Duty of Care of Landlords of Residential Premises

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From Immunity to Duty

The Australian law relating to the liability of landlords of residential premises in negligence has recently undergone significant development. We have moved from the position where landlords were immune from liability in tort under the rule in *Cavalier v Pope*,[1] to a position, culminating in the decision of *Northern Sandblasting Pty Ltd v Harris*,[2] where it is now accepted that landlords owe a duty of care.

After the decision in *Northern Sandblasting v Harris* there were significant unanswered questions as to the liability of landlords; the only ratio that could be extracted from the case was that the immunity in *Cavalier v Pope* was no longer good law in Australia. Recently, in *Jones v Bartlett*,[3] the High Court went some way towards clarifying the nature and content of the landlord's duty of care in the context of residential premises.

There have since been several cases that have applied or considered *Jones v Bartlett*. The most significant is the case of *Taber v NSW Land and Housing Corporation*,[4] as it was a case of an action by a tenant

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1 [1906] AC 428.

2 (1997) 188 CLR 313 ('*Northern Sandblasting v Harris*').

3 (2000) 176 ALR 137. See the detailed discussion of this case by C Shanahan, 'New Duties and Old Categories? *Jones v Bartlett*: The Liability of Landlords after *Northern Sandblasting Pty Ltd v Harris*' (Paper presented at the Australian Plaintiff Lawyers Association Western Australian State Conference, Perth, 11-12 May 2001); see also P Handford, 'Through a Glass Door Darkly: *Jones v Bartlett* in the High Court' (2001) 30 *University of Western Australia Law Review* 75; T Wilson, 'After *Northern Sandblasting*: Landlord's Liability for Property Defects and Security' (2001) 15 *Australian Property Law Bulletin* 41; M Redfern and D Cassidy, *Australian Tenancy Practice and Precedents* (1987) Vol 2, [CN146].

4 (Unreported, New South Wales Supreme Court of Appeal, No 182, Heydon JA, Ipp and Rolfe AJJA, 19 June 2000).

against a landlord in negligence. Other cases have considered *Jones v Bartlett* in the context of occupier's liability.[5]

The Traditional Immunity of Landlords in Negligence Actions[6]

The traditional immunity of landlords against liability in negligence derives from the judgment of Erle CJ in *Robbins v Jones*,[7] which was cited by Lord Macnaghten in *Cavalier v Pope* as follows:

> A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any.[8]

On this reasoning, the tenant's wife who fell through the floor in *Cavalier v Pope* was precluded from bringing an action against the landlord in tort for her injuries. The House of Lords held that, as she was not a party to the lease under which the landlord had contracted to repair, but had failed to do so, she had no privity of contract and there was no tort liability. The case became known as authority for the immunity of landlords – the rule in *Cavalier v Pope*.

As 'the price or rent of a tumbledown house reflects its condition'[9] and 'houses are ordinarily inspected before purchase or leasing',[10] it was suggested that the basis of the landlord's immunity – the tenant having an opportunity to examine the premises and discover defects – was caveat tenant.[11]

5 *Wilkinson v Law Courts Ltd* (Unreported, New South Wales Supreme Court of Appeal, No 196, Meagher, Heydon JJA and Rolfe AJA, 25 June 2001) (occupier of premises sued by visitor to courts); *David Jones v Bates* (Unreported, New South Wales Supreme Court, No 233, Heydon JA, Davies AJA and Young CJ, 20 July 2001) (occupier of department store sued by shopper); *Commonwealth of Australia v O'Callaghan* (Unreported, Western Australia Supreme Court, No 276, Kennedy, Wallwork and Steytler JJ, 7 September 2001) (occupier of premises sued by client).

6 For an evaluation of the cases leading to *Jones v Bartlett*, see Andrew Morrison, 'Falling from Balconies: Developments in Occupiers Liability' (Paper presented at Australian Plaintiff Lawyers Association 1998 National Conference, Hamilton Island, 15-18 October 1998).

7 (1863) 15 CB (NS) 221; 143 ER 768, 776.

8 [1906] AC 428, 430 (Lord Macnaghten, citing Erle CJ ibid).

9 *Parker v South Australian Housing Trust* (1985) 41 SASR 493, 533 (Prior J).

10 Ibid.

11 *Jones v Bartlett* (2000) 176 ALR 137, 171 (Gummow and Hayne JJ). See the discussion in F Trindade and P Cane, *The Law of Torts in Australia* (3rd ed, 1999) 624; see also J G Fleming, *The Law of Torts* (9th ed, 1998) 520-1.

The Rejection of the Immunity

The immunity of landlords has been called 'the misbegotten product of fallacy' by Sir Percy Winfield, who asked:

> what conceivable difference is there between carelessly putting in circulation a dead snail in a bottle of ginger beer and putting on the market a house so carelessly built as to be likely to cause death or grave injury?[12]

The immunity was not accepted in *Parker v South Australian Housing Trust*,[13] and ultimately rejected by the High Court in *Northern Sandblasting v Harris*[14] after a concession by counsel.

Parker v South Australian Housing Trust

In *Parker v South Australian Housing Trust*,[15] Mrs Parker leased a house from the defendant, the South Australian Housing Trust. The landlord agreed to repair the premises. The premises included an old gas stove that was not functioning correctly and shot out flames. Mrs Parker warned her children not to use the stove and complained to the defendant about the irregular flame. No repairs were made and after another incident Mrs Parker complained again. Despite being told that the stove would be repaired, it remained in disrepair and Mrs Parker's daughter (the plaintiff) was burnt when a flame shot out while she was heating some milk. The plaintiff sued the defendant landlord, alleging negligence.

The trial judge, Legoe J, found that the defendant was liable to the plaintiff. The defendant appealed to the Full Court. In the Full Court, King CJ rejected the landlord's immunity. He said:

> I am satisfied that the rule, for which *Cavalier v Pope* is regarded as authority, that a lessor is not under a duty of care to persons who may suffer injury on the demised premises by reason of the lessor's failure to comply with a covenant with the lessee to effect repairs or to keep the premises in repair is inconsistent in principle with the modern doctrine of liability for negligence as it has developed since *Donoghue v Stevenson*. That being so, I do not think that this Court would be justified in following the decision of the House of Lords, thereby imposing upon the parties a result which the Court would consider to be incorrect. I would therefore hold that there is no rule of law precluding the existence of a

12 Cited by Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 90, referring to (1946) 62 *Law Quarterly Review* 315.

13 (1985) 41 SASR 493.

14 (1997) 188 CLR 313.

15 (1985) 41 SASR 493.

duty of care in the lessor if on the ordinary principles of the law of negligence the facts are such as to give rise to such a duty.[16]

Northern Sandblasting v Harris[17]

Northern Sandblasting v Harris involved a claim against a landlord by the nine-year-old daughter of the tenants, who was tragically left in a vegetative state after being electrocuted when turning off a garden tap. The landlord bought the house in 1984 and the electrical supply was inspected at that time. The tenants entered into possession in 1986. The tenant told the landlord that the stove did not work in 1987 and the landlord engaged an electrician to carry out repairs. The accident occurred as a result of a defect in the earthing system on the premises, which prevented the safety mechanism from operating, together with faulty repairs to the stove by the electrician.

The plaintiff claimed against the landlord on the following grounds:

- breach of an ordinary common law duty of care for negligence arising out of the unsafe condition of the electrical system;
- breach of a non-delegable personal common law duty of care to ensure that the independent electrical contractor exercised care in repairing the stove; and
- breach of statutory duties arising under the *Property Law Act 1974* (Qld) s 106[18] and the *Residential Tenancies Act 1975* (Qld) s 7(a).[19]

A majority of the High Court ruled in favour of the plaintiff,[20] although the members of the majority found in favour of the plaintiff for different reasons.

16 Ibid 517. See also Prior J, who said at 520 that 'the power to sue in tort notwithstanding a contract is now well established' (cf *Donghue v Stevenson* [1932] AC 562, 610 and *Grant v Australian Knitting Mills* [1936] AC 8, 103, 104); and at 525 that 'privity is the language of contract and should no longer apply to deny a duty of care in the summary way that it did in 1906 in *Cavalier v Pope*'.

17 This case was the subject of a detailed analysis by Morrisson, above n 6.

18 Section 106(a) applies to leases of less than or equal to three years and requires the landlord to 'provide and maintain premises in a condition reasonably fit for human habitation'.

19 For an analysis of the contractual arguments, see P Handford, 'No Consensus on Landlord's Liability' (1998) 6 *Tort Law Review* 105; Handford, 'Through a Glass Door Darkly', above n 3, 77-85; K Evans, 'Extension of a Landlord's Duty of Care: the Decision in *Northern Sandblasting Pty Ltd v Harris*' (1997) 12 *Australian Property Law Bulletin* 1.

20 *Northern Sandblasting v Harris* (1997) 188 CLR 313, Brennan CJ, Gaudron, Toohey and McHugh JJ (Dawson, Kirby and Gummow JJ dissenting).

Brennan CJ[21] and Gaudron J[22] considered that the defendant landlord was in breach of the ordinary common law duty of care.[23] Toohey[24] and McHugh JJ[25] considered that the landlord was in breach of a non-delegable personal common law duty of care to ensure that care was taken by the independent electrical contractor.[26]

No member of the majority considered that the plaintiff was entitled to succeed on the basis of breach of statutory duty.

It was conceded by the landlord (the appellant), and accepted by all Judges, that it owed a duty of reasonable care to the plaintiff. The members of the High Court unanimously considered that the concession was rightly made.[27] In particular, Brennan CJ noted that the landlord's immunity was 'logically indefensible and is to be accounted for by social conditions that have long since passed'.[28] Furthermore, Dawson J noted that 'there is no rule of law precluding the existence

21 His Honour considered that the duty of care of a landlord was analogous to that of an occupier to a contractual entrant. He said (ibid 340) that the duty was confined to 'defects in the premises at the time when the tenant is let into possession' and 'does not extend to defects in the premises ... discoverable only after the landlord parts with possession'. As to the standard of care, his Honour considered at 340 that the relevant standard was that stated by McCardie J in *MacLenan v Segar* [1917] 2 KB 325, 332-3.

22 *Northern Sandblasting v Harris*, ibid 258-360. Her Honour considered that the duty extends not only to remedying defects which develop during the tenancy of which the landlord is aware or ought to have been aware, but also to remedying defects that exist at the commencement of the lease and that are discoverable on inspection, including those defects only discoverable by persons exercising special skill or expertise.

23 Dawson, Gummow and Kirby JJ dissented. Dawson J said: 'The duty of care was that which arises under the ordinary principles of the law of negligence, namely, a duty to take reasonable care to avoid foreseeable risk of injury. The nature and extent of the duty in the particular instance is determined by the circumstances' (ibid 343). See also Toohey J at 352-3. Kirby J considered that the landlord's duty to take reasonable care extended only to the remedying of defects 'obvious to an untrained observer such as the appellant' and 'did not oblige a landlord to institute a system of inspections against the off chance that a defect might be found' (at 394). Gummow J agreed with Kirby and Dawson JJ, thus finding that there was no liability in negligence (at 370).

24 Ibid 349-55.

25 Ibid 368-70.

26 Ibid 333 (Brennan CJ). Gaudron J at 360-2 rejected the proposition (in the majority), as did the dissenting judges, Dawson J at 346-7, Gummow J at 370 and Kirby J at 397-404.

27 Ibid 340 (Brennan CJ), 342-3 (Dawson J), 347 (Toohey J implicitly), 357-8 (Gaudron J), 364 (McHugh J), 370 (Gummow J, agreeing with the reasons of Dawson and Kirby JJ in relation to the common law negligence claims), 391 (Kirby J implicitly).

28 Ibid 340 (Brennan CJ).

of a duty of care in the lessor if on the ordinary principles of the law of negligence the facts are such as to give rise to such a duty'.[29]

Toohey J noted that although the existence of a duty was conceded, 'the nature and content of that duty, as conceded, remains ill defined'.[30] Unfortunately, the judgments in *Northern Sandblasting v Harris* did not clarify the duty of care, there being significant disagreement as to the nature and content of it. The decision in *Northern Sandblasting v Harris* has been subjected to much commentary and analysis.[31]

Clarification of the Nature and Content of the Landlord's Duty: *Jones v Bartlett*

The recent decision of the High Court in *Jones v Bartlett*[32] has gone some way towards clarifying the nature and content of the landlord's duty.

In *Jones v Bartlett*, the plaintiff appellant was the son of the tenants of a residential property owned by the defendant respondent. He had been living on the property with his parents for about four months when he suffered injuries after walking through a glass door, thinking it was open.

The glass door appeared to be in good repair and operating normally. It complied with building standards and regulations applicable at the time of construction. However, the glass in the door did not comply with the standards applicable had the house been constructed immediately prior to entry into the lease.[33]

The appellant made the following claims against the respondent:

- breach of a common law duty of care owed by the respondent to the appellant;

29 Ibid 342 (Dawson J citing *Parker v Housing Trust* (1985) 41 SASR 493, 516-7 (King CJ)).

30 Ibid 347.

31 See, for example, the numerous articles cited by Kirby J in *Jones v Bartlett* (2000) 176 ALR 137, 184.

32 (2000) 176 ALR 137.

33 The standard that applied immediately before the lease was entered into demanded the glass be a thickness of 10 mm, or toughened safety glass, laminated glass or safety organic coated glass. The standard at the time of construction required a thickness of only 4 mm of annealed glass, the thickness of the glass in question: ibid 140 (Gleeson CJ).

- breach of statutory duties created by the *Occupiers' Liability Act 1985* (WA);[34] and
- breach of the residential tenancy agreement by the respondent.[35]

The particulars relied upon by the appellant in relation to the negligence claim were that the respondent failed to:

- install safety glass in the door;
- warn that safety glass was not installed;
- place a protective guard over the glass in the door;
- replace the 4 mm annealed glass in the door with glass complying with the safety standards that would have applied had the building been newly constructed, or had the glass in the door been replaced at that time; and
- have an expert inspect the premises before they were let.

The trial judge held that there had been a breach of duty owed pursuant to s 5(1) of the *Occupiers' Liability Act 1985* (WA). A finding of contributory negligence was made and damages were reduced by 50%.[36]

The landlord appealed to the Full Court of the Supreme Court of Western Australia. The appeal was allowed.[37] The Court held that the duty of the landlord to take reasonable care to ensure the safety of the premises did not require the glass door to be expertly assessed in the circumstances of this case.[38]

An appeal was subsequently made to the High Court. The Court found in favour of the landlord respondent by majority.[39] The Court

34 Section 5(1) imposes duties on occupiers and s 9(1) imposes duties on landlords where the landlord is 'responsible for the maintenance and repair of the premises'. For a thorough analysis of the claims under the *Occupiers Liability Act*, see Handford, 'Through a Glass Door Darkly', above n 3, 85-92.

35 For a thorough analysis of the contractual claim, see Handford, 'Through a Glass Door Darkly', ibid 77-85.

36 *Jones v Bartlett* (Unreported, Western Australia District Court, Reynolds C, 4 February 1998).

37 *Bartlett v Jones* (Unreported, Western Australia Supreme Court, Murray, White and Scott JJ, 22 February 1999).

38 Ibid 24-5 (Murray J).

39 (2000) 176 ALR 137. The majority was comprised of Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ. Gummow and Hayne JJ delivered a joint judgment. McHugh J dissented. All judges, including McHugh J (agreeing with the reasons of Gummow and Hayne JJ at 156) considered that the plaintiff could not succeed in respect of his claims of breach of implied contractual term and breaches of statutory duty. The discussion that follows is limited to the common law negligence claims.

held that the only ratio that could be extracted from *Northern Sandblasting v Harris* was that the immunity in *Cavalier v Pope* was no longer good law in Australia.[40]

The Judges in the majority concluded that the respondent was not in breach of duty. In the circumstances of the case, the landlord's duty did not require expert inspection of the house[41] or the replacement of glass to accord with Australian Safety Standard recommendations.[42] There was no evidence to suggest that the defendants knew that the glass was annealed, that they knew of the different types of glass, nor that they were aware of the contemporary Australian Standards. The door met safety standards applicable at the date of installation, even though it did not meet the more rigorous standards imposed later. Also, there was nothing inherently dangerous or defective about the door, as opposed to the electrical system in *Northern Sandblasting v Harris*.[43] The premises were reasonably fit for the purpose of residential occupancy.[44] The fact that the door could have been made safer did not make it dangerous or defective.

These conclusions can be contrasted with those of McHugh J (in dissent), who considered that, in this case, reasonable care required an inspection by a person qualified to assess the safety of the premises before they were let.[45] In his Honour's view, the landlord was in breach, because the reasonably foreseeable risk of injury to persons such as the appellant and the means of avoiding the risk were matters that the landlord ought to have known.[46]

Formulations of the Duty of Care Owed by Landlords

In *Jones v Bartlett* differing formulations of the duty of care owed by the landlord were given by the Judges in the High Court.

40 Ibid 142 [21], 148 [53] (Gleeson CJ); 153 [84] (Gaudron J); 156 [100] (McHugh J); 170-1[160], [166] and 179 [200] (Gummow and Hayne JJ); 187 [230] (Kirby J); 200 [278] (Callinan J).

41 Ibid 148-9 [57] (Gleeson CJ); 176 [183]-[184] (Gummow and Hayne JJ); 194 [252] (Kirby J).

42 Ibid 148 [57] (Gleeson CJ); 155 [93] (Gaudron J).

43 Ibid 142 [21]-[22] (Gleeson CJ); 155 [80], [90] and [93] (Gaudron J); 176-7 [180], [186] (Gummow and Hayne JJ).

44 Ibid 176 (Gummow and Hayne JJ).

45 Ibid 158 [107].

46 Ibid [109].

Gleeson CJ considered that the landlord owed a duty to prospective tenants and members of their household[47] to 'take reasonable care to avoid foreseeable risk of injury'.[48]

Gaudron J held that the landlord owed a duty to 'take reasonable care to put and keep premises in a safe state of repair'.[49]

Gummow and Hayne JJ considered that the duty arose because '[t]he relationship between landlord and tenant is so close and direct that the landlord is obliged to take reasonable care that the tenant not suffer injury'.[50] The premises must be reasonably fit for the purposes for which they are let, namely habitation as a domestic residence.[51] Thus the landlord owed a duty to tenants to take reasonable care to ascertain the existence of any dangerous defects and to take reasonable steps to remove them or to make the premises safe.[52] As dangerous defects are unlikely to discriminate between tenants and those on the premises either due to a familial or other personal relationship, or some other social or business relationship or occasion, the landlord's duty to tenants extends to those other entrants.[53]

47 Ibid 148 [57].

48 Ibid [56], citing *Northern Sandblasting v Harris* (1997) 188 CLR 313, 343 (Dawson J).

49 *Jones v Bartlett*, ibid 155 [93].

50 Ibid 173, citing *Donoghue v Stevenson* [1932] AC 562. Their Honours regarded at 172 the duty between landlord and tenant to be the same as that stated by Dawson J in *Northern Sandblasting v Harris*, namely, a duty 'to take reasonable care to avoid foreseeable risk of injury to the respondent'.

51 *Jones v Bartlett*, ibid 173 [171].

52 Ibid 174 [173].

53 Ibid 179. Their Honours continued to make an interesting observation at 179 as follows:

> Nevertheless, the duty of the landlord owed to these third parties, in many cases, will be narrower than that owed to them by an occupier such as a tenant. An example of facts not involving the placing of a duty on the landlord is a slippery floor; an unsecured gate to a fenced swimming pool may be another. The duty of care of the landlord to the third party is only attracted by the presence of dangerous defects in the sense identified earlier in these reasons. These involve dangers arising not merely from occupation and possession of premises, but from the letting out of premises as safe for purposes for which they were not safe. What must be involved is a dangerous defect of which the landlord knew or ought to have known. It is unnecessary here to pursue this aspect of the case further. This is because, as indicated above, in the present case treating the appellant as in as good a position as his parents, the tenants, there was no breach of duty by the respondents. The glass door was not a dangerous defect in the relevant sense.

Kirby J considered that the landlord owed a duty to tenants and to third parties (such as permitted occupants and visitors)[54] to take 'reasonable care to avoid a foreseeable risk of injury to a person in the position of the appellant'.[55]

Callinan J noted that 'the courts should, develop and apply ... "a healthy scepticism towards invitations to jettison years of developed jurisprudence in favour of a beguiling legal panacea"' and not create or extend categories of duties of care.[56] He concluded that 'if any duty were owed, a matter of which I am far from convinced, I would define it as no more than a duty to provide, at the inception only of the tenancy, habitable premises'.[57]

McHugh J (in dissent) considered that:

> the common law duty of care owed by a landlord to a tenant and other members of the tenant's household is to take reasonable care to avoid foreseeable risks of harm to those persons having regard to all the circumstances of the case. The duty extends to dangerous defects but is not limited to them.[58]

The Nature and Content of the Landlord's Duty of Care

A variety of statements were made by the members of the Court in *Jones v Bartlett* as to the nature and content of the landlord's duty of care.

Gleeson CJ considered that 'the practical extent of the duty was governed by the circumstances of the case'[59] He noted that the 'critical question is as to what is reasonable'.[60] It is a question of fact in the circumstances whether the duty has been breached. His Honour concluded:

54 Ibid 189 [237].

55 Ibid 194 [253].

56 Ibid 203 [288], citing W L Prosser and P Keeton, *Prosser and Keeton on the Law of Torts* (5th ed, 1984) 434. Relevant policy factors include that the Court really has no way of estimating the economic consequences of the erection of a new duty of care in landlord and tenant situations: at 203, citing Kirby J in *Northern Sandblasting v Harris* (1997) 188 CLR 313, 402.

57 *Jones v Bartlett*, ibid [289].

58 Ibid 156. His Honour continued that '[to] limit the duty to "dangerous defects", "ordinary use of the premises" or "unusual dangers" would reintroduce into the law the categories expelled by this Court in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479'.

59 *Jones v Bartlett*, ibid 148 [56].

60 Ibid [57].

> The capacity to adjust and adapt, which is inherent in the test of reasonableness, would be diminished if a more particular test were formulated. There is no reason to seek to do so. Whether it is reasonable to require an owner of the premises to have them inspected by an expert before letting depends upon the circumstances of the case. There is no answer which is of universal application. Deciding what the answer should be in a particular case involves a factual judgment, and does not provide the occasion for the imposition of a requirement of the law.[61]

Gaudron J considered that there was 'no basis for the imposition of a higher duty of care on a landlord than is cast on an occupier of premises'.[62] Therefore, her Honour implicitly rejected the standard of care identified in the judgment of Brennan CJ in *Northern Sandblasting v Harris*,[63] that the landlord's general duty of care is 'to make premises as safe for residential use as reasonable care and skill on the part of anyone can make them'.[64] Like occupiers of premises, the landlord is only required 'to take such care as is reasonable in the circumstances'.[65]

Gummow and Hayne JJ noted that 'it would be of no utility' to conclude simply that the duty was to take reasonable care to avoid a foreseeable risk of injury as this would leave the duty of care without content.[66] They considered that '[b]roadly, the content of the landlord's duty to the tenant will be coterminous with a requirement that the premises be reasonably fit for the purposes for which they are let, namely habitation as a domestic residence'.[67] As to the meaning of this phrase, they said:

> Premises will not be reasonably fit for the purposes for which they are let where the ordinary use of the premises for that purpose would, as a matter of reasonable foreseeability, cause injury. The duty requires a landlord not to let premises that suffer defects which the landlord knows or ought to know make the premises unsafe for the use to which they are to be put. The duty with respect to dangerous defects will be discharged if the landlord takes reasonable steps to ascertain the existence of any

61 Ibid 149 [58].

62 Ibid 155 [92]. Her Honour considered that the contractual nature of the relationship was relevant (at 155).

63 (1997) 188 CLR 313, 340. Brennan CJ considered that the standard of care was that identified by McCardie J in *Maclenan v Segar* [1917] 2 KB 325, 332-3.

64 (2000) 176 ALR 137, 155 [92].

65 Ibid, citing *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

66 *Jones v Bartlett*, ibid 172 [167].

67 Ibid 173 [172]. Their Honours stated that 'This does not exceed the content of the statutory requirements in various Australian jurisdictions'.

> such defects and, once the landlord knows of any, if the landlord takes reasonable steps to remove them or to make the premises safe. This does not amount to a proposition that the ordinary use of the premises for the purpose for which they are let must not cause injury; it is that the landlord has acted in a manner reasonably to remove the risks.[68]

The determination of reasonable fitness involves the following three inquiries:

- the presence of dangerous defects;[69]
- taking reasonable care to ascertain dangerous defects; and
- exercising reasonable care to remove dangerous defects or otherwise to make the premises safe.

Kirby J considered that the duty was limited to taking reasonable care to avoid the foreseeable risk of injury from defects of which the landlord was 'on notice or of which (by appropriate inspection) they would reasonably become aware because they were obvious to a reasonable landlord or its agent'.[70]

Callinan J simply stated that if a duty was owed, the landlord 'surely' met the standard of care that it required.[71]

McHugh J (in dissent) considered that reasonable care in the circumstances is the benchmark of liability and that it was neither appropriate nor desirable to make an exception in the case of the liability of landlords.[72] He said that the relevant circumstances that generate the standard of care owed by the landlord include the following circumstances of which the landlord knew or ought reasonably to have known:[73]

- the right/capacity of the landlord to inspect the premises;
- the age and condition of the premises;
- the ages and physical and mental capacities of persons who will use them;
- the use to which they will be put;
- the nature and degree of the risk of injury; and
- the cost or inconvenience of eliminating the risk.

68 Ibid 174 [173]-[175].

69 Ibid 175 [178]-[179]. Gummow and Hayne JJ defined 'dangerous defects' and gave examples.

70 Ibid 194 [252].

71 Ibid 203 [289].

72 Ibid 156 [100].

73 Ibid [101].

Duty of Care Owed by Landlords of Residential Premises: Extracting Some Principles

As a result of the decisions of *Northern Sandblasting v Harris* and *Jones v Bartlett*, and their interpretation in subsequent decisions, it is now possible to identify some features of the duty of care owed by landlords of residential premises.[74]

Duty Is Not Absolute – Reasonable Care Only

It is clear that the duty owed by a landlord is to exercise reasonable care in the circumstances; it is not a duty of strict liability. For example, in *Jones v Bartlett*, Gleeson CJ said:

> 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 ...
>
> It is interesting, and not without relevance, to speculate about how many objects in and around an ordinary dwelling house would constitute a potential hazard to a person who behaved as carelessly as the appellant.[75]

Gleeson CJ considered that the 'critical question is as to what is reasonable',[76] noting that a trial judge's finding of fact could not be 'circumvented by an attempt to formulate the legal duty with greater particularity, in a manner which seeks to pre-empt the decision as to reasonableness'.[77]

Similarly, Gaudron J considered that the standard was reasonable care,[78] rejecting a proposition that the duty was 'to make premises as

74 In *Jones v Bartlett*, Gummow and Hayne JJ noted: 'that which is required in respect of premises let for commercial or educational or other purposes may well differ, but that is not for decision in this case' (at 72). See also Gaudron J at 155 [92].

75 Ibid 142-3 [23]-[25].

76 Ibid 148 [57].

77 Ibid. In *Rosenberg v Percival* (2001) 178 ALR 577, *Jones v Bartlett* is cited by Gleeson CJ at 581 (fn 10) as authority for the 'danger of a failure, after the event, to take account of the context, before or at the time of the event, in which a contingency was to be evaluated.'

78 *Jones v Bartlett*, ibid 155. See also *Toomey v Scolaro's Concrete Constructions Pty Ltd* (Unreported, Victorian Supreme Court, Eames J, 17 August 2001) 279 [409].

safe for residential use as reasonable care and skill on the part of anyone can make them'.[79]

The standard of reasonable care has been applied in the cases decided since *Jones v Bartlett*.[80] For example, in *Wilkinson v Law Courts Ltd*,[81] the plaintiff fell down the steps outside the Sydney Law Courts and broke his ankle. There was no hand-rail, edge-delineation strips or warning signs present on or near the steps. The plaintiff sued the occupiers of the building for damages for negligence. He was unsuccessful at trial and appealed.

The plaintiff's appeal was dismissed with costs. On the facts of the case, the failure to install a hand-rail, edge-delineation strips and a warning sign at or near the place of the accident was not a breach of duty.

Heydon JA[82] noted that the duty of an occupier was to take reasonable care in the circumstances, not one of strict liability. After commenting that landlords are a sub-class of occupiers, he concluded:

> If safety was to be assured by procuring that every user of the steps had a handrail within reach, a handrail would be needed at many points along the considerable length of the steps. An extensive system of railings would be expensive. It would be ugly, which is not irrelevant: *Phillis v Daly* (1988) 15 NSWLR 65 at 68F-G; *Jones v Bartlett* (2000) 75 ALJR 1; 176 ALR 137 at [23]. ... The steps were obvious in appearance, their

79 Ibid. See also Gummow and Hayne JJ at 174: 'This does not amount to a proposition that the ordinary use of the premises for the purpose for which they are let must not cause injury; it is that the landlord has acted in a manner reasonably to remove the risks'. And at 178: 'The content of the landlord's duty in a case such as the present is not one of strict liability, to ensure an absence of defects or that reasonable care is taken by another in respect of existing defects. It is not a duty to guarantee that the premises are safe as can reasonably be made'. See too McHugh J (in dissent) at 156 who considered that reasonable care in the circumstances is the benchmark of liability and that it was neither appropriate nor desirable to make an exception in the case of the liability of landlords.

80 *Taber v NSW Land and Housing Corporation* (Unreported, New South Wales Supreme Court of Appeal, No 182, Heydon JA, Ipp and Rolfe AJJA, 19 June 2001) [60]; *Wilkinson v Law Courts Ltd* (Unreported, New South Wales Supreme Court of Appeal, No 196, Meagher, Heydon JJA and Rolfe AJA, 25 June 2001) [21]-[22]; *David Jones v Bates* (Unreported, New South Wales Supreme Court of Appeal, No 233, Heydon JA, Davies AJA and Young CJ, 20 July 2001) [26] (Davies AJA); [58]-[59] (Young CJ); *Commonwealth of Australia v O'Callaghan* (Unreported, Western Australia Supreme Court, No 276, Kennedy, Wallwork and Steytler JJ, 7 September 2001) [19]; *Toomey v Scolaro's Concrete Constructions Pty Ltd* (Unreported, Victorian Supreme Court, No 279, Eames J, 17 August 2001) [347].

81 (Unreported, New South Wales Supreme Court of Appeal, No 196, Meagher, Heydon JJA and Rolfe AJA, 25 June 2001).

82 Ibid (Meagher JA and Rolfe AJA concurring).

> edges were clear, there were not many of them, and dimensions and variations in the step sizes have not been shown to create any danger or create any inadequacy in them if they were properly used.[83]

At common law, as the landlord relinquishes control and possession of the premises to the tenant, it is the tenant and not the landlord who is generally the occupier of premises. This is because an occupier is a person who has a sufficient degree of control over the premises such that he or she ought to realise that any failure by him or her may result in injury to a person coming there.[84] The occupier's liability statutes[85] in some cases extend the common law definition of occupier to include landlords in certain circumstances.[86] In any event, the imposition of a standard of reasonable care is consistent with the general principles of negligence and the approach of the High Court in relation to the duty owed by occupiers in *Australian Safeway Stores Pty Ltd v Zaluzna*[87] where a majority of the High Court adopted the following statement of Deane J in *Hackshaw v Shaw*:

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

83 Ibid [21]-[22], citing *Jones v Bartlett* (2000) 176 ALR 137, 142 (Gleeson CJ).

84 *Wheat v E Lacon & Co* [1966] AC 552; *Parker v South Australian Housing Trust* [1985] 41 SASR 493, 513 (King CJ); *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 89; *Jones v Bartlett* (2000) 75 ALJR 1, 13-4 (Gaudron J), 25 (Gummow and Hayne JJ), 9 (Gleeson CJ). See Trindade and Cane, above n 11, 413; Fleming, above n 11, 500; P Handford, 'Occupiers' Liability Reform in Western Australia – and Elsewhere' (1987) 17 *University of Western Australia Law Review* 182, 187-8. As it is possible that more than one person can be an occupier, a landlord may be an occupier to the extent that he or she retains control over common areas such as stairs and lifts: *Wheat v E Lacon & Co* [1966] AC 552; discussed by Trindade and Cane, at 413; Handford, 'Through a Glass Door Darkly', above n 3, 87-8. The recent decision of the High Court in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 176 ALR 411 is an example of a case where the landlord was sued for negligence as occupier.

85 *Wrongs Act 1958* (Vic) ss 14A-14D, inserted by the *Occupier's Liability Act 1983* (Vic); *Occupiers' Liability Act 1985* (WA); *Wrongs Act 1936* (SA) ss 17B-17E, inserted by the *Occupiers Liability Act 1987* (SA); discussed generally in Handford, ibid 85-7.

86 Discussed in Trindade and Cane, above n 11, 414-5.

87 (1987) 162 CLR 479.

able man would, in the circumstances, do by way of response to the foreseeable risk.[88]

Prima Facie Duty May Be Delegated – Duty Is Not Ordinarily Personal and Non-Delegable

As noted by Gleeson CJ, issues as to non-delegability of duty did not arise in *Jones v Bartlett*,[89] and therefore its significance was 'merely rhetorical'.[90] It is suggested that the case supports a proposition that the duty owed by landlords is prima facie delegable.[91]

However, although Gleeson CJ did not comment on whether the landlord's duty was personal and non-delegable in *Jones v Bartlett*,[92] the remaining majority Judges indicated that they did not consider that the duty was personal and non-delegable in the case before them.

Kirby J considered that, after *Northern Sandblasting v Harris*, it was clear that 'a landlord may ordinarily discharge its duty by delegating such inspection and repair to a competent person'.[93] Similarly, Gaudron J implicitly indicated that she considered the duty delegable by holding that the duty owed by a landlord was of 'a more general duty of care' as opposed to the 'non-delegable duty' recognised by Toohey and McHugh JJ in *Northern Sandblasting v Harris*.[94]

Callinan J was particularly cautious of extending the categories of non-delegable duties to include landlords, noting that if such a duty were imposed it would be 'very difficult for any landlord to be sure that it has satisfied its duty of care'.[95] He concluded:

88 (1984) 155 CLR 614, 662-3.

89 (2000) 176 ALR 137, 146 [47].

90 Ibid 148 [55].

91 *Jones v Bartlett* is cited in *Dawmac Industries Pty Ltd v Anson* (Unreported, Supreme Court of NSW, No 42, Meagher JA, Ipp and Rolfe AJJA, 14 March 2001) [12] as authority for the proposition that the courts should be reluctant to extend categories of non-delegable duties.

92 Similarly, McHugh J (in dissent) did not mention the non-delegable nature of the landlord's duty, but applied a general duty of care. It should be noted, however, that in *Northern Sandblasting v Harris* (1997) 188 CLR 313, McHugh J was of the view in the circumstances of that case that the duty of the landlord was non-delegable (at 368-9).

93 (2000) 176 ALR 137, 189 [237].

94 Ibid 154 para [86].

95 Ibid at 201 para [284].

> In my respectful opinion the courts should be very cautious about extending the range of non-delegable duties, the law in respect of which has already developed in a not entirely satisfactory and principled way.[96]

Gummow and Hayne JJ also considered that the landlord's duty was delegable on the facts of the case. They said:

> The content of the landlord's duty in a case such as the present is not one of strict liability, to ensure an absence of defects or that reasonable care is taken by another in respect of existing defects. It is not a duty to guarantee that the premises are safe as can reasonably be made.[97]

They held that, in the case before them, the landlord's duty was not personal and non-delegable as the landlord tenant relationship did not exhibit the indicia that trigger a non-delegable duty.[98] Nor could it be said on the facts of the case that the glass door was a dangerous substance brought onto the land or that the landlord allowed a dangerous activity to be performed on the land.[99] This formulation leaves open the possibility that, although the landlord's duty will ordinarily be delegable, in a particular fact situation the duty of care owed by a landlord might be personal and non-delegable.[100]

In *Taber v NSW Land and Housing Corporation*,[101] the trial judge noted that there was no suggestion by the respondent that it had delegated

96 Ibid.

97 Ibid 178 [193]. Their Honours also noted at 175 (fn 119) that 'the observations of two members of the Full Court in that case (*Le Cornu)* respecting the non-delegability of duties of care must be doubted'.

98 Ibid [191].

99 Ibid [192].

100 See also *Northern Sandblasting v Harris* (1997) 188 CLR 313 per Dawson J who noted that the duty might be personal and non-delegable where hazardous activities were carried out upon the premises, noting that the duty would not arise out of the relationship, but out of the nature of the activities. He made it clear that he did not consider that the supply of electricity to domestic premises was a hazardous activity (at 347). See too Gaudron J, who thought that the duty might be non-delegable if a tradesperson was engaged to carry out work involving dangerous or potentially dangerous activities or substances (at 362). The duty would arise due to the control by the landlord and vulnerability of those on the premises within the principles of *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. For a recent discussion of non-delegable duties and an analysis of the comments in *Jones v Bartlett* in the context of the liability of co-defendants including an owner/developer, project manager, builder, surveyors, architect and building inspector see *Toomey v Scolaro's Concrete Constructions Pty Ltd (in Liq) & Ors* (Unreported, Supreme Court of Victoria, No 279, Eames J, 17 August 2001) (action claiming damages arising out of a fall over a balustrade within a stairwell in a block of flats).

101 (Unreported, New South Wales Supreme Court of Appeal, No 182, Heydon JA, Ipp and Rolfe AJJA, 19 June 2001).

any duty in relation to the construction of the steps.[102] He also said that there was no issue as to liability in relation to breach of a non-delegable duty. On appeal the respondent was not allowed to raise the point concerning the independent contractor.[103]

In *Jones v Bartlett* Gummow and Hayne JJ considered that so far as the duty owed to a tenant is concerned, as the landlord surrenders occupation of the premises to the tenant, 'the content of any duty is likely to be less than that owed by an owner-occupier who retains the ability to direct what is done upon, with and to the premises'.[104] In relation to the duty owed by occupiers, Fleming has argued that the duty may generally be discharged by delegating construction, maintenance and repair jobs to reputable independent contractors. He argues that, in such cases, the occupier will not be liable for defective work by the independent contractors if reasonable care was taken in selecting and supervising the contractor as well as personally inspecting (or where appropriate arranging an expert, such as an architect to inspect) the work after completion.[105]

While it seems that the tortious duty can be delegated, it is interesting to note that, if the action is brought in contract, the contractual liability to repair may be non-delegable.[106]

[102] Ibid [25]-[26] (Rolfe AJA), reiterating trial judge Bowden ADCJ's reasoning.

[103] Ibid [39].

[104] (2000) 176 ALR 137, 173. See also Gaudron J at 155. In *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 176 ALR 411, *Jones v Bartlett* was distinguished on the basis that the landlord was not a 'landlord that leased premises to a tenant and then played only a small role in the premises, as was the case in *Northern Sandblasting v Harris* and *Jones v Bartlett*'.

[105] Fleming, above n 11, 511. Fleming also raises the possibility of a non-delegable duty arising where dangerous work is carried out on the premises citing *Burnie Port Authority Ltd v General Jones* (1994) 179 CLR 520, 557.

[106] *Meyers v Easton* (1878) 4 VLR 283, 284, discussed by Morrison, above n 6, 4. In the context of occupier's liability and the non-delegability of the contractual warranty that premises are as safe as reasonable skill and care could make them, see *Alagic v Callbar Pty Ltd* (Unreported, Supreme Court of Northern Territory, Court of Appeal, No 15, Angel, Thomas and Riley JJ, 8 December 2000); discussed 'Casenotes – *Alagic v Callbar Pty Ltd*' (2001) 16(6) *Insurance Law Bulletin* 57; 'Duties to Contractual Entrants' (2001) 75 *Australian Law Journal* 227. See also *Watson v George* (1953) 89 CLR 409; *Maclenan v Segar* [1917] 2 KB 325. In view of the findings in *Northern Sandblasting v Harris* (1997) 188 CLR 313 that the contractual duties in the lease were not extended to persons other than the tenant, it is unlikely that, in the cases concerning the contractual liability of landlords the non-delegable duty will be held to extend to persons other than tenants.

Actionable Defects

The cases have concerned claims alleging negligence in relation to accidents arising out of a variety of circumstances, including faulty electrical and gas supply and equipment;[107] defective stairs;[108] defective balconies;[109] defective glass doors;[110] defective windows;[111] and slippery floors.[112]

Where the landlord is responsible for the defect, whether by designing, building or repairing, he or she will be liable. In such circumstances, liability arises not from the defendant's status as landlord, but from his or her own conduct in creating the risk.[113]

Some of the judgments in *Jones v Bartlett* introduce different language to describe defects that may give rise to liability.[114] For example, Gummow and Hayne JJ would limit the duty to 'dangerous defects', defining such defects as follows:

> A dangerous defect will, or may, cause injury to persons using the premises in an ordinary way. They are defects in the sense that they are more than dangerous; they are dangerous in a way not expected by their normal use.[115]

[107] *Parker v South Australian Housing Trust* [1985] 41 SASR 493; *Northern Sandblasting v Harris* ibid; *Assaf v Kostrevski* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Priestley JA and Shepherd AJA, 30 September 1998); *New South Wales v Watton* (Unreported, New South Wales Supreme Court of Appeal, Powell, Beazley JJA and Fitzgerald AJA, 7 December 1998); *Bond v Weeks* [1999] 1 Qd R 114.

[108] *Austin v Bonney* [1999] 1 Qd R 114; *Taber v NSW Land and Housing Corporation* (Unreported, New South Wales Supreme Court of Appeal, No 182, Heydon JA, Ipp and Rolfe AJJA, 19 June 2001); *Wilkinson v Law Courts Ltd* (Unreported New South Wales Supreme Court of Appeal, No 196, Meagher, Heydon JJA and Rolfe AJA, 25 June 2001); *Johnson v Johnson* (Unreported New South Wales Supreme Court of Appeal, Kirby P, Mahoney and Clarke JJA, 10 September 1991).

[109] *Short v Barrett* (Unreported, New South Wales Supreme Court of Appeal, Clarke, Meagher and Handley JJA, 5 October 1990); *King v Stewart* (Unreported, New South Wales Supreme Court of Appeal, No 85, Kirby P, Priestley JA, Sheller JA, 19 December 1994).

[110] *Commonwealth of Australia v O'Callaghan* (Unreported, Western Australia Supreme Court of Appeal, No 276, Kennedy, Wallwork and Steytler JJ, 7 September 2001); *Jones v Bartlett* (2000) 176 ALR 137.

[111] *Coventry v National Association of Queensland* (1893) 5 QLR 72.

[112] *David Jones v Bates* (Unreported, New South Wales Supreme Court of Appeal, No 233, Heydon JA, Davies AJA and Young CJ, 20 July 2001).

[113] See Fleming, above n 11, 521. In *Parker v South Australian Housing Trust* [1985] 41 SASR 493, Prior J contrasted the position of a builder landlord (at 519) with a bare landlord (at 520).

[114] See the discussion by Shanahan, above n 3, 14.

[115] (2000) 176 ALR 137, 175 [178]-[179].

In determining whether the premises were defective, Gleeson CJ considered whether the defendants been alerted to any 'unusual dangers'.[116]

Kirby J regarded the landlord's duty as limited to patent or obvious defects, namely 'defects of which they were on notice or of which (by appropriate inspection) they would reasonably become aware because they were obvious to a reasonable landlord or its agent'.[117]

The other majority Judges did not appear to introduce such qualifications. In particular, McHugh J in dissent specifically rejected such an approach. He said:

> The duty extends to dangerous defects but is not limited to them. To limit the duty to 'dangerous defects', 'ordinary use of the premises' or 'unusual dangers' would be to reintroduce into the law the categories expelled by this court in *Safeway Stores Pty Ltd v Zaluzna*.[118]

Although some judges have used differing terminology in relation to defects, it is hoped that this will not have the effect of focusing attention on the artificial classification of defects, rather than the essence of liability, which is whether reasonable steps have been taken to remedy defects of which the landlord is, or ought to be aware and that might foreseeably cause harm to those on the premises.[119]

Knowledge of Landlord

Where the landlord or his or her agent[120] has actual knowledge of a defect and he or she fails to rectify it within a reasonable time, the cases prior to *Jones v Bartlett* have consistently held that he or she will be in breach of duty.[121] In this context a reasonable time is 'such time

[116] Ibid 142 [22].

[117] Ibid 194 [252].

[118] Ibid 156 [100], discussed Shanahan, above n 3, 14.

[119] In another context Callinan J noted 'the anomalies and difficulties to which any attempted classification of chattels as either dangerous or nondangerous instrumentalities ... may give rise': *Scott v Davis* (2000) 175 ALR 217, 310.

[120] As to when a landlord is fixed with the knowledge of his or her agent see *Austin v Bonney* [1999] 1 Qd R 114, 4 (Thomas J); see also *Stewart v Rudland-Wood; Kim Messenger Real Estate Pty Ltd v Rudland-Wood* (Unreported, New South Wales Supreme Court of Appeal, Stein, Fitzgerald JJA and Hodgson CJ in Eq, 11 April 2000) [16] (Fitzgerald JA, with whom Stein JA and Hodgson CJ agreed).

[121] *Parker v South Australian Housing Trust* (1985) 41 SASR 493; *Austin v Bonney*, ibid 1 (Thomas J) (tenant fell while descending internal stairs and suffered injury. Although notice of defect received by agent, there was no evidence of failure to repair within a reasonable time. The defendant was therefore not liable in tort per Thomas and Helman JJ. Cf Macrossan CJ at 10, who considered the notice received by the agent of the landlord and the failure to repair). See also *Aassaf v*

as would enable a reasonable landlord to rectify defects'.[122] In *Parker v South Australian Housing Trust*, King CJ said:

> The extent of the duty owed by the lessor would no doubt depend upon the criteria determining the existence of the duty. If knowledge is necessary for the existence of the duty, the duty would be to take reasonable measures to remove the known danger or known potential danger. If knowledge is not necessary, the duty would extend to some degree of inspection or inquiry to ascertain whether the condition of the premises is free of danger.[123]

Knowledge may include constructive knowledge, that is, matters the landlord ought to have known. This will require evidence as to what a reasonable person in the position of the defendant landlord would have known. Within the context of owner-occupiers, in *Short v Barrett*,[124] Meagher JA (Clarke and Handley JJA concurring) overturned a finding by the trial judge that the railing was obviously defective. He said:

> It must also, I think, be conceded that if a person were minded to undertake the task of ascertaining whether the junctions were affixed by bolts or nail he could have discovered that fact; however, no occasion ever arose for essaying this task. In my view, a householder in the position of Dr or Mrs Short is not acting unreasonably in taking their house as they find it, assuming it to be perfectly safe unless and until they either know it is unsafe or else receive a warning that it may be unsafe. Here there was no warning. Indeed, so far from there being any warning of its lack of safety, Dr Short, acting on the assumption that the nails were secure, was in the habit of leaning over the very rail which collapsed for the purpose of cleaning the gutters below.[125]

This case can be contrasted with another case concerning the liability of an owner occupier to a guest, *Johnson v Johnson*,[126] where it was

Kostrevski (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Priestley JA and Shepherd AJA, 30 September 1998) (a tenant and guest were injured by electric shock after installing a temporary light in an outside toilet. The owner had knowledge of the defective light and did not rectify it. The landlord was held liable as it was foreseeable that a tenant might rectify the problem in a makeshift manner, as they did: Mason P at 11-8).

122 *Austin v Bonney*, ibid 3 (Thomas J).

123 (1985) 41 SASR 493, 517. As the landlord had actual knowledge of the defect and did not take reasonable measures to remove the danger it was in breach of its duty.

124 *Short v Barrett* (Unreported, New South Wales Supreme Court of Appeal, Clarke, Meagher and Handley JJA, 5 October 1990) (plaintiff sued in respect of death of husband who fell from a balcony at the defendant's premises).

125 Ibid 8.

126 (Unreported New South Wales Supreme Court of Appeal, Kirby P, Mahoney and Clarke JJA, 10 September 1991).

found at trial that the defendants had ample warnings of the structural instability of the staircase so as to prompt them to repair.[127] *Short v Barrett* was distinguished on the basis that in this case 'there were other objective signs of instability proved in the evidence'.[128] There was dry rot visibly evident on the staircase and numerous other indicators of instability.

Similarly, in *Coventry v National Association of Queensland*,[129] a guest of the licensee of a hall was injured when a window on the premises fell in. The Court held that, as the defendants could have discovered the defect by reasonable diligence and prevented the fall, they were liable in negligence. The opening of a window on a hot night could not be regarded as an 'unfair user'.[130]

It seems that this position remains unaltered after *Jones v Bartlett*.[131] Gummow and Hayne JJ considered that the landlord's duty 'requires a landlord not to let premises that suffer defects which the landlord knows or ought to know make the premises unsafe for the use to which they are to be put'.[132]

Ordinarily No Affirmative Duty To Inspect

It appears that in the absence of some special contractual arrangement, notice of defect[133] or a legislative requirement,[134] ordinarily the landlord does not have an affirmative duty to inspect, although such a duty may arise in the special circumstances of the case.[135]

[127] Ibid 12, Kirby P set out the trial judge's findings.

[128] Ibid 20 (Kirby P).

[129] (1893) 5 QLJ 72.

[130] Ibid 75.

[131] (2000)176 ALR 137.

[132] Ibid 174. See also Kirby J who formulated the duty by reference to patent defects (at 189). See also McHugh J (in dissent) at 156:

> The relevant circumstances which generate the standard of care owed by the landlord include the following circumstances of which the landlord knew or ought reasonably to have known: the right/capacity of the landlord to inspect the premises; the age and condition of the premises; the ages and physical and mental capacities of persons who will use them; the use to which they will be put; the nature and degree of the risk of injury; and the cost or inconvenience of eliminating the risk.

[133] See the discussion by Morrison, above n 6, 12.

[134] See for example *New South Wales v Watton* (Unreported, New South Wales Supreme Court of Appeal, Powell, Beazley JJA and Fitzgerald AJA, 7 December 1998).

[135] See also P Butt, 'Landlord's Duty of Care to Tenant' (2001) 75 *Australian Law Journal* 74.

Cases prior to *Jones v Bartlett*[136] have held that the landlord is not fixed with constructive knowledge of defects discoverable only by inspection where there was no evidence of matters that would put the landlord on notice that such inspection might be necessary.

In *Watson v George*,[137] the plaintiff's husband was killed as a result of gas poisoning, caused by gas escaping from a defective heater, while he was a paying guest at the defendant's boarding house. The condition of the heater would have been apparent to an expert, but not to an ordinary person. Though the heater had been in use for more than 20 years, and was an outdated model, it was safe when in good repair, and a large number of such heaters were still in use.

The trial judge held that the defendant impliedly warranted to paying guests that reasonable care had been taken to make and keep the premises reasonably fit for the purposes for which they are to be used. In this case there was no breach, despite the fact that the heater had not been inspected at regular intervals, as there was no evidence that it was usual practice to do so, nor was there any reason for the defendant to believe that the heater required inspection. As there was no evidence of negligence on the part of anyone, an appeal to the High Court was dismissed.

In a landlord tenant case, *Aslanidis v Atsidakos*,[138] where the relevant lease imposed the primary obligation to repair on the tenant, not the landlord, Meagher JA, with whom Hope JA agreed, said:

> Unless one were to embrace the proposition that every landlord has an obligation to make a thorough going inspection of the demised premises immediately before the commencement of a tenancy, I do not see any basis on which one could sensibly find that the defendants ought reasonably to have known.[139]

Within an owner-occupier context, in *King v Stewart*,[140] the plaintiff fell from a balcony while a guest at a 21st birthday party and became a paraplegic. The plaintiff's appeal was dismissed as there was no breach of the duty of the owner-occupier to take reasonable care to avoid foreseeable risks. Absent an indication of any prior instability or fault, there was no obligation on the owner-occupier to engage an ex-

[136] (2000) 176 ALR 137.

[137] (1953) 89 CLR 409.

[138] (Unreported, New South Wales Supreme Court of Appeal Supreme Court of New South Wales, Hope, Priestley and Meagher JJA, 13 February 1989).

[139] Ibid 3.

[140] (1994) 85 LGERA 384, New South Wales Court of Appeal.

pert to examine the balcony.[141] Sheller JA, with whom Priestley JA agreed, noted that 'this court has hitherto declined to impose any tortious duty on occupiers to inspect their premises for the purposes of discovering unknown or unsuspected defects'.[142]

The terms of the tenancy agreement may impose a duty on landlords to inspect the premises prior to the tenancy. In addition, an obligation to inspect the premises prior to leasing them to the tenant may arise through statute. In *New South Wales v Watton*,[143] the plaintiff suffered an electric shock due to faulty electrical wiring while a tenant of the defendant's premises. The trial judge held that the landlord was in breach of duty arising from failure to inspect. On appeal it was held that, although the decision in *Northern Sandblasting v Harris* did not impose an obligation on landlords to inspect, such an obligation could arise in the circumstances of the case.[144] In this case, a duty to inspect was implied from the requirement for the landlords to complete and provide the tenant with a condition report at the start of the tenancy pursuant to the regulations under the *Residential Tenancy Act 1987* (NSW).[145] As the inspection was negligently carried out, the landlord was liable to the tenant in negligence.[146]

It is suggested that the courts will not infer a duty to inspect from general statements in property law legislation such as those contained in the Queensland legislation.[147]

In *Jones v Bartlett*, Gummow and Hayne JJ made it clear that it is not normally necessary to institute a system of regular inspection for defects during the tenancy.[148] Nor is it necessary to engage experts in fields such as electrical wiring and glass fabrication and installations,

[141] Ibid 407 (Sheller JA); 388 (Kirby P).

[142] Ibid 407 citing *Stannus v Graham* (1994) Aust Torts Rep ¶81-293, 61-564.

[143] (Unreported, Powell, New South Wales Supreme Court of Appeal Beazley JJA and Fitzgerald AJA, 7 December 1998); discussed M Redfern, '*Northern Sandblasting* Once Again' (1999) 7 *Australian Property Law Journal* 16; T Wilson, 'Landlord's Duty after *Northern Sandblasting v Harris:* How the Decision Is Being Interpreted' (1999) 13 *Australian Property Law Bulletin* 73; Butt, above n 135, 74.

[144] *New South Wales v Watton*, ibid 7 (Beazley JA); 1 (Fitzgerald AJA). Powell JA agreed with both Beazley JA and Fitzgerald AJA.

[145] Ibid 8 (Beazley JA).

[146] Ibid 2, Fitzgerald AJA considered that breach of the obligation to inspect with reasonable care was evidence of negligence.

[147] *Northern Sandblasting v Harris* (1997) 188 CLR 313; discussed Wilson, above n 143, 79.

[148] (2000) 176 ALR 137, 176 [183].

where risks of defects could be seen as a possibility.[149] The imposition of higher standards, including obligations in relation to specific matters such as electricity and gas, or classes of premises, may, of course, be imposed by legislation.[150]

Their Honours considered that the appropriate standard is that accepted in *Watson v George*,[151] namely that, where the existence of a dangerous defect was merely a possibility, the landlord was only required to take those steps 'that would be taken in the course of "ordinary reasonable human conduct"'.[152] This is not an exercise in hindsight, but depends on:[153]

- whether an ordinary person in the landlord's position would or should have known that there was any risk;
- whether that person would or should have known of steps that could be taken in response to that risk;
- the reasonableness of taking such steps.

What will constitute the taking of reasonable steps depends on all the circumstances of the case.[154] The standard is one of reasonableness, not strict liability.[155] Relevant factors might include:

- the terms of the lease, including the rent payable;

[149] Ibid. See also Kirby J, who considered that, in the case of latent defects, the landlord's duty to take reasonable care to avoid a foreseeable risk of injury did not require a detailed inspection of every possible source of danger by experts or otherwise. Instead, the duty was limited to taking reasonable care to avoid foreseeable risk of injury from defects of which the landlord was 'on notice or of which (by appropriate inspection) they would reasonably become aware because they were obvious to a reasonable landlord or its agent' (at 194 [252]). Cf McHugh J in dissent, who considered that in determining what the landlord ought to have known, as the exercise of reasonable care will often require expert inspection, so the knowledge of experts may be relevant. Whether expert inspection is needed depends on the age of the premises, known or suspected risks, and the time since previous inspections. In the case of a new letting, McHugh J considered that reasonable care would 'ordinarily require an inspection by the landlord or an agent immediately before the commencement of the letting'. In addition it may require 'inspection by a person with building qualifications who has the capacity to assess the safety of the premises' depending on the age and condition of the premises and the time since the last inspection (at 157 [102]).

[150] Ibid 177 [187].

[151] (1953) 89 CLR 409.

[152] Ibid 416 and 427.

[153] (2000) 176 ALR 137, 177 [186].

[154] Ibid 174 [174] (per Gummow and Hayne JJ) In particular: 'What is reasonable for premises let for the purpose of residential housing may be less demanding than for premises let for such purposes as the running of a school, or the conduct of a hotel or club serving liquor'.

[155] Ibid 178 [193].

- the obligations of the parties and any limitations on use of the premises;
- the terms of any applicable statutes, such as residential tenancy statutes.[156]

Similarly, Gleeson CJ did not impose an affirmative duty to inspect, but considered that whether it is reasonable to require a landlord to inspect premises before a tenancy is a question of fact in the circumstances of the case.[157]

Kirby J also considered that the landlord's duty to take reasonable care to avoid a foreseeable risk of injury did not require a detailed inspection of every possible source of danger by experts or otherwise. In his Honour's view, whether an inspection is required is determined by the nature of the defect and the knowledge of the landlord. In the case of patent defects, a landlord owes a duty of care not solely under the contract of lease and not only to tenants but also to third parties (such as permitted occupants and visitors) injured as a result of a patent defect in the tenanted premises. A landlord may discharge such a duty by undertaking an inspection of the premises prior to each lease or renewal of a lease, by responding reasonably to defects drawn to notice, and by ensuring that repairs are made that such inspection or notice discloses to be reasonably necessary. A landlord may ordinarily discharge its duty by delegating such inspection and repair to a competent person.[158] However, in the case of latent defects, the landlord's duty to take reasonable care to avoid a foreseeable risk of injury did not require a detailed inspection of every possible source of danger by experts or otherwise. Instead, the duty was limited to taking reasonable care to avoid foreseeable risk of injury from defects of which the landlord was 'on notice or of which (by appropriate inspection) they would reasonably become aware because they were obvious to a reasonable landlord or its agent'.[159]

McHugh J (in dissent) considered that in determining what the landlord ought to have known, the exercise of reasonable care would often require expert inspection, so the knowledge of experts may be relevant.[160] Whether expert inspection is needed depends on the age of the premises, known or suspected risks, and the time since previous

[156] Ibid 174 [174].
[157] Ibid 149 [58].
[158] Ibid 189 [237].
[159] Ibid 194 [252].
[160] Ibid 157 [102].

inspections.[161] In the case of a new letting, his Honour considered that reasonable care requires that the premises 'are reasonably fit for habitation by those who will reside in the premises'.[162] His Honour considered that not only would that 'ordinarily require an inspection by the landlord or an agent immediately before the commencement of the letting'.[163] In addition it may require 'inspection by a person with building qualifications who has the capacity to assess the safety of the premises' depending on the age and condition of the premises and the time since the last inspection.[164]

The Relevance of Safety Standards

In *Irvine v Wesley College*,[165] a student fell through a school window and suffered injury to his arms. The glass did not meet the Australian Safety Standards at the time of construction nor was the glass made compliant with the upgraded safety standard, which had been introduced a few years after construction. The school was held to be in breach of its duty.

The majority in *Jones v Bartlett* considered that a landlord was not to be regarded as having failed to display reasonable care in letting a house with a glass door that was constructed in accordance with the then current building requirements, but was inadequate when compared against more recently adopted standards.

This can be contrasted with the approach of McHugh J (in dissent), who considered that the Australian Safety Standards 'are a guide to, but they cannot dictate, the standard of care required in the circumstances of individual cases'.[166] Furthermore, his Honour considered that what is reasonable is 'influenced by current community standards'.[167] He said:

> Not so very long ago, for example, householders, landlords, and even experts did not appreciate the harm that could be caused by asbestos fibres,

[161] Ibid 157 [103].

[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] (1996) 15 SR(WA) 342. See also *Trustees of Christian Brothers v Cardone* (1995) 130 ALR 345. Both cases are discussed in Wilson, above n 143, 77.

[166] (2000) 176 ALR 137, 159.

[167] Ibid 157 citing *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301. In addition he noted that findings of fact in cases such as *Watson v George* (1953) 89 CLR 409 provide no guidance as to the determination of what is reasonable at present.

> a material commonly used as insulation in walls and ceilings. Nor were they aware of the dangers inherent in using lead based paints.[168]

Subsequent cases have relied upon *Jones v Bartlett* as authority for the proposition that premises are to be judged by the safety standards in existence at the date of construction and that safety standards are not to be retrospectively applied.[169]

In *Commonwealth of Australia v O'Callaghan*,[170] the plaintiff pushed his hands through the glass doors at the Commonwealth Employment Service ('CES') while there to claim social security benefits. He suffered injuries and sued the defendant in negligence as occupier of the premises.

The plaintiff was successful at trial, subject to a finding of 50% contributory negligence. The defendant appealed and the plaintiff's claim was dismissed. Kennedy J considered that the defendant was not in breach, noting that there is no such thing as absolute safety.[171] In response to an argument that the glass should have been replaced to comply with Australian Standards, he said:

> Acknowledging that the Australian standards do not preempt the common law, there is no evidence that the glass doors did not comply with the standard when the building was constructed.[172]

168 Ibid 158.

169 *Commonwealth of Australia v O'Callaghan* (Unreported, Western Australia Supreme Court, No 276, Kennedy, Wallwork and Steytler JJ, 7 September 2001) [19] (Kennedy J). See also *Barlow v South East Water Ltd* [2001] VCAT 659 (Unreported, 31 March 2001) [59]:

> We think it wholly unrealistic to regard a householder as under some duty as it were to 'update' his or her house to the latest standard on these and other building matters at least or even to be aware of them unless the relevant authority makes some public policy statement requiring 'retro-fitting' of the newer equipment.

170 Ibid.

171 Ibid, citing the words of Gleeson CJ in *Jones v Bartlett* (2000) 176 ALR 137, 142; Wallwork and Steytler JJ agreed.

172 *Commonwealth v O'Callaghan*, ibid 19. See also *Jones v Bartlett* (2000) 176 ALR 137; *Barlow v South East Water Ltd* [2001] VCAT 659 (Unreported, 31 March 2001) [59]. In any event, his Honour considered, at [19], that the glass broke as a result of

> the deliberate act of the respondent who, in the words of the trial judge, was determined to make a point by banging his way out of the doors. It was not the case that the cause of the breakage was some deficiency in the strength of the glass.

Individual Responsibility

In *Jones v Bartlett* Gleeson CJ said:

> It is interesting, and not without relevance, to speculate about how many objects in and around an ordinary dwelling house would constitute a potential hazard to a person who behaved as carelessly as the appellant. [173]

In the cases decided since *Jones v Bartlett*, the courts are not only requiring that defendant landlords or occupiers exercise reasonable care to prevent injury to persons on the premises, but are also expecting plaintiffs to take responsibility for their own actions and reasonable care for their own safety, particularly where the risks of injury are obvious.[174] As explained by Stapleton,[175] the coherence of tort law depends upon 'the notions of deterrence and individual responsibility'.[176]

This expectation of individual responsibility has manifested itself in findings as to what reasonable steps are required to be taken by a landlord or occupier to discharge the duty as well as in findings as to causation. The result has been that in recent cases plaintiffs have not generally been successful. [177]

In *Taber v NSW Land and Housing Corporation*,[178] the plaintiff was the tenant of a house owned by the defendant landlord. She fractured her ankle when she fell on a set of four steps at the house. The plaintiff claimed that the defendant was negligent by failing to provide safe steps that complied with the building code requirements of consistency of depth. Additionally, the plaintiff claimed the defendant was negligent by failing to provide a handrail (though the failure to install

[173] (2000) 176 ALR 137, 142-3, [23]-[25].

[174] *Taber v NSW Land and Housing Corporation* (Unreported, New South Wales Supreme Court of Appeal, No 182, Heydon JA, Ipp and Rolfe AJJA, 19 June 2001); *Wilkinson v Law Courts Ltd* (Unreported, New South Wales Supreme Court of Appeal, No 196, Meagher, Heydon JJA and Rolfe AJA, 25 June 2001); *David Jones v Bates* (Unreported, New South Wales Supreme Court, No 233, Heydon JA, Davies AJA and Young CJ, 20 July 2001); *Commonwealth of Australia v O'Callaghan* (Unreported, Western Australia Supreme Court, No 276, Kennedy, Wallwork and Steytler JJ, 7 September 2001).

[175] J Stapleton, 'Duty of Care: Peripheral parties and alternative opportunities for deterrence' (1995) 111 *Law Quarterly Review* 301, 317.

[176] Cited by Hayne J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 176 ALR 411, 440 [115].

[177] See for example *Wilkinson v Law Courts Ltd* (Unreported, New South Wales Supreme Court of Appeal, No 196, Meagher, Heydon JJA and Rolfe AJA, 25 June 2001).

[178] (Unreported, New South Wales Supreme Court of Appeal, No 182, Heydon JA, Ipp and Rolfe AJJA, 19 June 2001).

a handrail did not breach any code). A handrail had previously been in place on the steps, the plaintiff had requested that one be installed and the landlord knew of the plaintiff's medical condition which made it difficult to climb steps. The defendant replied that the plaintiff fell because her foot was not properly positioned on the step, and that a handrail would have made no difference.

The trial judge found that the respondent was not in breach because of the failure to install a handrail, and that the accident did not occur because of the absence of a handrail.[179] The risk was ordinary and obvious.

The plaintiff appealed, claiming that the trial judge erred in finding that there was no breach. The respondent submitted that the failure to install a handrail did not amount to a breach and that even if there had been a breach by providing stairs of uneven depth, this breach did not cause the appellant's injuries.

The plaintiff's appeal was dismissed with costs. Rolfe AJA[180] focused on his finding that the plaintiff had been careless and posed the question as to the extent to which the landlord was required to go to make 'these four essentially unremarkable steps "safe"'. He said:

> Why, one may ask rhetorically, was it not necessary to make them safe to have a handrail on each side; reflective tape at the edge of the treads to indicate to a person looking down with greater precision their position; a surface, which would prevent a person slipping in wet weather; and lighting to give a more full view of the steps at night? The idea that one handrail was needed at small expense does not in any way answer the extent to which the landlord was required to go in seeking to prevent injury from any cause, particularly careless conduct on the part of the appellant ... .[181]

He concluded that, in all the circumstances, the respondent did not breach its duty to the appellant by not installing a handrail.

Though it was not necessary to deal with causation due to the finding of no duty, his Honour considered that it was the carelessness of the appellant rather than the absence of a handrail that caused the acci-

[179] Ibid [32] (Rolfe AJA, reiterating Bowden ADCJ judgement).

[180] With whom Heydon JA and Ipp AJA agreed.

[181] *Taber v NSW Land and Housing Corporation* (Unreported, New South Wales Supreme Court of Appeal, No 182, Heydon JA, Ipp and Rolfe AJJA, 19 June 2001) [60].

dent.[182] After finding that the plaintiff had been 'very careless'[183] by not stepping correctly, his Honour said:

> On this analysis, the absence of the handrail was not causative of any injury. This was a case where, in my opinion, on the assumption that there was a breach of duty which I do not accept, that breach cannot be treated as causative of the injury, merely because there was injury. Rather the carelessness of the appellant and the conceded limited effectiveness of the handrail demonstrate 'sufficient reason to the contrary': *Chappel v Hart* (1988) 195 CLR 332 per Gaudron J at p239; per Gummow J at p255-p256 and Kirby J at p269.[184]

Perhaps the best example is the plaintiff in *David Jones v Bates*,[185] who slipped while shopping in David Jones wearing the 'slipperiest shoes she had ever worn'. After noting 'that the occupier of the premises can reasonably assume that people will take reasonable care for their own safety',[186] Young CJ cited[187] *Ghantous v Hawkesbury City Council*,[188] and in particular the statement by Callinan J, who said:

> The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along.[189]

Excluding or Limiting Liability

In *Northern Sandblasting v Harris*,[190] Gaudron J said:

> It may be, however, that, in a given case, the lease limits or excludes recovery by the tenant for breach of that duty. At least that is so unless some statutory provision renders a stipulation of that kind void or of no effect.[191]

[182] Ibid [74].
[183] Ibid [60].
[184] Ibid [74].
[185] (Unreported, New South Wales Supreme Court, No 233, Heydon JA, Davies AJA and Young CJ, 20 July 2001).
[186] Ibid [58].
[187] Ibid [58]-[59].
[188] (2001) 180 ALR 145.
[189] Ibid 240 [355].
[190] (1997) 188 CLR 313.
[191] Ibid 358 and see the cases referred to at fn 157.

While it seems clear that, subject to legislative provisions,[192] liability to the tenant can be limited by contract, it is not certain whether liability to persons other than tenants can be so excluded.

In *Aassaf v Kostrevski*,[193] Mason P considered that a contractual exclusion clause could only affect the tenant and not third parties such as guests.[194] This is because the ordinary rules as to privity of contract indicate that persons other than the tenant are usually not bound by clauses in a contract to which they are not a party.[195]

It may be that liability to persons other than tenants can be excluded or limited by the landlord either orally or by a written notice. However, as noted by Trindade and Cane,[196] the basis for attaching conditions upon entry is the power to exclude persons from the land and as such power is usually vested in the tenant pursuant to the lease, unless the landlord expressly reserves such power, it may be that this method of excluding liability may not be effective in landlord liability cases as opposed to owner occupier cases. In any event, such notices will generally only be effective if the visitor has either actual or constructive notice (due to steps taken by the landlord to bring the notices to their attention) of the notices at or before entry onto the land.[197]

It is open to a landlord to insert a clause in the lease whereby the tenant is under an obligation to indemnify him or her for any liability occasioned due to loss or damage suffered by persons lawfully on the premises whilst the tenant is in occupation.

Alternative Basis of Liability

In addition to liability in negligence, the landlord may be subject to statutory and contractual liability. The landlord may also be vicariously liable for the negligence of his or her agent.

[192] In relation to the occupiers liability legislation see Trindade and Cane, above n 11, 421.

[193] (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Priestley JA and Shepherd AJA, 30 September 1998).

[194] Ibid 9. See also *Modbury Triangle Shopping Centre v Anzil* (2000) 176 ALR 411, 425 [62] (Kirby J), where his Honour notes that it was accepted that an exclusion clause in the contract between the landlord and tenant could not bind the plaintiff who was an employee of the tenant.

[195] See the discussion in the context of occupiers in Trindade and Cane, above n 11, 420 and note the authors' suggestion that there is some authority to the contrary.

[196] Ibid.

[197] Ibid.

Though the common law of Australia is uniform, the residential tenancies and occupiers liability statutes are not. Fortunately, in relation to liability under the legislation in Western Australia, Queensland, and New South Wales respectively, *Bartlett v Jones*,[198] *Northern Sandblasting v Harris*[199] and *State of New South Wales v Watton*[200] provide some guidance.[201]

Landlords have been held to be vicariously liable for the negligence of their agents. In *Stewart v Rudland-Wood; Kim Messenger Real Estate Pty Ltd v Rudland-Wood*,[202] a brick balustrade on the first floor landing collapsed and the plaintiff, who leased the premises from the defendant landlord, fell and was injured. The plaintiff had complained about the state of the wall to the defendant agent.[203] The District Court gave judgment for the plaintiff against the owner and the agent, and the agent was ordered to indemnify the owner.

An appeal by the defendants was dismissed. The owner was vicariously liable for the agent's negligence,[204] subject to the indemnity from the agent in the agency contract. Fitzgerald J said:

> The owner argued that he is not liable to the plaintiff even if she did inform the agent that the wall was unsafe in May or June 1991 because, it was submitted, the owner was not vicariously liable for the agent's negligence. However, the owner's address for the purpose of the Rental Tenancy agreement with the plaintiff was care of the agent. When the plaintiff informed the agent in May 1991 that the wall was unsafe, that

198 (2000) 176 ALR 137.

199 (1997) 188 CLR 313.

200 (Unreported, New South Wales Supreme Court of Appeal, Powell, Beazley JJA and Fitzgerald AJA, 7 December 1998).

201 Discussed, Redfern and Cassidy, above n 3.

202 (Unreported, New South Wales Supreme Court of Appeal, Stein, Fitzgerald JJA and Hodgson CJ in EQ, 11 April 2000) [16] (Fitzgerald JA, with whom Stein J and Hodgson CJ agreed).

203 In relation to the personal liability of agents see *Aassaf v Kostrevski* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Priestley JA and Shepherd AJA, 30 September 1998) 11: 'The agent's duty was different to that of the owners. At its highest it involved careful advice'.

204 *Stewart v Rudland-Wood; Kim Messenger Real Estate Pty Ltd v Rudland Wood* (Unreported, New South Wales Supreme Court of Appeal, Stein, Fitzgerald JJA and Hodgson CJ in Eq, 11 April 2000). For an example of vicarious liability in an owner-occupier context, see *Foster v Grace*, (Unreported, New South Wales Supreme Court, 8 December 1992) where a prospective tenant was injured when sent to inspect the premises. Building work was being conducted on the premises and the floor gave way. The plaintiff succeeded against the agent who sent her there, the landlord who was vicariously liable for the agent's negligence and the builder who let her in.

> constituted notice to the owner, and his liability to the plaintiff is based on his own failure to remedy the defect, not the agent's failure to do so or to inform him of the unsafe condition of the wall.[205]

Conclusion

Consistent with the general law of negligence, it now appears clear that the duty owed by a landlord is to exercise reasonable care in the circumstances to avoid foreseeable risk of injury to tenants, members of the tenants' households and other third parties who are lawfully upon the premises.[206]

Prima facie, the duty is capable of being discharged by delegation to suitably qualified independent contractors, unless the circumstances of the particular case justify the imposition of a non-delegable duty, such as where dangerous substances or activities are conducted on the premises at the landlord's direction and control.

Although some judges have used terminology such as 'dangerous defects', 'unusual dangers', 'patent or obvious defects', it is hoped that this will not have the effect of focusing attention on artificial classifications rather than the essence of liability, which is whether reasonable steps have been taken to remedy defects of which the landlord or his or her agent was aware or ought to have been aware. In the absence of some special contractual arrangement, notice of defect or a legislative requirement, ordinarily the landlord will not have an affirmative duty to inspect for defects either personally or by experts, although such a duty may arise in the special circumstances of the case.

The duty owed by landlords is not strict; it is a duty to exercise reasonable care in the circumstances only. Premises are to be judged by the safety standards in existence at the date of construction and safety standards are not to be retrospectively applied.

As to practical measures which landlords can take to avoid liability, it is suggested that the judgment of Kirby J provides useful practical guidance:

[205] *Stewart v Rudland-Wood*, ibid [16].

[206] See also Shanahan, above n 3, 14. Callinan J, however, was not convinced that landlords owed duties of care concluding that 'if any duty were owed, a matter of which I am far from convinced, I would define it as no more than a duty to provide, at the inception only of the tenancy, habitable premises.': *Jones v Bartlett* (2000) 176 ALR 137, 203 [289].

> In the case of patent defects, a landlord owes a duty of care not solely under the contract of lease and not only to tenants but also to third parties (such as permitted occupants and visitors) injured as a result of a patent defect in the tenanted premises. A landlord may discharge such a duty of care by undertaking an inspection of the premises prior to each lease or renewal of a lease, by responding reasonably to defects drawn to notice, and by ensuring that any repairs are made which such inspection or notice discloses to be reasonably necessary. A landlord may ordinarily discharge its duty by delegating such inspection and repair to a competent person.[207]

However, in the case of latent defects, the landlord's duty to take reasonable care to avoid a foreseeable risk of injury does not require a detailed inspection of every possible source of danger by experts or otherwise. Instead, the duty is limited to taking reasonable care to avoid foreseeable risk of injury from defects of which the landlord was 'on notice or of which (by appropriate inspection) they would reasonably become aware because they were obvious to a reasonable landlord or its agent'.[208]

It may be that it is possible for landlords to exclude or limit liability by contract, at least to tenants, though possibly not to other persons. Further, it may be possible to exclude or limit liability by placing notifications in or about the premises. Landlords can also require that tenants indemnify them in respect of liability arising out of loss or damage to persons lawfully on the premises while the tenant is in occupation.

Occupier's liability and residential tenancy legislation in particular jurisdictions may impact upon the common law liability of landlords. Therefore, in addition to liability in negligence, the landlord may be subject to statutory and contractual liability. The landlord may also be vicariously liable for the negligence of his or her agent.

In *Scott v Davis*,[209] Gummow J noted that 'Judge Posner described the present as "an age when tort law is dominated by the search for the deep pocket"'.[210] In balancing the competing policy considerations of compensating deserving plaintiffs, yet not imposing unreasonable re-

[207] *Jones v Bartlett*, ibid 189 para [237].

[208] Ibid 194 [252].

[209] (2000) 175 ALR 217.

[210] R Posner, *Economic Analysis of the Law* (5th ed, 1998) 205. Similarly in *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 Callinan J noted at 297 that the process of shifting losses to insurers on the basis of economic efficiency may tend to lead to distortions in the law of tortious liability and the assessment of damages, and to invite the intrusion of the courts into quasi-legislative activity.

straints on conduct, the courts are requiring not only that defendant landlords or occupiers exercise reasonable care to prevent injury to persons on the premises, but are also expecting plaintiffs to take responsibility for their own actions and reasonable care for their own safety, particularly where the risks of injury are obvious.