JONES V BARTLETT: LANDLORDS' LIABILITY TO TENANTS AND MEMBERS OF THEIR HOUSEHOLD IN NEGLIGENCE

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I INTRODUCTION

According to the latest available statistics, in 1997–98, of the total of seven million Australian households, two million were renting their dwelling from a State housing authority or private landlords.[1] Therefore, the decision on the scope of landlords' liability to tenants, members of their households, and guests in the right of the tenant handed down by the High Court of Australia in November 2000 was not only of legal, but also of social and economic significance. This note will discuss the *Jones v Bartlett* case[2] in the context of the traditional common law approach to landlords' liability and the ground-breaking, if flawed, case of *Northern Sandblasting Pty Ltd v Harris*.[3]

II THE ORIGINAL COMMON LAW POSITION

Under the law of property, the leasing of land and/or premises to a tenant is regarded as being in the nature of a sale of land for a term.[4] The contractual nature of lease has had important consequences with regard to tortious liability. Contractu-

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[1] Australian Bureau of Statistics: http://www.abs.gov.au/Ausstats/ABS%40.nsf/94713ad445ff1425ca25682000192af2/89f01825f733d7f1ca2568a900154a3a!OpenDocument current on 12 January 2001.

[2] *Jones v Bartlett* (2000) 176 ALR 137.

[3] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

[4] When a landlord leases land to a tenant, the lessee acquires an interest in the land for the term of the lease. As a general rule, the lessor surrenders both the possession and the control of the land to the lessee, retaining only a revisionary interest.
W. Page Keeton *et al.* (eds), *Prosser and Keeton on Torts* (5th ed, 1984) [434].

ally, there was no implied covenant by landlords that land, or unfurnished residential premises let by them, were fit for habitation.[5] Landlords were not liable for injuries which arose from the defective state of land or premises let in a dangerous or dilapidated condition, unless they acted fraudulently, or an express term of contract prohibited such lease. Lessees came within the contractual doctrine of *caveat emptor*, or '*caveat lessee*'[6] which meant that the tenant was expected to inspect the land before agreeing to the lease, or be left to take it as he found it. The privity rule confined liability to the parties of the lease agreement. In 1863 Erle CJ, in *Robbins v Jones*, summed up the law 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 tumble-down house.[7]

This dictum was cited in 1906 by Lord Macnaghten in *Cavalier v Pope*,[8] where a landlord of a dilapidated house contracted with the tenant to repair a defective floor, but failed to do so.[9] The tenant's wife was injured as a consequence. The House of Lords held that the landlord was not liable in contract because the wife was not a party to the lease. There was no liability in tort because the law did not recognise duty of care with respect to leasing of a ruinous house.

III EXPANSION OF LIABILITY AT COMMON LAW

The decision in *Donoghue v Stevenson*,[10] which introduced a general duty of care based on the notion of reasonable foreseeability of risk within a relationship of legal neighbourhood,[11] had little effect on the operation of the *Cavalier v Pope* doctrine.[12] It was only in 1984 that the English Court of Appeal determined in *Rimmer v Liverpool City Council*,[13] that a landlord who is not only a landlord, but who also has designed or built the defective premises, owes a duty of care to persons who might reasonably be expected to be affected by the condition of the premises. The *Rim-*

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[5] *Francis v Cockrell* (1870) V QB 184; *Maclenan v Segar* (1917) 2 KB 325; *Watson v George* (1953) 89 CLR 409.

[6] *Cheater v Cater* [1918] 1 KB 247, 252–56.

[7] *Robbins v Jones* (1863) 15 CB (NS) 221, 240; [1861–73] All ER Rep 544, 547.

[8] *Cavalier v Pope* [1906] AC 428, 430.

[9] When *Cavalier v Pope* was before the Court of Appeal, Mathew LJ, in a dissenting judgment, held that the fraudulently made representation by the landlord could provide the tenant's wife with an action for misrepresentation.

[10] *Donoghue v Stevenson* [1932] AC 562.

[11] To establish a relationship of legal neighbourhood, the plaintiff must show that it was reasonably foreseeable that the defendant's careless conduct may result in damage to the plaintiff's person or property. The plaintiff must also establish that she or he was foreseeable as a person or class and the risk was latent, i.e., not readily discoverable.

[12] *Bottomley v Bannister* [1932] 1 KB 458; *Otto v Bolton* [1936] 2 KB 46.

[13] *Rimmer v Liverpool City Council* [1985] QB 1; [1984] 1 All ER 930 (hereinafter '*Rimmer*').

mer case, however, did not overrule *Cavalier v Pope*, but merely provided an exception to it in relation to landlord-builders.[14]

Both in England[15] and Australia statutory provisions were enacted to soften the harshness of the *Pope v Cavalier* rule. In general, these provisions are expressed in contract law and require the landlord to put and keep residential premises in clean condition and good repair, implying a warranty of habitability.[16] Since warranties are an aspect of contract, however, only parties to the tenancy agreement can sue under the respective *Residential Tenancies Acts*,[17] though breach of these provisions may be evidence of negligence.

The Australian Capital Territory is the only jurisdiction where the rule in *Cavalier v Pope* was abolished outright by s 29 of the *Law Reform (Miscellaneous Provisions) Act 1955* (ACT).[18] Western Australia, Victoria, and South Australia have also enacted provisions limiting landlords' immunity from liability in tort for defective premises.[19] The relevant provisions contain codified criteria for determining whether the duty of care has been discharged.[20] However, the statutory regime is confined to circumstances where the landlord has actual control over the premises before commencement of the tenancy.

IV THE DECISION IN *NORTHERN SANDBLASTING PTY LTD V HARRIS*

In the light of its history, the 1997 decision of the High Court in *Northern Sandblasting Pty Ltd v Harris*,[21] which held that the rule in *Cavalier v Pope* should no longer be followed in Australia, marked an important landmark for the majority of Australian jurisdictions. The case involved a negligence action by Nicole Harris (by her next friend) against the landlord, Northern Sandblasting Pty Ltd.[22] Nicole alleged that due to the landlord's conduct she suffered severe brain damage following electrocution, which left her, at the age of nine, in a vegetative state. It was found that her injuries were caused by two concurrent faults. The first fault in-

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[14] Pope neither built nor designed the floor of the house through which Mrs Cavalier fell.

[15] The *Defective Premises Act 1972* (UK) provides a limited statutory protection for those in occupation of defective premises by imposing a statutory duty on the landlord to repair the premises. See *McNerny v London Borough of Lambeth* [1989] 19 EG 77, 21 HLR 188, 193 (Dillon LJ).

[16] *Residential Tenancies Act 1987* (WA) s 42(1); *Residential Tenancies Act 1994* (Qld) s 103; *Residential Tenancies Act 1995* (SA) s 65 and s 68; *Residential Tenancies Act 1997* (ACT) s 67 and 68; *Residential Tenancies Act 1997* (Vic) s 65 and s 68; *Tenancy Act 1996* (NT) s 55(1).

[17] See, e.g., *Jones v Bartlett* (2000) 176 ALR 137, 144 (Gleeson CJ).

[18] æRule in *Cavalier v Pope* abolished. A lessor of premises is not exempt from owing a duty of care to persons on those premises by reason only that the lessor is not the occupier of those premises."

[19] *Occupiers' Liability Act 1985* (WA) ss 4, 5 and 9; *Wrongs Act 1958* (Vic) s 14A(1) and s 14B(3); *Wrongs Act 1936* (SA) s 17D. See, e.g., *Crosthwaite v Pietila* [1999] VSCA 110 (Unreported, Tadgell, Phillips and Batt JJA, 11 August 1999).

[20] *Wrongs Act 1958* (Vic) s 14B(4); *Wrongs Act 1936* (SA) s 17E.

[21] (1997) 188 CLR 313 (*'Northern Sandblasting'*).

[22] Northern Sandblasting Pty Ltd bought the house property in July 1984.

volved a tangle of wires being left in the switch-box by the landlord's electrical contractor, Mr Briggs. He was engaged by the landlord in November 1986 to check and repair a refrigerator and stove before the premises were let to Nicole's parents. The electrician's conduct probably made the entire earthing system on the property unsafe.

The second fault occurred in June 1987, when, following a complaint by Mrs Harris about the defective stove, the landlord again engaged Mr Briggs to repair it. He carried out the work so negligently that the earth and active wires in the stove element could connect and thus enliven the whole earthing system. This happened when barefooted Nicole attempted to turn off an outside water tap while standing on wet grass. In the Supreme Court of Queensland, Mr Briggs was found liable in negligence. Nicole's damages were assessed at the sum of $1,204,429.82, but Briggs was impecunious.

In the High Court, Nicole asserted that the landlord's duty of care extended to an inspection of the premises after the electrical contractor finished the original repairs and before her family occupied them. Had such inspection been carried out, the problem in the switch-box would have been discovered and repaired, thereby averting the subsequent accident. She also argued that the landlord had, in regard to the stove repair, a non-delegable, or personal duty of care which could not be delegated to the electrical contractor. Persons placed under the special non-delegable duty of care are obliged not only to exercise reasonable care, but to personally ensure that reasonable care is taken by any independent contractor whom they employ.[23] In other words, Nicole contended that the landlord's duty was not simply to take reasonable care, but to ensure that reasonable care was taken.[24]

In the High Court, the majority held the landlord liable in negligence, though on different grounds. Justice McHugh determined that the doctrine of non-delegable duty of care, which should apply to landlords, was breached by the defendant.[25] Justice Toohey held that there was a breach of non-delegable duty of care, though he rejected negligence within the landlord-tenant relationship.[26] Chief Justice Brennan rejected the applicability of non-delegable duty of care, but found the

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[23] *Hughes v Percival* (1883) 8 App Cas 443, 446.

[24] This was paraphrased by Brennan CJ thus: 'the task which an independent contractor is employed to perform carries an inherent risk of damage to the person or property of another and if the risk eventuates and causes such damage, the employer [of the independent contractor] may be liable even though the independent contractor exercised reasonable care in doing what he was employed to do, because the employer authorised the running of the risk and the employer may be in breach of his own duty for failing to take the necessary steps to avoid the risk which he authorised': *Northern Sandblasting* (1997) 188 CLR 313, 332 (Brennan CJ).

[25] '[T]he landlord owed the plaintiff a personal, non-delegable duty of care because he undertook to have an electrical stove repaired in circumstances where the plaintiff and her parents might reasonably expect that due care would be exercised in repairing the stove': Ibid 368 (McHugh J).

[26] 'The landlord owed Nicole a non-delegable duty of care in respect of the defective stove. The appellant engaged a qualified electrician to carry out the work. The landlord's duty extended not only to engaging a qualified contractor but also to ensuring that the work was done with reasonable skill and care. That responsibility was not met and the appellant was liable to the respondent': Ibid 350–1 (Toohey J).

landlord liable under ordinary principles of negligence in relation to the first fault, stating that the duty of a landlord is 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.'[27]

Justice Gaudron came to a similar conclusion with respect to non-delegable duty of care,[28] but determined that, in negligence, the landlord's duty to take reasonable care for the safety of members of the tenant's household was more general. The duty was not confined to defects existing at the commencement of the lease, but included putting and keeping the premises in a safe state of repair.[29] Its ambit, however, was predicated on whether or not the tenants were in possession. Thus, Gaudron J held that landlords are under an obligation to inspect residential premises before they are let, and to remedy existing defects that could pose a foreseeable risk of injury. With regards to potential defects involving such special dangers as electrical wiring and gas connections, the duty extended to carrying out an inspection 'by persons skilled or expert in that regard'.[30]

Justices Dawson, Kirby and Gummow held that the landlord was not liable either in negligence or under non-delegable duty.[31] Thus, despite the finding of liability, only two judges found that non-delegable duty was owed to a tenant by a landlord who leased residential premises. The rejection of non-delegable duty of care in *Northern Sandblasting* was reiterated by the majority of High Court in *Jones v Bartlett*[32] (McHugh J dissenting).[33] In their joint judgment, Gummow and Hayne JJ noted that patients in hospitals and children in schools manifest a dependence or vulnerability which may trigger the imposition of non-delegable duty. The same could be said of certain tenants, but, the other requirement of non-delegable duty of care, namely, the 'control element', is often missing where residential landlords are involved.[34]

V THE DECISION IN *JONES V BARTLETT*

Since the two judges who determined that the landlord was liable in general negligence provided different reasons for their decision, *Northern Sandblasting* left the common law in a state of uncertainty 'with regard to the liability in tort of landlords to tenants, occupiers and other entrants of residential premises respecting the unsafe

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[27] Ibid 340.
[28] Ibid 361 (Gaudron J).
[29] Ibid 358.
[30] Ibid 360.
[31] Ibid 344–5 (Dawson J), 395 (Kirby J).
[32] (2000) 176 ALR 137.
[33] McHugh J found that: 'The exercise of reasonable care by the landlords in this case required that, either immediately before the letting to the appellant's parents or, at some reasonable period before that time, the house should have been inspected by a person with building qualifications to assess its safety.': ibid 158.
[34] *Jones v Bartlett* (2000) 176 ALR 137, 178. See also 201 (Callinan J).

condition of such premises.'[35] Consequently, it became the task of the High Court in *Jones v Bartlett* to clarify the law.

The case concerned a claim in negligence by the plaintiff, son of the tenants, who was injured in 1992 when he walked through a glass door. He sued the landlord in negligence and breach of contractual duty,[36] alleging that the landlord failed to install safe glass panes in the door. The thickness of the glass panes through which he walked conformed to the Australian Standard as set in 1957, when the house was built, but not to the requirements of the 1989 standard. The plaintiff argued that, had the landlord engaged an expert to undertake regular inspections of the house, the inadequate thickness of the glass would have been discovered, and its replacement with safer panels would have averted the risk of injury. Consequently, the landlord's failure to conform to the safety standards of 1989 rendered the premises defective, and was the cause of the injury.

In his dissenting judgment, McHugh J accepted the plaintiff's arguments. He focused on the specific matter of the safety posed by the glass panels, which did not conform to the required standards, rather than a general principle of safety of a tenant-occupied premises. His Honour found that the landlord breached the duty of care because the cost and inconvenience of eliminating the risk by replacing the panels with laminated or wired glass were modest, and a reasonable person would not disregard a risk that was likely to happen even once in a very long period, unless he or she 'had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk.'[37] McHugh J would impose upon landlords a duty to have residential premises assessed for safety by a person with building qualifications either immediately before the letting of them, or at some reasonable period before that time.[38]

The majority in their separate judgments[39] rejected the narrow approach of McHugh J, finding that the premises were not defective.[40] Rather, the approach adopted by the rest of the bench was oriented towards elucidating general principles that would govern the duty of care for all landlords of residential premises. Kirby J stated that the following major jurisprudential issues needed to be considered:

1. Whether landlords of residential premises may discharge their duty of care by undertaking an inspection of the premises prior to each lease or renewal

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[35] Ibid 169 (Gummow and Hayne JJ).

[36] The court determined that the plaintiff was not a party to the tenancy agreement, and thus could not sue either in contract or for breach of a warranty of habitability under *Residential Tenancies Act 1987* (WA).

[37] *Jones v. Bartlett* (2000) 176 ALR 137, 159 (McHugh J, quoting *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617, 642).

[38] Ibid 158 (McHugh J).

[39] Ibid Gleeson CJ, Gummow J in joint judgment with Hayne J, Gaudron, Kirby and Callinan JJ; with McHugh in dissent.

[40] On their analysis of the *Northern Sandblasting* in *Jones v Bartlett*, Hayne J (jointly with Gummow J) as well as Callinan J, would have rejected liability of *Northern Sandblasting* for injuries suffered by Nicole. Gleeson CJ distinguished *Northern Sandblasting* on the grounds that in that case the electrical wiring had been left in a highly dangerous condition making the house 'undoubtedly defective': ibid 142.

of a lease and by responding reasonably to defects drawn to notice,[41] or do they have to undertake regular inspections to find and protect against possible sources of danger in the leased premises?

2. Whether landlords may ordinarily discharge their duty by delegating inspection and repair to a competent person[42] or do they need to employ experts capable of detecting latent defects not reasonably apparent to an untrained eye; and,

3. 'if so, whether the failure to procure such experts will impose legal liability on the landlord where a tenant or associated third party is injured by reason of a defect of which the landlord personally remains reasonably unaware?'[43]

With regard to the issue of duty to inspect, the majority, in their separate judgments, discussed the landlord's status as occupier under the statute and at common law before and after residential premises are leased to tenants with exclusive possession. The court decided that under the *Occupiers' Liability Act 1985* (WA) the landlords are regarded as occupiers of the premises for the purposes of the Act only until the commencement of the lease.[44] According to Gummow and Hayne JJ, before commencement of the lease, in their role as occupiers, landlords would be expected to arrange for an assessment of premises for known or apparent dangerous defects and to remedy them.[45] Gaudron J defined the extent of the duty as 'putting and keeping the premises in a state of safe repair,'[46] whereas Callinan J considered that it was limited to 'no more than ... to provide, at the inception only of the tenancy, habitable premises.'[47] The majority noted that unless landlords knew or ought to have known of a dangerous defect, they were not required to engage experts to assess risks even in such fields as 'electrical wiring, and glass fabrication and installations, where such risks of defects could, in the nature of things, be seen as a possibility'.[48]

Once tenants assume exclusive possession of premises, they acquire the status of occupiers, and the landlords lose their control over the premises. Although the landlords may retain the right to effect, or approve, repairs and alterations, they do not retain the status of occupiers. Thus, the degree of duty owed by landlords to tenants, their households and licensees with exclusive possession is likely to be less than that owed by an owner-occupier who retains the ability to direct what is done

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[41] Ibid 189 (Kirby J).
[42] Ibid 189 (Kirby J).
[43] Ibid 189 (Kirby J).
[44] The court rejected the plaintiff's claim under *Occupiers' Liability Act 1985* (WA), 147 Gleeson CJ), 153 (Gaudron J), 203 (Callinan J).
[45] According to Gleeson CJ, 147; Hayne and Gummow JJ, if they fail to do so, and an accident happens once the premises have been let, they may be liable on the ground of negligent failure to assess and remove dangerous defects.
[46] Ibid 155.
[47] Ibid 203.
[48] *Jones v Bartlett* (2000) 176 ALR 137, 176 (Gummow and Hayne JJ), 141 (Gleeson CJ).

upon, with and to the premises.[49] Gummow and Hayne JJ commented that landlords should only be considered occupiers if they have control before the commencement of the tenancy. This would exclude cases in which the landlord never had control, either *de facto* in the case of back-to-back tenancies, or *de jure* in the case where a landlord assumes ownership some time after the tenant has gone into possession.[50]

Taking judicial notice of prohibitive financial implications of risk-proofing residential housing,[51] the majority also rejected the plaintiff's claim that a landlord is under an obligation to provide regular inspections. Gummow and Hayne JJ stated that:

> The diligence required to ascertain dangerous defects will not in the ordinary case require the institution of a system of regular inspection for defects during the currency of the tenancy.[52]

Their Honours quoted with approval Kirby J in *Northern Sandblasting*, who pointed out the impracticability of imposing upon landlords a duty to undertake regular inspections against the risk of such perils as electricity and gas supply, floorboards, balustrades, etc.[53]

Furthermore, with respect to the second question regarding the standard of care, the majority determined that the common law should recognise practical differences in the degree of control of residential premises between landlords, who surrender them for a term to tenants-occupiers on the one hand, and occupiers, be they tenants or owners, on the other. Taking note of the fact that this difference in degree of control is already reflected in legislation, Gummow and Hayne JJ observed that:

> In the present field [of residential tenancies], affecting the daily lives and transactions of a very large proportion of the population, the Court should be slow to hold that the content of a common law duty rises above that which has been imposed by statute in various Australian jurisdictions.[54]

The majority concluded that where the premises are constructed in accordance with the standards prevailing at the time and are adequately maintained, the landlord's duty of care is to put and keep the premises in safe repair. The landlord's reasonable duty of care does not extend to a guarantee of absolute safety.[55] Rather, the standard should be that set in *Australian Safeway Stores Pty Ltd v Zaluzna*,[56]

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[49] Ibid 173 (Gummow and Hayne JJ).
[50] Ibid 172 (Gummow and Hayne JJ).
[51] Ibid 141.
[52] Ibid 176.
[53] *Northern Sandblasting v Harris* (1997) 188 CLR 313, 394. Statements to similar effect were made at 343–344 (Dawson J), 349 (Toohey J), 370 (Gummow J). See also *Jones v Bartlett* (2000) 176 ALR 137, 193.
[54] *Jones v Bartlett* (2000) 176 ALR 137,173.
[55] Ibid 142 (Gleeson CJ), 155 (Gaudron J), 173 and 178 (Gummow and Hayne JJ), 193–94 (Kirby J), 203 (Callinan J).
[56] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

namely, to use reasonable care and skill to put and keep the premises in safe repair.[57] Gleeson CJ explained that:

> 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. ... 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.[58]

The standard of what the court considers 'reasonable' will depend on circumstances of each case.[59] However, in general, the standard for landlords' reasonable care will vary with the nature and purpose of the premises. For example, the standard of reasonable care expected of a landlord who lets premises for residential housing may be less demanding than when premises are let for a school or as a hotel, or a club serving liquor.[60] The required standard will also be affected by the terms of the lease, including the level at which the rental is pitched, allocation of respective obligations between the parties to a lease, limitations of purposes to which the premises may be put, and statutory requirements, which may or may not impose a higher standards than the common law.[61]

In relation to dangerous defects, Gummow and Hayne JJ described landlords' obligations in the following way:

> 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 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.[62]

The court thus predicated the liability of landlords on the knowledge of dangerous defects before or at the time of letting the premises. According to Gummow and Hayne JJ, this test is applicable also to landlords' liability to third parties:

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[57] *Jones v Bartlett* (2000) 176 ALR 137, 155 (Gaudron J), 192–93 (Kirby J).
[58] Ibid 142.
[59] Ibid 174 (Gummow and Hayne JJ).
[60] Ibid 174 (Gummow and Hayne JJ).
[61] Ibid 174 (Gummow and Hayne JJ).
[62] Ibid 174 (Gummow and Hayne JJ), 192–93 (Kirby J).

> [D]uty of care of the landlord to the third party is only attracted by the presence of dangerous defects ... 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.[63]

VI CONCLUSION

The case of *Jones v Bartlett* provides comprehensible guidance for landlords and their legal advisers on the scope of their duty and the standard of care owed to tenants and others. One could only wish that, in future, in cases of major importance to the nation's social and commercial life, their Honours would consider handing down a joint judgment.

[63] Ibid 175 (Gummow and Hayne JJ).