Through a Glass Door Darkly: Jones v Bartlett in the High Court

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In Jones v Bartlett *the High Court has resolved much of the uncertainty surrounding the duty of a landlord to persons on tenanted premises arising from its earlier decision in* Northern Sandblasting v Harris, *in which no justification for imposing liability commanded majority support. The High Court discusses how to determine the ratio of a case in such circumstances. It also reviews issues raised by two important Western Australian statutes: (i) the rights of third party beneficiaries under a contract conferred by section 11 of the Property Law Act 1969; and (ii) a landlord's liability under the Occupiers' Liability Act 1985.*

ST PAUL, in the passage misquoted in the title of this article,[1] was not referring to proceeding through closed doors. He nevertheless had some experience of this problem: according to the Acts of the Apostles, Paul and Silas were delivered from prison in Philippi when, as the result of an earthquake, the doors flew open and their chains fell off.[2] On another occasion, he evaded those who were keeping a watch on the city gates at Damascus by being let down from the walls in a basket.[3]

Lacking divine assistance, Marc Jones' method of proceeding through a closed door was much less subtle and much less effective. He simply walked through the glass door separating the dining room and the games room of his parents' rented home in the Perth suburb of Mount Pleasant without first ascertaining whether it

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1. 1 Corinthians 13:12: 'For now we see through a glass, darkly; but then face to face' (Authorised Version).
2. Acts 16:25-28. Compare Peter's similar experience in Acts 12:6-11.
3. Acts 9:23-25.

was open. His knee, which was the first part of his body to come into contact with the door, broke the lower part of the glass pane, whereupon the upper portion of the glass dropped, badly cutting his leg, severing arteries, nerves and tendons and damaging muscles. For these injuries he claimed damages (agreed at trial to amount to $75 000) from Mr and Mrs Bartlett, from whom the house had been rented by his parents. His claim was ultimately rejected by the High Court by a 6:1 majority.[4]

Arising out of this seemingly simple fact situation, the highest Australian appellate court has, for the first time, given detailed consideration to two important pieces of Western Australian legislation — section 11 of the Property Law Act 1969 and the Occupiers' Liability Act 1985. In addition, it has lent much greater certainty to the vexed question of a landlord's liability at common law, settling difficulties created by its earlier decision in *Northern Sandblasting Pty Ltd v Harris*.[5] Two judgments review the approach to be adopted to the problem of determining the ratio of an appellate decision when there is a majority in favour of a particular result but no agreement as to the reasoning supporting it.

At the time of the accident, Mr and Mrs Jones had been occupying their rented house for just over a year, and Marc had been living with them for four months. The door in question, it seems, originally led from the dining room to the outside of the property, which had been built in the late 1950s or early 1960s, but the games room was added later on. The door consisted of glass in a timber frame. The glass, annealed[6] glass four millimetres thick, complied with the relevant Australian Standard at the time the house was built, but not with the 1989 Standard applying at the time of the accident. This required a new door in new premises, if of annealed glass, to be 10 millimetres in thickness.

Marc's action, on the question of liability only, was initially heard by Commissioner Reynolds in the District Court of Western Australia. It was brought both in contract and in tort. Marc alleged that the landlords, Mr and Mrs Bartlett, were in breach of express or implied terms of the lease imported into the contract by the Residential Tenancies Act 1987 (WA), arguing that although the contract was made with his parents he was entitled to the benefit of these terms by virtue of section 11 of the Property Law Act 1969. He also sued for breach of the duties imposed on occupiers and landlords of premises by sections 5 and 9 respectively of the Occupiers' Liability Act 1985, and for breach of the duty of care owed by landlords at common law under the tort of negligence. Commissioner Reynolds rejected the contract claim. He found that the Bartletts were in breach of their duty as occupiers

4. *Jones v Bartlett* (2000) 75 ALJR 1.
5. (1997) 188 CLR 313.
6. This refers to the cooling process the glass goes through when it comes out of the furnace: *Jones v Bartlett* supra n 4, Gleeson CJ 4, quoting Commissioner Reynolds' summary of the evidence.

under section 5, but that Marc was guilty of contributory negligence, remarking that he had been living in the house for four months and so was very familiar with this particular door, yet he 'had totally failed to look at the door before endeavouring to pass through it'.[7] Accordingly, he reduced the agreed amount of damages by 50 per cent. He found it unnecessary to consider the Bartletts' position as landlords under section 9, and did not consider whether they owed a duty at common law. The Bartletts appealed to the Full Court of the Supreme Court of Western Australia, arguing that they were not occupiers and were not in breach of any other duty. The Full Court (Murray, White and Scott JJ) held that the only duty which the Bartletts owed under the Occupiers' Liability Act 1985 (WA) was as landlords, and that they were not in breach of this duty. The contract claim was again rejected. Following this reverse, Marc obtained special leave to appeal to the High Court.

THE CONTRACTUAL CLAIM: SECTION 11 OF THE PROPERTY LAW ACT 1969

1. The history of section 11

Section 11 was a Western Australian response to the problem presented by the common law doctrine of privity of contract, according to which a person who was not a party to a contract could not enforce it even if the contract was made for the third party's benefit. A settled rule since the mid-19th century,[8] it has been variously justified on the basis that the third person was not a party to the contract, or did not provide consideration — which, according to some analyses, is the same thing.[9]

Privity of contract was generally thought to be an inconvenient rule, and a large number of exceptions were developed enabling third parties to sue by invoking agency, trusts, covenants and various other legal principles.[10] Australian courts have been particularly active in this regard. The High Court in *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd*[11] recognised a further exception in the

7. *Bartlett v Jones* (unreported, WA Sup Ct, Full Court, 22 Feb 1999, Appeal FUL 25 of 1998) Murray J.
8. *Tweddle v Atkinson* (1861) 1 B & S 393, 121 ER 762; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.
9. For different interpretations of the rule, see NC Seddon & MP Ellinghaus (eds) *Cheshire and Fifoot's Law of Contract* 7th edn (Sydney: Butterworths, 1997) para 4.8.
10. As a result of the influence of Josef Unger, Barber Professor of Law at the University of Birmingham until his death in 1967, I have always had much sympathy for the view that the privity rule is a rational manifestation of the importance of the doctrine of consideration in contract and that most of the exceptions owe their existence to the need to enforce property or other non-contractual rights. For an interesting discussion of a similar view, see P Kincaid 'Privity Reform in England' (2000) 116 LQR 43.
11. (1988) 165 CLR 107.

field of insurance,[12] and some judges contemplated the virtual abolition of the doctrine.

In 1937, the English Law Revision Committee in its Sixth Interim Report[13] noted that the English common law was almost alone in adhering to the view that contracts should not confer any rights on strangers to the contract even though the sole object might be to benefit them.[14] Influenced particularly by the recognition of the rights of third party beneficiaries in United States contract law,[15] it recommended that where a contract by its express terms purported to confer a benefit directly on a third party, it should be enforceable by the third party in his or her own name subject to any defences that would have been valid between the contracting parties. Unless the contract otherwise provided, it should be possible to cancel it by the mutual consent of the contracting parties at any time before the third party had adopted it either expressly or by conduct.[16]

This recommendation was not accepted in England, but Western Australia took the plunge, enacting the following provisions in its Property Law Act 1969:

> **Persons taking who are not parties**
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> 11. (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.
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> (2) Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but —
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> (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
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> (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and

12. See now the Insurance Contracts Act 1984 (Cth) s 48, not in force at the time of the action in *Trident,* ibid.
13. Law Revision Committee *Sixth Interim Report: Statute of Frauds and the Doctrine of Consideration* (1937) Cmd 5449.
14. Ibid, para 41.
15. Stemming from *Lawrence v Fox* (1859) 20 NY 268, and enshrined in the American Law Institute's *First Restatement of the Law of Contracts* (St Paul: ALI Publishers, 1932) s 133. See now American Law Institute *Second Restatement of Contracts* (St Paul: ALI Publishers, 1979) s 309.
16. Law Revision Committee supra n 13, para 50.

(c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.

(3) Unless the contract referred to in subsection (2) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the person referred to in that subsection has adopted it either expressly or by conduct.

Section 11(1) essentially reproduced section 56(1) of the English Law of Property Act 1925, but sections 11(2) and (3) had no English equivalent. The wording clearly shows the direct influence of the Law Revision Committee's recommendation. In later years, Queensland and then New Zealand followed with similar provisions,[17] each more extensive and elaborate than its predecessor,[18] and very recently England, 60 years after the original report, has heeded a similar recommendation by the Law Commission.[19] The Contracts (Rights of Third Parties) Act 1999 (Eng) amends the law of contract in England and Wales[20] to provide that a third party can enforce a term of the contract in its own right if the contract expressly so provides or if the term purports to confer a benefit on the third party.[21]

In Western Australia, the principal issue left open by the legislation was whether consideration had to move from the promisee in order for the third party to enforce the statutory right. This was answered by the Full Court in *Westralian Farmers Co-operative Ltd v Southern Meat Packers Ltd*,[22] Kennedy J saying:

> If the doctrine of privity is distinct from the rule as to consideration, it appears to me that section 11(2) should be interpreted to cover both, and the fact that no

17. Property Law Act 1974 (Qld) s 55; Contracts (Privity) Act 1982 (NZ). In each case, the reform benefited from investigation and report by a law reform body: see QLRC *Report on a Bill to Consolidate, Amend and Reform the Law relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (Brisbane: QLRC, 1973); NZ Contracts & Commercial LRC *Report on Privity of Contract* (Wellington: Govt Printer, 1981). In Western Australia, the drafting of the bill which became the Property Law Act 1969 pre-dated the setting up of the Law Reform Committee, which commenced operations in January 1969.
18. For comparison of the three legislative provisions, see A Rogers 'Contracts and Third Parties' in PD Finn (ed) *Essays on Contract* (Sydney: Law Book Co, 1987) 81, 92-102; L Wilson 'Contracts and Benefits for Third Parties' (1987) 11 Syd LR 230, 251-256; J Vroegop 'Current Topics: The New Zealand Contracts (Privity) Act 1982' (1984) 58 ALJ 5. See also D Butler 'Enforcement of Third Party Rights in Queensland Pursuant to Property Law Act 1974 (Qld), s 55' (1998) 14 QUTLJ 73.
19. See Law Commission *Privity of Contract: Contracts for the Benefit of Third Parties* Report No 242 (London: HMSO, 1996).
20. Thus bringing the law into line with the position already established in Scotland.
21. S 1(1). For comment, see Kincaid supra n 10; M Dean 'Removing a Blot on the Landscape – The Reform of the Doctrine of Privity' [2000] JBL 143.
22. [1981] WAR 241.

> consideration moved from the third party should not be an available defence under section 11(2)(a). If this were not so, the instances in which the contract would be 'enforceable' by the third party would be rare.[23]

Later statutes expressly so provide.[24] Other problems not resolved by Western Australia's pioneering legislative effort in this field[25] are now in some cases expressly dealt with by the other statutory provisions.[26]

2. Section 11 in the High Court

In *Jones v Bartlett*, the appellant argued that he was entitled to enforce the contractual terms inserted into the lease between his parents and the respondents by section 42 of the Residential Tenancies Act 1987 (WA). Under this section it is a term of every residential tenancy agreement that the owner of the premises must provide and maintain the premises in a reasonable state of repair having regard to their age, character and prospective life, and comply with all statutory requirements in respect of buildings, health and safety. This argument was based on the fact that Mr and Mrs Jones, at the time they entered into the lease, apparently thought that their son would be coming back to Perth and living with them, and so the lease provided that the house could be used as a 'private dwelling to be occupied by not more than three persons'. The High Court agreed that there had been no breach of the terms set out in section 42,[27] and in view of this Kirby J opined that there was no need to explore the question whether section 11 gave the appellant the right to enforce any such term if breached.[28] However, some of the other judgments give section 11 more extensive consideration.[29]

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23. Ibid, 251. For judicial comment on other issues raised by s 11, see *Visic v State Government Insurance Co Ltd* (1990) 3 WAR 122; *Whitfords Beach Pty Ltd v Gadsdon* (1991) 6 WAR 537.
24. Property Law Act 1974 (Qld) s 55(3)(a); Contracts (Privity) Act 1982 (NZ) s 8.
25. See J Longo 'Privity and the Property Law Act: *Westralian Farmers Co-operative Ltd v Southern Meat Packers Ltd*' (1983) 15 UWAL Rev 411, 415-417.
26. In the Contracts (Rights of Third Parties) Act 1999 (Eng), s 1(6) allows a third party to rely on an exclusion or limitation of liability in the contract, thus confirming the case law allowing third parties to take the benefit of 'Himalaya clauses': see eg *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd ('The New York Star')* (1980) 144 CLR 300.
27. *Jones v Bartlett* supra n 4, Gleeson CJ 7, Gaudron J 13, McHugh J 16, Gummow and Hayne JJ 22-23, Kirby J 37. See also Callinan J 46-47.
28. Ibid, 37. In the Full Court, Murray J by contrast held that there was no need to examine the decision of the trial judge that there was no breach of the lease because s 11 gave the appellant no rights.
29. See also Gleeson CJ 7-8 and Callinan J 46-47. Gleeson CJ said that the appellant was not a party to the contract and s 11 did not enable him to sue for breach of it. Callinan J cited the view of Murray J in the Full Court that the lease needed to confer a benefit on the appellant either by naming him or unmistakably identifying him. He said that it was not necessary to

In many ways, the most interesting examination is that of Gaudron J.[30] Her Honour referred to the restrictive interpretation of the words 'land or other property' in section 56(1) of the Law of Property Act 1925 (the English equivalent of section 11(1)) by the House of Lords in *Beswick v Beswick*.[31] It was held that section 56(1) did not apply to personal property, in spite of the fact that the words 'other property' were expressly defined to include any form of property, real or personal, including a chose in action. This was a consolidating statute and it was presumed that parliament had not intended to alter the law of contract.[32] Gaudron J suggested that if section 11(1) had stood alone there would be much to be said for interpreting it in the more extensive manner consistently favoured by Lord Denning,[33] presumably on the basis that it could not be regarded as merely a consolidating measure. However, her Honour said that the addition of section 11(2) meant that it must have been intended to have a more limited operation[34] — the Western Australian parliament's adoption of the Law Revision Committee's recommendation presumably confirming that it took a more conservative view of the English provision adopted in section 11(1). In her view, neither subsection provided a definitive basis on which section 11(1) could be read down,[35] and the only rational way in which this could be achieved was that identified by Lord Upjohn in an obiter dictum in *Beswick v Beswick*.[36] According to his Lordship, section 56(1) —

> was only intended to sweep away the old common law rule that in an indenture inter partes the covenantee must be named as a party to the indenture to take the benefit of an immediate grant or the benefit of a covenant.[37]

Accordingly, section 56(1) could be invoked only by a person who, though not named as a party to the conveyance or other instrument, was a person to whom it purported to grant some thing or with whom some agreement or covenant was purported to be made.[38] On this basis the appellant in *Jones v Bartlett* had no rights, because the lease neither purported to be made with him nor to grant anything to him.

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decide whether s 11 went this far because, on any view, the appellant did not fall within its intended operation.

30. Ibid, 11-13.
31. [1968] AC 58.
32. Ibid, Lord Reid 73, 76-77, Lord Hodson 79-81, Lord Guest 87, Lord Pearce 93-94, Lord Upjohn 105-106.
33. See *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, 517; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250, 274-275; *Beswick v Beswick* [1966] Ch 538, 556-557.
34. *Jones v Bartlett* supra n 4, 12.
35. Ibid, 12-13.
36. [1968] AC 58.
37. Ibid, 106.
38. Ibid, adopting the views of Simonds J in *White v Bijou Mansions Ltd* [1937] Ch 610, 625.

The joint judgment of Gummow and Hayne JJ agreed that this was the only possible interpretation.[39] Their Honours then asked whether it was possible for the appellant to invoke section 11(2). The relationship between it and section 11(1), they said, was not completely clear, but they noted some differences:

> While section 11(1) treats the person concerned as a party to the conveyance or other instrument that relates to the land or property in question, section 11(2) does not constitute the person concerned a party to the contract in the ordinary sense. Rather section 11(2) stipulates special conditions attaching to any enforcement of the contract in an action by that person and section 11(3) preserves, in certain circumstances, the rights of the parties to the contract themselves alone to cancel or modify it.[40]

The lease did not by its terms purport to confer a benefit on the appellant himself. For it to do so, he would have to be identified in the lease as the recipient of that benefit — but he was not. The lease simply allowed use of the premises as a dwelling house for not more than three persons. The third person could have been anybody.

3. A comparison with Northern Sandblasting

It is interesting to compare the approach taken to the contractual claim in *Jones v Bartlett* with the High Court's consideration of similar arguments three years earlier in *Northern Sandblasting*,[41] an appeal from Queensland. An action was brought against a landlord on behalf of the tenants' nine-year old daughter, Nicole, who suffered brain damage through being electrocuted on turning off a garden tap. The water pipes had become live due to the combined effect of negligence by an electrician called in to repair the cooker and the failure of the main safety mechanism to function because the earth wire had been pulled out of the socket in the switchbox. Under Queensland legislation not materially different from section 42 of the Residential Tenancies Act 1987 (WA),[42] it was an implied term of the lease that the landlord would provide and maintain the premises in a condition fit for human habitation. It was argued for Nicole that, although she was not a party to the

39. *Jones v Bartlett* supra n 4, 23-24. Some additional authorities are referred to: RE Megarry & ECS Wade *The Law of Real Property* 6th edn (London: Sweet & Maxwell, 1996) para 16-007; *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 1 WLR 1025, 1032.
40. *Jones v Bartlett* supra n 4, 24.
41. Supra n 5. For discussion of these issues, see P Handford 'No Consensus on Landlord's Liability' (1998) 6 Tort L Rev 105, 107-108.
42. Property Law Act 1974 (Qld) s 106(1)(a); Residential Tenancies Act 1975 (Qld) s 7(a). Gummow and Kirby JJ both endorsed the view of the majority in the court below that the later provision had superseded the earlier: *Northern Sandblasting* supra n 5, Gummow J 384-385, Kirby J 407-408. However, this is not material for the purposes of the present article.

contract, she could enforce it by virtue of section 55 of the Property Law Act 1974 (Qld). Though the purpose of this section is generally similar to section 11 of the Property Law Act 1969 (WA), its drafting is a little different. It provides that when a promisor promises for valuable consideration to do an act for the benefit of a third party, the beneficiary on acceptance becomes entitled to enforce the promise.[43] Unlike the Western Australian section, it makes the requirement of consideration express, but does not specify that all parties to the contract should be joined in the action. Importantly for present purposes, it also requires acceptance by the third party beneficiary. 'Acceptance' is defined in the legislation to mean an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor.[44] For four members of the High Court, the lack of acceptance was the chief difficulty. It was unreal to suggest that the basis on which Nicole was living in the house with her parents was the acceptance by her of a promise made by landlords in the contract of lease. In the words of Gummow J:

> It is one thing to say that by operation of [the statutory provision] in the lease of the subject premises there was an obligation on the part of the appellant to provide and maintain the premises in a condition reasonably fit for human habitation. It is another to construe this statutory obligation as a promise by the appellant to do an act or acts for the benefit of the respondent, which was accepted by the conduct of the respondent in going into occupation of the premises with her parents.[45]

Kirby J, however, did not see this as a problem:

> [W]here, as here, the tenancy agreement between the appellant and the respondent's parents as tenants was obviously for her benefit, the purpose of section 55 of the Property Law Act extended to securing to her the entitlement to enforce the duties owed by the landlord to her parents as tenants. All that was required was her 'acceptance' of her status as a beneficiary. By the Property Law Act, she could do this by 'conduct' communicated to the landlord. The landlord knew that she had entered into possession of the demised premises with her parents. By section 55 of the Property Law Act, the difficulties of her enforcement of the obligation owed by the landlord to her parents as tenants were therefore overcome.[46]

Whatever the correct view, it made no difference to Nicole's claim at the end of the day because Gummow and Kirby JJ agreed that there was no breach of the statutory implied term. It did not impose absolute liability, but only an obligation to take

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43. Property Law Act 1974 (Qld) s 55(1).
44. Ibid, s 55(6)(a).
45. *Northern Sandblasting* supra n 5, 382, Dawson J 342 and Toohey J 348 concurring. See also Brennan CJ 329.
46. Ibid, 413, Gaudron J concurring 363. McHugh J did not discuss this issue.

reasonable care, which the landlords had complied with by employing an apparently competent electrician.[47]

Given that section 11 of the Western Australian Act does not expressly require acceptance on the part of the third party beneficiary, Nicole might have found it easier to establish her right to invoke the contractual protection in Western Australia. Moreover, in terms of the Queensland provision, if occupation of the premises by a third party has to be based on an acceptance of a promise made by the landlords, it seems easier to imply such acceptance by a young man who has returned to live with his parents than by a nine-year old girl who automatically goes wherever her parents go. However, in *Jones v Bartlett*, Marc Jones' attempt to invoke section 11 ultimately failed for the same reason as Nicole's claim based on section 55 in *Northern Sandblasting*, namely the lack of any breach of the statutory duties on the part of the landlord. As we have seen, the principal judgments offered no hope of success under section 11 and Kirby J, whose views as expressed in *Northern Sandblasting* had failed to command majority support, saw no point in another exposition of the relevant arguments.

In *Northern Sandblasting* it was also argued that members of the tenants' family and household could invoke the statutory implied terms on another basis, independently of section 55 of the Property Law Act (Qld). It was suggested that as a matter of statutory interpretation the legislation was intended for the protection of all the inhabitants of the dwelling and could therefore give rights of action not only to the tenants but also to members of their family and household. Again, the two principal judgments which considered the contractual claims differed somewhat in their approach. Gummow J (with whom Dawson and Toohey JJ agreed) referred to a British Columbia decision upholding such an argument,[48] but said that this was explained by the existence of legislation based on section 4 of the Occupiers' Liability Act 1957 (Eng) providing that a landlord's duty to maintain and repair is owed to all persons lawfully on the premises.[49] Queensland's lack of a similar provision told against Nicole's claim. In contrast, Kirby J did not see such provisions as all-important, and was prepared to follow Nova Scotia decisions which reached a similar result in the absence of such legislation.[50] The fact that Western Australia is one of the three Australian jurisdictions which does have such legislation[51] might be seen

47. Ibid, Gummow J 382, Kirby J 414-416. See also Gaudron J 363.
48. *Zavaglia v Maq Holdings Ltd* (1986) 6 BCLR (2d) 286.
49. Occupiers' Liability Act 1974 (BC) s 6(3)(c). Gummow J noted that the English case of *Ryall v Kidwell & Son* [1914] 3 KB 135 had decided that the implied term in the lease only benefited the tenant, but said that the position had been altered by the 1957 legislation.
50. *Gaul v King* (1979) 103 DLR (3d) 233; *Basset Realty Ltd v Lindstrom* (1979) 103 DLR (3d) 654.
51. See Occupiers' Liability Act 1985 (WA) s 9, discussed in the next section of this article; Wrongs Act 1958 (Vic) s 14A; Wrongs Act 1936 (SA) s 17D.

to support an argument to the effect that the appellant in *Jones v Bartlett*, as a member of the tenants' family and household, should be able to invoke the clause in the lease. However, as noted above, Nicole's contractual claims failed because the statutory provisions only imposed an obligation to take reasonable care, which had been met. No doubt this is why no similar argument was mounted in *Jones v Bartlett*. Kirby J said that it was unnecessary to explore the arguments he had discussed in *Northern Sandblasting,*[52] and the joint judgment of Gummow and Hayne JJ does not mention the issue.

LIABILITY AS OCCUPIER OR LANDLORD: THE OCCUPIERS' LIABILITY ACT 1985

1. The history of the Act

The Occupiers' Liability Act 1985 (WA) was enacted to reform the unsatisfactory common law position under which the liability of occupiers for damage caused to visitors as a result of the dangerous condition of the premises depended on whether the visitor was a contractual entrant, an entrant by right, an invitee, a licensee or a trespasser. Each was owed a different duty of care, ranging from the exacting obligations owed to certain categories of contractual entrant to the very low duty owed to a trespasser (amounting to little more than a duty not to cause intentional or reckless harm). It seemed that the various rules were so entrenched that the courts could do little to ameliorate the position. Recognition of this state of affairs in England had resulted in the passing of the Occupiers' Liability Act 1957, replacing the categories with a 'common duty of care' owed to all lawful visitors. This Act applied only to England and Wales, but the Occupiers' Liability (Scotland) Act 1960 was more extensive, including even trespassers within the ambit of the common duty.[53] Similar legislation followed in other common law countries[54] — but in Australia not until the 1980s, when three States modified the common law position.[55] In Western Australia, the Act, produced as part of a co-operative exercise by the Crown Solicitor (who had taken personal responsibility for law reform in the Crown Law Department,

52. *Jones v Bartlett* supra n 4, 37.
53. The Occupiers' Liability Act 1984 (Eng) eventually extended the statutory liability to trespassers. For comment on the relationship between the two Acts, see P Handford 'Acting to Deter Criminal Trespassers' (1996) 4 Tort L Rev 261, 262-263.
54. Occupiers' Liability Act (Northern Ireland) 1957; Occupiers' Liability Act 1972 (Eire); Occupiers' Liability Act 1962 (NZ); Occupiers' Liability Act 1973 (Alta); Occupiers' Liability Act 1974 (BC); Occupiers' Liability Act 1980 (Ont); Occupiers' Liability Act 1983 (Man).
55. Wrongs Act 1958 (Vic) ss 14A-14D, inserted by the Occupiers' Liability Act 1983 (Vic); Occupiers' Liability Act 1985 (WA); Wrongs Act 1936 (SA) ss 17B-17E, inserted by the Occupiers' Liability Act 1987 (SA).

of which he was head) and the WA Law Reform Commission, endeavoured to piece together the best provisions from other jurisdictions and weave them into a coherent whole, rather than starting afresh.[56] Thus section 4(1), following in the main the simpler drafting of the Scottish Act, though also consistently with the English Act, provided as follows:

> **Application of sections 5 to 7**
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> Sections 5 to 7 shall have effect, in place of the rules of the common law, for the purpose of determining the care which an occupier of premises is required, by reason of the occupation or control of the premises, to show towards a person entering on the premises in respect of dangers ... which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier of premises is by law responsible.

Section 5 provided that the care the occupier was required to show was such care as in all the circumstances of the case was reasonable, except in respect of risks willingly assumed by the entrant, where the duty was the lower one not to do deliberate or reckless harm. The latter duty was owed to persons on the premises with the intention of committing serious criminal offences. Section 9 adopted the provision that where premises were occupied or used by virtue of a tenancy under which the landlord was responsible for maintenance or repair, the landlord owed entrants the same care in respect of dangers arising from failure to carry out his or her responsibilities of maintenance and repair as was required to be shown by an occupier.

As regards section 4, the intention of the drafters was to reproduce exactly the English position under which the Act replaced the old common law with regard to damage caused by the condition of the premises, but the ordinary law of negligence applied to activities being carried out on them. Though this might appear to be foreclosed by the last few words of section 4 and its English and Scottish equivalents, these had to be read in the light of the earlier reference to the care the occupier was required to show *by reason of the occupation or control of the premises*.[57] In retrospect, the Victorian and South Australian provisions probably achieved a better balance between the Act and the common law.[58] However, it is arguable that none of

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56. The author represented the WA Law Reform Commission in this initiative. For commentary on the Act, see P Handford 'The New Occupiers' Liability Act – A Change in Direction?' (WA Law Society Seminar, 1986); P Handford 'Occupiers' Liability Reform in Western Australia – and Elsewhere' (1987) 17 UWAL Rev 182 (hereafter cited as 'Handford').
57. See Handford, ibid 213-214; *Ogwo v Taylor* [1987] 1 All ER 668, affirmed on other grounds [1988] AC 431.
58. The Wrongs Act 1958 (Vic) s 14B(3) provides that the occupier owes a duty to take care to see that entrants are not injured or damaged 'by reason of the state of the premises or things done or omitted to be done *in relation to the state of the premises*' (emphasis added). The Wrongs Act 1936 (SA) s 17C(1) deals only with the occupier's liability for injury,

these three States foresaw the speed of developments in the High Court under the influence of Deane J. Following two earlier judgments in which his Honour held that the different duties owed to the various categories of visitor had been replaced by the general common law of negligence,[59] the High Court unanimously adopted this view in *Australian Safeway Stores Pty Ltd v Zaluzna*.[60] Thus, in States which had retained the common law it was only necessary to ask one question, namely whether there was a duty of reasonable care; in contrast, in Victoria, Western Australia and South Australia it was (at least in theory) necessary to determine whether or not the case fell under the legislation or the common law, even if the actual obligation owed was, at the end of the day, not much different.

2. The High Court's interpretation of the 1985 Act

In *Jones v Bartlett*, Commissioner Reynolds and the Full Court both held that the respondents, as landlords, could be occupiers of the premises and therefore owed a duty of care under section 5. The Full Court, however, reversed the original finding that the respondents were in breach of that duty. Each held that there was no liability under section 9.

The major issue discussed by the High Court was whether it was possible for a landlord to be an 'occupier' under section 5. The Act provided that the occupier was a person occupying or having control of the premises,[61] but that the application of this test was to be determined according to the common law rules.[62] Thus, where there was a landlord-tenant relationship, ordinarily the tenant, and not the landlord, was the occupier.[63] The judgments emphatically endorse this view. Gaudron J, for example, confirmed the common law understanding that there could be more than one occupier,[64] but added that:

> Once a lessee has entered into possession of premises ... the lessor no longer occupies those premises. And the lessor has only such control over the premises as is reserved by the lease.[65]

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damage or loss attributable to the dangerous state or condition of the premises. The position under the Australian legislation is discussed in Handford supra n 53, 266-268. Note however that the repeal of the Occupiers' Liability Act 1983 (Vic) by the Statute Law Revision Act 1995 (Vic) s 3(1) and Schedule 1 led the author to assume (erroneously) that the occupiers' liability provisions inserted by the 1983 Act in the Wrongs Act 1958 (Vic) had also been repealed. My thanks to Professor Harold Luntz for pointing out my mistake.

59. *Hackshaw v Shaw* (1984) 155 CLR 614; *Papatonakis v Australian Telecommuncations Commission* (1985) 156 CLR 7.
60. (1987) 162 CLR 479.
61. Occupiers' Liability Act 1985 (WA) s 2.
62. Ibid, s 4(2).
63. See Handford supra n 56, 187-188.
64. See eg *Wheat v E Lacon & Co Ltd* [1966] AC 552.
65. *Jones v Bartlett* supra n 4, 13-14.

As Gummow and Hayne JJ suggested, there were exceptional situations (eg, where a local authority was the occupier of a house which was empty because the tenant had moved out,[66] or where a landlord of a block of units remained the occupier of the common areas), but these simply served to emphasise the strength of the general rule.[67] There was nothing exceptional about the position of the respondents. Like any other lessor of a house, they had ceased to be occupiers once the lease took effect.[68] The contrary views of the courts below were analysed and shown to be in error. The High Court's decision is a valuable reinforcement of the intentions behind the Act.

The Act provides that 'premises' includes any fixed or movable structure, including any vessel, vehicle or aircraft.[69] This is a standard definition found in most occupiers' liability legislation.[70] It was suggested in argument that the respondents, as landlords, retained control over at least some parts of the premises by virtue of clause 2.11 of the lease, which obliged them to keep 'all ... doors (including glass, if any) ... in the same condition as they were at the commencement of the tenancy', and that the door was a fixed or movable structure under this definition. Gaudron J said that this clause did not reserve control over the specified items to the respondents as lessors. Rather it proceeded on the basis that control would pass to the lessees and required them to keep those items in the same condition as at the commencement of the tenancy. Even if this were not so, it would at most constitute a reservation of control over some parts of the structure constituting the house, and not the house itself. In her view, the definition of 'premises' could not be read as relating to items forming part of a structure, as distinct from the structure as a single unit.[71] This again underlines orthodox doctrine: the words 'fixed and movable structure' are generally said to have been included to cover such items as builders' ladders, staging and scaffolding.[72] Callinan J made a similar point when he said that it was impossible to describe the door as a 'danger' for the purposes of the duty imposed on an occupier by sections 4 and 5. This, he said, would be 'to misdescribe an object in every day, apparently benign usage, in an incalculable number of buildings throughout the country, as it was in the household in this case for 30 or so years'.[73]

66. *Harris v Birkenhead Corporation* [1976] 1 WLR 279.
67. *Jones v Bartlett* supra n 4, 25.
68. To the same effect, see Gleeson CJ 9, Callinan J 47 (by implication).
69. Occupiers' Liability Act 1985 (WA) s 2.
70. Handford supra n 56, 188.
71. *Jones v Bartlett* supra n 4, 13-14. Gummow and Hayne JJ 25 said it was unnecessary to consider this issue.
72. Handford supra n 56, 188.
73. *Jones v Bartlett* supra n 4, 47-48.

Turning to section 9, there was general agreement that Mr and Mrs Bartlett were not in breach of the duty imposed on them as landlords by this section because, according to the clause in the lease referred to in the previous paragraph, the obligation to maintain and repair had been assigned to the appellant's parents as tenants. The case was therefore not one in which premises were occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises.[74] Callinan J suggested[75] that the statute was intended to reverse the common law rule in *Cavalier v Pope*,[76] which held that landlords were under no duty to anyone with whom they were not in a contractual relationship, and so were not liable to a tenant's visitors – a manifestation of the 'privity of contract fallacy' – and that it pre-dated later common law developments recognising that landlords owed a wider obligation.[77] His Honour speculated whether the Act leaves room for landlords to be subjected to common law duties. Section 9, unlike section 4, does not say that it applies in place of the rules of the common law; instead section 9(3) specifically provides that nothing relieves landlords of any duty they are under apart from the section. Callinan J began by assuming that the Act left room for the imposition of duties at common law,[78] but then explored the opposite assumption:

> The Court did not hear argument that by clear implication [the] Act does exclude a common law duty of the kind for which the appellant contends, or indeed even of a lesser kind. It may be that the Occupiers' Liability Act should be read as comprehensively stating (subject to section 9(3)) the obligations of landlords towards entrants: that having decided to intrude upon the common law, the intrusion was intended in that regard to be complete to the extent stated in the Act, leaving no room for any other liability.
>
> Section 9 imposes a duty upon a landlord only in respect of premises that the landlord is obliged to maintain or repair. When the landlord is responsible for the maintenance or repair of premises should that duty be taken to be comprehensive of the landlord's duties in those circumstances? The duty is owed in respect of matters arising from any failure to maintain and repair. It would seem to be an anomalous and unintended result if the landlord might be under a duty of care in respect of dangers in circumstances in which the landlord is not responsible for the maintenance or repair of the premises. Section 9(3) states that nothing in the section is to relieve a landlord of any duty that he is under apart from the section. Section 9(3) is unlikely to have been intended to have an operation in respect of any lesser duty than section 9(1) imposes. Section 9(3) should, I think, be read as

74. Ibid, Gleeson CJ 9, Gaudron J 13, McHugh J 16, Gummow and Hayne JJ 25-26, Kirby J 38, Callinan J 47-48.
75. Ibid, 49. For confirmation of His Honour's view, see Handford supra n 56, 206-207.
76. [1906] AC 428.
77. *Parker v South Australian Housing Trust* (1986) 41 SASR 493. See also *Northern Sandblasting v Harris* supra n 5, discussed infra pp 92-98.
78. *Jones v Bartlett* supra n 4, 48.

> intending to keep intact any contractual, special, or other statutory duties that a landlord might owe to occupants, entrants or others and any duties arising out of a nuisance emanating from the property not caused by the tenants.[79]

Callinan J's conclusion indicates that section 9 covers the field. The fact that other judges extensively discussed the common law position may perhaps compel the opposite conclusion, but it is respectfully suggested that they were not attempting to raise this precise issue.

As indicated above,[80] a similar question arises with regard to the relationship between the statutory duty imposed by sections 4 and 5 and the common law duty. Because the High Court came to the conclusion that the respondents were not occupiers there was no need to explore this issue and the judges did not explore it. There is, however, just a hint in the judgment of Kirby J that 'Nothing in the substantive provisions of the Occupiers' Liability Act ... would take the appellant beyond whatever claim he might have had in respect of the respondents' suggested breach of their common law duty of care to him, framed in negligence.'[81] It may well not have been Kirby J's intention to suggest that the Act and the common law can exist side by side, but any such suggestion would run counter to the words of section 4 that it has effect 'in place of the rules of the common law' in the area of its intended operation – occupancy as opposed to activity duties.

3. The relationship between occupiers' liability legislation and the law of negligence

Not all judges have seen things this way.[82] In a case in the Full Court of the Supreme Court of Western Australia, *Bryant v Fawdon Pty Ltd*,[83] Murray J attempted to reconcile the Act and the *Australian Safeway* common law duty of care by suggesting that the common law supplied the duty and the Act particularised the standard of care that would otherwise apply by virtue of the general law of negligence. In support, he pointed to the long title of the Act: 'An Act prescribing the *standard* of care owed by occupiers and landlords of premises to persons and property on the premises'.[84] The relationship between duty and standard of care in

79. Ibid, 50.
80. See text at supra nn 57-60.
81. *Jones v Bartlett* supra n 4, 38.
82. In *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, the High Court, discussing occupiers' liability in a Western Australian context, applied the principles of common law. The event took place in 1977 and thus the Occupiers' Liability Act 1985 (WA) was not applicable.
83. (Unreported) WA Sup Ct, Full Court, 22 Jan 1993, Appeal No 167 of 1991.
84. Ibid, 13 (emphasis added).

matters of occupiers' liability is not easy to disentangle. It may well be that the long title of the Act was not happily phrased; it is inconsistent with other references in the Act (including the sidenotes to sections 5 and 9) which refer to *duties* of care. Though the intentions of the drafters are not controlling, the Act was not intended to dovetail with the common law in the way suggested by Murray J. In another Full Court case a year later, *Tonich v Macaw Nominees Pty Ltd*, Anderson J said:

> The Occupiers' Liability Act leaves no room for the operation of the doctrines of the common law as regards the duty of care that is owed by an occupier to an entrant. It is no longer the common law that imposes the duty but the statute and the nature and the extent of the duty is defined by the statute.... It is a question of fact in any particular case whether the occupier has observed the standard required by the statutory duty.[85]

Though Anderson J did not make reference to *Bryant v Fawdon Pty Ltd*, it is noteworthy that his judgment was cited to the Full Court in the present case and Murray J made no attempt to restate his earlier view.

The relationship between the occupiers' liability legislation in Western Australia and the general law of negligence, as discussed in *Jones v Bartlett*, can be contrasted with the approach apparently adopted in South Australia, on the evidence of another recent High Court case, *Modbury Triangle Shopping Centre Pty Ltd v Anzil*.[86] The judgments in that case were handed down one week after *Jones v Bartlett*. In *Modbury Triangle*, the employee of a video rental store in the appellant's shopping centre was attacked in the car park of the shopping centre after leaving work at 10.30 pm, a time at which all the shops were closed and the car park was unlit. He sued the appellant as occupiers of the centre, claiming that it owed him a duty of care. A five-judge High Court held (Kirby J dissenting) that an occupier of land did not owe a duty to take reasonable care to prevent harm at the hands of criminals to someone lawfully on the land.

The case was argued exclusively in terms of common law and the judgments therefore make no mention of the occupiers' liability provisions in the Wrongs Act 1936 (SA).[87] This was to be expected, since the reach of the South Australian legislation is rather more limited than that in Western Australia: it applies only to the occupier's liability for injury, damage or loss attributable to the dangerous state or condition of the premises. The lack of lighting in the car park at the relevant time might perhaps be regarded as an aspect of the state or condition of the premises, and had the respondent, for example, tripped on a kerbstone there would no doubt be a strong argument for invoking the Act. However, it might be harder to describe

85. (Unreported) WA Sup Ct, Full Court, 11 Mar 1994, Appeal No 98 of 1993.
86. (2000) 75 ALJR 164.
87. Wrongs Act 1936 (SA) ss 17B-17E.

criminal activity under cover of darkness as something due to the state or condition of the premises. In any event, the respondent's legal advisers chose to frame the claim in common law negligence. However, there seems to be something of a tendency in recent South Australian cases to ignore the Act. In *Benton v Tea Tree Plaza Nominees Pty Ltd*,[88] for example, the plaintiff fell as she stepped over an unusually high concrete barrier kerb in a car park and suffered personal injury. The decision of the South Australian Full Court was based entirely on negligence principles.[89]

It is perhaps arguable that once the old categories of occupiers' liability were submerged by general negligence law as a result of the High Court's decision in *Australian Safeway Stores Pty Ltd v Zaluzna*,[90] the legislation in Victoria, Western Australia and South Australia became redundant and could be quietly discarded.[91] Whether or not this is right, counsel, courts and judges in South Australia, at least, seem to be taking only limited notice of it.

THE LANDLORD'S LIABILITY AT COMMON LAW

The argument that the respondents were liable to the appellant in negligence at common law, which did not feature prominently in the proceedings at first instance

88. (1995) 64 SASR 494.

89. See also *Cutts v O'Neil* (unreported) [1998] SASC 6921 13 Nov 1998; *Nguyen v Hiotis* (unreported) [2000] SASC 88 11 May 2000, in which the Wrongs Act provisions received only passing mention. Note also *Chicco v City of Woodville* [1990] Aust Torts Reports 81-028, where the plaintiff was accidentally injured on a 'flying fox' in a playground maintained by the defendants, an interesting example of the difference between legislation and case-law with regard to their retrospective effect. The court was able to take advantage of the changes to common law negligence brought about by *Australian Safeway Stores v Zaluzna* supra n 60, but could not apply the legislation because it had not been enacted at the date of the accident.

90. Ibid.

91. Moves to introduce occupiers' liability legislation in the ACT, NSW and Tasmania were abandoned after the *Australian Safeway Stores* decision. For the ACT, see ALRC *Occupiers' Liability* Discussion Paper No 28 (Sydney, 1987); ALRC *Occupiers' Liability* Report No 42 (Sydney, 1988). The 1988 Report concluded that legislation to reform the law of occupiers' liability in the ACT was unnecessary. For NSW, see NSWLRC Working Paper No 3 *Occupiers' Liability* (Sydney, 1969). A memorandum from the Commission to the Attorney-General in 1986 suggested that this reference, previously classified as a 'standing reference', should be regarded as completed since developments in the common law had overtaken the need for further inquiry by the Commission: NSWLRC *Annual Report 1989* (Sydney, 1989) 58-59. For Tasmania, see Tas LRC *Research Paper on Occupiers' Liability Law* (Hobart, 1984); Tas LRC *Occupiers' Liability* Report No 53 (Hobart, 1988). The Standing Committee on Civil Law and Procedure convened by the Law Reform Commissioner (who replaced the Commission in 1987) resolved that no reform was necessary, and that any further development in the law should be left to the courts following the *Australian Safeway Stores* decision: Tas LRC *First Annual Report 1989* (Hobart, 1990), 15.

or in the Full Court, was the main focus of the judgments of the High Court in *Jones v Bartlett*. The principal reason for granting special leave was the uncertainty resulting from the court's previous decision on landlords' liability in *Northern Sandblasting*.[92] In that case, the facts of which have already been stated,[93] the court's decision that the landlord was liable to the tenants' nine-year old daughter electrocuted by turning off a tap was reached by a 4:3 majority. Unfortunately, there was no unanimity in the reasoning of the majority judges. Brennan CJ and Gaudron J held that landlords owe a duty of care not to let premises in an unsafe condition, Toohey and McHugh JJ that they were under a non-delegable duty of care and therefore remained liable for work entrusted to a competent independent contractor. The second finding was specifically dissented from by the remaining five judges, and the first by all except McHugh J, who did not consider the issue.

In *Jones v Bartlett*, the premises were not let in a dangerous condition. Gleeson CJ said:

> There was nothing about the premises that alerted, or should have alerted, the owners to any unusual danger. The premises were constructed in accordance with the standards prevailing at the time, and, so far as appears from the evidence, were adequately maintained.[94]

In view of *Northern Sandblasting*, the respondents conceded that they owed a duty of care but disputed its content.[95] The appellant argued that landlords were subject to an affirmative duty of inspection. In the words of Kirby J:

> It was at the heart of the appellant's case that this Court should demonstrate a concern with accident prevention similar to that which the Court has adopted in other fields, notably that of employer liability to employees. The appellant argued that, unless this Court expressed the common law in such a way as to impose affirmative duties of inspection on landlords to discover, and remedy, latent defects of the kind that existed in the glass of the door which caused his injuries, such injuries would continue to happen to people like himself. Landlords would have no legal incentive to discover defects, to repair them and thereby to prevent injuries from happening. Vulnerable tenants, their families and visitors, who could least manage to protect or insure themselves, would be left to their own devices.[96]

These arguments were accepted by McHugh J but rejected by the other members of the court.

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92. Supra n 5. For comment, see Handford supra n 40.
93. See supra p 82.
94. *Jones v Bartlett* supra n 4, Gleeson CJ 6.
95. Ibid, Gleeson CJ 10.
96. Ibid, 42.

1. Determining the ratio of Northern Sandblasting

Rejecting the appellant's argument involved attempting to settle the exact scope of a landlord's liability. The problem, of course, was that in spite of the 'valiant attempts' of some commentators,[97] it was impossible to extract any ratio from *Northern Sandblasting* beyond the proposition that *Cavalier v Pope* no longer represented current Australian law.[98] *Northern Sandblasting* presents the difficult problem, all too often evident in recent High Court decisions, of a majority in favour of a particular result but no majority in favour of any particular ground justifying it.[99] One of the most important aspects of the decision in *Jones v Bartlett* is the detailed consideration given by Gummow, Hayne and Kirby JJ to the process to be adopted to resolve such conflicts.

The joint judgment of Gummow and Hayne JJ referred to the locus classicus on this particular debate, an article by two Australian law professors in the Law Quarterly Review, in which two views were identified.[100] The first is that there is no discernible ratio decidendi and so a later court is free to decide the legal issues for itself and adopt any reasoning which appears to it to be correct so long as it supports the actual decision in the earlier case. The second is that the later court is bound to apply the earlier decision if the circumstances of the later case cannot reasonably be distinguished from the earlier one. Their Honours described the second view as a 'variant' of the first,[101] and it may well be that the distance between the two views is not great. Kirby J was clearly in favour of the first view:

> It follows that, as a matter of law, I am at liberty to maintain the [dissenting] view that I expressed in *Northern Sandblasting* concerning the duty which, statute apart, a landlord owes to a tenant. Of course, I am also free to derive from the main thrust of the majority conclusions in that decision a tendency or trend of the common law to expand the scope of the liability of the landlord in Australia. I am free to take into account, in addition to the arguments of the present parties, the commentaries which *Northern Sandblasting* has elicited. And I am entitled to consider any developments of the law in the courts of other jurisdictions which share the same general legal principles and similar statutory and common law developments, where such courts have considered the legal liability of landlords to their tenants.[102]

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97. Ibid, Kirby J 38.
98. Ibid, Gleeson CJ 10, Gaudron J 14, Gummow and Hayne JJ 33, Kirby J 38-39, Callinan J 48.
99. For other examples, see *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Perre v Apand Pty Ltd* (1999) 198 CLR 180. The problem is not confined to High Court decisions. For a prominent House of Lords example, see *Chaplin v Boys* [1971] AC 356.
100. GW Paton & G Sawer 'Ratio Decidendi and Obiter Dictum in Appellate Courts' (1947) 63 LQR 461. See also AI MacAdam & J Pyke *Judicial Reasoning and the Doctrine of Precedent in Australia* (Sydney: Butterworths, 1998) paras 10.22-10.40.
101. *Jones v Bartlett* supra n 4, 34.
102. Ibid, 39-40.

His Honour introduced this analysis by saying that the process of identifying the ratio required dissenting judgments to be eliminated. Thus, in attempting to discover a ratio for *Northern Sandblasting,* the minority opinions of Dawson and Gummow JJ and himself were to be ignored.[103] Gummow and Hayne JJ were more equivocal on this issue, suggesting that 'Some decisions may yield a ratio only by the inclusion of reasoning as to propositions of law by a member of the Court who dissented as to the application of those principles to the facts'.[104] They noted that there are different views about this: perhaps the most satisfactory is the late Sir Rupert Cross's moderate suggestion that dissenting judgments should not be wholly disregarded and may at least contain weighty dicta.[105]

Gummow and Hayne JJ pointed out that the High Court is not bound by its previous decisions and so it was unnecessary for them to resolve these problems.[106] As stated in *John v Federal Commissioner of Taxation*[107] one of the reasons for departing from a previous decision is a difference in the reasoning of the majority judges. Referring again to the opinion of the two professors, their Honours suggested that there was much to be said for the view that the ratio of a decision may be uncertain until it is possible to assess its reception and how it is treated by subsequent cases.[108]

2. The landlord's liability after Jones v Bartlett

In the light of these considerations, what principle of landlords' liability emerges from *Jones v Bartlett*? Of the protagonists in *Northern Sandblasting*, there remained Gaudron J from one camp, McHugh J from the other, and two of the three dissentients. McHugh J's earlier opinion was based on the existence of a non-delegable duty, which was not in issue in the present case since the landlords did not delegate any duty they owed to anyone else (such as an expert glass inspector). The rest of the court were not prepared to join him in recognising an affirmative obligation.

An analysis of the five majority judgments shows that there is a broad measure of agreement between Gaudron, Gummow, Hayne and Kirby JJ. Given this opportunity to review the outcome of *Northern Sandblasting,* Kirby and Gummow JJ, it appears, have altered their previous position. Kirby J said:

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103. Ibid, 38, referring to his own judgment in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 417-418.
104. Ibid, 34. An example is *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460. Note also Mason CJ and McHugh J's summary of the effect of the judgments in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15.
105. R Cross & JW Harris *Precedent in English Law* 4th edn (Oxford: OUP, 1991), 92.
106. *Jones v Bartlett* supra n 4, 34.
107. (1989) 166 CLR 417, Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ 438.
108. *Jones v Bartlett* supra n 4, 34.

> For my own part, I would be prepared to accept that the decision of the majority in *Northern Sandblasting*, although yielding no binding rule, has enlarged a landlord's duty to its tenants at common law. No other conclusion would be consistent with the outcome in the facts of that case by which the injured child of tenants was held entitled to recover damages from the landlord, notwithstanding the reasonable steps which the landlord had taken to protect the tenants and their family from harm.[109]

Gaudron J pointed out that in *Northern Sandblasting* she had gone further than Brennan CJ. In her view, the landlord was under a duty to take reasonable care for the safety of the tenants and their household by putting *and keeping* the premises in a safe state of repair. Whereas Brennan CJ would confine the duty to defects existing at the commencement of the tenancy, she would extend it to defects occurring subsequently. But even this more extended version of the duty would not avail the appellant in the present case, because it was confined to defects. The glass door was not defective and therefore not in need of repair. In the light of all the circumstances, and particularly the fact that tenants in occupation could exercise greater control than the landlords, it was inappropriate to impose any higher duty.[110]

Gummow and Hayne JJ, in the most detailed analysis of any of the judgments, stressed that the landlord was under a greater duty than merely to take reasonable care to avoid foreseeable risk of injury. Such a formulation would not give enough content to the duty to enable the case to be decided.[111] Interestingly, their Honours did not resort to concepts such as 'control' – invoked by the High Court in former years as an indicator of 'proximity',[112] and still sometimes considered relevant in the post-proximity era as part of the process of establishing a duty of care.[113] Instead, they preferred to go back to the foundations of negligence in the shape of Lord Atkin's neighbour principle,[114] asking whether the relationship between landlord and tenant was so close and direct that the act in question directly affected the plaintiff as a person the defendant would know would be directly affected by his careless act.[115] Applying this general test, Gummow and Hayne JJ said that the landlord's duty to the tenant was based on the principle that premises would not be

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109. Ibid, 40.
110. Ibid, 15.
111. Ibid, 27.
112. See eg *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. Gummow and Hayne JJ, ibid 28, affirmed the view of Prosser and Keeton that control was 'a fiction devised to meet the case and not a particularly helpful one': see *Prosser and Keeton on the Law of Torts* 5th edn (Minnesota: West Publishing Co, 1984) 444.
113. Eg *Hill v Van Erp* (1997) 188 CLR 159, Gaudron J 198-199, Gummow J 234; *Pyrenees Shire Council v Day* (1998) 192 CLR 330, Brennan CJ 347-348, Gummow J 388-391; *Perre v Apand Pty Ltd* (1999) 198 CLR 180, Gleeson CJ 195, Gaudron J 200-202, Gummow J 259-260.
114. *Donoghue v Stevenson* [1932] AC 562, 581.
115. *Jones v Bartlett* supra n 4, 28.

reasonably fit for the purposes for which they were let where the ordinary use of the premises for that purpose would, as a matter of reasonable foreseeability, cause injury. The landlord, therefore, had to take reasonable steps to ascertain the existence of dangerous defects, and, once they had become known, to take reasonable steps to remove them or make the premises safe.[116] The three elements of what was a dangerous defect, the diligence required to ascertain such defects, and what had to be done to remove them were examined in detail.[117] The present case failed at the first of the three hurdles because the glass door was not a dangerous defect, and no liability could arise from danger due to disrepair because the lease placed the tenants under an obligation to keep the door in the same condition as at the beginning of the lease.[118] Their Honours then asked whether the landlord owed a lesser duty to other visitors to the premises than that owed to the tenant. Even though the landlord's duty would ordinarily be narrower than that owed by a tenant in occupation, because of the greater control enjoyed by the latter, defects were unlikely to discriminate between tenants and others on the premises. Even if the appellant was owed the same duty as his parents, there was no breach of duty because the door was not a dangerous defect.[119]

Kirby J, adopting the approach already referred to,[120] considered that a landlord owed a duty of care not only under the contract of lease, and not only to the tenants, but also to third parties injured as a result of a patent defect in the premises. The landlord could discharge this duty by undertaking inspection prior to each lease or renewal, responding reasonably to defects drawn to his or her attention, and ensuring that any repairs disclosed by inspection or notice were made. The duty could ordinarily be discharged by delegating the responsibility of inspection and repair to a competent person.[121] Following an examination of the law elsewhere and the parties' arguments,[122] he found that Australian law had not yet developed so far as to recognise an affirmative duty to conduct or procure a detailed inspection of every possible source of danger. The duty was limited to taking reasonable care to avoid a foreseeable risk of injury to a person in the position of the appellant.[123]

The other members of the majority were less forthcoming. Gleeson CJ contributed an economically-worded judgment in which he said that there was no ground in principle for imposing on landlords an obligation greater than to take reasonable care to avoid foreseeable risk of injury to prospective tenants and members

116. Ibid, 29.
117. Ibid, 29-32.
118. Ibid, 30.
119. Ibid, 32-33.
120. Ibid, 39-40, quoted supra p 94.
121. Ibid, 40.
122. Ibid, 40-43.
123. Ibid, 43-44.

of their household: 'The capacity to adjust and adapt, which is inherent in the test of reasonableness, would be diminished if a more particular test were formulated'.[124] Callinan J, who, as we have seen, expressed some reservations whether section 9 of the Occupier's Liability Act 1985 permitted the concurrent imposition of a common law duty,[125] suggested that this section might represent the maximum intrusion on the common law intended by the Western Australian parliament.[126] Accordingly, he was not prepared to recognise anything more than a duty to provide habitable premises at the time when the tenancy commenced.[127]

What, then, is the present state of the law after *Jones v Bartlett*? There can be no doubt that a good deal of the former uncertainty has been resolved. The High Court has recognised that *Northern Sandblasting*, albeit in a rather unsatisfactory manner, raised the level of the duty owed by a landlord. Even if there are still some differences of approach and wording between the major judgments, there is now a broad concurrence of view about the limits of that duty.

It is common for major legal initiatives undertaken by appellate courts to be accompanied by initial uncertainties due to differences of detail and approach between different judgments.[128] Over the course of time such uncertainties are gradually resolved, often as a result of one judgment achieving particular prominence in subsequent judicial utterances.[129] It is suggested that the joint judgment of Gummow and Hayne JJ may well become the predominant formulation of the landlord's duty over the course of the next few years. Returning, with a little more fidelity, to the words of St Paul, we may say that we no longer see in the glass quite so darkly, and that eventually we may come face to face.

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124. Ibid, 11.
125. See text to supra nn 75-79.
126. *Jones v Bartlett* supra n 4, 49.
127. Ibid, 50.
128. Eg *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465; *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529.
129. Eg the speech of Lord Wilberforce in *Chaplin v Boys* [1971] AC 356: see *Church of Scientology v Commissioner of Metropolitan Police* (1976) 120 SJ 690, and *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136, Hodgson J 1145-1146; *Caltex Oil,* ibid, Gibbs and Mason JJ: see *Johns Period Furniture Pty Ltd v Commonwealth Savings Bank* (1980) 24 SASR 224, but note the comments of the Privy Council in *Candlewood Navigation Corp Ltd v Mutsui OSK Lines Ltd* [1986] AC 1, Lord Fraser 22-24.