allowed for $2,000.

Conclusion

548 In my view, an allowance of $8,000 should be made for future out of pocket expenses.

CONCLUSION

549 Coles is liable in negligence for any injuries, loss or damages occasioned to the plaintiff arising from her fall at the car park outside a Coles supermarket on 20 January 2015.

550 I do not find the owners liable in negligence.

551 No issue of contributory negligence arises in the proceedings. By virtue of arrangements between the defendants, the cross-claims have fallen away.

552 The Court has made determinations as to each head of damage contested in the proceedings which are specified in the section of my judgment bearing that heading.

553 At the conclusion of the hearing, the amount of Medicare charges remained uncertain. The Court indicated that, in that light, some further steps may be required before judgment in order to determine the quantum of damages. The Court has not received any update in that respect.

554 The defendants should bring in short minutes of order reflecting this judgment, after discussion with the plaintiff, as to Medicare charges. There is liberty to have the matter listed in the event of any dispute as to those charges or the form of the short minutes of order. Costs shall be reserved.

Liccardy v Daniel Payne t/as Sussex Inlet Pontoons Pty Ltd [2022] NSWDC 246 (05 July 2022) (Judge Levy SC)

147. Those considerations include allowing for the possibility that despite the expectation that the passengers would exercise reasonable care for their own safety, it was possible that one or more of them might be inattentive or act negligently, depending on the circumstances, which here, included the party atmosphere, the consumption of alcohol, and drugs: *Roads & Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42, at [45] ; following *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234, at [35] .

James v USM Events Pty Ltd [2022] QSC 63 (14 June 2022) (Brown J)
Thompson v Woolworths (Queensland)Pty Ltd (2005) 221 CLR 234 , cited

James v USM Events Pty Ltd [2022] QSC 63 -
James v USM Events Pty Ltd [2022] QSC 63 -
James v USM Events Pty Ltd [2022] QSC 63 -
Pietrobelli v Jewell Family Nominees Pty Ltd [2022] NSWSC 660 -
Horne v J K Williams Contracting Pty Limited [2022] NSWDC 135 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Pike v Coles Supermarkets Australia Pty Ltd; Pike v Solomon [2021] NSWSC 1492 (19 November 2021) (Walton J)

227. In *Ratewave Pty Limited v BJ Illingby* [2017] NSWCA 103, Meagher JA observed at [54] :

> In assessing what reasonableness requires in response to a particular risk of harm, the reasonable person in the occupier's position is entitled to take into account "with due allowance for human nature, [that] a person he permits to be on his premises will use reasonable care for his own safety": per Mahoney JA in *Phillis v Daly* (1988) 15 NSWLR 65 at 74 ; a passage cited with approval in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [45] fn 69 (Gummow J); [2007] HCA 42 . The weight to be wgiven to that expectation is in each case a matter for factual judgment: *Thompson v Woolworths (Q'land) Pty Limited* (2005) 221 CLR 234 at [35] ; [2005] HCA 19 ; and the matters to be considered include the "obviousness of [the] risk, and the remoteness of the likelihood that other people will fail to observe and avoid it" (at [36]). The Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) continued (at [37]):
>
> > The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory

> negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

Pike v Coles Supermarkets Australia Pty Ltd; Pike v Solomon [2021] NSWSC 1492 -
Khanna v Woolworths Group Limited (no 2) [2021] NSWDC 567 -
Stewart v Hames [2021] WADC 93 -
Stewart v Hames [2021] WADC 93 -
Wollongong City Council v Williams [2021] NSWCA 140 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 (30 June 2021) (Murphy JA, Mitchell JA, Vaughan JA)

88. In ***Thompson v Woolworths (Q'land) Pty Ltd*** , [112] the High Court said, with reference to the change in the common law wrought by ***Australian Safeway Stores*** with respect to the duty owed by occupiers: [113]

> That is not to say, however, that the law now disregards any aspect of the relationship between the parties other than that of occupier and entrant. On the contrary, other aspects of the relationship may be important, as considerations relevant to a judgment about what reasonableness requires of a defendant, a judgment usually made in the context of deciding breach of duty (negligence).

Statutory reform

via

[112] ***Thompson v Woolworths (Q'land) Pty Ltd*** [2005] HCA 19; (2005) 221 CLR 234 .

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

Thompson v Woolworths (Q'land) Pty Ltd [2005] HCA 19 ; (2005) 221 CLR 234

Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Garnett v Qantas Airways Ltd [2021] WASCA 110 -
Nathaniel Corbett by his Next Friend Debra Todd v Town of Port Hedland [2021] WADC 55 (14 June 2021) (Gething DCJ)

140. In effect, the plaintiff asserts that the defendant should have toddlerproofed the racecourse. Contemporary standards within the community do not require this to occur. In my view, it is both unreasonable and unrealistic. Reasonableness may require no response to a foreseeable risk that is not insignificant. [103] This is such a case. As the High Court observed in ***Thompson v Woolworths (Qld) Pty Ltd*** : [104]

> In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises ...

Nor do the community's standards of reasonable behaviour require a local government to eliminate all risks to children from the public open spaces it manages.

via

[104] ***Thompson v Woolworths (Qld) Pty Ltd*** [2005] HCA 19; (2005) 221 CLR 234 [36] (judgment of the court); ***Neindorf v Junkovic*** [2005] HCA 75; (2005) 80 ALJR 341; 222 ALR 631 [8] (Gleeson CJ); ***Hetherington*** [16] .

Nathaniel Corbett by his Next Friend Debra Todd v Town of Port Hedland [2021] WADC 55 -
Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 (12 March 2021) (Quinlan CJ; Murphy and Vaughan JJA)

129. The obviousness of a risk is, however, only one of a number of considerations relevant to the assessment of reasonableness. It is not, on its own, determinative. As the High Court said in ***Thompson v Woolworths (QLD) Pty Ltd*** : [83]

> The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

via

[83] ***Thompson v Woolworths (QLD) Pty Ltd*** [2005] HCA 19; (2005) 221 CLR 234 [37] (Gleeson CJ, McHugh, Kirby, Hayne & Heydon JJ).

Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 -
Williams v Wollongong City Council [2020] NSWDC 564 -
Ellis v Amari Metals Australia Pty Ltd t/as Atlas Steels Pty Ltd [2020] NSWDC 627 -
Bowman v Nambucca Shire Council [2020] NSWSC 1121 (21 August 2020) (Walton J)

317. In *Ratewave Pty Limited v BJ Illingby* [2017] NSWCA 103, Meagher JA observed at [54] :

> [54] In assessing what reasonableness requires in response to a particular risk of harm, the reasonable person in the occupier's position is entitled to take into account "with due allowance for human nature, [that] a person he permits to be on his premises will use reasonable care for his own safety": per Mahoney JA in *Phillis v Daly* (1988) 15 NSWLR 65 at 74 ; a passage cited with approval in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [45] fn 69 (Gummow J); [2007] HCA 42 . The weight to be given to that expectation is in each case a matter for factual judgment: *Thompson v Woolworths (Q'land) Pty Limited* (2005) 221 CLR 234 at [35] ; [2005] HCA 19 ; and the matters to be considered include the "obviousness of [the] risk, and the remoteness of the likelihood that other people will fail to observe and avoid it" (at [36]). The Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) continued (at [37]):
>
> > The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

Bowman v Nambucca Shire Council [2020] NSWSC 1121 -
Bowman v Nambucca Shire Council [2020] NSWSC 1121 -
Singh v Lynch [2020] NSWCA 152 (23 July 2020) (Basten, Leeming, Payne and McCallum JJA, Simpson AJA)

149. In *Kempsey Shire Council v Five Star Medical Centre Pty Ltd* (2018) 99 NSWLR 98; [2018] NSWCA 308 Basten JA, (with whom McColl JA and Simpson AJA agreed on this point) said (at [11]-[12]):

> "[11] The concept of an 'obvious risk' long pre-dated the enactment of the *Civil Liability Act* . However, under the general law, the obviousness of a risk was not an answer to a claim in negligence. Although it was an important consideration in many circumstances, the question to be asked, in all cases, remained what a reasonable response required from the defendant in the particular circumstances [see, for example, *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234; [2005] HCA 19 at [36] (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ)]. The *Civil Liability Act* has changed the law in that respect; subject to the cases excluded by s 5H (2) , s 5H(1) removes any duty to warn of an obvious risk.
>
> [12] Further, the test of obviousness is objective and does not turn on the subjective knowledge or beliefs of the plaintiff: s 5F(1) . Taken in the context provided by s 5G(2) , that suggests that the risk should be assessed at a reasonable level of generality."

El Hallak v Sydney Trains [2020] NSWDC 374 (21 July 2020) (Abadee DCJ)

97. It is first necessary to consider the existence and scope of a duty of care. Sydney Trains was, relevantly, an occupier and the plaintiff was an entrant on the property. It is well-established that an occupier of premises has a duty to exercise reasonable care so that the premises are safe for pedestrians in the position of the plaintiff [5] . The obligation is, as the defendant submits, to exercise reasonable care to prevent injury to entrants to the premises using reasonable care for their own safety [6] . Nevertheless, the relationship between occupier and entrant typically gives rise to the existence of a duty and, in this case, the entrant here was supplying a service for the benefit of the occupier in the course of which he was required to work on a platform which, it can be posited, contained a hazard. An occupier should not be relieved of responsibility where, for reasons of inadvertence or otherwise, a worker suffers injury by reason of his or her contact with the hazard. It was not suggested, in this case, that the plaintiff deliberately stepped on the hole. I find that the duty of care was made out.

Breach of duty

via

5. Australian Safeways Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 at 488 ; Thompson v Woolworths (Queensland) Pty Ltd (2005) 221 CLR 234 at [24] .

Baker v Bunnings Group Limited [2020] NSWDC 310 (18 June 2020) (Dicker SC DCJ)

219. In *Jackson v McDonald's Australia Ltd* [2014] NSWCA 162 at [7]- [8] , McColl JA stated as follows:

> "**Duty of care**
>
> 7. It was common ground that McDonald's owed the appellant a duty to take reasonable care to avoid a foreseeable risk of injury to him arising from the physical state of its land, on the assumption that he used reasonable care for his safety: *Austra lian Safeways Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 (at 488) per Mason, Wilson, Deane and Dawson JJ; *Roads & Traffic Authorities (NSW) v Dederer* [2 007] HCA 42; (2007) 234 CLR 334 (at [45]) per Gummow J. The appellant submitted that Holistic's duty was relevantly identical with McDonald's, a proposition Holistic did not dispute insofar at least as liability to the appellant was concerned.

8. Gleeson JA (with whom Emmett JA and Tobias AJA agreed) addressed the content of the assumption that an entrant uses reasonable care for his or her safety in his pellucid judgment in *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 (at [159]) as follows:

> "[159] The scope of the occupier's duty of care is marked out by the relationship between the occupier and users exercising reasonable care for their own safety. Thus, 'the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case': *Roads and Traffic Authority of New South Wales v Dederer and Another* [2007] HCA 42; 234 CLR 330 at [45] (Dederer). This involves a factual judgment which may depend on the circumstances of the case: T *hompson v Woolworths (Q'land) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [35] ."

Coulthurst v Miles [2020] NSWSC 599 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Nihill v Vivien's Model and Theatrical Management [2020] NSWDC 131 -
Nihill v Vivien's Model and Theatrical Management [2020] NSWDC 131 -
Mohammed Abed v Canterbury-Bankstown Council [2020] NSWDC 55 -
Whitton v Dexus Funds Management Limited [2019] NSWDC 579 -
Keven Gors by his Plenary Administrator of Janet Christine Gors v Tomlinson [2019] WADC 88 (02 July 2019) (Scott DCJ)

89. In my view the risk of harm to the plaintiff was not a foreseeable risk of which the defendants were required to warn the plaintiff. A reasonable person in the position of the defendants would not have warned the plaintiff of the risk of injury to him. My reasons are as follows:

(a) Working on a roof is dangerous and always presents some risk of injury.

(b) Deciding what is reasonable includes the reasonableness of an expectation that any invitee will exercise reasonable care for his own safety, the possibility that the invitee will sometimes be inattentive or even negligent and the obviousness of the relevant risk of harm: ***Thompson v Woolworths*** .

(c) It was common ground that the task to be performed by the plaintiff with assistance from Clifton was to unbolt the unit and then carry it directly to the ladder which was resting against the barge board on the eastern side of the veranda. There was no evidence as to how the plaintiff and Clifton then intended to lower the unit to the ground. However given its size and weight I consider it was unlikely that they would have carried it down the ladder. It was more likely that they would use the defendants' front end loader.

(d) The evidence of Clifton was that neither he nor the plaintiff ever intended to step onto the patio roof. The decision to change the direction in which the unit was to be carried was made by the plaintiff and Clifton when the first defendant was not present.

(e) The first defendant was never asked nor did the plaintiff or Clifton intend to ask him for his input about removing the unit from the roof. Both of them were experienced farmers and the plaintiff was also a qualified mechanic.

(f) The method adopted by the plaintiff and Clifton to carry the unit to the ladder was entirely a matter for them and a matter in which the defendants were not expected to nor did they play a part.

(g) The first defendant had left the premises to source new tiles to replace the cracked tiles in the proximity of the unit, before the plaintiff and Clifton had taken any steps to pick up the unit.

(h) It was not, from the defendants' perspective, reasonably foreseeable that the plaintiff would step onto the patio roof at any time during the removal of the unit.

(i) For the reasons to which I have previously referred, the risk to the plaintiff standing on the patio roof which would not bear his weight and falling through it was an obvious risk.

Causation - whether the failure by the first defendant to warn the plaintiff of the risk caused the injury to him?

Keven Gors by his Plenary Administrator of Janet Christine Gors v Tomlinson [2019] WADC 88 -
Keven Gors by his Plenary Administrator of Janet Christine Gors v Tomlinson [2019] WADC 88 -
Chaffey v MPM Maintenance Services Pty Ltd & Anor [2019] NSWDC 260 -
Deans v Maryborough Christian Education Foundation Ltd [2019] QCA 75 -
Hawkesbury Sports Council v Martin [2019] NSWCA 76 (16 April 2019) (Meagher JA and Emmett AJA at [1]; Simpson AJA at [44])

Thomson v Woolworths (Q'land) Pty Ltd (2005) 221 CLR 234; [2005] HCA 19 applied.

Hawkesbury Sports Council v Martin [2019] NSWCA 76 -
Manmi v Manmi [2019] NSWDC 96 -
Bruce v Apex Software Pty Ltd [2018] NSWCA 330 (18 December 2018) (Meagher, Leeming and White JJA)

27. The question remains whether, as Mrs Bruce contends, the primary judge should have held that the risk of harm was "not insignificant". In my view the evidence before the primary judge supported the conclusion that the risk of someone tripping and falling was "insignificant" because of the obviousness of that risk and remoteness of the likelihood that people using the area would fail to observe and take account of the uneven surface: *Thompson v Woolworths* at [36]. The use of the brick pavers as borders to the concrete slabs was readily apparent, both from the different surface materials and their colouring. The fact of a difference in the levels of the two surfaces was also obvious to anyone giving some attention to the surface on which they were walking. Whilst the extent of the difference in levels at any point may have been difficult to determine, the fact of the difference remained obvious and recognisable as something which ordinary life experience and common sense showed must be avoided or accommodated. The evidence as to the absence of any reported falls, or other complaints, for the period of at least 15 years (see [4] to [8] above) is wholly consistent with an assessment of the risk of tripping as being insignificant; as was the fact that Mrs Bruce herself had walked across the area "for the nine months prior to the accident including up to about 100 times without any difficulty" (Judgment [240](c)).

Bruce v Apex Software Pty Ltd [2018] NSWCA 330 -
Bruce v Apex Software Pty Ltd [2018] NSWCA 330 -
Kempsey Shire Council v Five Star Medical Centre Pty Ltd [2018] NSWCA 308 -
Thompson v J-Corp Pty Ltd [2018] WADC 164 -
Thompson v J-Corp Pty Ltd [2018] WADC 164 -
Trajkovski v Ballgate Pty Limited [2018] NSWDC 308 -
Taylor v Fisher [2018] WASCA 126 (01 August 2018) (Martin CJ, Murphy JA, Beech JA)

58. The propositions of law summarised by Buss JA in ***Department of Housing and Works v Smith [No 2]*** [18] in relation to the liability of an occupier or lessor are relevant to the second ground of appeal:

> In my opinion, some wellestablished propositions concerning the notion of a 'reasonable person' and the standard of 'reasonableness' generally, under the common law of negligence, remain relevant in considering cases of alleged breach of duty by an occupier or lessor. First, the determination of what, if anything, a reasonable person in the occupier's or lessor's position would have done involves an assessment of what would have been reasonable and practicable for the occupier or lessor to have done. Second, this inquiry is not to be undertaken in hindsight. It is necessary to look forward to identify what a reasonable person would have done, not backward to identify what would have avoided the particular injury. Third, contemporary standards within the community are relevant in determining what is reasonable in the circumstances of a particular case. Fourth, reasonableness may require no response to a foreseeable risk that is not insignificant. Fifth, the occurrence of a foreseeable risk, that was not insignificant, does not establish unreasonableness: see ***New South Wales v Fahy*** (2007) 232 CLR 486 at [7] per Gleeson CJ; at [57] [58] per Gummow and Hayne JJ; ***Neindorf v Junkovic*** (2005) 80 ALJR 341 at [93] per Hayne J; ***Mulligan v Coffs Harbour City Council*** (2005) 223 CLR 486 at [3] per Gleeson CJ and Kirby J; at [50] per Hayne J; ***Vairy v Wyong Shire Council*** (2005) 223 CLR 422 at [126] [129] per Hayne J; ***Thompson v Woolworths (Qld) Pty Ltd*** (2005) 221 CLR 234 at [36] per Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ ; ***Illawarra Area Health Service v Dell*** [2005] NSWCA 381 at [85] per Mason P (Handley JA and Young CJ agreeing); ***Bankstown Foundry Pty Ltd v Braistina*** (1986) 160 CLR 301 at 309 per Mason, Wilson and Dawson JJ.

Taylor v Fisher [2018] WASCA 126 -
Taylor v Fisher [2018] WASCA 126 -
Deans v Maryborough Christian Education Foundation Ltd [2018] QDC 123 -
Deans v Maryborough Christian Education Foundation Ltd [2018] QDC 123 -
Oakley v Collins [2018] NSWDC 141 -
Pocock v Citi-Steel Pty Ltd [2018] QDC 81 (10 May 2018) (Judge AJ Rafter SC)

114. In *Thompson v Woolworths* (*Qld) Pty Ltd* [209] the plaintiff was required to adopt Woolworths' delivery system. Woolworths therefore had an obligation to exercise reasonable care for the safety of drivers so that they were not exposed to an unreasonable risk of physical injury. The court said:

> "Even so, the respondent established and maintained a system, and its obligation to exercise reasonable care for the safety of people who came on to its premises extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of physical injury. A number of aspects of the facilities and procedures for the delivery of goods into the respondent's store might have involved issues of health and safety. Many, perhaps most, of the people who made the actual deliveries were outside the respondent's organisation, and were not subject to the direct control it exerted over its employees. Even so, they were regular visitors to the premises, for a mutual commercial purpose, and it was reasonable to require the respondent to have them in contemplation as people who might be put at risk by the respondent's choice of facilities and procedures for delivery." [210]

Pocock v Citi-Steel Pty Ltd [2018] QDC 81 -
Pocock v Citi-Steel Pty Ltd [2018] QDC 81 -
Pocock v Citi-Steel Pty Ltd [2018] QDC 81 -
Pocock v Citi-Steel Pty Ltd [2018] QDC 81 -
Pocock v Citi-Steel Pty Ltd [2018] QDC 81 -
Pocock v Citi-Steel Pty Ltd [2018] QDC 81 -
Jennings v George Harcourt Management Pty Ltd [2018] ACTSC 33 (27 February 2018) (McWilliam AsJ)
Thompson v Woolworths (Q'Land) Pty Ltd [2005] HCA 19; 221 CLR 234
Tsueneaki v Stewart

75. More recently in *Bridge v Coles Supermarkets Australia Pty Ltd (No 3)* [2017] NSWSC 1800 (***Bridge***), Campbell J stated at [55] :

> Amongst the other relevant considerations is an expectation that an entrant to the premises would use reasonable care for his own safety. Meagher JA explained this in *Ratewave Pty Ltd v BJ Illingby* [2017] NSWCA 103 (Macfarlan JA and Fagan J (the latter on this point) agreeing) and expressed it this way (at [54]):
>
> > In assessing what reasonableness requires in response to a particular risk of harm, the reasonable person in the occupier's position is entitled to take into account "with due allowance for human nature, [that] a person he permits to be on his premises will use reasonable care for his own safety": per Mahoney JA in *Phillis v Daly* (1988) 15 NSWLR 65 at 74 ; a passage cited with approval in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [45] fn 69 (Gummow J); [2007] HCA 42 . The weight to be given to that expectation is in each case a matter for factual judgment: *Thompson v Woolworths (Q'land) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234 at [35] ; [2005] HCA 19 ; and the matters to be considered include the "obviousness of [the] risk, and the remoteness of the likelihood that other people will fail to observe and avoid it" (at [36]). The Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) continued (at [37]):
> >
> > > The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

Jennings v George Harcourt Management Pty Ltd [2018] ACTSC 33 -
Jennings v George Harcourt Management Pty Ltd [2018] ACTSC 33 -
Bridge v Coles Supermarkets Australia Pty Ltd (No 3) [2017] NSWSC 1800 -
Miloradovic v Osborne Park Commercial Pty Limited [2017] WADC 129 -
Five Star Medical Centre Pty Limited v Kempsey Shire Council [2017] NSWDC 250 (13 September 2017) (Judge D. Russell)

99. Gleeson JA in *Reid v Commercial Club (Albury) Limited* [2014] NSWCA 98 said at [159] :

> "The scope of the occupier's duty of care is marked out by the relationship between the occupier and users exercising reasonable care for their own safety. Thus, 'the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case': Roads & Traffic Authority of NSW v Dederer at [45]. This involves a factual judgment which may depend on the circumstances of the case: Thompson v Woolworths (Queensland) Pty Limited [2005] HCA 19 ; 221 CLR 234 at [35] ."

Bruce v Apex Software Pty Limited trading as Lark Ellen Aged Care [2017] NSWDC 237 -
Holland v City of Botany Bay Council [2017] NSWSC 1120 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
Love v North Goonyella Coal Mines Pty Ltd [2017] QSC 140 -
Love v North Goonyella Coal Mines Pty Ltd [2017] QSC 140 -
Fatma Abdel Razzak v Coles Supermarkets Australia Pty Ltd [2017] NSWDC 183 -
Ratewave Pty Ltd v BJ Illingby [2017] NSWCA 103 -
Coote (by his next friend Stephen Desmond Coote) v Terry's Crane Hire Pty Ltd [2017] WADC 28 -
Coote (by his next friend Stephen Desmond Coote) v Terry's Crane Hire Pty Ltd [2017] WADC 28 -

Coote (by his next friend Stephen Desmond Coote) v Terry's Crane Hire Pty Ltd [2017] WADC 28 -
Coote (by his next friend Stephen Desmond Coote) v Terry's Crane Hire Pty Ltd [2017] WADC 28 -
Coote (by his next friend Stephen Desmond Coote) v Terry's Crane Hire Pty Ltd [2017] WADC 28 -
VWA v Downer Utilities Australia Pty Ltd [2016] VSC 775 -
Kerle v BM Alliance Coal Operations Pty Limited [2016] QSC 304 -
Kerle v BM Alliance Coal Operations Pty Limited [2016] QSC 304 -
Hodgson v Sydney Water Corporation [2016] NSWDC 361 -
Allen v Strata Plan 54664 [2016] NSWDC 217 -
Lee v Wickham Freight Lines Pty Ltd [2016] NSWCA 209 (15 August 2016) (Basten and Simpson JJA, Sackville AJA)

11. (2005) 221 CLR 234; [2005] HCA 19 .

Lee v Wickham Freight Lines Pty Ltd [2016] NSWCA 209 -
Hutchison Construction Services Pty Ltd v Fogg; Fogg v Les Quatre Musketeers Pty Ltd (t/as Plastamasta South Coast) [2016] NSWCA 135 -
ALDI Foods Pty Ltd v Young [2016] NSWCA 109 -
Carlson v State of Queensland [2016] QDC 88 (22 April 2016) (Devereaux SC DCJ)

43. In *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234, the Court remarked that:

> 'The obviousness of the risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response'. [26]
>
> .....
>
> 'If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence'. [27]

via

[27] 221 CLR at 246 [37].

VWA v Monash University [2016] VSC 178 -
Carlson v State of Queensland [2016] QDC 88 -
Carlson v State of Queensland [2016] QDC 88 -
VWA v Probuild [2016] VSC 102 -
Vincent v Woolworths Ltd [2016] NSWCA 40 (15 March 2016) (McColl, Macfarlan and Ward JJA)

35. The primary judge did not therefore misconstrue s 5B(1)(b) . Nor, in my view, was his application of it shown to be erroneous. His Honour referred, as was appropriate, to the principle that occupiers of property are in general entitled to expect that users of the property will exercise reasonable care for their own safety (see *RTA v Dederer* at [45]) and to the fact that this principle is of varying significance depending upon the circumstances of particular cases (Judgment [30]; *Thompson v Woolworths (Queensland) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [35] ; *RTA v Dederer* at [46]). The principle was applicable in the present case because of the commonplace character of the activity that led to Ms Vincent's accident, namely, her getting up and down from a small step at a time when it was possible that something or someone might be passing behind her.

South Sydney Junior Rugby League Club Ltd v Gazis [2016] NSWCA 8 (09 February 2016) (Basten, Macfarlan and Simpson JJA)

> The reliance on *Thompson v Woolworths (Qld) Pty Ltd* [52] requires further explanation. It had a common feature with the present case. The plaintiff was required, in the course of her business, to deliver bread to a Woolworths store. Delivery drivers were required to reverse their trucks into a laneway and unload goods at a loading dock. Woolworths had two industrial waste bins which, when in use, were placed alongside the loading dock. They were routinely left in the laneway in front of the loading dock, thus constituting an obstacle for delivery vehicles. [53] Ms Thompson injured herself seeking to move one of the industrial waste bins. The High Court held that Woolworths owed a duty of care to delivery drivers to avoid operating its own business in a way which exposed them to an unreasonable risk of physical injury. [54]

South Sydney Junior Rugby League Club Ltd v Gazis [2016] NSWCA 8 (09 February 2016) (Basten, Macfarlan and Simpson JJA)

> *Phillis v Daly* (1988) 15 NSWLR 65, referred to; *Thompson v Woolworths (Qld) Pty Ltd* (2005) 221 CLR 234 , distinguished.

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> *via*

> 52. (2005) 221 CLR 234; [2005] HCA 19 .

South Sydney Junior Rugby League Club Ltd v Gazis [2016] NSWCA 8 -
South Sydney Junior Rugby League Club Ltd v Gazis [2016] NSWCA 8 -
Tarbotton v Citic Pacific Mining Management Pty Ltd [2015] WADC 159 -
Humphries v Downs Earthmoving Pty Ltd [2015] QDC 323 (11 December 2015) (Bowskill QC DCJ)

> 176. There will be other aspects to the relationship between occupier and entrant, which will affect the content of the duty owed. So, for example, in *Thompson v Woolworths* , it was significant that the plaintiff, in the pursuit of her own business, was delivering goods to the defendant for the purpose of sale in the course of the defendant's business; and to do that, she was required to conform to a delivery system established by the respondent. [237] Accordingly, since the defendant established the system to which the plaintiff was required to conform, the defendant's duty in that case covered not only the static condition of the premises but also the system of delivery. The defendant's obligation to exercise reasonable care for the safety of people who came on to its premises therefore extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of injury. [238] It was the failure on the part of the defendant to have a proper delivery system in place, which lead to the finding of negligence. [239] That was the focus of the breach analysis in circumstances where there were measures that could reasonably have been implemented, which would have averted the risk of harm.

Application in this case – scope of the duty of care owed by Downs Earthmoving – what did "reasonable care" require?

via

[239] *Thompson* at [38] , approving the reasoning of McMurdo J (as his honour then was) in the Court of Appeal (set out at [17]).

Humphries v Downs Earthmoving Pty Ltd [2015] QDC 323 -
Humphries v Downs Earthmoving Pty Ltd [2015] QDC 323 -
Humphries v Downs Earthmoving Pty Ltd [2015] QDC 323 -
Humphries v Downs Earthmoving Pty Ltd [2015] QDC 323 -
Humphries v Downs Earthmoving Pty Ltd [2015] QDC 323 -
Humphries v Downs Earthmoving Pty Ltd [2015] QDC 323 -
Ernst v McRoss [2015] VCC 1754 -
Ernst v McRoss [2015] VCC 1754 -
Ernst v McRoss [2015] VCC 1754 -
Glenn Turner v Harrington Estates (NSW) Pty Ltd t/as Harrington Grove Country Club and Hassell Ltd [2015] NSWDC 256 -
Erickson v Bagley [2015] VSCA 220 (25 August 2015) (Kyrou JA and Kaye JA)

38. Similarly, in *Thompson v Woolworths (Qld) Pty Ltd* [14] the High Court, in its joint judgment, stated:

> The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety. ...
>
> The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration. [15]

via

[15] Ibid , 246–7 [36]–[37] (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) .

Erickson v Bagley [2015] VSCA 220 -
Erickson v Bagley [2015] VSCA 220 -
Stenning v Sanig [2015] NSWCA 214 -
Murko v Greenfields Narellan Holdings trading as Narellan Town Centre [2015] NSWDC 132 -
Carangelo v State of New South Wales [2015] NSWSC 655 -
Fogg v Kane Constructions (NSW) Pty Limited; Fogg v Les Quatre Musketeers Pty Limited (t/as Plastamasta South Coast) (No. 5) [2015] NSWSC 648 -
Scott Lawrence v Giang Thanh Liem Nguyen [2015] NSWDC 56 -

Vincent v Woolworths Limited [2015] NSWSC 435 -
Vincent v Woolworths Limited [2015] NSWSC 435 -
Vincent v Woolworths Limited [2015] NSWSC 435 -
Vincent v Woolworths Limited [2015] NSWSC 435 -
Vincent v Woolworths Limited [2015] NSWSC 435 -
Andonovski v Park-Tec Engineering Pty Ltd and Barbeques Galore Pty Ltd; Andonovski v East Realisations Pty Ltd (No 6) [2015] NSWSC 341 (31 March 2015) (Campbell J)

99. Park-Tec argued that Mr Andonovski was guilty of contributory negligence. That argument in part depended upon a view that the duty owed by Park-Tec was that of an occupier, even if in the *Thompson v Woolworths* sense, rather than the duty owed by a quasi-employer. I have found against Park-Tec on that issue. The factual basis for the argument is that the plaintiff was aware not only that the drop pins sometimes stick, but also that the gate sometimes jams. In those circumstances, given his elevated workplace, it was unreasonable for him to persist in exerting effort on three occasions to open the gate. He should have foreseen that the gate might "fly open" (521.5T) subjecting him to a sudden release of force sufficient to propel him off the platform.

Andonovski v Park-Tec Engineering Pty Ltd and Barbeques Galore Pty Ltd; Andonovski v East Realisations Pty Ltd (No 6) [2015] NSWSC 341 (31 March 2015) (Campbell J)

58. In *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; 221 CLR 234 a unanimous High Court recognised that the scope of the duty owed by an occupier, depending upon the nature of the relationship between the occupier and the entrant may extend beyond the exercise of reasonable care in relation to the condition of the premises, to risks arising out of the nature of the activities conducted on the premises, assuming the occupier is in a position to control them. There is no question here that Park-Tec is in a position to control of the activities on its land, including its own operations. In *Thompson* the occupier's duty "covered not only the static condition of the premises, but also the system" it had established for the delivery of goods: ([26]).

Andonovski v Park-Tec Engineering Pty Ltd and Barbeques Galore Pty Ltd; Andonovski v East Realisations Pty Ltd (No 6) [2015] NSWSC 341 -
Andonovski v Park-Tec Engineering Pty Ltd and Barbeques Galore Pty Ltd; Andonovski v East Realisations Pty Ltd (No 6) [2015] NSWSC 341 -
Central Darling Shire Council v Greeney [2015] NSWCA 51 -
Victorian WorkCover Authority v The Australian Steel Company (Operations) Pty Ltd [2015] VSC 0 -
Victorian WorkCover Authority v The Australian Steel Company (Operations) Pty Ltd [2015] VSC 0 -
Victorian WorkCover Authority v The Australian Steel Company (Operations) Pty Ltd [2015] VSC 0 -
Shaw v BHP Billiton Ltd [2015] SADC 3 (21 January 2015) (Soulio J)

Jones v Dunkel (1959) 101 CLR 298; *Gately v The Queen* (2007) 232 CLR 208; *Van Soest v BHP Billiton Ltd* [2013] SADC 81; *Parker v BHP Billiton Ltd* [2011] SADC 104 ; *Hamilton v BHP Billiton Ltd* [2012] SADC 25; *BHP Billiton Ltd v Parker* (2012) 113 SASR 206; *McPherson's Ltd v Eaton* (2005) 65 NSWLR 187; *Seltsa m Pty Ltd v McNeill* (2006) 4 DDCR 1; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; *Roads and Traffic Authority of New South Wales v Dederer & Anor* (2007) 234 CLR 330; *Czatyrko v Edith Cowan University* (2005) 79 ALJR 839; *Vai ry v Wyong Shire Council* (2005) 223 CLR 422; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; *Rosenberg v Percival* (2001) 205 CLR 434; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Mt Isa Mines v Pusey* (1970) 125 CLR 383; *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; *Burnie Port Authority v Bernie Jones Pty Ltd* (1994) 179 CLR 520; *Thompson v Woolworths (Qld) Pty Ltd* (2005) 79 ALJR 904 ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Roman Catholic Church Trustees for the Diocese of Canberra & Goulburn v Hadba* (2005) 221 CLR 161; *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307; *Thompson v Johnson & Johnson Pty Ltd* [1991] 2 VR 449;

F v R (1984) 33 SASR 189; *Stevedoring Industry Finance Committee v Henderson* (2000) 2 VR 396; *SS Pharmaceuticals Pty Ltd v Qantas Airways Ltd* [1991] 1 Lloyd's Rep 288; *Cockatoo Dockyard Pty Ltd v Browne* [2001] NSWCA 58; *Seltsam Pty Ltd v McGuinness* [2000] 49 NSWLR 262; *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; *Evans v Queanbeyan City Council and Amaca* [2010] NSWDDT 7; *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85; *Van Gervan v Fenton* (1992) 175 CLR 327; *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329; *BHP Billiton Ltd v Van Soest* [2014] SASCFC 135; *BHP Billiton Ltd v Hamilton & Anor* (2013) 117 SASR 329; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Barrow v CSR Ltd; Heys v CSR Ltd* [1988] SCWA 4 August 1988, considered.

Shaw v BHP Billiton Ltd [2015] SADC 3 -
Hennessy v Patrick Stevedores Operations [2014] NSWSC 1716 -
Hennessy v Patrick Stevedores Operations [2014] NSWSC 1716 -
Proudlove by his next friends Kevin Lesley Proudlove and Patricia Proudlove v Burridge [2014] WADC 156 -
Proudlove by his next friends Kevin Lesley Proudlove and Patricia Proudlove v Burridge [2014] WADC 156 -
Ross Gazis v Gual Pty Limited - Formerly known as Sermacs Australia Pty Ltd (under external administration and/or controller appointed) [2014] NSWSC 1617 (17 November 2014) (Rothman J)

109. Even though the first defendant had the capacity to supervise in that it had the ability to provide a supervisor, at least from time to time, to supervise the work being done at the Club, such supervision would have been wholly ineffective to allow the first defendant to foresee or ameliorate the risk in relation to trolleys, unless, coincidentally, the supervision were to occur at a time when the trolley was located in the area supervised by Mr Gazis. As I have already noted, the circumstances with which the Club was required to deal were not dissimilar to the circumstances with which the High Court was dealing in *Thompson v Woolworths (Qld) Pty Ltd* .

Ross Gazis v Gual Pty Limited - Formerly known as Sermacs Australia Pty Ltd (under external administration and/or controller appointed) [2014] NSWSC 1617 -
Ross Gazis v Gual Pty Limited - Formerly known as Sermacs Australia Pty Ltd (under external administration and/or controller appointed) [2014] NSWSC 1617 -
Courts v Essential Energy (aka Country Energy) [2014] NSWSC 1483 -
Courts v Essential Energy (aka Country Energy) [2014] NSWSC 1483 -
Lee v Carlton Crest Hotel (Sydney) Pty Ltd [2014] NSWSC 1280 -
Lee v Carlton Crest Hotel (Sydney) Pty Ltd [2014] NSWSC 1280 -
Lee v Carlton Crest Hotel (Sydney) Pty Ltd [2014] NSWSC 1280 -
De Bever v M B Marlow Engineering Pty Ltd [2014] VCC 1373 (29 August 2014) (His Honour Judge Parrish)

> 361 I consider that the High Court authority of *Thompson* makes clear that the duty owed by an occupier to an entrant extends beyond the static condition of the premises to also include exercising reasonable care that the system operated on the premises did not expose entrants to unreasonable risk of physical injury.

De Bever v M B Marlow Engineering Pty Ltd [2014] VCC 1373 -
De Bever v M B Marlow Engineering Pty Ltd [2014] VCC 1373 -
De Bever v M B Marlow Engineering Pty Ltd [2014] VCC 1373 -
De Bever v M B Marlow Engineering Pty Ltd [2014] VCC 1373 -
Windley v Gazaland Pty Ltd T/A Gladstone Ten Pin Bowl [2014] QDC 124 (30 May 2014) (Smith DCJ)

212. I consider this matter falls some where between *Carey* and *Thompson* but closer to *Thompson* .

Windley v Gazaland Pty Ltd T/A Gladstone Ten Pin Bowl [2014] QDC 124 -

Windley v Gazaland Pty Ltd T/A Gladstone Ten Pin Bowl [2014] QDC 124 -
Windley v Gazaland Pty Ltd T/A Gladstone Ten Pin Bowl [2014] QDC 124 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 (07 May 2014) (McColl, Basten and Emmett JJA)

61. As the High Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) explained in *Thompson v Woolworths (Queensland) Pty Ltd* (at [24] - [27]) the following factors are relevant to the relationship between the parties. First, the status of the appellant as occupier of the land on which the respondent was injured gave the appellant a measure of control that is regarded by the law as important in identifying the existence and nature of a duty of care. Secondly, the purpose for which, and the circumstances in which, the respondent was on the appellant's land. Just as in *Thompson v Woolworths (Queensland) Pty Ltd* the respondent was on the appellant's land delivering goods, in this case fuel, to the appellant for use in the course of the appellant's business. Thus, "[s]ince the [appellant] established the system to which the [respondent] was required to conform, the [appellant's] duty covered not only the static condition of the premises but also the system of delivery": *Thompson v Woolworths (Queensland) Pty Ltd* (at [26]).

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 (07 May 2014) (McColl, Basten and Emmett JJA)

64. Insofar as the respondent is concerned, it is relevant that his relationship with the appellant was not that of an employee, but an entrant: *Thompson v Woolworths (Queensland) Pty Ltd* (at [40]). In that context, perhaps somewhat more emphasis might be placed on his obligation to take reasonable care for his own safety, although what that means will depend upon the circumstances of the case: *Thompson v Woolworths (Queensland) Pty Ltd* (at [35]).

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 (07 May 2014) (McColl, Basten and Emmett JJA)

61. As the High Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) explained in *Thompson v Woolworths (Queensland) Pty Ltd* (at [24] - [27]) the following factors are relevant to the relationship between the parties. First, the status of the appellant as occupier of the land on which the respondent was injured gave the appellant a measure of control that is regarded by the law as important in identifying the existence and nature of a duty of care. Secondly, the purpose for which, and the circumstances in which, the respondent was on the appellant's land. Just as in *Thompson v Woolworths (Queensland) Pty Ltd* the respondent was on the appellant's land delivering goods, in this case fuel, to the appellant for use in the course of the appellant's business. Thus, "[s]ince the [appellant] established the system to which the [respondent] was required to conform, the [appellant's] duty covered not only the static condition of the premises but also the system of delivery": *Thompson v Woolworths (Queensland) Pty Ltd* (at [26]).

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
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Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98 (03 April 2014) (Emmett and Gleeson JJA, Tobias AJA)

160. The appellant complained that the primary judge gave too much weight to the reasonableness of an expectation that other people will take care for their own safety, and either overstated or misapplied the effect of the statements of Gummow J in *Dederer* at [45] and the plurality in *Thompson v Woolworths* at [35]-[37] . In my view, this complaint is

misconceived. As the primary judge correctly noted, the present case turned on its own facts (Judgment at 4). The findings by the primary judge that the appellant was not paying attention and was not looking where she was walking were uncontroversial. It was open to her Honour to give weight to both the obviousness of the risk, and the reasonableness of an expectation that the appellant would take care for her own safety. There was no error in her Honour's approach.

Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98 -
Victorian WorkCover Authority v Centro Property Management (Vic) Pty Limited [2013] VSC 587 -
Victorian WorkCover Authority v Centro Property Management (Vic) Pty Limited [2013] VSC 587 -
Victorian WorkCover Authority v Centro Property Management (Vic) Pty Limited [2013] VSC 587 -
Victorian WorkCover Authority v Centro Property Management (Vic) Pty Limited [2013] VSC 587 -
Victorian WorkCover Authority v Centro Property Management (Vic) Pty Limited [2013] VSC 587 -
Caruso v Black and White Distribution Pty Ltd [No 2] [2013] WADC 145 -
Caruso v Black and White Distribution Pty Ltd [No 2] [2013] WADC 145 -
Heywood v Commercial Electrical Pty Ltd [2013] QCA 270 (20 September 2013) (Muir and Morrison JJA and Margaret Wilson J,)

13. The primary judge quoted the following passage from the reasons of the High Court in *Thompson v Woolworths (Qld) Pty Ltd* : [4]

> "When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case ...
>
> The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response ...
>
> The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

Heywood v Commercial Electrical Pty Ltd [2013] QCA 270 -
Heywood v Commercial Electrical Pty Ltd [2013] QCA 270 -
Herbert v Clarendon Homes (NSW) Pty Ltd [2013] NSWSC 1158 (23 August 2013) (Beech-Jones J)

54. In *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [40] the High Court noted that different considerations arise in deciding questions concerning allegations of contributory negligence on the part of employees compared with individual contractors. In *Pollard v Baulderstone Hornibrook Engineering Pty Ltd* [2008] NSWCA 99 at [15] McColl JA referred to this aspect of *Thompson* and stated that "[i]n an employment situation a court is required to take into account, in determining whether a plaintiff has been guilty of contributory negligence, the fact that the employer had failed to use reasonable care to provide a safe system of work". Presumably, the corollary of this is that no such duty on the part of the principal enters into the assessment of whether a contractor was negligent in looking after their own safety. It would appear to follow that, in making decisions about their own work methods, a contractor is disentitled from assuming that the principal will design

and implement a safe system of work. Thus, both at the point of determining liability in negligence and in assessing contributory negligence, the common law dramatically favours the use of contract labour over employees.

Herbert v Clarendon Homes (NSW) Pty Ltd [2013] NSWSC 1158 -
Moor v Liverpool Catholic Club Ltd [2013] NSWDC 93 -
Moor v Liverpool Catholic Club Ltd [2013] NSWDC 93 -
Moor v Liverpool Catholic Club Ltd [2013] NSWDC 93 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
Weaver v Endeavour Foundation [2013] QSC 93 (12 April 2013) (McMeekin J)

77. No case was cited to me where an employer has escaped liability where it has directed an employee to carry out a task, which already carried an obvious risk of tripping up and falling, in a manner designed to increase the risk by directing that it be done quickly. The reliance on cases such as *Hill-Douglas v Beverly [53]* , *O'Connor v Commissioner for Government Transport [54]* , *Thompson v Woolworths (Qld) Pty Ltd [55]* and *Rasic v Cruz [56]* misses this point. In the first two cases the plaintiff asserted that the breach of duty lay in the failure to take some positive action – warn or instruct about an every day hazard or, additionally in *Hill-Douglas* , alter the layout of a vehicle. In the latter two cases the court was concerned with plaintiffs who created the risk by their own carelessness. The defendant seeks to assert that the plaintiff has created the risk here by her own carelessness but that is not right at all.

Weaver v Endeavour Foundation [2013] QSC 93 -
Brown v Owners Corporation SP021532U (Ruling No. 1) [2013] VSC 126 -
Heywood v Commercial Electrical Pty Ltd [2013] QSC 52 (11 March 2013) (Martin J)

27. To similar effect are the statements by a unanimous High Court in *Thompson v Woolworths (Queensland) Pty Ltd* [5] where the following appears:

> "[35] When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case. ...
>
> [36] The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. ...
>
> [37] The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. In the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a

doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

Heywood v Commercial Electrical Pty Ltd [2013] QSC 52 -
Heywood v Commercial Electrical Pty Ltd [2013] QSC 52 -
Larkin v Suncorp Staff Pty Ltd [2013] QDC 28 -
Wieland v Commonwealth of Australia (Department of Defence) [2012] WADC 156 -
Wieland v Commonwealth of Australia (Department of Defence) [2012] WADC 156 -
Jones Lang LaSalle (NSW) Pty Ltd v Taouk [2012] NSWCA 342 -
Sibraa v Brown [2012] NSWCA 328 -
Ivan Krstin v Steven Krstin T/As CID Electrical Services & Welana Pty Limited;; Ivan Krstin v CID Electrical Services Pty Ltd & Edge Healthclub Weston Pty Limited [2012] ACTSC 145 -
Ivan Krstin v Steven Krstin T/As CID Electrical Services & Welana Pty Limited;; Ivan Krstin v CID Electrical Services Pty Ltd & Edge Healthclub Weston Pty Limited [2012] ACTSC 145 -
Wainright v Barrick Gold of Australia Limited [2012] WADC 79 -
Wainright v Barrick Gold of Australia Limited [2012] WADC 79 -
Wainright v Barrick Gold of Australia Limited [2012] WADC 79 -
Wainright v Barrick Gold of Australia Limited [2012] WADC 79 -
MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110 (21 May 2012) (Pullin JA, Newnes JA, Murphy JA)

Thompson v Woolworths (Q'land) Pty Ltd [2005] HCA 19 ; (2005) 221 CLR 234

MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110 -
Opoku v P and M Quality Smallgoods P/ L and othersOpoku v Kaybron No 6 P/L [2012] NSWSC 478 (14 May 2012) (Adamson J)
- Thompson v Woolworth's (Queensland) Pty Limited [2005] HCA 19; 221 CLR 234
- Bankstown Foundry Pty Limited v Braistina

Opoku v P and M Quality Smallgoods P/ L and othersOpoku v Kaybron No 6 P/L [2012] NSWSC 478 -
Watson v Meyer [2012] NSWDC 36 -
Minogue v Rudd [2012] NSWSC 305 -
Smith v Body Corporate for Professional Suites [2012] QDC 49 -
Cadoo v BHP Billiton Limited [2012] SADC 31 -
Cadoo v BHP Billiton Limited [2012] SADC 31 -
Swindells v Hosking [2012] QDC 6 -
Swindells v Hosking [2012] QDC 6 -
Swindells v Hosking [2012] QDC 6 -
Swindells v Hosking [2012] QDC 6 -
Amaca Pty Ltd v King [2011] VSCA 447 -
Laoulach v Ibrahim [2011] NSWCA 402 -
Inspector Regan v Pybar Mining Services Pty Ltd [2011] NSWIRComm 123 (12 September 2011) (Staff J)

181. Mr Hatcher also cited the decision of the High Court of Australia in *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234; (2005) 214 ALR 452; (2005) 79 ALJR 904 and the decision of the Supreme Court of New South Wales, Court of Appeal in *Van Der Sluice v Display Craft Pty Ltd* [2002] NSWCA 204, particularly the judgment of Heydon JA. These cases also dealt with the tort of negligence, personal injury and employer's liability. In citing these cases, Mr Hatcher acknowledged that he was not suggesting that the test to be applied in determining penalty in this matter was the Common Law test that was implied in these authorities. However, counsel submitted:

... merely that much of the learning in this jurisdiction has been from employers duties at Common Law and when the High Court passes upon those duties, it may be of some assistance in approaching the task that the Court is to approach here.

Hughes v Tucaby Engineering Pty Ltd [2011] QSC 256 -
Parker v BHP Billiton Ltd [2011] SADC 104 (18 July 2011) (Lovell J)

Cosmetic Equipment Company Pty Ltd v Forrest [2008] SASC 144; *Wyong SC v Shirt* (1980) 146 CLR 40; *Cole v South Tweed Heads Rugby League Football Club and another* (2004) 217 CLR 469; *Neindorf v Junkovic* (2005) 80 ALJR 341; *Neindorf v Junkovic* (2006) 222 ALR 631; *Mt Isa Mines v Pusey* (1970) 125 CLR 383; *Amaca Pty Ltd v Hannell* (2007) 34 WAR 109; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486, per Hayne J at 501 ; *Vairy v Wyong Shire Council* (2005) 223 CLR 422, per Hayne J at 462 ; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486, per Gleeson CJ and Kirby J at 491 ; *Thompson v Woolworths (Qld) Pty Ltd* (2005) 79 ALJR 904 ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Roman Catholic Church Trustees for the Diocese of Canberra v Hadba* (2005) 221 CLR 161; *R v Bonython* (1984) 38 SASR 45; *English Exporters Pty Ltd v Eldonwall* [1973] 1 Ch 415; *PQ v Australian Red Cross Society* [1992] 1 VR 19 at 36 ; *R v Abadom* [1983] 1 WLR 126; *Milirrpum v Nabalco Pty Ltd* [1971] 17 FLR 141 at 161 ; *BI (Contracting) Pty Ltd v University of Adelaide* [2008] NSWCA 210; *Trevorrow v SA* (2007) 98 SASR 136; *F v R* (1984) 33 SASR 189 at 194 ; *Thompson v Johnson & Johnson Pty Ltd* [1991] 2 VR 449 at 494 ; *Julia Farr Services v Hayes* [2003] NSWCA 37; *Cockatoo Dockyard v Browne* (2001) 21 NSWCCR 544; *Gray v Motor Accident Commission* (1998) 196 CLR 1; *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; *Abel v Amaca Pty Ltd* [2010] SADC 98; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *James v Hill* [2004] NSWCA 301, discussed.

Parker v BHP Billiton Ltd [2011] SADC 104 (18 July 2011) (Lovell J)

319. A failure to eliminate a risk that is reasonably foreseeable does not establish negligence. In some cases the response of a reasonable person to a foreseeable risk may be to do nothing. [106]

via

[106] *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486, per Gleeson CJ and Kirby J at 491 ; *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 79 ALJR 904, at 911.

Burton v Brooks [2011] NSWCA 175 (01 July 2011) (Hodgson and Macfarlan JJA, Tobias AJA)

21. Mr Burton's concession that he owed a duty of care to Mr Brooks was in my view well-founded. As Mr Burton was the occupier of the premises upon which the accident occurred and Mr Brooks was a lawful entrant, Mr Burton owed Mr Brooks a duty to take reasonable care to avoid a foreseeable risk of injury (*Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 at 488). However, as in *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234, Mr Burton's status as the occupier of the property was only one aspect of his relationship with Mr Brooks (see [24]). Mr Brooks was on the property for the purpose of assisting Mr Burton to undertake an activity that was for Mr Burton's benefit and, as the primary judge held, "the job was done ... the way the defendant [Mr Burton] wanted to do it. The plaintiff was simply helping" (Judgment p 7 quoted in [20] above). As the organiser of an activity involving a risk of injury to those engaged in it Mr Burton was "under a duty to use reasonable care in organising the activity to avoid or minimise that risk" (*Leighton Contractors Pty Ltd v Fox* [2009] HCA 35; (2009) 240 CLR 1 at [20] ; see also *Thompson v Woolworths* at [26] - [27]). The fact that Mr Brooks was not paid for his assistance did not lessen the duty that Mr Burton owed to him.

Burton v Brooks [2011] NSWCA 175 -
Burton v Brooks [2011] NSWCA 175 -
Drouet v Garbett [2011] WADC 100 (24 June 2011) (Goetze DCJ)

120 In ***Wensink v Marshall*** [2010] WASCA 117, McLure P also referred to ***Shirt*** and said:

In deciding whether there has been a breach of a duty of care, the court must first ask itself whether a reasonable person in the defendant /appellant's position would have foreseen that his conduct involved a risk of injury to the plaintiff … . If the answer to that question is in the affirmative, it is for the court to determine what a reasonable person would do by way of response to the risk which calls for a consideration of the magnitude of the risk, the degree of the probability of its occurrence, together with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have: ***Wyong*** (47 - 48) (Mason J).

However, a failure to eliminate a risk that is reasonably foreseeable and reasonably preventable does not establish breach: ***Neindorf v Junkovic*** (2005) 80 ALJR 341; ***Tame v The State of New South Wales*** (2002) 211 CLR 317; ***Thompson v Woolworths (Qld) Pty Ltd*** (2005) 221 CLR 234 [36] - [37].

The factual judgment of what is a reasonable response to a foreseeable risk depends on all the circumstances [23] – [25].

Drouet v Garbett [2011] WADC 100 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
The v AEG Ogden (Convex) Pty Ltd [2011] QDC 51 -
Felhaber v Rockhampton City Council [2011] QSC 23 -
Horne v Gilshenan & Luton [2010] QDC 491 -
Burns v Pearce [2010] WASCA 214 -
Burns v Pearce [2010] WASCA 214 -
Marshbaum v Loose Fit Pty Ltd [2010] NSWSC 1130 -
Addison v The Owners - Strata Plan No. 32680 [2010] NSWDC 251 (06 October 2010) (Gibson DCJ)

[44] The starting point for consideration of "obvious risk" is *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 221 CLR 234; (2005) 214 ALR 452; (2005) 79 ALJR 904; (2005) Aust Torts Reports 81-795; [2005] HCA 19, where the High Court said at [36] and [37] :

"[36] The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety. This is not a case about warnings. Even so, it may be noted that a conclusion, in a given case, that a warning is either necessary or sufficient, itself involves an assumption that those to whom the warning is

addressed will take notice of it and will exercise care. The whole idea of warnings is that those who receive them will act carefully. There would be no purpose in issuing warnings unless it were reasonable to expect that people will modify their behaviour in response to warnings.

[37] The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

Addison v The Owners - Strata Plan No. 32680 [2010] NSWDC 251 -
Grimes v Grimes [2010] WADC 137 (17 September 2010) (Goetze DCJ)

171. Further, in ***Smith's*** case at [34] Pullin JA, with whom Newnes JA agreed, said that:

"The standard of care determines what it is that the person under the duty must do to discharge a duty of care. At common law the question to be asked is what, if anything, a reasonable person in that person's position would have done by way of response to the foreseeable risk of that injury. If s 5B(1)(c) of the CLA oper ates at this stage of the inquiry the same question arises, that is, whether 'in the circumstances a reasonable person in [the appellant's] position' would have taken the precautions which the respondent alleged should have been taken. It is necessary to look forward to identify what a reasonable person would have done, not backward to identify what would have avoided the particular injury or damage. See *New South Wales v Fahy* [2007] HCA 20; (2007) 232 CLR 486 [57]. Reasonableness may require no response to a foreseeable risk. See *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234 [36]."

Grimes v Grimes [2010] WADC 137 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Shaw v Thomas [2010] NSWCA 169 -
Shaw v Thomas [2010] NSWCA 169 -
Gaskin v Ollerenshaw [2010] NSWSC 791 -
Wensink v Marshall [2010] WASCA 117 (28 June 2010) (McLure P; Newnes JA; Kenneth Martin J)

24. However, a failure to eliminate a risk that is reasonably foreseeable and reasonably preventable does not establish breach: ***Neindorf v Junkovic*** (2005) 80 ALJR 341; ***Tame v The State of New South Wales*** (2002) 211 CLR 317; ***Thompson v Woolworths (Qld) Pty Ltd*** (2005) 221 CLR 234 [36] [37].

Wensink v Marshall [2010] WASCA 117 (28 June 2010) (McLure P; Newnes JA; Kenneth Martin J)

Thompson v Woolworths (Qld) Pty Ltd [2005] HCA 19 ; (2005) 221 CLR 234

Hamllton v Duncan [2010] NSWDC 90 -
Sijuk v Ilvariy Pty Limited, trading as, Craftsman Homes [2010] NSWSC 354 (29 April 2010) (Hall J)

163 In **Pollard** (supra), the appellant in that case was not the respondent's employee and that, McColl JA noted, different considerations arise in the case of contributory negligence on the part of such persons, citing **Thompson v Woolworths (Queensland) Pty Limited** [2005] HCA 19; (2005) 221 CLR 234 at [40] . In an employment situation, the Court is required to take into account, in determining whether a plaintiff has been guilty of contributory negligence, the fact that the employer had failed to use reasonable care to provide a safe system of work which exposed the plaintiff to unnecessary risks.

Sijuk v Ilvariy Pty Limited, trading as, Craftsman Homes [2010] NSWSC 354 -
Samways v WorkCover Queensland [2010] QSC 127 -
Samways v WorkCover Queensland [2010] QSC 127 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Liddiard v Bostik Australia Pty Ltd & Anor [2010] HCATrans 19 -
DAVIES v Tomkins [2009] WASCA 228 -
DAVIES v Tomkins [2009] WASCA 228 -
Jasmina Investments Pty Ltd v Vlahos [2009] WASCA 190 (03 November 2009) (Wheeler, Buss and Newnes JJA)

Thompson v Woolworths (Q'land) Pty Ltd [2005] HCA 19 ; (2005) 221 CLR 234

Jasmina Investments Pty Ltd v Vlahos [2009] WASCA 190 -
Taylor v Woolworths Limited [2009] NSWDC 311 (27 October 2009) (Sidis DCJ)

21 The plaintiff relied upon the High Court's decision in **Thompson v Woolworths (Queensland) Pty Limited** 221 CLR 234 in which judgment was entered for a plaintiff on the basis that she was required to make deliveries to the defendant in accordance with a system and with procedures established by the defendant. It was held that the system was defective. The court also noted that the relationship between the parties involving a mutual commercial purpose was important.

Taylor v Woolworths Limited [2009] NSWDC 311 -
The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173 -
The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Kirk and Anor v Industrial Relations Commission of NSW and Anor [2009] HCATrans 237 (29 September 2009) (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

MR HATCHER: Well, your Honour, that is the substance of our submissions. We had hoped to make that clear from the way in which we had put our principal written submissions and we say that the vice in the way it is approached by the Industrial Court is that they have no regard to the judgments of this Court in relation to those duties. They are not to be influenced by *Vairy*, *Jones* or *Thompson* . *Thompson* tells us that we are entitled to expect that a person in the community will avoid a clear and obvious risk. The Industrial Court works on the opposite proposition. We are to expect that they will throw themselves into a clear and obvious risk.

Kirk and Anor v Industrial Relations Commission of NSW and Anor [2009] HCATrans 237 (29 September 2009) (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

To similar effect the more recent judgment of this Court in *Thompson v Woolworths* (2005) 221 CLR 234 where the Court said at page 246 , paragraph 36:

Kirk and Anor v Industrial Relations Commission of NSW and Anor [2009] HCATrans 237 -
Kirk and Anor v Industrial Relations Commission of NSW and Anor [2009] HCATrans 237 -
Willett v United Concrete Pty Limited [2009] NSWSC 957 (22 September 2009) (Schmidt J)

18 In this case, also to be considered is the expectation discussed by the High Court in *Thompson* , that a person will exercise reasonable care for his or her own safety. At [35] to [37], it was observed:

> "[35] When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case. To take a commonplace example, in ordinary circumstances a motorist in a city street, approaching a pedestrian crossing, will reasonably assume that the pedestrians assembled on the footpath will observe the lights which control the crossing. Most people drive as though it may be expected that other road users will be reasonably careful. At the same time, it is often judged reasonable to expect a motorist to allow for the possibility that some other road users will be inattentive or even negligent.
>
> [36] The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety. This is not a case about warnings. Even so, it may be noted that a conclusion, in a given case, that a warning is either necessary or sufficient, itself involves an assumption that those to whom the warning is addressed will take notice of it and will exercise care. The whole idea of warnings is that those who receive them will act carefully. There would be no purpose in issuing warnings unless it were reasonable to expect that people will modify their behaviour in response to warnings.
>
> [37] The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

How did Mr Willett come to injure his back?

Willett v United Concrete Pty Limited [2009] NSWSC 957 -
Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem [2009] HCATrans 233 -
Willett v United Concrete Pty Limited [2009] NSWSC 957 -
Willett v United Concrete Pty Limited [2009] NSWSC 957 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Thomas v Shaw [2009] NSWSC 510 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Vosebe Pty Ltd v Bakavgas [2009] NSWCA 117 -
Vosebe Pty Ltd v Bakavgas [2009] NSWCA 117 -
Dowell v Queensland Rail [2009] QDC 47 -
Dowell v Queensland Rail [2009] QDC 47 -
Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 (04 December 2008) (McMurdo P, Fraser JA and Mackenzie AJA,)

> *Thompson v Woolworths (Q'land) P/L* (2005) 221 CLR 234; [2005] HCA 19 , cited

Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 -
Ellis v. Uniting Church in Australia Property Trust (Q) [2008] QCA 388 -
Inspector Patton v Western Freight Management Pty Ltd [2008] NSWIRComm 217 -
Inspector Patton v Western Freight Management Pty Ltd [2008] NSWIRComm 217 -
Hoad v Peel Valley Exporters Pty Ltd [2008] NSWSC 981 -
Toll Transport Pty Limited v Raymond Haskins [2008] NSWCA 244 (15 September 2008) (Allsop P ; Bell JA ; Young CJ in Eq)

> 28 The heads of negligence identified by his Honour were either failing to provide staff to clean or clear the area of clutter or, alternatively, widening the dock. As his Honour said, these were connected. There is some force, as the respondent recognised in his submissions, that the requiring of another to clear the dock may simply be transferring the risk. But I agree with the respondent's submissions that a properly organised system, together with properly organised training and a direction to staff, may well have enabled the appellant to deal with the clearing of any clutter in a way that minimised the risk to anyone attempting that task. Here, the respondent was not an employee of the appellant. He was an entrant into a workspace in relation to whom the appellant had responsibilities of the kind referred to in *Thompson v Woolworths (Queensland) Pty Limited* (2005) 221 CLR 234 .

Toll Transport Pty Limited v Raymond Haskins [2008] NSWCA 244 -
Wilkinson v BP Australia Pty Ltd [2008] QSC 171 -
The Uniting Church v Takacs [2008] NSWCA 141 -
The Uniting Church v Takacs [2008] NSWCA 141 -
Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99 -
Pollard v Baulderstone Hornibrook Engineering Pty Ltd [2008] NSWCA 99 -
Ross v Profile Packaging Pty Limited [2008] WADC 8 (24 January 2008) (Schoombee DCJ)

Thompson v Woolworths (Queensland) Pty Ltd (2005) 221 CLR 234

Ross v Profile Packaging Pty Limited [2008] WADC 8 -
Marshall v Townsend [2008] SADC 1 -
Marshall v Townsend [2008] SADC 1 -
Marshall v Townsend [2008] SADC 1 -
Marshall v Townsend [2008] SADC 1 -
Brighton le Sands Amateur Fishermen's Association Ltd v Vasilios Koromvokis [2007] NSWCA 331 (26 November 2007) (Giles JA at 1; Tobias JA at 2; Handley AJA at 39)

32 Obviousness of risk was also referred to in the joint judgment of Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ in *Thompson v Woolworths (Queensland) Pty Ltd* [2005] HCA 19, (2005) 221 CLR 234 at 246-247 where the following was said:

Brighton le Sands Amateur Fishermen's Association Ltd v Vasilios Koromvokis [2007] NSWCA 331 -
Juric v Transformex Pty Limited [2007] NSWDC 229 -
Slatter v Wellparks Holdings Pty Ltd [2007] WADC 185 -
Slatter v Wellparks Holdings Pty Ltd [2007] WADC 185 -
Leite v Tarabay [2007] NSWDC 188 -
Leite v Tarabay [2007] NSWDC 188 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 (30 August 2007) (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ)

45. Many of those matters were canvassed in *Brodie v Singleton Shire Council* [48] . The result of that case is that a road authority is obliged to exercise reasonable care so that the road is safe "for users exercising reasonable care for their own safety" [49] . The expression of the scope of the RTA's duty of care in those terms has long antecedents in the law relating to occupiers' liability. In *Indermaur v Dames*, giving the judgment of the Court of Common Pleas[50], Willes J held that [51] :

> "we consider it settled law, that [a visitor], using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger".

The modern form of that principle has been frequently affirmed in recent times, both with regard to occupiers and roads authorities [52] . Of course, the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case [53] , but in the present case it was also a specific element contained, as a matter of law, in the scope of the RTA's duty of care.

via

[53] *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234 at 246 [35] .

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 -
Ainger v Coffs Harbour City Council (No 2) [2007] NSWCA 212 -
Ainger v Coffs Harbour City Council (No 2) [2007] NSWCA 212 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 (20 July 2007) (Wheeler JA)

Thompson v Woolworths (Q'land) Pty Ltd (2005) 221 CLR 234
Vairy v Wyong Shire Council

Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 (20 July 2007) (Wheeler JA)

Thompson v Woolworths (Q'land) Pty Ltd (2005) 221 CLR 234
Vairy v Wyong Shire Council

Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
J Blackwood & Son Steel & Metals Pty Ltd v Nichols [2007] NSWCA 157 -
Saad & Anor v Gosford City Council [2007] NSWSC 643 -
Saad & Anor v Gosford City Council [2007] NSWSC 643 -
Skulander v Willoughby City Council [2007] NSWCA 116 -
Skulander v Willoughby City Council [2007] NSWCA 116 -
Nikola Boric v M. Vujinovic & Anor t/as Drina Carpentry [2007] NSWDC 142 (20 April 2007) (McGrowdie ADCJ)

71. In *Thompson v Woolworths (Q'land) Pty Limited* [2005] HCA 19 at [26] the Court stated that:

> *"The purpose for which, and the circumstances in which, the appellant was on the respondent's land, constituted a significant aspect of the relationship between them."*

Nikola Boric v M. Vujinovic & Anor t/as Drina Carpentry [2007] NSWDC 142 -
New South Wales Department of Housing v Hume [2007] NSWCA 69 (28 March 2007) (Beazley JA ; McColl JA Basten JA)
Thompson v Woolworths (Queensland) Pty Ltd [2005] HCA 19 ; (2005) 221 CLR 234
Vairy v Wyong Shire Council

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

95. The circumstances of this accident were highly unusual, but, as the primary judge recognised, not so much as to be described as far-fetched or fanciful: cf *Wyong Shire Council v Shirt* (at 47-48). There was a risk, albeit probably a low one, that a person whose hands were full whether because carrying a child, shopping or some other household items, might stumble and fall on either the porch or steps and be injured because there was no handrail to break the fall. That risk was one of the many encountered in domestic premises, which, as has been frequently emphasised, are not "risk-free": *Thompson v Woolworths (Queensland) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234 at [36] . As Gleeson CJ said in *Jones v Bartlett* (at [23] :

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

New South Wales Department of Housing v Hume [2007] NSWCA 69 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 (20 March 2007) (Steytler P)

42. The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response: ***Thompson v Woolworths (Q'land) Pty Ltd*** (2005) 221 CLR 234 at [36] ; ***Dovuro v Wilkins*** (*supra*) at [3

8]. This does not mean that if whenever a risk is obvious there will be no duty of care or no breach. The High Court in ***Thompson v Woolworths (Q'land)*** (*supra*) said (at [37]):

> "... The weight to be given to any [consideration] is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

Sauer v Australian Capital Territory [2007] ACTSC 18 (20 March 2007) (Master Harper)

62. Similarly, in *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 221 CLR 234 at 246 (para 36), the Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) said:

> *The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response.*

Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Takacs v The Uniting Church [2007] NSWSC 175 (06 March 2007) (Rothman J)

> 110 The defendant owed a duty of care to the plaintiff and the only real question then is whether that duty was breached. Such a question was also the subject of the judgment in **Thompson** , supra. In **Thompson** , as in this case, the defendant argued the obviousness of the risk and that, therefore, no breach of duty occurred. Like **Thompson** , the plaintiff in these proceedings does not argue that the lack of proper fencing, for example, was not the subject of a warning or was not a risk of which the plaintiff was unaware. There is no issue here of a breach of duty by a failure to warn. Thereafter the facts in this case are dissimilar to that in **Thompson** . However, the result must be the same.

Takacs v The Uniting Church [2007] NSWSC 175 (06 March 2007) (Rothman J)

> 110 The defendant owed a duty of care to the plaintiff and the only real question then is whether that duty was breached. Such a question was also the subject of the judgment in **Thompson** , supra. In **Thompson** , as in this case, the defendant argued the obviousness of the risk and that, therefore, no breach of duty occurred. Like **Thompson** , the plaintiff in these proceedings does not argue that the lack of proper fencing, for example, was not the subject of a warning or was not a risk of which the plaintiff was unaware. There is no issue here of a breach of duty by a failure to warn. Thereafter the facts in this case are dissimilar to that in **Thompson** . However, the result must be the same.

Takacs v The Uniting Church [2007] NSWSC 175 -
Takacs v The Uniting Church [2007] NSWSC 175 -
Takacs v The Uniting Church [2007] NSWSC 175 -
Takacs v The Uniting Church [2007] NSWSC 175 -
Carey v Lake Macquarie City Council [2007] NSWCA 4 -
Carey v Lake Macquarie City Council [2007] NSWCA 4 -
Carey v Lake Macquarie City Council [2007] NSWCA 4 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 (19 January 2007) (Martin CJ)

Thompson v Woolworths (Q'land) Pty Ltd (2005) 221 CLR 234
Timberland Property Holdings Pty Ltd v Bundy

Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Husson v Keppel Prince Engineering Pty Ltd [2006] VSC 412 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Wynne v Pilbeam [2006] HCATrans 493 (05 September 2006) (Gummow and Heydon JJ)

In the Court of Appeal of Western Australia it was argued that the trial judge had erred in considering the issue of liability in terms of causation before formulating and answering the questions as to duty and breach of duty. Pullin JA, with whom Wheeler JA agreed, held that the trial judge had not confused issues of causation with issues of breach of duty. Steytler P held that the trial judge's approach was "broadly in accordance" with the principles stated by this Court in *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234 at 246-247 [35]-[37]. In particular their Honours did not see any error in the trial judge's treatment of aspects of the facts that touch upon the issue of "obvious risk".

Wynne v Pilbeam [2006] HCATrans 493 -
Sims v Farquhar Corporation Pty Ltd and Page Furnishers Pty Ltd [2006] QDC 301 (25 August 2006) (Forde DCJ)

(g) It was submitted that the plaintiff would have been guided by a warning sign. As was discussed in *Thompson's* case and referred to in *Hetherington's* case,[47] reasonableness may require no response to a foreseeable risk and that occupiers do not ordinarily place notices at their front doors warning entrants of all dangers that await them if they fail to take reasonable care for their safety. In the present case, the plaintiff failed to take reasonable care. [48] Placing signs at the door warning short and/or elderly people was not required in the circumstances.

Sims v Farquhar Corporation Pty Ltd and Page Furnishers Pty Ltd [2006] QDC 301 -
Sims v Farquhar Corporation Pty Ltd and Page Furnishers Pty Ltd [2006] QDC 301 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 (30 June 2006) (Beazley JA at 1; Ipp JA at 2; Basten JA at 3)

52 The appellant in *Thompson* was involved in making deliveries to the Respondent's premises "in the pursuit of her own business", as an independent contractor. The Court continued, at [27]:

> "Even so, the respondent established and maintained a system, and its obligation to exercise reasonable care for the safety of people who came onto its premises extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of physical injury."

Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Maricic v Dalma Formwork (Australia) Pty Ltd [2006] NSWCA 174 -
Hetherington v Belyando Shire Council [2006] QCA 209 (09 June 2006) (Jerrard JA, White and Philippides JJ,)

16. Mr McMeekin's submissions reminded the Court of the observation in *Mulligan v Coffs Harbour City Council* (2005) 221 ALR 764 [13], namely that the High Court had recently said in *Thompson v Woolworths (Qld) Pty Ltd* (2005) 214 ALR 452 [14] that reasonableness may require no response to a foreseeable risk, and that householders do not ordinarily place notices at their front doors warning entrants of all the dangers that await them if they fail to take

reasonable care for their safety. Mr McMeekin also referred this Court to the decision in *Nein dorf v Junkovic* (2005) 222 ALR 631 [15] and the statement there by Gleeson CJ to the effect that the response of most people to many hazards in and around their premises is to do nothing, and that whether in a particular case that is a reasonable response is simply a question of fact.

Hetherington v Belyando Shire Council [2006] QCA 209 (09 June 2006) (Jerrard JA, White and Philippides JJ,)

Thompson v Woolworths (Qld) Pty Ltd (2005) 214 ALR 452; [2005] HCA 19 ; B54 of 2004, 21 April 2005, considered

C G Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 (29 May 2006) (Santow JA; McColl JA; Bryson JA)

106 Thus the High Court discussed the relationship between obviousness and breach of duty in the recent case of *Vairy v Wyong Shire Council* (2005) 80 ALJR 1. A majority of judges agreed that the obviousness of a risk of injury is not determinative of breach; Gleeson CJ and Kirby J at [7]-[8], Gummow J at [55], Hayne J at [162]. Gleeson CJ and Kirby J did however consider it to be a relevant factor in the context of deciding what steps ought to have been taken by the local authority to satisfy its duty of care. For example, they said "*the obviousness of the danger can be important in deciding whether a warning is required*" [8]. McHugh J, however, emphasised that obviousness of risk goes to the issue of contributory negligence and rarely to the discharge of the defendant's duty: [46]; see also Hayne J at [162]; *Thompson v Woolworths (Qld) Pty Ltd* (2005) 79 ALJR 904 at [37] . However, in *Thompson* , McHugh J formed part of a majority which said that the obviousness of a risk was often a factor relevant to what reasonableness requires as a response.

C G Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 -
C G Maloney Pty Ltd v Hutton-Potts [2006] NSWCA 136 -
Balesfire Pty Ltd t/as the Gutter Shop & Ors v Jamie Adams & Ors [2006] NSWCA 112 -
Balesfire Pty Ltd t/as the Gutter Shop & Ors v Jamie Adams & Ors [2006] NSWCA 112 -
Mcvicar v S&j White Pty Ltd T/A Arab Steed Hotel [2006] SADC 49 -
Mcvicar v S&j White Pty Ltd T/A Arab Steed Hotel [2006] SADC 49 -
Darke v El Debal [2006] NSWCA 86 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 (07 April 2006) (Beazley JA at 1; Ipp JA at 2; Hunt AJA at 170)

Thompson v Woolworths (Queensland) Pty Ltd (2005) 79 ALJR 904
Vairy v Wyong Shire Council

Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Randwick City Council v Muzic [2006] NSWCA 66 -
Shellharbour City Council v Johnson [2006] NSWCA 67 -
Randwick City Council v Muzic [2006] NSWCA 66 -
Shellharbour City Council v Johnson [2006] NSWCA 67 -
Bennett v Manly Council and Sydney Water Corporation [2006] NSWSC 242 -
Bennett v Manly Council and Sydney Water Corporation [2006] NSWSC 242 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 (31 March 2006) (Roberts-Smith JA)

36 The relevance of, and weight to be given to, the obviousness of the risk has been considered by the High Court on many occasions and most recently in ***Vairy*** (*supra*) and ***Mulligan v Coffs Harbour City Council*** (2005) 80 ALJR 43 which were heard together. See also ***Ghantous v Hawkesbury City Council*** (2001) 206 CLR 512; ***Woods v Multi-Sport Holdings Pty Ltd*** (2002) 208 CLR 460; ***Thompson v Woolworths (Qld) Pty Ltd*** (2005) 221 CLR 234 .

Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 (31 March 2006) (Roberts-Smith JA)

Thompson v Woolworths (Qld) Pty Ltd (2005) 221 CLR 234
Vairy v Wyong Shire Council

Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
Lynch v Shooters Saloon Bar Pty Ltd [2006] QCA 63 -
Lynch v Shooters Saloon Bar Pty Ltd [2006] QCA 63 -
Lynch v Shooters Saloon Bar Pty Ltd [2006] QCA 63 -
Lynch v Shooters Saloon Bar Pty Ltd [2006] QCA 63 -
Booksan Pty Ltd v Wehbe [2006] NSWCA 3 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2006] WADC 7 -
Renehan v Leeuwin Ocean Adventure Foundation Ltd [2006] NTSC 4 -
Renehan v Leeuwin Ocean Adventure Foundation Ltd [2006] NTSC 4 -
Langham v Connells Point Rovers Soccer Club Inc [2005] NSWCA 461 -
Langham v Connells Point Rovers Soccer Club Inc [2005] NSWCA 461 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Ainger v Coffs Harbour City Council [2005] NSWCA 424 (05 December 2005)

79. Since *Brodie* the High Court has addressed the significance of obviousness of risk in *Thompson v Woolworths (Queensland) Pty Limited* [2005] HCA 19; (2005) 79 ALJR 904 and, most recently, in *Vairy* and *Mulligan* . Ipp JA analysed the treatment of the issue of obviousness of a risk in those decisions in *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380 and concluded (at [53]):

> "53 A common expression of principle as to the concept of obviousness of risk is manifest from the unanimous decision in *Thompson* and the judgments of those justices in *Mulligan* and *Vairy* who formed a majority on this issue. It can be articulated as follows. Obviousness of risk is not a phrase that denotes a principle or rule of the law of negligence. It is merely a descriptive phrase that signifies the degree to which risk of harm may be apparent. It is a factor that is relevant to whether there has been a breach of the duty of care. I make no comment as to whether it is relevant also to the existence of a duty of care as that was not in issue in this case (and see *Ghantous* and the comments of Gummow J in *Vairy* at [55] and [80]). The weight to be attached to the obviousness of the risk depends on the totality of all the circumstances. In some circumstances it may be of such significance and importance as to be effectively conclusive."

Giles JA and Hunt AJA agreed with his Honour.

Ainger v Coffs Harbour City Council [2005] NSWCA 424 -
Ainger v Coffs Harbour City Council [2005] NSWCA 424 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 (30 November 2005) (Handley and Basten JJA, Hunt AJA)
Thompson v Woolworths (Qld) Pty Ltd [2005] HCA 19
Turner v Arding & Hobbs Ltd

Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 (30 November 2005) (Handley and Basten JJA, Hunt AJA)

Richmond Valley Council v Standing (2002) Aust Torts Rep 81 679; *Brodie Shire Council* (2001) 206 CLR 512 and *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19 referred to.

Evans Shire Council v Richardson [2005] NSWCA 416 -
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419 -
Evans Shire Council v Richardson [2005] NSWCA 416 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -

Chandley v Roberts [2005] VSCA 273 (14 November 2005) (Maxwell, P., Nettle, J.A and Habersberger, A.J. A)

24. The question remains, nevertheless, what would have constituted the exercise of reasonable care by the plaintiff in the circumstances in which he found himself. To take account of the surrounding circumstances is not in any sense to convert an objective test into a subjective one. On the contrary, in my opinion, those circumstances provide the factual context in which the Court determines what the plaintiff ought reasonably to have done for his own protection. Indeed, it seems to me that that question cannot be answered unless it is set in the factual context of the relevant incident. So it was that in *Thompson v Woolworths (Queensland) Pty Ltd,* [13] the High Court took into account - in deciding that the plaintiff there had been guilty of contributory negligence - that she was aware of the particular risk, had recorded it in her diary and had made a previous complaint about it. [14] Prior knowledge of the risk was also held to be relevant in *Rabay v Bristow* ,[15] though in the particular case the New South Wales Court of Appeal held that there was no "blameworthy negligence" on the plaintiff's part, notwithstanding his prior knowledge of the risk. [16]

Chandley v Roberts [2005] VSCA 273 -
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 (11 November 2005)

37. In ***Thompson*** the High Court (Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ) said at [36], 911:

"The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response."

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 (11 November 2005)

36. CBH's submissions require due regard to be had to the more recent statements by the High Court on the subject of obviousness of risk. The latest discussion occurs in ***Vairy v Wyong Shire Council*** [2005] HCA 62 and ***Mulligan v Coffs Harbour City Council*** [2005] HCA 63 but the High Court did not speak with one voice in these cases and it is helpful to commence the inquiry by referring to a joint judgment of five members of the High Court (Gummow & Callinan JJ did not sit) delivered six months before ***Vairy*** and ***Mulligan*** , namely ***Thompson v Woolworths (Queensland) Pty Ltd*** (2005) 79 ALJR 904 .

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 -
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 -
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 -
Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Wynne v Pilbeam [2005] WASCA 200 -
Wynne v Pilbeam [2005] WASCA 200 -
Iliou v Eason & Eason [2005] SADC 130 (23 September 2005) (Beazley J)

Hunt v Knight Frank (NSW) [2005] NSWCA 139 AT [31], [43-44]; *Ragnelli v David Jones (Adelaide) Pty Ltd* (2004) SASR 233; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Tame v New South Wales* (2002) 211 CLR 317; *Thompson v Woolworths (QLD) Pty Ltd* (2005) H.C.A. 19 ; *Drotem Pty Ltd v Manning* (2000) NSWCA 320; *James v Naracoorte Services* (1978) 17 SASR 576; *Australian Postal Corporation v Gallard* (2000) NSWCA 316; *Sedgewick v Jerrabomberra Park* (2004) ACTSC 108; *Campbell v Burrows Engineering* (2001) 82 SASR 75; *Complete Scaffold v Adelaide Brighton Cement* [2001] SASC 199, considered.

Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 (02 September 2005) (McMurdo P, Atkinson and Mullins JJ,)

33. This case concerns the duty of an occupier of a shop to a lawful entrant. Although the common law no longer measures the duty owed according to the category of entrant, [30] the measure of control of the occupier of the premises is one aspect of the relationship that gives rise to a duty of care. [31] It is quite unlike the cases which deal with the question of whether a public authority should be held liable in negligence for failure to warn of conditions brought about by natural phenomena. [32] The duty owed to customers by the occupier of a commercial premises must take into account the risks the commercial environment creates. The test is no longer that found in *Indermaur v Dames* [33] that the occupier's obligation is only to take reasonable care to prevent damage from "unusual danger" of which it knew or ought to have known. [34] The retailer's duty in tort is more akin to, although it has not yet been held to be coincident with, the implied warranty in contract, "that the premises are as safe for the purpose as the exercise of reasonable skill and care can make them." [35]

via

[31] *Thompson v Woolworths (Qld) Pty Ltd* (2005) 214 ALR 452; 79 ALJR 904; [2005] HCA 19 at [24] .

Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Moore v Pack-Tainers Pty Ltd [2005] HCATrans 661 -
Lynch v Kinney Shoes (Australia) Ltd [2005] QCA 326 -
Flynn v Australian Postal Corporation [2005] QDC 247 -
Herning v GWS Machinery Pty Ltd [2005] NSWCA 263 -
Herning v GWS Machinery Pty Ltd [2005] NSWCA 263 -
De Candia v Holmes [2005] QDC 242 -
Ashfield Realty Pty Ltd t/as Ray White Ashfield v Gomes [2005] NSWCA 216 (24 June 2005) (Mason P, Ipp and Basten JJA)

34 There is also a need to identify the cause of the accident in order to determine if it were reasonably foreseeable and whether it could have been avoided by measures which it was reasonable to expect the defendant to have adopted. In this case, there were no known prior accidents or complaints involving the relevant chairs. If the risk of injury, once properly identified, should have been appreciated by the defendant a question arises as to whether it was limited to a particular use of the chair as seems likely. If so, should that risk also have been appreciated by the plaintiff. As the joint judgment of the members of the High Court in ***Thompson v Woolworths Queensland Pty Limited*** [2005] HCA 19 noted at [37] inadvertence by a user may be something a defendant needs to guard against. Nevertheless, that kind of risk where it materialises invites consideration of contributory negligence. Her Honour's rejection of any failure on the part of the plaintiff to take care for her own safety is hard to follow without knowing what the risk was and how the accident occurred.

Ashfield Realty Pty Ltd t/as Ray White Ashfield v Gomes [2005] NSWCA 216 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Rabay v Bristow [2005] NSWCA 199 -
Rabay v Bristow [2005] NSWCA 199 -
Rabay v Bristow [2005] NSWCA 199 -
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Rabay v Bristow [2005] NSWCA 199 -
Rabay v Bristow [2005] NSWCA 199 -
Cruise Group Pty Ltd v Fullard [2005] NSWCA 161 (02 June 2005)

44. Thus, assuming that the Respondent was inadvertent and failed to take reasonable care for her own safety, there may yet be a duty of care owed by the operator of the vessel to guard against precisely such inadvertence or carelessness. That possibility falls squarely within the circumstances adverted to by the High Court in *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19 at [37] :

"The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

Cruise Group Pty Ltd v Fullard [2005] NSWCA 161 -
Gomes v Metroform Pty Limited [2005] NSWCA 171 -
Doubleday v Kelly [2005] NSWCA 151 (12 May 2005) (Bryson JA, Young CJ in Eq and Hunt AJA)
Thompson v. Woolworths (Queensland) Pty Ltd [2005] HCA 19
Hahn v. Conley

Doubleday v Kelly [2005] NSWCA 151 -
Felk Industries Pty Ltd v Mallet [2005] NSWCA 111 -
Felk Industries Pty Ltd v Mallet [2005] NSWCA 111 -