SUPREME COURT OF QUEENSLAND

CITATION:	*Thompson v Woolworths (Q'land) P/L* [2003] QCA 551
PARTIES:	**THELMA JEAN THOMPSON** (plaintiff/respondent) **v** **WOOLWORTHS (Q'LAND) PTY LIMITED** ACN 000 034 819 (defendant/appellant)
FILE NO/S:	Appeal No 6349 of 2003 DC No 4107 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2003
JUDGES:	de Jersey CJ, Williams JA and McMurdo J Separate reasons for judgment of each member of the Court, de Jersey CJ and Williams JA concurring as to the orders made, McMurdo J dissenting
ORDERS:	**1. Appeal allowed** **2. Judgment entered in the proceeding for the appellant against the respondent** **3. The respondent to pay the appellant's costs of and incidental to the appeal, and the proceeding at first instance, to be assessed**
CATCHWORDS:	TORTS – NEGLIGENCE – DANGEROUS PREMISES – INJURIES TO PERSONS ENTERING PREMISES – WHO IS LIABLE – where respondent delivered bread to appellant as independent contractor – where respondent injured back attempting to move bins – where respondent previously moved bins – where assistance available to respondent – whether obviousness of risk limited appellant's duty of care – whether appellant liable for respondent's injury *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, considered *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512, applied *Morgan v Sherton Pty Ltd* (1999) 46 NSWLR 141, applied *Romeo v Conservation Commission of the Northern Territory*

(1998) 192 CLR 431, applied
Stevens v Brodribb Sawmilling Co Pty Ltd (1985-1986) 160 CLR 16, applied
Woods v Multi-Sport Holdings Pty Ltd (2001-2002) 208 CLR 460, applied

COUNSEL: J A Griffin QC, with M T O'Sullivan, for the appellant
M E Eliadis for the respondent

SOLICITORS: Blake Dawson Waldron for the appellant
Shine Roche McGowan for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of McMurdo J, and gratefully adopt his Honour's recitation of the facts of the matter.

[2] Shorn to their essentials, the critically important facts, emerging from the evidence accepted by the learned primary Judge, are these. The respondent injured her back early in the morning one day in August 1999. Delivering bread in her vehicle to the appellant's Stanthorpe store, in her capacity as an independent contractor, she found her access to the loading dock blocked by two large industrial bins which had some time earlier been emptied by the local authority. Each weighed more than 350 kilograms: they were approximately 1800mm long, 1350mm wide and 1250mm deep. The respondent is five feet one inch tall and weighed approximately eight stone. She had injured her back in a lifting manoeuvre only a week or two previously. On 22 May 1999, she noted in her diary, referring to such bins: "too heavy for manual moving … too heavy for me to move by myself". She could have buzzed for assistance from an employee of the appellant. That may have involved a wait (on the Judge's findings, up to 10-15 minutes), but she was not subject to any urgent demand. She could also have waited for assistance from her husband, who would be passing by. But having moved one of the bins about 20 feet and then encountering resistance, she persisted and was consequently injured.

[3] The learned Judge held that as occupier of the premises, the appellant owed a duty of care to the respondent, encompassing protecting against the risk which eventuated, because a reasonable person would have foreseen the prospect of injury to the respondent were she to push the bin. He also held that the appellant breached that duty by not implementing the measures advised by Mr McDougall. His Honour was not dissuaded from his conclusion as to the existence of the duty of care by the circumstance of the respondent's awareness of the subject risk, being the risk of injury arising from her moving or seeking to move the bin.

[4] In relation to the aspect of obviousness to the respondent of that risk, the Judge referred to what Kirby J said in *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 478:

> "Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just."

He then set out the observations of Gleeson CJ in *Woods v Multi-Sport Holdings Pty Ltd* (2001-2002) 208 CLR 460, 474:

> "It is right to describe that observation as a comment. It is not a proposition of law. What reasonableness requires by way of warning from an occupier to an entrant is a question of fact, not law, and depends on all the circumstances, of which the obviousness of a risk may be only one. And, as a proposition of fact, it is not of universal validity. Furthermore, the description of a risk as obvious may require closer analysis in a given case. Reasonableness would not ordinarily require the proprietor of an ice skating rink to warn adults that there is a danger of falling; but there may be some skaters to whom such a warning ought to be given. Nevertheless, as a generalisation, what Kirby J said is, with respect, fair comment."

Reference may be added, to *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934, 1945 para 67.

Counsel for the respondent emphasized that the negligence alleged here did not rest in a failure to warn. That may be so, but the obviousness of the risk was nevertheless factually significant in the delineation of the scope of the duty of care owed by the appellant.

[5] In *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512, which concerned injuries sustained through the collapse of a bridge on a public road, and through tripping on a footpath, Gaudron, McHugh and Gummow JJ spoke (p 581) of "the formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety". They described (p 580) as "a proper starting point", "the proposition that the persons using the road will themselves take ordinary care". See also at pp 582, 639. Accordingly, the circumstances that the respondent appreciated the risk she chose to undertake bore importantly on the formulation of the content of the duty.

[6] As to the respondent's choice in the matter, I have in mind these findings of the learned Judge, based on his acceptance of the respondent's evidence:

> "The plaintiff said when cross examined she could have used the buzzer to summons an employee of the defendant and she could have waited for her husband to arrive to assist her. Further, the plaintiff agreed with the propositions suggested to her that for the defendant there was no urgency to have the plaintiff vacate the dock and because she injured her back a week or two before [there was] all the more reason she should have waited for her husband."

(It was not the case that the respondent pushed the buzzer, with no help forthcoming, or that she had been refused assistance.)

[7] This approach to the determination of the content of the duty of care is consistent with what was said by Sheller JA in *Morgan v Sherton Pty Ltd* (1999) 46 NSWLR 141, 144, in a judgment with which the other members of the court agreed:

> "In *Romeo*, a case in which the High Court by a majority held that an occupier, in that case a public authority, was not liable to a plaintiff who when affected by alcohol went at night to a part of a public

reserve at the top of an unfenced cliff, the presence of which was obvious, fell over it and injured herself, Toohey J and Gummow J said (at 455) after referring to Mason J's judgment in *Wyong Shire Council v Shirt* (at 48):

> "But in the present case the risk existed only in the case of someone ignoring the obvious.
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> In putting the matter in that way, there is a danger of drawing in the question of contributory negligence of the plaintiff to what is a consideration of the duty of care on the defendant. For that reason we think it is preferable to approach the matter on the footing that there was a duty of care on the respondent to take any steps that were reasonable to prevent the foreseeable risk becoming an actuality."

The first part of this dictum describes as significant the foolhardy or reckless conduct of the plaintiff which is then, to avoid speaking in terms of contributory negligence, re-stated in the language of the reasonable steps to be taken by a defendant. A defendant is not required to take steps to guard against the risk of injury the result of an entrant's deliberate or reckless behaviour which is likely to cause him or her injury."

[8] In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1985-1986) 160 CLR 16, upon which Counsel for the appellant relied, the High Court described in limiting terms the extent of the duty of care owed by principal to independent contractor, which Wilson and Dawson JJ said (p 45) must "take account of the independent functions of the contractors and be something less than that owed by an employer to his employees". Chesterman J took up that theme in *McDonnell v Hoffman and Ors* [2000] QSC 54, as did the New South Wales Court of Appeal in *Kolodziejczyk v Grandview Pty Ltd* [2002] NSWCA 267.

[9] Mr Eliadis, who appeared for the respondent, submitted that approach was not relevant to the determination of this case, because this case concerns the duty of care owed by an occupier of premises in relation to an entrant. That submission would, if sustained, import a degree of rigidity inconsistent with the High Court's retreat from special categories and particular rules in the law of negligence, evident especially from *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 and *Brodie/Ghantous*.

[10] The relationship between those parties, as principal and independent contractor, might impact upon the determination of the content of the duty of care owed by an occupier, as was apparently recognized by Gleeson CJ in *Woods* (p 473):

> "Where it is claimed that reasonableness requires one person to provide protection, or warning, to another, the relationship between the parties, and the context in which they entered into that relationship, may be significant. The relationship of control that exists between an employer and an employee, or of wardship that exists between a school authority and a pupil, may have practical

> consequences, as to what it is reasonable to expect by way of protection or warning, different from those which flow from the relationship between the proprietor of a sporting facility and an adult who voluntarily uses the facility for recreational purposes. I say "may", because it is ultimately a question of factual judgment, to be made in the light of all the circumstances of a particular case."

[11] Accordingly here, one should not ignore the respective, independent functions of the appellant and the respondent, the respondent being, in terms used by Brennan J in *Stevens v Brodribb* (p 47), "competent [herself] to control [her] system of work without supervision by the [appellant]". I consider that was one of the circumstances bearing upon the scope of any duty owed to the respondent, although I am not to be taken as suggesting it was of determinative significance.

[12] Clearly the appellant owed the respondent, as entrant, a duty to take reasonable care to avoid a foreseeable risk of injury: *Australian Safeway Stores*. The issue is the content or scope of that duty (*Romeo* at 478, 487); and whether the respondent's own perception of the risk, against the background of the relationship between the parties, and her unnecessarily undertaking the risky manoeuvre, sufficiently powerfully militated against defining the duty to cover that risk, as to warrant this court, on appeal, differing from the primary Judge's factual approach. (Compare *Romeo* pp 488-9 per Hayne J, in the passage extracted by McMurdo J in para 22 of his reasons.)

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

[14] The learned Judge's factual conclusion that the duty of care owed by the appellant extended to protection against this risk was not, in my respectful view, reasonably open, and may and should therefore be upset on appeal.

[15] I would order that the appeal be allowed, that judgment be entered in the proceeding for the appellant against the respondent, and that the respondent pay the appellant's costs of and incidental to the appeal, and the proceeding at first instance, to be assessed.

[16] **WILLIAMS JA:** The different conclusions reached by the Chief Justice and McMurdo J in resolving the issues raised by this litigation highlight the difficulty of applying well established legal principles to the peculiar factual situation in question. There is no need for me to state the essential background facts; they can be gleaned from the other judgments.

[17] There is no doubt that the appellant, Woolworths (Q'land) Pty Limited, owed the respondent, Thelma Thompson, a duty (or perhaps one should more accurately say duties) of care given that she was an entrant onto its property, with its full knowledge and for the purpose of transacting business of mutual benefit. Without doubt the appellant had a duty to warn her of any dangers inherent in the premises which were not obvious, and also a duty not to carry out activities which constituted

a danger to her as a known entrant onto the premises. I do not suggest that they were the only duties imposed on the appellant with respect to the respondent, but they are indicative of the type of duty generally owed.

[18] The critical question is what duty, if any, did the appellant owe to the respondent with respect to the industrial waste bins which blocked the access to the delivery dock on the morning in question. Employees of the local authority responsible for emptying the bins had removed the bins from the latticed area so they could be emptied into the council vehicle and then left them in the position blocking access to the loading dock. Once a relevant duty is identified and defined, the next question is whether or not it was breached.

[19] As static objects left blocking the access to the loading dock the industrial rubbish bins did not pose any risk to the respondent. They were not, for example, something a person could trip over, and they were so obvious that no person acting reasonably could be injured by walking into them. The only risk to the respondent came after she made a conscious decision to move, or attempt to move, the bins.

[20] The bins in question were emptied three times a week and the evidence indicates that on most occasions they were left by the local authority employees in a position which either blocked or hindered access to the loading dock. There was no set time when the bins would be emptied; the evidence indicated that usually that occurred randomly between 4.00 am and 6.00 am. A storeman employed by the appellant commenced work at 5.00 am. The regular storeman was the witness Frank Thompson, though it would appear he was on leave at the time the respondent sustained her injury. His evidence was that on a few occasions the local authority employees returned the bins to the latticed area (sometimes with his assistance), but more often than not they were left outside the latticed area. His evidence was that if he saw the bins in such a position he would return them to the area enclosed by the lattice. However, there is an abundance of evidence to suggest that delivery drivers (sometimes arriving before Frank Thompson commenced work) would move the bins into the latticed area in order to gain ready access to the loading dock. As part of the appellant's case evidence was called from delivery drivers Wilson and Shatte, each of whom gave evidence that from time to time he moved the bins for his own convenience. In addition to Frank Thompson the appellant called evidence from RW Bates, a delivery driver, who also gave evidence that from time to time he "shoved the bins out of the road" because it was more convenient for him to do so; on other occasions he assisted the council employees in doing that. Dailey, the appellant's manager, also gave evidence he moved the bins "on several occasions".

[21] The general picture therefore emerges, which is not inconsistent with the findings of fact made by the learned trial judge, that frequently the bins were moved by delivery drivers for their own convenience, often before Frank Thompson was aware the bins were blocking the access to the loading dock; but once Frank Thompson (or another employee of the appellant) became aware of that circumstance he would move the bins. Wilson, Shatte, RW Bates, Dailey and Frank Thompson were all able bodied men, and the evidence of each was that there was no difficulty in moving the empty bins which were on wheels. Bennett, who relieved Frank Thompson when he was on leave, also gave evidence that he would move the bins if he saw they were blocking access.

[22] As outlined in the other judgments, and as found by the learned trial judge, there was a buzzer on the loading dock which could be used to attract the attention of a storeman if assistance was required either in moving the bins or otherwise in making a delivery. Understandably, because of other commitments of the storeman, it sometimes took 10 to 15 minutes for there to be a response.

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

[24] It remains to consider the respondent's conduct on the morning in question in the light of the foregoing analysis.

[25] As recorded in the other judgments the respondent had noted in her diary on 22 May 1999 that the bins were "too heavy for manual moving … to heavy for me to move by myself". She had injured her back a week or so before the critical date (some time in August 1999) and must have been aware of her vulnerability. Under cross-examination she said "it was obvious to me that I shouldn't have pushed the bins". The respondent was of small stature; the learned trial judge described her as "petite". The fact that she knew that moving the bin was beyond her physical capability is confirmed by the evidence from her husband that he complained to the manager of the appellant on some three occasions that his wife should not have to move the bins. The response to those complaints was that she was not obliged to move the bins, and assistance was available.

[26] Much was made in the course of argument of the fact that no employee of the appellant had specifically directed the respondent not to move the bins. I do not regard that as decisive. The respondent was under no obligation to move the bins and she fully appreciated that. There was evidence that once Frank Thompson had told her not to move the bins and he then did that. As with the male delivery drivers, on all occasions on which she moved the bins (and she said she had done it on some 20 or 30 prior occasions) it was a voluntary decision made by her because she perceived it to be for her own convenience to do so.

[27] Given her knowledge that the bins were too heavy for her to move by herself, the risk to her of sustaining an injury in attempting to move the bins manually was obvious. The respondent did not use the buzzer to call for assistance on the day she

was injured. It is of no avail for the respondent to say she believed the relieving storeman, Bennett, to be unhelpful; there is no evidence suggesting he refused to give assistance after being asked.

[28] There is no need for me to consider the relevant legal principles. It is sufficient for me to say I agree with the discussion of the authorities in the reasons of the Chief Justice.

[29] In the circumstances the evidence does not establish that there was any breach by the appellant of a relevant duty owed to the respondent. It follows that the appeal should be allowed. I agree with the orders proposed by the Chief Justice.

[30] **McMURDO J:** The appellant has a supermarket at Stanthorpe, to which stock is delivered by a laneway leading to a loading dock. The respondent was a self employed delivery driver who delivered bread to shops and supermarkets in the area, including this supermarket. When she went to the appellant's premises one morning in August 1999, she found her path to the loading dock blocked by two large industrial bins. She parked her truck and attempted to push the bins away from the lane. As she did so, she suffered a back injury.

[31] The respondent sued the appellant in the District Court, claiming damages for negligence. In essence, her case was that the bins should not have been left in her way. The trial judge held that the appellant was liable and that there was no contributory negligence. The appellant was held liable because there were steps which it could have taken to avoid the presence of these bins in the path of a delivery driver, and the exercise of reasonable care required those steps to be taken.

[32] The appellant argues that it owed no duty to the respondent in relation to the bins or, alternatively, that it did not breach any such duty. Each of those submissions is based upon an assertion that the risk of injury to the respondent from attempting, unassisted, to move the bins was obvious to her. Alternatively, it is said that the trial judge should have found contributory negligence.

The Appellant's premises

[33] The laneway provided the only vehicular access to the loading dock. The laneway was not sufficiently wide to enable delivery vehicles such as the respondent's two and a half tonne truck to pass or turn around. Vehicles had to reverse down the laneway towards the dock. To one side of a vehicle as it parked against the dock was an area in which the two industrial garbage bins used by the appellant were kept. On three mornings a week, the bins would be removed from that area by the appellant's employees to the laneway to enable a Council garbage truck to remove their contents. The Council employee would then leave the bins in a position blocking access to the loading dock, where they would remain until moved by one of the appellant's employees or a delivery driver, such as the respondent.

[34] There was a bell or "buzzer" by which drivers could summon an employee of the appellant to request that the bins be moved. Whilst the appellant's employees often moved the bins, the trial judge found that sometimes so did delivery drivers, without seeking the appellant's assistance. He found that the appellant knew of, but did not try to prevent, drivers from doing so.

[35] The laneway, the bin storage area and the loading dock were premises occupied by the appellant.[1] The bins were used only by the appellant. At any relevant time, there was an employee at the appellant's premises able to move the bins off the laneway into their storage area after they had been emptied by the Council.

Respondent at Appellant's premises

[36] The respondent was aged 47 at the time of this accident. She had then been delivering bread to these premises for about 17 months. She made her deliveries to the appellant at about five in the morning and in the course of a schedule of deliveries to several places. That schedule was likely to be disrupted if she had to wait for some minutes whilst someone else moved the bins, because in the meantime she might have to make way for another truck which could then occupy the loading dock for some time. Often her husband, who was also making deliveries of his own to other places, would manage to meet her at the appellant's premises to assist her to move the bins. The respondent moved the bins about 20 or 30 times over this period, usually with the assistance of her husband. She also received assistance, on occasions, from a particular employee of the appellant, who would either help the respondent or move the bins himself. Neither this employee nor any other directed her to summon help from the appellant and not to move the bins unassisted.

[37] The respondent often called for assistance with the bins but, like other delivery drivers, she commonly experienced delays of the order of 10 to 15 minutes before the call was answered. In the month or so prior to this accident, a relatively unhelpful person was the appellant's storeman on duty, of whom the respondent had reasonably concluded that he was unlikely to provide at least prompt assistance.

[38] Through her husband, the respondent complained about the bins to the appellant several times prior to this accident. The appellant was well aware that the respondent was likely to move these bins if they were in her way, although she was not happy to do so. Although at times one particular employee of the appellant, if he saw the respondent moving a bin, would tell her not to do so and would move it himself, this was an act of personal courtesy rather than any direction or instruction by the respondent that she was not to do so. The respondent was well aware of her own difficulty in moving these bins due to their weight. Indeed she had made an entry in her diary a few months prior to the accident that the bin was too heavy for "manual moving" and that it was "too heavy for me to move by myself".

[39] At the trial the appellant conceded that it was unsafe for a person of the respondent's stature and weight to move the bins. She was just over five feet tall and weighed about 50 kilograms. Each bin weighed more than 350 kilograms. According to the expert evidence, the force required to manually move a bin was beyond the strength of a significant proportion of the female population and exceeded the maximum criteria for female workers specified in accepted guidelines.

[40] On the morning in question she did not use the buzzer to call for assistance. She was not in any more hurry than usual, but there were other vehicles behind her waiting for access to the loading dock. The respondent had suffered some back

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[1] The notice of appeal said that the trial judge should have taken into account the fact that the accident did not occur on the *property* of the appellant, but no such point was taken in argument.

injury a couple of weeks prior to this accident, when working at her own premises, but there were no remaining symptoms by this date. As she attempted to push a bin she felt a sharp pain down her back and leg and she thereby suffered a back injury, the physical and financial consequences of which are not in dispute upon this appeal.

The trial judge's reasoning

[41] Each of the facts already set out was found by the trial judge. He held that the appellant owed a duty to the respondent as an entrant to its premises, which was a duty to take reasonable care to avoid a foreseeable risk of injury, citing *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488. He concluded that the risk of injury to the respondent from attempting unassisted to move one of these bins was foreseeable. He further concluded that the appellant failed to take reasonable steps to avoid that risk. He found that the appellant should have either eliminated the manual handling of bins by providing vehicular access to the bins away from the laneway, or it should have provided a system by which its employees moved the bins as soon as the Council was finished with them. Neither remedy was said to be expensive or impracticable.

[42] He then held that there was no contributory negligence by the respondent, reasoning by reference to a number of circumstances which, for the most part, focused upon the conduct of the appellant, rather than that of the respondent.

Appellant's case on appeal

[43] A good deal of the appellant's argument emphasised that the respondent was not its employee. To that end the appellant relied on authorities which distinguish what is required of an employer, in providing a safe system of work or giving appropriate work instructions, from that required of a person engaging an independent contractor.[2] In this, the argument appeared to misunderstand the trial judge's reasoning. His Honour had not reasoned by analogy with an employment relationship but instead had characterised the case as one of occupier and entrant.

[44] Otherwise the challenge to the appellant's liability was based on the argument that "it ought to have been so obvious to the (plaintiff) (and was in fact obvious to her) that such movement entailed a danger of serious physical injury to her."[3] The appellant cited *Brodie v Singleton Shire Council* (2001) 206 CLR 512 as support for a proposition "that, in formulating a duty of care, a defendant is required to take precautions, not against any foreseeable injury but against injury to persons exercising reasonable care for their own safety."[4] The appellant further, and it would seem alternatively, argued that any duty owed by the appellant "did not extend to protecting her from the obvious danger of injury entailed in her manually moving the bins."

[45] The trial judge did not make a specific finding that the risk of injury was obvious to the respondent. As I have mentioned, he did find that the respondent was concerned that the bins were too heavy for her to move and that, through her husband, she had

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2 Specifically citing *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *McDonnell v Hoffman & Ors* [2000] QSC 054; *Kolodziejczyk v Grandview Pty Ltd* [2002] NSW CA 267.

3 Appellant's written argument para 31.

4 Appellant's written argument page 32

complained of having to move them, expressly referring to the prospect of injury. It does not follow that the respondent knew of the extent of the risk or, put another way, of the relative likelihood of an injury of the severity of that which she suffered. But with those qualifications in mind, the facts as found required a conclusion that the respondent was aware that she was risking injury.

[46] The appellant's argument makes the alleged obviousness of that risk a matter which qualifies the appellant's duty of care as an occupier. It says that it owed no duty in relation to that risk. Apparently accepting that ordinarily the occupier's duty is, as the trial judge held in accordance with *Australian Safeway Stores*, a duty to take reasonable care to avoid a foreseeable risk of injury, it says that no duty is owed where the risk is not only foreseeable by the occupier, but obvious to the entrant.

[47] The appellant does not argue that it was entitled to a defence upon a basis that the respondent had voluntarily assumed the relevant risk. Nor does it say that the risk was so obvious to the respondent that it was not foreseeable that she would attempt to move the bin as she did. Its argument involves a proposition of law which would limit the common law duty of care in a way which makes it irrelevant to consider the reasonableness of the occupier's response to a foreseeable and obvious risk. On this argument, the factual question of what was reasonable of the occupier would not arise.

[48] In my view, the submission is contrary to authority and must be rejected.

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

> "*Foreseeability*
>
> In view of the division of opinion between the judges who have dealt with the case in the courts below, it is clear that the question of foreseeability is one of the critical issues in the case. Ultimately, having read and reviewed the relevant evidence given at trial and the reasons for decision of the trial judge and of the members of the Full Court, we are left in no doubt that the trial judge was correct in concluding that the risk of injury to those diving from the rock ledge was reasonably foreseeable. As he said, "it may have reasonably been considered foolhardy or unlikely" for a person to dive as the

> appellant did. But, as he recognized, that was not the relevant question: a risk may constitute a foreseeable risk even though it is unlikely to occur (16). It is enough that the risk is not far-fetched or fanciful (16)."

[50] The appellant's submission is inconsistent with the reasoning in *Romeo*, where the plaintiff suffered serious injuries when, heavily intoxicated, she fell from the top of an unfenced cliff where the presence of the cliff was obvious. The majority in the High Court dismissed her appeal, not because a duty of care was not owed but because it was not breached. The trial judge had found that the risk of someone falling off the cliff and suffering injury was reasonably foreseeable, a finding unchallenged in the Court of Appeal. Accordingly, a duty of care defined according to the ordinary principles of negligence was owed. Toohey and Gummow JJ remarked that "the risk existed only in the case of someone ignoring the obvious" but added:

> "In putting the matter in that way, there is a danger of drawing in the question of contributory negligence of the plaintiff to what is a consideration of the duty of care on the defendant. For that reason we think it is preferable to approach the matter on the footing that there was a duty of care on the respondent to take any steps that were reasonable to prevent the foreseeable risk becoming an actuality."[5]

[51] Kirby J[6] and Hayne J[7] each distinguished between the issue of whether a duty of care existed and the issue involving what was alternatively described as the measure, scope or content of that duty. The obviousness of the danger presented by the cliff was relevant to the second of those issues: see pp 488-489 where Hayne J said:

> "What is reasonable must be judged in the light of *all* the circumstances. Usually the gravity of the injury that might be sustained, the likelihood of such an injury occurring and the difficulty and cost of averting the danger will loom large in that consideration. But it is not only those factors that may bear upon the question. In the case of a public authority which manages public lands, it may or may not be able to control entry on the land in the same way that a private owner may; it may have responsibility for an area of wilderness far removed from the nearest town or village or an area of carefully manicured park in the middle of a capital city; it may positively encourage, or at least know of, use of the land only by the fit and adventurous or by those of all ages and conditions. All of these matters may bear upon what the reasonable response of the authority may be to the fact that injury is reasonably foreseeable. Similarly, it may be necessary, in a particular case, to consider whether the danger was hidden or obvious, or to consider whether it could be avoided by the exercise of the degree of care ordinarily exercised by a member of the public, or to consider whether the danger is one created by the action of the authority or is naturally

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5 At 455.
6 At 475-479
7 At 486-490

> occurring. But all of these matters (and I am not to be taken as giving some exhaustive list) are no more than particular factors which *may* go towards judging what reasonable care on the part of a particular defendant required. In the end, that question, what is reasonable, is a question of fact to be judged in all of the circumstances of the case (255)."

[52] In *Nagle*, Brennan J dissented because in his view the duty owed by the respondent was not a general duty to take reasonable care to avoid foreseeable risks of injury but instead was a differently defined duty, owed by a public authority in which was vested the control and management of land. Accordingly, he held that the respondent's duty in that case was according to the judgment of Dixon J in *Aiken v Kingborough Corporation* (1939) 62 CLR 179 at 210, which was that the public authority should take reasonable care to prevent injury through dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care. At 439, Brennan J contrasted this with a duty according to *Australian Safeway Stores v Zaluzna*, a comparison which he said revealed a possibility of different conclusions depending upon which duty was imposed. He there said:

> "In a case where a plaintiff suffers an injury as the result of an obvious danger in an area under the control and management of a public authority, it may have been foreseeable that a member of the public, entering as a right, would be careless of his own safety and would suffer injury. If serious injury were foreseeable, the conclusion that the public authority was under a duty to fence off or to warn against the obvious danger could be easily reached. Of course, that would not be a necessary conclusion."

Brennan CJ adhered to this view of the liability of a statutory authority in his judgment in *Romeo*, which again makes clear the potential for different outcomes where the relevant risk is an obvious one and is avoidable by the exercise of reasonable care on the part of the entrant, according to whether the duty is the general duty of care or the specific duty of a statutory authority as advanced by Dixon J in *Aiken*. Yet upon the appellant's argument here, the duty owed by a private occupier is effectively according to the test in *Aiken* for a public authority, a test rejected by the majority in *Nagle* and *Romeo*. A consequence of *Nagle* is that a public authority must act reasonably to avoid a foreseeable risk although it is obvious to the entrant, just as an occupier of private land must do. In each case, the obviousness of the risk goes to the factual question of what reasonableness requires.

[53] In my view, there is nothing in *Brodie* which is inconsistent with this clear demarcation between the respective issues of existence and content of the duty of care, or which otherwise supports the appellant's submission. In the joint judgment of Gaudron, McHugh and Gummow JJ who with Kirby J constituted the majority, the same distinction between the existence and content of the duty of care clearly appears at, for example, p 577. The passage from *Brodie* specifically relied upon by the appellant, being para [355] in the judgment of Callinan J,[8] involves an assessment of whether the duty of care was breached if the ordinary test of liability in negligence applied.

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[8] And the concurrence of Gaudron, McHugh and Gummow JJ at [167].

[54] The relevance of the obviousness of a risk to a person exercising reasonable care for his or her own safety was further explained by Gleeson CJ in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 474 as follows:

> "Judge French, and the Full Court, were criticised in argument for their reliance on what Judge French described as the comment of Kirby J in *Romeo v Conservation Commission (NT)* (22) that:
>
> > "Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about the risk is neither reasonable nor just."
>
> It is right to describe that observation as a comment. It is not a proposition of law. What reasonableness requires by way of warning from an occupier to an entrant is a question of fact, not law, and depends on all the circumstances, of which the obviousness of a risk may be only one. And, as a proposition of fact, it is not of universal validity. Furthermore, the description of a risk as obvious may require closer analysis in a given case. Reasonableness would not ordinarily require the proprietor of an ice skating rink to warn adults that there is a danger of falling; but there may be some skaters to whom such a warning ought to be given. Nevertheless, as a generalisation, what Kirby J said is, with respect, fair comment. That is how Judge French and the Full Court understood it, and they did no more than indicate that they regarded it as apposite to the present case. There is no error in that."

To the same effect is the judgment of Kirby J in *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934 at 1945.

Conclusion on appellant's liability

[55] In the present case, the trial judge found that the risk of injury to the respondent was reasonably foreseeable. There is no basis for a challenge to that finding and I do not understand that it is challenged. In the context then of the respondent being a permitted entrant to premises in the appellant's occupation, the appellant owed her a duty to do what was reasonable to avoid the risk of injury from her attempting unassisted to move the bins.

[56] The content of this duty was then affected by a consideration of "the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.": *Wyong Shire Council* per Mason J at 47-48. To these considerations can be added others such as the relationship between the parties, but ultimately the factual question is what a reasonable person, in the position of the respondent, would do by way of response to the risk: *Woods v Multi-Sport Holdings Pty Ltd* per Gleeson CJ at 472-473.

[57] The trial judge held that reasonable care required the avoidance of the risk by one of two alternative courses, neither of which was said to be significantly expensive or problematical. In my view there was no error in that factual conclusion. The risk may have been obvious, but the probability of the occurrence of injury was

relatively high. To the extent that the appellant did anything towards discharging its duty, it knew that this had not avoided the risk, and it knew or should have known that this was because the respondent, like other drivers, was likely to run the risk of injury through the pressure of meeting the requirements of her work programme. It was, of course, a risk that came from the way in which the appellant organised its own business and premises. Because neither of the available steps was taken, the respondent remained exposed to the risk and the appellant's duty of care was breached.

Contributory Negligence

[58] As I have mentioned, the respondent had diarised her concern that the bins were too heavy to be moved by her and, through her husband, she had told the appellant's representative of her concern that she could be hurt. On the facts found by his Honour, including the facts in relation to those two matters, his Honour should have been satisfied that the respondent was or ought to have been aware of the risk of injury.

[59] As I have mentioned, his Honour's consideration of the issue of contributory negligence appears to have been dominated by a consideration of the appellant's negligence, without proper consideration of the factors going to whether the respondent exercised reasonable care. The circumstances, at least to some extent, explained why she attempted to move the bins on the day in question. But given what she knew or at least should have known of the risk of injury, in my view, she failed to exercise reasonable care in attempting to move the bins.

[60] The remaining issue is then one of apportionment. Whilst the appellant should bear most of the responsibility for this accident because it created the risk, the respondent's contribution was by a deliberate act in disregarding a risk which she had herself raised with the appellant. In my view it is appropriate that her judgment be reduced by one third.

Conclusion on the appeal

[61] Accordingly, the appeal should be allowed, the judgment below should be set aside and, in lieu, there should be judgment for the respondent against the appellant in the sum of $105,327.92. The respondent should pay the appellant's costs of the appeal.