SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Body Corporate for Professional Suites Community Title Scheme 14487* [2013] QCA 80
PARTIES:	**JODIE SMITH** (applicant) **v** **BODY CORPORATE FOR PROFESSIONAL SUITES COMMUNITY TITLE SCHEME 14487** (respondent)
FILE NO/S:	Appeal No 3791 of 2012 DC No 3873 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2012
JUDGES:	Margaret McMurdo P and Fraser JA and Fryberg J Separate reasons for judgment of each member of the Court, Fraser JA and Fryberg J concurring as to the orders made, Margaret McMurdo P dissenting in part
ORDERS:	**1. Leave to appeal granted.** **2. Appeal dismissed.** **3. The applicant to pay the respondent's costs of the application and appeal to be assessed.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – DUTY OF OCCUPIER – where the applicant fell through a glass panel adjoining the entrance to an office building – where the respondent was a body corporate in control of the common areas of the building including the foyer entrance and building façade – where the applicant suffered severe lacerations to her face, neck, arms and torso – where the applicant had been drinking prior to the accident – where the applicant brought an action for damages in negligence against the respondent – where the glass in the glass panel was 6 mm annealed glass – where this glass complied with the relevant Australian Standards in place in 1971 at the time of the

original construction of the building – where later Australian Standards required glass installed to be safety glass – where renovations were conducted between 2000 and 2001 to the foyer and the glass in the front doors, but not the glass panel through which the applicant fell – where the glass in the front doors was replaced with safety glass in accordance with Australian Standards – where the architect's plans for the renovation didn't alert the respondent to the relevant Australian Standards – where the respondent admitted a glass audit could have been conducted which would have revealed the current glass type and whether it complied with the relevant Australian Standards – whether the applicant had proved the respondent acted unreasonably in failing to organise a glass audit by a suitable person and thereafter replace the glass in the side panels with safety glass

TORTS – NEGLIGENCE – STATUTES, REGULATIONS, ETC – APPLICABILITY AND EFFECT IN ACTIONS FOR NEGLIGENCE – GENERALLY – where the applicant contended that s 30(1)(c) of the *Workplace Health and Safety Act* 1995 (Qld) ('the Act') placed a duty on the respondent to ensure that there was appropriate, safe access to and from the workspace through the common areas that the respondent controlled – where the applicant contended this included the glass panels – where the Workplace Health and Safety Risk Management Advisory Standard 2000 ('the Advisory Standard') set out ways to manage an alleged risk – where the applicant contended that s 26(3) of the Act and the Advisory Standard required the respondent to take active steps to manage risk – where the trial judge held that the respondent did not breach its statutory duty under s 30(1) – whether the respondent's duties under the Act required it to have organised a suitable person to audit the glass – whether the applicant proved a breach of the statutory duty owed by the respondent

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – OTHER CASES – where the applicant brought an action for damages in negligence against the respondent – where the applicant contended that her blood alcohol concentration did not have a significant affect on her – where the trial judge reduced damages for contributory negligence by one third – whether the applicant bears any responsibility for her injuries

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – CIRCUMSTANCES JUSTIFYING INTERFERENCE BY APPELLATE COURT – where the applicant contended that the trial judge's assessment of damages for past and future economic loss was manifestly inadequate – where the applicant sought a global award of $10,000 for past economic loss – where the trial judge did not

award damages for economic loss because the applicant had not adduced evidence of the "essential facts" of such a claim – where the trial judge awarded $15,000 for loss of future earning capacity – where the trial judge found that the applicant's psychological complications arising from the accident affected her future earning capacity – whether the trial judge erred in the assessment of damages

District Court of Queensland Act 1967 (Qld), s 118
Workplace Health and Safety Act 1995 (Qld), s 22(2) s 26(3), s 30(1)(c), s 37(1), s 41(1)

A V Jennings Construction Pty Ltd v Maumill (1956) 30 ALJR 100, cited
Bourk v Power Serve Pty Ltd & Anor [2008] QCA 225, considered
Hackshaw v Shaw (1984) 155 CLR 614; [1984] HCA 84, considered
Jones v Bartlett (2000) 205 CLR 166; [2000] HCA 56, considered
Leighton Contractors Pty Ltd v Fox (2009) 240 CLR 1; [2009] HCA 35, considered
Nichols v Curtis [2010] QCA 303, cited
O'Connor v S P Bray Ltd (1937) 56 CLR 464; [1937] HCA 18, cited
Pennington v Norris (1956) 96 CLR 10; [1956] HCA 26, cited
Ridis v Strata Plan 10308 (2005) 63 NSWLR 449; [2005] NSWCA 246, considered
Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2) [2001] 1 Qd R 518; [2000] QCA 18, considered
Sibley v Kais (1967) 118 CLR 424; [1967] HCA 43, cited
Tweed Shire Council v Hancomatic Music Pty Ltd [2007] NSWCA 350, considered
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, considered

COUNSEL: G J Cross for the applicant
R C Morton for the respondent

SOLICITORS: Colin Patino & Company for the applicant
Moray & Agnew Solicitors for the respondent

[1] **MARGARET McMURDO P:** The applicant plaintiff, Ms Jodie Smith, fell through a glass wall forming part of the ground floor façade of an office building at 138 Albert Street in downtown Brisbane shortly before 8.30 pm on 21 December 2001. She suffered severe lacerations to her face, neck, arms and torso. She brought an action for damages in negligence against the defendant respondent, the body corporate for the building. The primary judge dismissed her claim but assessed damages had she been successful. His Honour would have reduced her damages award by one third on account of contributory negligence in that her voluntary intoxication was the reason for her fall. Ms Smith applies for leave to

appeal from that decision under s 118(3) *District Court of Queensland Act* 1967 (Qld). She contends that the judge should have allowed her claim without any finding of contributory negligence and that aspects of his Honour's assessment of damages were flawed.

Liability

Workplace Health and Safety Act and the 2000 Advisory Standard

[2] The respondent was not Ms Smith's employer but it employed others. It admitted that its foyer where Ms Smith was injured was a workplace under the *Workplace Health and Safety Act* 1995 (Qld) ("the Act"). It followed that the respondent was obliged under s 30(1) of the Act as a person in control of a workplace "to ensure there is appropriate, safe access to and from the workplace for persons"[1] including Ms Smith. Under s 26(3) of the Act, the respondent could discharge its duty under s 30(1)(c) only by complying with the Workplace Health and Safety Risk Management Advisory Standard 2000 ("the Advisory Standard") or in some other way which gave the same level of protection against exposure to the risks managed by the Advisory Standard.

[3] I agree with Fraser JA's reasons for finding that the primary judge erred in not adverting to s 26(3) of the Act and to the Advisory Standard.[2]

[4] The respondent's obligation under s 30(1)(c) could be met only by following the Advisory Standard as to the risk identified in s 30(1)(c) or by adopting another way that identifies and manages exposure to the risk and by taking reasonable precautions in exercising proper diligence about the risk.[3] The Advisory Standard required the respondent to manage exposure to risks associated with all hazards at its workplace[4] through five basic steps: identifying hazards; assessing risks that may result because of the hazards; deciding on control measures to prevent or minimise the level of the risks arising from the hazards; implementing control measures; and monitoring and reviewing the effectiveness of measures.[5] It defined a hazard as "something with the potential to cause harm" and a risk as "the likelihood that death, injury or illness might result because of the hazard".[6] It is necessary to briefly consider the first four of those steps.

[5] The first step is to identify workplace hazards by looking for those things in the workplace with the potential to cause harm.[7] Workplace hazards include the work environment.[8] Hazards can be identified by means such as dividing the workplace into groupings such as locations, and walking through and inspecting each location and conducting a safety audit. If hazards are discovered, there must be an associated risk assessment.[9] Relatively minor hazards or those which can be easily fixed should be attended to straight away.[10] The second step is to assess the risk, determine the likelihood of an incident occurring and its consequences, rate each

---

1 The Act, s 30(1)(c).
2 See Fraser JA's reasons [60]-[67].
3 Advisory Standard, p 2.
4 Above, p 4, 1.
5 Above, p 5, 2.1.
6 Above, p 7, 2.5.
7 Above, p 8.
8 Above, p 8, 3.1.
9 Above, p 8, 3.2.
10 Above, p 9, 3.3.

risk and prioritise the attention to be given to the risk.[11] The third step is to decide on control measures to manage exposure to an identified risk. Control measures should try to eliminate the hazard[12] or prevent or minimise exposure to the risk, for example, by substituting a less dangerous substance for a more dangerous one, such as replacing glass with plastic.[13] For present purposes, it is sufficient to note that the fourth step is to implement the control measures decided on.[14] I note that these are also the five steps set out in s 22(2) of the Act as the way workplace health and safety can generally be managed.

The relevant facts

[6] I adopt Fraser JA's statement of the relevant facts[15] and will only repeat or add to these where necessary to explain my reasons for granting the application for leave to appeal and allowing the appeal as to liability. The critical factual findings which are not now disputed are as follows.

[7] Ms Smith was injured outside the entrance way to the foyer as she and her companions attempted to enter the building with her swipe card after hours. They were planning to go her companion's car in the car park. Ms Smith worked in the building. Between 4,500 and 5,000 people per week used the entrance way and foyer. Students regularly congregated outside the building near the entrance. The building was in the vicinity of night clubs and bars. Ms Smith had consumed a great deal of alcohol at seasonal celebrations and was unsteady on her feet. Her blood alcohol reading was probably about 0.26 per cent at the critical time. She was therefore at more than a 60 per cent greater risk of accidentally falling than a person with a blood alcohol concentration below 0.05 per cent.[16] Whilst Ms Smith was looking for her swipe card, she stumbled backwards into the glass wall which broke into large shards. Ms Smith's impact with the wall was not significant. Her companions who witnessed the fall were surprised the glass broke: she did not crash heavily against it.[17] The broken glass severely cut her face, neck, arms and torso. She was left with scarring, including on her face and suffered resulting psychological difficulties.

[8] The wall was made of 6 mm thick annealed glass which complied with relevant standards when the building was constructed in 1971. It formed one corner of the recessed main entrance to the building in the centre of which two glass doors opened outwards.[18] Standards adopted in 1973 and revised in 1994 would have required the glass wall to be safety or laminated glass but did not require the replacement of existing glass which complied with standards when installed. The 1973 and 1994 standards specified, however, that if non-compliant glass was replaced, it must comply with the new standard. An ordinary person could not identify whether the glass wall was safety glass. The respondent did not conduct any safety audit of the glass in its entrance way and foyer between 1971 and December 2001 when the accident occurred. Such an audit would have cost no

---

11 Above, pp 10-12, 4.1-4.4.
12 Above, p 13, 5.1.
13 Above, p 13, 5.2.
14 Above, p 15, 6.
15 Fraser JA's reasons [30]-[40].
16 *Smith v Body Corporate for Professional Suites Community Title Scheme 14487* [2012] QDC 49, [7].
17 *Smith v Body Corporate for Professional Suites Community Title Scheme 14487* [2012] QDC 49, [39].
18 See photographic exhibits 2 to 5, 14.

more than $220. The judge seems to have found that had such an audit been conducted, it would have revealed that the glass did not comply with current standards and would have recommended the installation of safety or laminated glass.[19] There was no evidence the respondent was aware of any difficulties or concerns about the safety of the glass wall prior to the accident. After the accident, the glass wall was replaced with 8.38 mm thick clear laminated glass, compliant with the current standard, at a cost of $1,651.70.[20]

[9] In 2000 and 2001 the respondent had engaged architects to upgrade the building façade, front common area and ground floor entrance way and foyer where the accident later occurred. It anticipated the renovation would cost around $200,000. Its building upgrade specification[21] described the foyer as a high volume area; requested an upgraded foyer providing "good, clear access to the building"; and noted "[t]here is a large volume of people accessing the building". The specification did not refer to the issue of the safety of those entering and leaving the building. There was no evidence that anyone advised the respondent that the glass wall did not comply with Australian standards or amounted to a safety risk. The respondent's resulting renovation utilised the existing glass wall which soon afterwards collapsed and broke, injuring Ms Smith.

The competing contentions

[10] Ms Smith's case at trial included the contention that the respondent, in light of s 26 and s 30 of the Act and the Advisory Standard, breached its duty of care to her in not having the glass in the entrance way and foyer inspected by a safety expert, at least at the time of the renovation. Non-compliance with this regulatory scheme should be considered in determining whether the respondent breached its common law duty of care in negligence.[22] A safety audit of the glass would have cost very little and would have exposed the dangers of annealed glass in the foyer area and recommended that it be replaced with safety or laminated glass as required by standards in place since 1973 (as revised in 1994). Ms Smith relied on this aspect of her case in applying for leave to appeal against the findings on liability.

[11] The respondent contended that it did not fail to take reasonable care in discharging its duty to Ms Smith. It was not required to undertake an expert examination to detect latent defects not obvious to an ordinary, reasonable person. It emphasised the High Court's decisions in *Jones v Bartlett*,[23] its observations in *Leighton Contractors Pty Ltd v Fox*[24] and the decisions of the New South Wales Court of Appeal in *Ahluwalia v Robinson*,[25] *Ridis v Strata Plan SP 10308*[26] and *Tweed Shire Council v Hancomatic Music Pty Ltd*.[27]

Conclusion on liability

[12] The respondent was obliged under s 30(1)(c) of the Act to ensure appropriate safe access to and from the workplace for people, including Ms Smith. As the Advisory

---

19 *Smith v Body Corporate for Professional Suites Community Title Scheme 14487* [2012] QDC 49, [3], [10].
20 Ex 35. Excluding the after hours callout fee to secure the premises.
21 Ex 25.
22 Plaintiff's outline of submissions [9.40]-[9.44].
23 (2000) 205 CLR 166.
24 (2009) 240 CLR 1, [49].
25 [2003] NSWCA 175.
26 (2005) 63 NSWLR 449.
27 [2007] NSWCA 350.

Standard was in place, the respondent could discharge its obligation under s 30(1)(c) only by adopting and following it or by adopting and following another way that gave the same level of protection against the risk.[28]

[13] As noted earlier, the Advisory Standard required the respondent to first identify workplace hazards by looking for things with the potential to cause harm. The respondent could have met this requirement by inspecting its work environment[29] for hazards in locations such as the entrance way and foyer where this accident occurred and by conducting a safety audit.[30] Had it done so, it should have appreciated that the glass wall was a potential hazard: it was in a busy area where people could fall or be pushed against it and it could break causing injury. At least at the time of the renovation, the respondent should have conducted a safety audit of the glass in the area to be renovated. This would have shown the glass wall against which Ms Smith later fell was made of 30 year old 6 mm thick annealed glass and that this was a hazard as it could break in a way that was more likely to injure people than safety glass. The Advisory Standard then required the respondent to assess the risk of the glass wall breaking and injuring people.[31] It should have been clear to the respondent that the risk was significant: the entrance way and foyer was part of a medium sized building in a busy city street in the vicinity of nightclubs and bars. The pedestrian traffic flow in and out of the entrance way and foyer was about 4,500 to 5,000 people per week and students often milled around it. In those circumstances it should have appreciated that there was a real risk of someone falling into or being pushed against the glass wall, breaking it and being seriously injured, perhaps even fatally. The Advisory Standard next required the respondent to decide on control measures such as substituting a hazardous substance with a less hazardous one.[32] In the present case, that required the respondent to replace the 30 year old annealed glass wall with safety glass compliant with current standards.

[14] The primary judge did not advert to these relevant factors in determining whether the respondent owed Ms Smith a duty of care. Of course, breach of the Advisory Standard did not prove a breach of the common law duty of care in negligence. But it is also true that these factors were relevant in determining the existence and nature of the respondent's duty to Ms Smith and whether the respondent breached it. Caution must be exercised, however, in translating statutory and regulatory obligations like those under the Act and the Advisory Standard into a common law duty of care which requires only the exercise of reasonable care: *Leighton Contractors Pty Ltd v Fox*.[33]

[15] Ms Smith has placed reliance on *Jones v Bartlett*, *Ahluwalia* and *Ridis*. All three cases concerned incidents arising in domestic premises whereas the respondent's premises was a commercial building with the glass wall forming part of the façade to a busy area in downtown Brisbane. And nor did those three cases concern a breach of the equivalent of s 30(1)(c) of the Act or the Advisory Standard. I note that since *Jones v Bartlett* was decided, Higgins J in *Cardone v Trustees of the Christian Brothers*[34] found that, in a non-domestic (school) situation, failure to

---

28 The Act, s 26(3).
29 The Advisory Standard 2000, p 8, 3.1.
30 Above, p 8, 3.2.
31 Above, p 10, 4.
32 Above, p 13, 5.1 and 5.2.
33 (2009) 240 CLR 1, 22, [49].
34 [1994] ACTSC 85, [57]; on appeal *Trustees of Christian Brother v Cardone* (1995) 130 ALR 345 where the appeal was upheld on another basis and this issue was not discussed.

replace non-safety glass with safety glass after the introduction of revised standards was a breach of duty to the plaintiff student injured by falling into and breaking the glass.

[16] In *Ridis*, s 62 *Strata Schemes Management Act* 1996 (NSW) required the body corporate to properly maintain and keep in a state of good and serviceable repair the common property. The majority (Hodgson and McColl JJA, Tobias JA dissenting) rejected the contention that, in light of s 62, the respondent body corporate of a domestic unit block was obliged to obtain an assessment of the premises by specialist experts to ascertain whether any of the materials of which the common property were constructed could be made safer. Their Honours held the s 62 obligation did not require the replacement of a glass entrance door, apparently in good repair and operating as intended; it did not matter that the glass did not accord with that used in contemporary buildings. But as McColl JA recognised, citing *Sibley v Kais*,[35] *Abela v Giew*[36] and *Tucker v McCann*,[37] whether a failure to act in accordance with a statutory obligation constitutes a breach of the common law duty to act reasonably is a question of fact to be judged in the circumstances of each case.[38]

[17] In *Hancomatic*, upon which the respondent also placed reliance, the New South Wales Court of Appeal overturned the primary judge's conclusion that the owner of a motel premises had breached its duty of care to the family of a boy who died after his throat was cut by broken annealed glass after running through a glass door. The door met standards when constructed and was not upgraded during a later renovation. The fact that the door was contained annealed rather than safety glass was neither obvious nor known to the owner. The owner was a private company controlled by the deceased boy's grandfather. It was not the occupier of the premises at the time of the accident, having leased the premises to the deceased boy's parents who were plaintiffs in the action. The Court of Appeal considered that the primary judge had misstated the duty and had not undertaken the enquiry required by *Wyong Shire Council v Shirt*[39] in that he made no reference to the role of the deceased boy's parents as occupiers. The Court of Appeal concluded that, although the premises were commercial rather than domestic premises, the owner had constructed the glass door in accordance with standards applicable at the time and the evidence did not show that it knew or ought to know of the danger of annealed glass. It followed that the plaintiffs had failed to establish negligence.

[18] At first blush *Hancomatic* seems to support the respondent's contentions, but it is distinguishable on two bases. First, the owner of the premises was not the occupier of the premises.[40] Second, no breach of any statutory or regulatory workplace health and safety scheme was established.[41] What is reasonably required to be done in one set of circumstances may not be reasonably required in another: *Jones v Bartlett*[42] and *Hancomatic*.[43] In my respectful opinion, none of the cases

---

35 (1967) 188 CLR 424, 427.
36 (1965) 65 SR (NSW) 485, 489; (1965) 82 WN (Pt 2) (NSW) 435, 438.
37 [1948] VLR 222, 225.
38 *Ridis v Strata Plan No 10308* (2005) 63 NSWLR 449, McColl JA 467, [90].
39 (1980) 146 CLR 40, 47-48.
40 *Tweed Shire Council v Hancomatic Music Pty Ltd* [2007] NSWCA 350, [19]-[21], [183].
41 Above, [235].
42 (2000) 205 CLR 166, 185, [58], 216, [174].
43 [2007] NSWCA 350, [223].

relied on by the respondent, alone or in combination, are determinative of the scope and nature of the respondent's duty of care in the present case.

[19] Consistent with *Wyong Shire Council v Shirt*, the determination of whether the respondent has breached its common law duty to Ms Smith requires the assessment of the risk of injury to her or a class of persons including her. The risk must be foreseeable, that is, real and not far-fetched or fanciful. If the risk is foreseeable, the court must determine what a reasonable person in the respondent's position would do in response to it, taking into account its magnitude and probability, expense, difficulty and associated inconvenience, and the respondent's other conflicting responsibilities.

[20] The respondent occupied and was in control of a work place including an entrance way to a busy medium-sized building in downtown Brisbane. Groups of students used the entrance way and foyer. There were night clubs and bars in the vicinity. The glass wall which broke and injured Ms Smith formed part of the façade to the building. It is common ground the respondent as occupier owed Ms Smith a duty of care. There was a real risk that those entering or leaving the building or simply in the vicinity outside it might fall or be pushed against the glass wall. If the glass was not safety glass, it might break and injure people, perhaps gravely or even fatally as in *Hancomatic*. What then would a reasonable person in the respondent's position do in response to such a risk?

[21] In answering that question, it is relevant but not decisive that the glass wall was part of the respondent's workplace and the respondent as a person in control of that workplace was obliged to ensure appropriate safe access to and from the workplace for people like Ms Smith. The respondent was required under the Act to comply with the Advisory Standard which included identifying hazards in ways, such as by conducting a safety audit, which I consider would have found the glass wall to be a hazard, requiring an expert safety audit of the glass in the entrance way and foyer. This would have identified the unsatisfactory nature of the glass wall which created a potential risk of injury. The respondent then should have assessed and eliminated this risk by substituting the annealed glass with safety or laminated glass. The breach of these statutory and regulatory requirements should inform the scope and nature of the duty of care in the present case but is not decisive of it.

[22] Another factor in this case relevant to the scope and nature of the duty of care was the respondent's renovation to the entrance way and foyer in 2000 and 2001 shortly before Ms Smith was injured. I consider that a reasonable person in the respondent's position planning and implementing that renovation, in light of the respondent's obligations under the Act and the Advisory Standard, should have included safety as a significant consideration in the specification. The clear inference from the evidence at trial is that a safety audit would have recommended the replacement of the annealed glass wall with safety or laminated glass. The cost of a glass safety audit was modest, as was the cost of the replacement of the inferior glass wall with safety glass. There was a significant probability that if the inferior glass was not replaced, someone could be seriously or even fatally injured. A reasonable person in the respondent's position would have replaced the glass wall in accordance with the inevitable audit recommendation.

[23] It follows that I consider the respondent breached its common law duty to Ms Smith in not undertaking a safety audit of the glass in the foyer during its 2001 renovation.

The audit would have advised replacement of the 30 year old annealed glass with safety or laminated glass. In reaching that conclusion, I take particular note of the fact that the entrance way and foyer was a busy part of this commercial building in bustling downtown Brisbane, frequented by students and in the vicinity of bars and nightclubs, where the prospect of people falling or being pushed against the glass wall was very real.

[24] Contrary to the respondent's submissions below, this conclusion does not have the effect "that whenever a safer product becomes available in the marketplace an occupier (or a landlord or an employer or the provider of a service such as a taxi driver) is required to upgrade to utilise that safer product".[44] Nor does it have the effect "that every single pane of glass out there that does not comply with the current Standards must be replaced".[45]

[25] In my view, the trial judge erred in not finding the respondent breached its duty of care to Ms Smith and was liable for damages in negligence for her resulting injuries. I would grant the application for leave to appeal as to liability and allow this aspect of the appeal.

Contributory negligence

[26] I do not consider that leave to appeal should be granted in respect of the issue of contributory negligence. Ms Smith was extremely drunk and as a result fell against the glass wall, breaking it. Had she not been so intoxicated, she probably would not have fallen, the glass would not have broken and she would not have been injured. Ms Smith must take some responsibility for compromising her own safety through voluntary, gross intoxication. The judge was entitled to conclude that she was contributorily negligent in the amount of one third. It is not appropriate, therefore, to grant leave to appeal as to contributory negligence.

Quantum

[27] I also agree with Fraser JA that Ms Smith has not demonstrated any reason warranting the grant of leave to appeal as to quantum. The judge was entitled to conclude that there was insufficient evidence of any loss of past earning capacity. The judge's award in respect of future lost earning capacity, whilst modest, was within an appropriate range on the evidence. Ms Smith's counsel did not pursue the contention included in his outline of argument that the judge erred in assessing damages for past gratuitous services. I agree with Fraser JA that his Honour's decision to discount the cost of further surgery by 60 per cent has not been shown to be an appropriate matter for the granting of leave to appeal.

Proposed orders

[28] I would grant the application for leave to appeal, limited to the ground of appeal that the trial judge did not consider one aspect of Ms Smith's case on breach of statutory duty. I would allow the appeal, set aside the order of 30 March 2012 dismissing the claim and instead give judgment in the sum assessed by the primary judge. As the judge's reasons did not make clear the amount of the notional damages and interest he assessed, I would give leave to each party to file submissions limited to two pages as to the appropriate orders, including costs of the hearing and the appeal, within seven days of the delivery of these reasons.

---

44 Defendant's outline of submissions at trial, [83].

45 Above, [85].

[29] **FRASER JA:** At about 8.30 pm on 21 December 2001, the applicant stumbled backwards and fell onto and through a plate glass panel on the ground floor facade of an office building at 138 Albert Street in Brisbane's central business district. She suffered serious lacerations when the glass broke and large shards fell onto her. In proceedings in the District Court the applicant claimed that her injuries were caused by the negligence of the respondent occupier of the building common areas. After a trial in the District Court, the trial judge dismissed the applicant's claim for damages. The applicant seeks leave to appeal from that decision. If the applicant's claim should succeed, she also seeks to challenge the trial judge's assessment of the amount of her damages and a finding that her damages should be reduced by one third on account of her contributory negligence.

Facts

[30] The applicant was 29 years old at the time of her accident. She worked at a multimedia company which was one of the many tenants in the fourteen storey building. The respondent was the body corporate of the building's Community Title Scheme and the occupier of the common property for the Scheme. The common property included the foyer entrance and the building facade.

[31] On the day of the accident the applicant attended a staff Christmas party at a restaurant and after that she went with some work colleagues to a nightclub near 138 Albert Street. The applicant returned to 138 Albert Street to let a friend, Ms Casey, take her car into the car park at the building. They had arranged that Ms Casey, who remained sober throughout, would later drive the applicant from the building. After returning to the nightclub for a short time, the two of them and the applicant's work colleagues Ms Koppens and Mr Angell returned to 138 Albert Street.

[32] The trial judge accepted the accuracy of the applicant's estimate in a written statement that she had consumed about ten glasses of white wine between 11.30 am and 4.00 pm, and her evidence that she had six drinks of premixed spirits at the nightclub. The applicant did not challenge the opinion expressed by Dr Purssey that, based on the applicant's own statements: her blood alcohol concentration at 8.30 pm would have been .26 per cent; as a result, her balance and mobility would have been "severely disturbed"; consumption of alcohol increases a pedestrian's risk of accidental fall somewhat more than it does a driver's risk of a traffic accident; the risk of accidental fall at and above blood alcohol concentrations of 0.16 per cent was about sixty times greater than the risk at blood alcohol concentrations of or below .05 per cent; and the risk of accidental fall at concentrations above 0.1 per cent was so high that practically all cases of accidental fall could be considered to have been caused by alcohol.

[33] The applicant denied that she was unsteady on her feet or had any difficulty in walking from the nightclub to the building. The trial judge accepted Mr Angell's evidence-in-chief that the applicant was, "drunk", "more than a little bit tipsy", "not incapable of walking", and "[n]ot so drunk that she couldn't move, so somewhere in between…", with the result, Mr Angell said, that he walked with the applicant with his arm around her "just to help steady her". Mr Angell thought that if he had not been there the applicant "probably" would have completed the walk back to the building. The applicant submitted that the trial judge accepted Mr Angell's answer to a question in cross-examination whether the applicant had difficulty walking by

herself that "[n]o, she was okay". That answer fell to be assessed in the context of Mr Angell's other evidence. Having regard also to Dr Purssey's evidence, there could not be a successful challenge to the trial judge's finding that the applicant was unsteady whilst she was walking from the nightclub back to the building.

[34] When the four work colleagues arrived at 138 Albert Street, the applicant and Ms Koppens searched in their handbags for the "swipe key" required to unlock the front doors. The applicant was standing adjacent to the front doors in an area which was recessed in towards the interior of the building. There were two front entrance doors, each measuring 1.175 metres. Each of the doors opened outwards, swinging on an axis 300 millimetres from the end of each door. The doors were recessed into the foyer by a distance of less than a metre. On each side of the glass doors, at right angles to them, were glass side panels extending both inwards from the doors and outwards to the point where the panels formed corners with the rest of the external facade. The glass panels measured 2.842 metres by 1.4 metres. The glass panel through which the applicant fell was on the right hand side as one looks into the building. That panel formed part of one wall of a backpackers' travel centre tenancy to the right of the front doors. The identical glass panel to the left of the doors formed part of a wall of a different tenancy. Photographs in evidence show that the handle on each door is near the closing edge of the door. When the doors are closed the handles are near the centre of the double doors and thus some distance from the side panels. When the doors are open they cover the side panels. There was no evidence whether the doors remained open throughout the day or whether each person entering and exiting opened the doors as necessary.

[35] Whilst the applicant and Ms Koppens were looking for their swipe key, the applicant fell through the glass panel. The trial judge accepted Mr Angell's evidence that the applicant was standing with her back to the panel and fell backwards into the glass in a "half step/stumble". The glass did not shatter but broke into large plates which fell on the applicant as she was falling. She suffered severe lacerations to her face, neck, arms and torso when she was cut by the falling shards.

[36] The trial judge found that the force on the panel caused by the applicant falling against it "…was considerably greater and more sudden than she would have it", but accepted submissions for the applicant that her impact upon the panel appeared to be "not significant" and "the consequences were surprising".[46] The trial judge speculated that the glass panel might have been damaged or weakened before the accident, but he acknowledged that there was no evidence to that effect and that the court was obliged to decide the case on the evidence alone.

[37] The glass panels were installed in 1971. They were made of six millimetre annealed glass. That did not contravene any building standard or Australian Standard in force in 1971. At the time of the applicant's accident on 21 December 2001, the relevant standard was AS1288-1994. It was introduced in 1973 and it was substantially revised in 1994. In December 2001, the standard specified safety glass rather than annealed glass in this kind of application. The standard did not specify the replacement of existing glass which complied with any previous standards in existence when the glass was installed. It did specify that if existing glass was replaced for any reason then the replacement glass should comply with the current standard.

---

46 [2012] QDC 49 at [7], [39].

[38] The applicant admitted that an ordinary person could not identify the type of glass which was installed. The respondent admitted that, between the time when the glass was installed when the building was constructed in 1971 and the date of the accident in December 2001, no audits of the premises had been conducted to ascertain whether the glass wall or the glass entry doors complied with the relevant Australian Standards. The respondent admitted that in 2000 and 2001 there were service providers which could conduct such a "glass audit" at a cost of not more than $220 and that such an audit would have revealed the type of glass and whether it complied with the current standards. The respondent did not admit that such an audit would have recommended or led to the replacement of the glass.

[39] The building was near nightclubs and bars. Students sometimes congregated near the entry doors. Customers of a travel agency sat on stools near or against the glass panel. The pedestrian traffic flow into the building was between 4,500 and 5,000 persons per week. The respondent had replaced the front doors during a substantial renovation of the foyer between 2000 and 2001. The respondent's architects had specified that the glass in the replacement front doors was to be safety glass in accordance with AS1288-1994. The architect's plans provided for the existing glass in the entrance area, including the glass side panels, to be retained.

[40] The applicant adduced evidence from Dr Casey, an expert in the behaviour of glass. The trial judge accepted the summary of Dr Casey's evidence which was set out in the applicant's written outline of submissions:

> "8.3 Dr Casey confirmed that the use of 6mm annealed glass for the original construction of the building in 1971 did not contravene the relevant Australian Standard at that time.
>
> 8.4 Dr Casey noted the standards relating to glass in buildings had been upgraded twice since the original construction of the building (AS1288-1973 and AS1288-1994) prior to the date of incident.
>
> 8.5 Dr Casey considered from a safety point of view it would have been prudent to consider upgrading the glass panel as part of the renovation process. He based this submission on:
>
> (i) The Standards relating to glass in buildings has been upgraded twice since 1971;
> (ii) Increased personnel traffic around the glass panel which sits prominently at the front of the building;
> (iii) Students loitering at the front of the building.
> (iv) The glass panel would have become more brittle over the thirty years it had been installed.
>
> 8.6 Dr Casey considered that if safety glass had been used the plaintiff would not have been injured to the same extent."[47]

The trial judge's reasons

[41] The trial judge held that the respondent, as occupier, owed the applicant a common law duty of care to act reasonably to guard against foreseeable risk of injury to the

---

47 [2012] QDC 49 at [37]–[38].

applicant. That was not in issue. The central issue about liability at trial was whether the respondent breached its duty of care by failing to arrange an audit of the glass doors and walls by an appropriately qualified person to ascertain whether they complied with the prevailing Australian standards. On the premise that such an audit was required to fulfil the respondent's duty of care to the applicant, the applicant argued that the respondent was liable because: a glass audit would have detected that the panel through which the applicant fell was made of annealed glass rather than safety glass; in light of the propensity of annealed glass to shatter into shards which were apt to cause serious cutting of any person who fell against the glass, the author of the audit would have recommended replacement with safety glass in conformity with the current Australian standard; the respondent should have acted on such advice; and the applicant would not have sustained serious injury when she stumbled backwards against the glass.

[42] The trial judge recorded that it was common ground that the test for deciding whether the respondent was negligent was that which Mason J propounded in the well known passage in *Wyong Shire Council v Shirt*:[48] the risk of injury to the plaintiff, or a class of persons including the plaintiff, which eventuated must be foreseeable, in the sense that the risk must be real and not far-fetched or fanciful, even if extremely unlikely; if the risk is foreseeable, the question is what a reasonable person in the defendant's position would do in response to the risk, taking into account its magnitude and probability, the expense, difficulty and inconvenience of taking alleviating action, and any other conflicting responsibilities of the defendant. The parties also agreed that the test was that identified by Deane J in *Hackshaw v Shaw*,[49] namely, that "[t]he measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk".

[43] The trial judge found against the applicant on the central issue whether the respondent was negligent in failing to arrange an inspection of the glass doors and walls to ascertain whether they complied with the prevailing Australian standards. The applicant's main argument in this Court was that the trial judge erred in so concluding by failing to take into account a breach by the respondent of one of its admitted statutory obligations under the *Workplace Heath and Safety Act* 1995 as evidence that the applicant was negligent. I will consider that argument after I have first discussed the trial judge's treatment of other arguments advanced by the applicant at the trial.

[44] In support of the argument that the respondent should have conducted an audit of the glass in the side panels, the applicant relied upon the circumstances that the respondent had not replaced the glass panels for 30 years even though the building was a commercial building in the CBD, the pedestrian traffic flow into the building was between 4,500 and 5,000 persons per week, the building was near nightclubs and bars, and there was a history of students congregating near the entry doors. The trial judge considered that the age of the premises and the fact that the original glass panels were retained were not relevant in determining what prudence required of the respondent, there being no evidence that it was appreciated in the wider community that the glass might deteriorate with age and become more likely to shatter than

---

48 (1980) 146 CLR 40 at 47-48.

49 (1984) 155 CLR 614 at 662-63, endorsed in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488.

when it was originally installed. As to the traffic flow and the students congregating near the entry doors, the trial judge observed that they were not shown to have presented any threat to the glass before the applicant's accident. The trial judge also remarked that whilst heavy use might have been made of this area and it might have been crowded or busy at times, there was "…nothing to suggest that those frequenting it would have been unruly" or behaved in ways which risked damage to the glass panel. The trial judge pointed out, "…for all the evidence of increasing user numbers, students congregating and nightclubs in the vicinity, there had been no incident or difficulty with the glass panels for 30 years."[50]

[45] The trial judge also observed that in light of the way in which the front doors were hung, it was necessary to be well away from the adjoining glass panels to get through the doors. In relation to the evidence that customers of a travel agency sat on stools near or against the glass panel, the trial judge considered that the pressure on a glass panel from a seated person leaning on it would fall short of that from a moving person falling on to the same panel. It was not persuasive to assert that the latter situation should be guarded against.

[46] As to the respondent's substantial renovations of the foyer before the accident, the trial judge considered that the architect's specification for that renovation did not give notice to the respondent of "…anything to do with Australian Standards…" otherwise than for the doors themselves, and that there was no significance in the renovation or the advice of the architects concerning the upgrading of the glass to the front doors.[51] Nevertheless, the trial judge observed that this did not "…deprive the refurbishment exercise of relevance as one of the factors to be taken into account…" in deciding whether the respondent had complied with its common law duty of care to the plaintiff.[52] The trial judge explained that the respondent's decision to upgrade the foyer created an occasion upon which the respondent "…might have reviewed the general location to identify deficiencies or defects that were unknown and unsuspected, or respects in which upgrading to meet then current standards for new work might be advisable or possible".[53] The trial judge went on to conclude that whilst such a proceeding would have been reasonable, it was also reasonable for the respondent to do nothing more than the respondent did under the guidance of competent architects. As to the applicant's reliance upon a reference in the architect's specification for the renovations to "improper use of the common area at the front of the building", the trial judge pointed out that this remark apparently concerned something which was thought to detract from the impression made by the building and there was nothing to suggest that it had anything to do with a risk relating to the glass panels.

[47] The applicant placed considerable emphasis at trial and again in this Court upon the circumstance that a glass compliance audit could have been conducted in 2000/2001 at the cost of no more than $220 and that the cost to replace the side panels would have been only $1,651.70 each. In that respect, the trial judge considered that the extent of the "audits" would have been considerable if all foreseeable risks were to be guarded against and there was no sound reason to restrict them to glass; similarly, the work to implement the recommendations which might result from the audits would be greater, "perhaps enormously so".[54]

---

50 [2012] QDC 49 at [38].
51 [2012] QDC 49 at [27], and the fifth and last dot points of [28].
52 [2012] QDC 49 at [4].
53 [2012] QDC 49 at [35].
54 [2012] QDC 49 at [28].

Consideration

[48] The respondent relied upon what McColl JA described in *Ridis v Strata Plan 10308*[55] as "…a considerable body of authority to the effect that an occupier will not be found to have breached the duty of reasonable care when an entrant is injured because of a defect in the premises which could not have been ascertained without the intervention of expert examination, in circumstances where there was nothing which would have caused the occupier to believe such an examination was warranted." It is necessary, however, to apply the uncontroversial test for liability in negligence in the context of the relevant statutory provisions and the particular facts and circumstances revealed by the evidence in this case.

[49] The evidence suggests that, viewed without the benefit of hindsight, the degree of the risk which eventuated in this case was extremely low. No doubt some people, including those seeking to enter the building after hours, could be expected to be close to the side panels at times and perhaps occasionally come into contact with a panel. However, most of the pedestrian traffic close to the panels must have occurred during office hours and the applicant acknowledged that there was no evidence that the doors were ever closed during the day. When the doors were open, there was no apparent risk associated with persons bumping into the side panels because they were then covered by the doors. When the doors were closed at night, except for persons using a swipe card at the reader near the left hand panel to unlock the doors, it would be expected that persons intending to enter through the doors usually would not stand close to the side panels. That is so because the door handles were near the centre of the double doors and the doors swung outwards and covered the side panels. That does not exclude the possibility that someone might occasionally stand near the side panels, for example, when looking for the card needed to unlock the doors after hours, or when waiting for someone else to unlock the doors. Not everybody entering the building would know beforehand that the doors swung outwards. Nevertheless, it would not seem likely that there would be much contact with the side panels, and the occasions upon which a person might come into contact with the glass with any force would be rarer still. That is so notwithstanding the possibility that some of those seeking to enter the building might be drunk.

[50] In the end, however, the likely frequency of persons applying force to the side panels is perhaps not of great significance in ascertaining the degree of risk. The applicant did not challenge the trial judge's finding that there had been no incident or difficulty with the glass panels for 30 years. There was no evidence that in the years before the applicant's accident the respondent knew or should have known, if it was the case, that the numbers or behaviour of people present in the vicinity of the doors, or any propensity of the glass to break, had materially changed in a way which rendered injury associated with the glass more likely. Even assuming, as seems likely, that the number of people passing by the glass every day had grown significantly over the years, on the necessary prospective analysis the absence of any incident or difficulty with the glass for 30 years points to the degree of the risk which eventuated as being extremely low, perhaps bordering upon far fetched.

[51] The trial judge was right to find that the architect's specification did not convey information to the respondent about any risk in not replacing the glass in the side

---

55 (2005) 63 NSWLR 449 at [127].

panels. The terms of the trial judge's finding that the decision to renovate provided an occasion upon which the respondent "might have" sought to identify any deficiencies or defects in the area appropriately emphasise the weakness of this aspect of the applicant's case in the absence of any evidence that the respondent should have been concerned about the glass. The evidence of the renovations and the architect's specification supplied no support for a suggestion that the respondent knew or should have known that the glass in the side panels was of a kind which was more likely than other kinds of glass to injure a person who fell against it.

[52] I record my agreement with the trial judge's conclusion that the evidence that customers of a travel agency sat on stools near or against the glass panel was unpersuasive in light of his Honour's finding that the pressure on a glass panel from a seated person leaning on it would fall short of that from a moving person falling on to the same panel; but if the point has any significance, the absence of any accident involving the glass despite persons leaning against it might be thought to support the respondent's case that it had no reason to suspect that the glass was not safe.

[53] As to the magnitude of the risk, to conclude that there was a prospect of serious lacerations of the kind suffered by the applicant appears in this case to involve hindsight reasoning. The trial judge commented that panel glass was "…a notorious potential hazard, given its propensity to shatter into shards capable of seriously cutting the person whose moving body is the mechanism whereby the glass breaks",[56] but the applicant was unable to point to any evidence that the respondent knew or should have known that the glass in the side panels was of a kind that might have such a propensity. There was also no challenge to the trial judge's finding that the applicant did not prove that respondent knew or should have known of the upgrading of the Australian Standards.

[54] Whilst the expense of investigating and replacing the two side panels with safety glass was small in the context of a tenanted inner city building of fourteen storeys, the applicant, who bore the onus of proving negligence, acknowledged that there was no evidence of the cost of conducting similar exercises in relation to other glass and other materials throughout the common area of the building. There was no basis in the evidence for a conclusion that the apparently very low risk of injury associated with the glass in the side panels was any more significant than risks of injury associated with other elements of the common area, including, for example, glass or other materials elsewhere in the ground floor facade, external glass and other material on the higher floors and the foundations. The same point has been made in many decisions. In *Jones v Bartlett*,[57] Gleeson CJ said:

> "… if there were to be an expert assessment at the time of the lease, there is no reason why it would have been restricted to an assessment of the glass door in question. Implicit in the proposition that reasonable care required that there should have been an expert assessment is the idea that all features of the premises potentially capable of harming someone who came onto the premises, or, at least, the prospective tenants and members of their households, should have been the subject of expert assessment. The glass door had been there for thirty years without causing any harm. It was an

---

56 [2012] QDC 49 at [10].

57 (2000) 205 CLR 166 at [19].

> ordinary door, constructed in accordance with building practice and standards of the time when the house was built. There was no reason why it would have been the focus of special attention."

That the scene of the applicant's accident was a fourteen storey city building with commercial tenants does not detract from the force of those points.

[55] In view of the extraordinarily large number of people who uneventfully entered and exited the building over 30 years, the absence of any evidence that the respondent knew or should have known that the glass in the side panels had a propensity to break into dangerous shards when sufficient force was applied to it, and the potentially enormous cost of investigating and removing equally unlikely risks associated with other glass or materials throughout the common areas of the building, the applicant did not prove that the respondent acted unreasonably by failing to organise an audit of the glass side panels by a person with appropriate expertise and thereafter replacing the existing glass with safety glass.

[56] Subject to the applicant's argument about the *Workplace Health and Safety Act* 1995, the trial judge was right to reject the applicant's claim that her accident was caused by the negligence she alleged against the respondent.

The *Workplace Health and Safety Act* 1995[58]

[57] Section 22(1) of the *Workplace Health and Safety Act* 1995 provided that workplace health and safety was ensured when persons were free from, so far as is presently relevant, "(a) … injury … caused by any workplace …" and "(b) risk of … injury … created by any workplace … ." Section 22(2) provided that workplace health and safety could "generally be managed by … identifying hazards; … assessing risks that may result because of the hazards …", "… deciding on control measures to prevent, or minimise the level of, the risks …", and implementing and monitoring and reviewing effectiveness of "control measures". Section 23(1) identified the persons who had obligations under Div 2 for workplace health and safety as including employers and persons in control of workplaces. Section 24(1) provided that "… [a] person on whom a workplace health and safety obligation is imposed must discharge the obligation …". Penalties were imposed for breach of that duty.

[58] In Div 2, s 30(1) imposed workplace health and safety duties, including:

> "30.(1) A person in control of a workplace has the following obligations—
>
> (a) to ensure the risk of injury or illness from a workplace is minimised for persons coming onto the workplace to work;
>
> …
>
> (c) to ensure there is appropriate, safe access to and from the workplace for persons other than the person's workers."

[59] In Div 4, s 37(1) provided that it was a defence in a proceeding against a person for a contravention of an obligation imposed on the person under Div 2 for the person to prove:

---

58 The relevant provisions were those in Reprint No. 4B.

> "(b) if an advisory standard or industry code of practice has been made stating a way or ways to manage exposure to a risk—
>
> (i) that the person adopted and followed a stated way to prevent the contravention; or
>
> (ii) that the person adopted and followed another way that managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention; …"

[60] The applicant, who was not employed by the respondent and did not work in the building common area, relied upon s 30(1)(c). She alleged that the respondent employed staff to work at the building and was in control of a workplace in the building's common area, and that the respondent owed the duty in s 30 to ensure that there was appropriate, safe access to and from the workplace through the common property. The respondent admitted those allegations. The respondent's obligation under s 30(1)(c) to ensure "appropriate, safe access to and from the workplace" applied in relation to the side panels adjoining the front entrance doors of the building.

[61] Section 41(1) of the Act empowered the Minister to make advisory standards that "state ways to manage exposure to risks common to industry". The provision upon which the applicant placed most emphasis in this application, s 26(3), provided:

> "(3) If an advisory standard … states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation only by—
>
> (a) adopting and following a stated way that manages exposure to the risk; or
>
> (b) adopting and following another way that gives the same level of protection against the risk. …"

[62] It was in issue on the pleadings whether, at the time of the accident on 21 December 2001, there was an advisory standard stating the way to manage an alleged risk, but at the trial the respondent did not contest the applicant's contention that the *Workplace Health and Safety (Advisory Standards) Notice* 1998 (as amended) gave notice of the making of the *Workplace Health and Safety Risk Management Advisory Standard* 2000. That advisory standard commenced on 1 February 2000.

[63] The advisory standard described itself as a "generic risk management document". It did not limit the risks in relation to which it applied. It was therefore capable of application in relation to the risk of injury associated with the glass side panel which eventuated in this case. The advisory standard set out a five step risk management process for managing exposure to health and safety risks that can arise from workplace hazards. It first summarised and then described in more detail the steps in workplace health and safety risk management expressed in general terms in s 22(2) of the Act. The first step was "to identify workplace hazards" by "looking for those things at your workplace that have the potential to cause harm." An inclusive list of the activities which might be undertaken to help in identifying hazards included "conducting a safety audit". Step 2 involved the assessment of the risk associated with the hazards identified in step 1, the desired outcome of which was a "prioritised list of risks for further action". Step 3 required a decision about the "control measures to manage exposure to identify risk". A table of "control priorities" identified the first priority as "try to eliminate the hazard", and if that was

not possible, "prevent or minimise exposure to the risk by" identified means. The first of the identified means was "substituting a less hazardous material, process or equipment …". Steps 4 and 5 referred in general terms to the implementation, monitoring, and review of the effectiveness of control measures.

[64] The applicant argued at trial and again in this Court that the alleged breach of statutory duty was proved because the respondent did not adduce any evidence to discharge an onus upon it to establish a defence under s 37. The trial judge rejected that argument, holding that it was for the applicant to "…marshal sufficient evidence to make out her claim of negligence" and that the respondent's failure to give evidence in those matters did not count against it.[59] I agree. The applicant cited *Bourk v Power Serve Pty Ltd*[60] in which an employee sued an employer for damages for breach of the obligation in s 28 to "ensure the workplace health and safety of each of the employer's workers at work." That was a civil proceeding for damages for breach of s 28 in which the trial judge's finding of breach was not in issue in the appeal. It was held that once the employee proved that he was injured as a result of the failure of necessary safety equipment, the employer could only escape a finding of breach of the "absolute"[61] duty "to ensure…health and safety" by bringing itself within other provisions of the Act, including s 26 and s 37(1).[62] That decision does not assist the applicant in her common law case for damages for negligence in which she seeks to adduce evidence of negligence by proving that the respondent breached a statutory duty. Whether or not the respondent did breach the duty was in issue. The onus of proving the alleged breach remained on the applicant throughout.

[65] The trial judge was not persuaded that the respondent had breached its statutory duty. The trial judge referred to the obligation in s 30(1)(c) to ensure "appropriate, safe access" and observed that, whilst it did not give any statutory cause of action to the applicant, who was not one of the respondents' workers, the statutory obligations were "an important factor in the mix of those pointing to what acting reasonably required of the defendant"; but the trial judge went on to hold that this consideration might add little to the respondent's obligation to act reasonably and that it was difficult to identify any failure to provide "appropriate, safe access".[63]

[66] The applicant argued that the trial judge did not take into account her argument about s 26(3) of the Act and the advisory standard which, the applicant argued, required the respondent to act proactively to ensure the safety of the access for persons in the applicant's position by conducting a glass audit by an appropriately qualified person. The applicant pointed out that the respondent admitted that it did not conduct any safety "audit" of the parts of the building it controlled. The respondent argued that the trial judge had not overlooked those arguments. Alternatively, the respondent emphasised that, if it did breach a statutory obligation, its common law duty to the applicant remained a duty only to take reasonable care.[64] It was not in issue that a breach of s 30(1)(c) would amount to evidence, but not conclusive evidence, of negligence.[65] The respondent argued that,

---

59 [2012] QDC 49 at [28](xiii) and the penultimate dot point.
60 [2008] QCA 225.
61 [2008] QCA 225 at [32].
62 [2008] QCA 225 at [19]; see also *Schiliro v Peppercorn Child Care Centres Pty Ltd* [2000] QCA 18 at [49].
63 [2012] QDC 49 at [32] – [35].
64 *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1 at [49].
65 *O'Connor v SP Bray Ltd* (1937) 56 CLR 464; *Sibley v Kais* (1967) 118 CLR 424.

notwithstanding any breach of statutory duty proved against it, it had not failed to take reasonable care. Reference was made to the refusal of the High Court in *Jones v Bartlett*[66] to hold a landlord of residential premises liable in negligence on the footing that the landlord had failed to replace items which, although not themselves defective, might have been replaced by safer items which would have avoided a foreseeable risk of injury. The respondent also cited *Tweed Shire Council v Hancomatic Music Pty Ltd*[67], in which the New South Wales Court of Appeal (Mason P, McColl JA and Bell J) applied *Jones v Bartlett* and other decisions which concluded that a landlord's duty in relation to the safety of premises did not generally require it to commission experts to look for latent defects in holding that negligence was not established by the retention of annealed glass in a door in commercial premises.

Consideration

[67] In otherwise comprehensive reasons, the trial judge did not advert to s 26(3), the advisory standard, or the applicant's pleadings and written arguments about those provisions. The trial judge certainly appreciated that the applicant relied upon s 30(1)(c), but his Honour may not have taken into account the applicant's case that the respondent was obliged by s 26(3) to discharge its duty under s 30(1)(c) only by complying with the advisory standard or in some other way which gave the same level of protection against exposure to the risks managed by the advisory standard. It is appropriate to grant leave to appeal for the purpose of considering whether, taking into account the effect of s 26(3) and the advisory standard, the respondent breached its statutory duty under s 30(1)(c) and, if so, whether, taking the evidence of breach into account, the respondent was negligent.

[68] As the respondent argued, s 26(3) did not oblige it to comply with the advisory standard, but any alternative approach allowed by s 26(3)(b) must necessarily give at least the level of protection against the risk of injury associated with the glass which would be achieved by the proactive approach prescribed in the advisory standard. The applicant proved, by the respondent's admission, that it had not conducted an audit, but an audit by an ordinary person would not have detected that the glass was not in conformity with the prevailing Australian Standard. The applicant's case was that the advisory standard obliged the respondent to engage an expert to conduct an audit of the glass in the side panels. The question is whether that was mandated by the requirement that the person in control of the workplace must "identify workplace hazards" by "looking for those things at your workplace that have the potential to cause harm" and the reference in an inclusive list of the activities which might be undertaken to "conducting a safety audit".

[69] Some features of the Act suggest an affirmative answer to that question. The focus of these regulatory provisions is upon ensuring personal safety. That aim might be thwarted if controllers of workplaces, who often might not have relevant expertise, are not obliged to engage appropriately qualified experts. Since s 30(1)(c) applies in relation to anyone (other than the workplace controller's own workers) entering a workplace, the safety of large numbers of people might be at stake in some cases. Although "safety audit" is not defined, the expression seems at least to comprehend an investigation by someone appropriately qualified to conduct it with a view to fulfilling the regulatory purpose of ensuring safety. However the Act and the

---

66 (2000) 205 CLR 166.

67 [2007] NSWCA 350 at [223].

advisory standard could have, but did not, express any obligation to engage experts. Whether that is required by the very general terms of the Act and the advisory standard must depend upon a case by case analysis.

[70] In some cases, such as in the case of potentially risky electrical apparatus for example, it may be obligatory to appoint an expert. This is not such an obvious case. Some aspects of the evidence point to a conclusion that the respondent's duty did require it to engage an expert to audit the glass, notably the very high volume of pedestrian traffic and the prospect that a pedestrian might come into contact with the glass. Furthermore, the commencement of the advisory standard on 1 February 2000 coincided with the commencement of the period during which the respondent undertook substantial renovations in the foyer. As the trial judge remarked, the respondent's decision to upgrade the building foyer "…brought about an occasion on which the defendant might have reviewed the general location to identify deficiencies or defects that were unknown and unsuspected, or respects in which upgrading to meet then current standards for new work might be advisable or possible."[68]

[71] Ultimately, however, and notwithstanding the proactive duty imposed by the Act, I am persuaded that the respondent was not obliged to engage an expert to audit the glass. There was no suggestion that the access was not "appropriate". The suggested purpose of engaging an expert to conduct a glass audit was as a first step in a risk management process designed to ensure that the access was "safe". What is safe necessarily involves questions of degree; "[t]here is no such thing as absolute safety".[69] That is reflected in the advisory standard, which required judgments to be made upon such questions. The evidence did not establish that the defendant had any reason to suspect that the glass panels were not safe or less safe in their situation than they were at the time when they were installed. The extent and cost of the necessary audits by experts must have been very considerable if every feature of the building common area was to undergo expert examination even where there was no reason to think that it might not be safe. On the evidence, the glass side panels could be regarded as "safe" if the respondent examined them without the assistance of a glass expert. That is so even though it is now known that the panels could have been made safer had the respondent engaged an expert to examine the glass, discovered that the glass in them was not the safest kind of glass available for this application, and replaced it with safety glass. Hindsight reasoning of that kind should not be used to find that the respondent breached a statutory duty.

[72] Even if it were held, contrary to my own view, that the respondent was obliged to engage an expert to inspect the glass, it would not follow that its breach of that obligation would justify a conclusion that the respondent was negligent or that the negligence caused the applicant's injuries. The failure to engage an expert, if required by the legislation, would amount only to some evidence of negligence, and proof of a causal link with the applicant's injuries would require a further finding that the applicant was negligent in not taking the second step of replacing the side panels with safety glass panels at a time before the applicant was injured. It was not suggested that any other statutory provision required an occupier of a commercial building who knew that annealed glass was installed to replace it with safety glass. As I have indicated, the advisory standard did not prescribe any such obligation, but

---

68 [2012] QDC 49 at [35].

69 *Jones v Bartlett* (2000) 205 CLR 166 per Gleeson CJ at [23].

rather required a person in the respondent's position to make a judgment. It is also noteworthy that the current Australian Standard did not itself specify that existing annealed glass must be replaced by safety glass in the absence of any reason to think that the annealed glass was itself defective.

[73] The applicant relied upon *Ridis v Strata Plan 10308*,[70] but the majority there held that the defendant had not breached a similar statutory duty imposed upon a body corporate. The unsuccessful plaintiff had sustained lacerations to his arm when he had instinctively reached out to stop a glass framed door from closing. The applicant called in aid the emphasis in the dissenting judgment of Tobias JA upon the proactive nature of the statutory duty as his Honour construed it:

> "But most importantly, in *Jones v Bartlett* there was no reason to focus special attention on the door, as it had existed for 30 years without causing any harm. It is true that in the present case the same observation might be made, but the difference is the statutory and intractable obligation upon the respondent to renew or replace fixtures or fittings such as the front door for which purpose it was required from time to time to inspect it and all other fixtures and fittings comprising the common property, at least where it was reasonably foreseeable that a safety issue might arise."

[74] The last phrase of that quote is significant in the context of Tobias JA's earlier references to it being of "considerable relevance" [71] that the automatic door closer was defective, sometimes closing the glass framed door very quickly, and to evidence that framed glass doors presented a "well-known hazard…".[72] There was no similar evidence in this case that the side panels were defective or known to be hazardous. It is necessary to decide this case upon its own distinctive facts and statutory provisions. My conclusion is that the applicant did not prove the breach of statutory duty which it alleged.

Contributory negligence

[75] In deciding upon any appropriate reduction in the damages awarded to a plaintiff to reflect contributory negligence alleged against the plaintiff, it is necessary to compare the degrees of departure from the standard of care of the reasonable person of each of the plaintiff and defendant,[73] but the trial judge did not specify the nature or degree of the assumed negligence by the respondent which informed his Honour's assessment that, if the applicant should succeed, her damages should be reduced by one third on account of her contributory negligence. For that reason, and notwithstanding the applicant's concession that the trial judge should be allowed much latitude in determining what is just and equitable,[74] if the respondent should now be found liable it would be necessary to consider this issue afresh. In view of the difficulty of fixing upon any particular hypothesis of liability in circumstances in which I have found none, it does not seem practicable for me to make any finding about contributory negligence. I propose only to consider the factual issue agitated by the parties.

---

70 (2005) 63 NSWLR 449.
71 (2005) 63 NSWLR 449 at [20].
72 (2005) 63 NSWLR 449 at [25].
73 *Pennington v Norris* (1956) 96 CLR 10 at 16.
74 cf *A V Jennings Construction Pty Ltd v Maumill* (1956) 30 ALJR 100; *Pennington v Norris* (1956) 96 CLR 10, 15-16.

[76] The applicant submitted that although her blood alcohol concentration level was high, its effect upon her was not significant. That submission should be rejected in light of the evidence accepted by the trial judge as to the amount of alcohol the applicant had consumed, her likely blood alcohol level, and its effect in causing the applicant to be unsteady on her feet and to stumble backwards into the glass. Whilst the trial judge found that the consequential shattering of the glass into large shards was surprising, the fact that the applicant's fall against the glass was a result of her voluntary consumption of so much alcohol that she was unsteady on her feet suggests that she should bear some responsibility for her resulting injuries.

Quantum

[77] The applicant contended that the trial judge's assessment of damages for past economic loss and future economic loss was manifestly inadequate.[75] The applicant had sought a global award of $10,000 for past economic loss. The trial judge considered that nothing should be allowed under that heading because, although a plaintiff should not go uncompensated merely because of the difficulty or impossibility of producing evidence of a precise quantification, in this case the applicant had not adduced evidence of the "essential facts"[76] for such a claim. The respondent submitted to the trial judge that the evidence also did not justify any assessment for loss of future earning capacity, but the trial judge made an assessment of $15,000 on the ground that the combination of the applicant's scarring and the evidence of her psychological complications did compromise her future earning capacity.

[78] The applicant referred to the following evidence. At the time of the accident the applicant was employed as a production assistant at QANTM Multimedia. As a result of the accident she was in hospital for five days. They were the first five days of the applicant's two weeks holidays upon which she was about to embark when she had the accident. She returned to work three weeks after the accident. The applicant gave evidence that she "just took…an extra week on top of the leave" before going back to work; she returned to work in the same position but with "really light duties" because she was unable to type as fast; and she had "desperately wanted to go back to work after the accident…just to get my life back." The applicant also gave evidence that in her work she was not required to interact with members of the public and she felt comfortable with working with her co-employees. A couple of months after the applicant returned to work her employer asked her to work as a receptionist, which the applicant found extremely uncomfortable. She objected to undertaking that role and the rehabilitation officer at the time, Ms Koppens, explained to management on the applicant's behalf that the applicant could not be expected to work in reception. The applicant gave evidence that her employer then did not make her work on reception. She also gave evidence that she left her employment "[b]ecause of what had happened there". When the respondent's counsel objected that there was no claim that the applicant left her employment because of her injuries, senior counsel for the applicant made it clear that this evidence was not led as part of the claim for economic loss but was simply part of the narrative.

---

75 In oral argument the applicant abandoned a contention that the assessment of damages for care and assistance ("*Griffiths v Kerkemeyer*" damages) was inadequate.

76 *Nicholson v Curtis* [2010] QCA 303 at [29]-[30], referring to the categorisation of many different cases by Thomas J in *McDonald v FAI General Insurance Co Ltd* [1995] QCA 436 at pp 6-7.

[79] The applicant left her employment with QANTM between April and June 2002, after which she found employment in an office at a jewellery company which did not involve interaction with members of the public. The applicant remained in that employment for four months. Why she left was not clear, but her evidence was that "I wasn't myself."[77] After one month without working, the applicant obtained employment as an office clerk, a role not involving interaction with the public, in a series of different businesses. At the time of the trial she remained in employment with the fourth of those businesses, for which she worked from her home. She liked that job because she did not have to be in an office. Although being in the office in that business did not require her to see clients, she liked to be at home. A psychologist who gave evidence for the applicant noted that the applicant had not wanted to be in contact with people since the accident, had found it hard enough to get out of bed each day, and at her work with QANTM she had been required to pass the scene of the accident daily. A psychiatrist called by the respondent expressed the view that the applicant was very self-conscious so that it was not surprising and it was understandable that the applicant would seek employment out of the public eye.

[80] I accept the submission for the respondent that the evidence did not justify a finding that the applicant suffered past economic loss. She did not give evidence that she had in fact suffered any loss of wages before the trial or that she was otherwise out of pocket. She did not articulate any claim for financial loss on account of her misfortune that she spent five days of her annual leave in hospital, she did not adduce evidence to prove that the additional week that she took off work at that time was reflected in a loss of wages attributable to the accident, and she did not claim that her cessation of her original employment resulted from her injuries. The evidence in support of the claim for future economic loss was also imprecise and general. That is no criticism of the applicant or her lawyers, but it does make it difficult for the applicant to contend that the global assessment made by the trial judge was inadequate. I am not persuaded that there is any ground for interfering with the award of damages for economic loss.

[81] The applicant also contended that the trial judge's discount of 60 per cent of the costs of anticipated future surgery ($5,345.56) was too severe. The applicant did not submit that some discount was not appropriate for the reason assigned by the trial judge, to reflect the prospect that the applicant would resile from her decision to undergo the surgery. The surgery in question was for the revision of the applicant's face and neck scars to reduce their width from about 7 mm to 1 mm. One doctor gave evidence that the surgery was feasible and another doctor gave evidence that the risk of a worse outcome from the surgery was not worth taking. The trial judge was in a better position than this Court to assess the appropriate discount and the submission by the applicant's counsel that it was "a little savage"[78] does not suggest that the award as a whole is inadequate.

[82] The applicant has not established any error justifying the grant of leave to appeal against, or appellate correction of, the trial judge's assessment for damages.

Disposition and proposed orders

[83] Leave to appeal should be granted on the ground that the trial judge did not consider one aspect of the applicant's case on breach of statutory duty, but the appeal should

---

77 She gave evidence that she was still depressed at that time.

78 Transcript 1-56.

be dismissed because the applicant did not prove the alleged breach of statutory duty and there was otherwise no error in the trial judge's decision.

[84] I would grant leave to appeal, dismiss the appeal, and order the applicant to pay the respondent's costs of the application and appeal to be assessed.

[85] **FRYBERG J:** The applicant seeks leave to appeal from the judgment of the District Court dismissing her claim for nearly $179,000 for damages for personal injuries.

[86] Fraser JA has described the circumstances which gave rise to the claim. I shall do no more than supplement his description to the extent necessary for these reasons.

[87] In or about April 2000 the body corporate provided what was described as a "Building Upgrade Specification" to (among others) a firm of architects in order to obtain an expression of interest in designing and managing a renovation of the building.[79] Relevantly it provided:

> "The body corporate committee of the 'Professional Suites Building', on behalf of lot owners have allocated funds to be used in the upgrade of the property at 138 Albert St Brisbane.
>
> Below are the broad specifications outlining our objectives in carrying out the upgrade. Responses outlining design options, costings, and timeframes that address our requirements are being sought.
>
> …
>
> Upgrade Description: The scope of this project includes the upgrading of the building facade, common area in front of the property, and the ground floor foyer area as part of a process to upgrade the building classification to B class standard.
>
> Budget: Approximately $200,000".

A series of headings followed: Facade, Common Area at the Front of the Property, Retail Tenancies, Security, Ground Floor Foyer, Lift Cars and Summary. They made it clear that further stages of the development were contemplated later, that plans should discourage loitering on common property and that the objective of the changes was cosmetic, to create a professional appearance. The summary provided:

> "In this stage of the building upgrade/development we are seeking to greatly enhance the first impression value of the property. This will involve upgrading the façade, front common area and foyer, as well as address some existing issues such as improper use of the common area at the front of the building.
>
> We are looking for a first stage enhancement that will be a low maintenance option that will age well, 10 - 15 yrs, and integrate into future development. It should take into consideration the need to better control the usage of the frontage common area, and lend itself to possible commercial uses of the space. It should provide good, clear access to the building (There is a large volume of people

[79] AB 193, 205, 164-5.

> accessing the building), wheelchair access must be maintained and disabled toilet facilities incorporated."[80]

[88] What was meant by "upgrade the building classification to B class standard" was not explained in the evidence. The *Building Code of Australia*[81] contained no such classification[82] and it was not suggested that the work involved or formed part of work which would have required compliance with that Code.[83]

[89] The architects successfully tendered for the renovation and were appointed to design it on or about 30 May 2000.[84] They prepared tender documents which included drawing number SDA 301, issued on 26 September 2000.[85] That drawing contained two blocks of text headed "Door Hardware Specification" and "Window Specification" respectively. The window specification included the following provisions:

> "GLASS: TO AS1288; FREE FROM DEFECTS WHICH DETRACT FROM APPEARANCE OR INTERFERE WITH PERFORMANCE.
> …
> SAFETY GLASSES: TO AS/NZ 2208, GRADE A WITH STANDARDS MARK
> LAMINATED SAFETY (CLEAR FLOAT WITH CLEAR INTERLAYER) USED TO PARTITION GLAZING AND WHERE CLEAR FLOAT IS REQ'D BUT AS1288 INDICATES SAFETY GLASS."

[90] At first instance, Ms Smith submitted and it seems the judge accepted, "Architects had advised the upgrade of glass to the front door to comply with the AS 1288-1994". That was simply wrong. The "advice" quoted in support of the submission was the window specification which included the passages quoted above. The door hardware specification contained no reference to AS1288.

[91] His Honour correctly noted that the drawing contained the annotation "EXISTING GLAZING TO REMAIN", referring to the glass panels along the Albert Street frontage of the building. Rightly drawing the inference that this annotation also referred to the panels at the sides of the entrance recess, he held, "The plans specifically record that, apart from the doors being replaced, the glass in the entrance area was to be retained".[86] Nothing on the drawing contained any indication that AS1288 had anything to do with fixed glass panels. The misleading submission was regrettable, but it did not affect the outcome, as his Honour rightly held that the body corporate was not put on notice that there was an Australian Standard relevant to the panels.

[92] Ms Smith also sought to place reliance on what she characterised as a finding by his Honour:

> "[10] Sheet or panel glass is a notorious potential hazard, given its propensity to shatter into shards capable of seriously cutting the person whose moving body is the mechanism whereby the glass breaks."[87]

---

80 AB 165.
81 Which formed part of, and was to be read as one with, the *Standard Building Regulation 1993*: see s 8 of the latter.
82 *Building Code of Australia*, s A3.2.
83 *Standard Building Regulation 1993*, ss 106-7.
84 AB 194.
85 AB 163.
86 [2012] QDC 49 at [27].
87 [2012] QDC 49.

Her counsel was unable to point to any evidence to support such a finding. In my judgment that is not a matter of which judicial notice could be taken. It is not even clear what his Honour meant by "sheet or panel glass", let alone why either should be a potential hazard. One would expect glass walls or panels facing the street at ground floor level of an office building to be of a quality sufficient to withstand a moving human body. If, contrary to my view, judicial notice is in order, I would take judicial notice of the fact that armour plated glass has been around for much longer than the defendant's building.

[93] In my judgment neither the architects' drawing nor common knowledge of the properties of glass was a factor which ought to have alerted the body corporate to a risk that the glass panels beside the doors were dangerous.

[94] Ms Smith further submitted that the body corporate ought to have known of such a risk because it ought to have carried out a safety audit of the glass panels. I agree with Fraser JA[88] that the evidence failed to demonstrate that the standard of care imposed on the body corporate required such an audit to be carried out. Nor did it demonstrate that had such an audit been carried out Ms Smith would not have been hurt. There was no reason why the proposed audit should have been limited to the side panels of the front door; looked at prospectively, a safety audit would have to encompass the entire building. There was no evidence that the glass panel had deteriorated over time, nor that even if it had, an audit would have revealed that fact. There was no evidence of what an audit of the building would have cost, what it would have revealed, and what the cost of replacing not only faulty portions of the building but also portions which failed to conform to contemporary standards would have been.

[95] The trial judge held:

> "It is probably a reasonable assumption that an audit would have recommended upgrading the panel installed in that location to meet current standards (or at least considering why not to do so). On the balance of probabilities, the plaintiff would not have been hurt had such upgrading occurred."[89]

With respect, if all an audit would have done was to lead to a consideration of why not to replace the panels, Ms Smith failed to prove causation. More fundamentally, it is not all apparent to me that one can assume that an audit would have recommended upgrading the panel. Counsel for Ms Smith said that there was evidence to support what the judge called an assumption, but none of the evidence to which she referred this court did so.

[96] Again, I agree with what Fraser JA has written on this aspect of the application.

[97] Finally I deal with Ms Smith's submission that the trial judge's reasoning was vitiated because he failed to take into account an advisory standard made under the *Workplace Health and Safety Act 1995*. Assuming that the standard was relevant, I agree with Fraser JA for the reasons which his Honour gives that it did not require an audit, and that even if it did do so for the purposes of that Act, that was not sufficient to tip the balance at common law.

---

88 Paragraph [54] – [55].

89 [2012] QDC 49 at [10].

[98] In so finding, however, I do not wish to be taken as accepting that the ministerial standard had any relevance in the present case. The body corporate's statutory obligations were set out in s 30(1) of the Act. The first two paragraphs of that section dealt with risk – compare s 22(1)(b). The third, s 30(1)(c) did not. It imposed an absolute obligation of ensuring appropriate, safe access – compare s 22(1)(a). The standard was concerned with ways to manage exposure to risks – s 41(1)(a) and s 37(1)(a) and (b). It is arguable that had the body corporate been prosecuted any defence would have to have been found under s 37(1)(c). I make no finding on that aspect of the matter. It is unnecessary to do so. Even on this approach, Ms Smith failed to demonstrate that the body corporate ought to have carried out a safety audit.

Contributory negligence and quantum

[99] It is impossible to make a hypothetical determination of contributory negligence when no negligence has been shown. We should ignore the trial judge's attempt to do so. It is unnecessary to consider the issue of quantum.

Leave to appeal

[100] Ms Smith submitted that leave should be granted because:

(a) The subject matter involved an important point of law, namely whether and to what extent the failure by the respondent to meet its admitted statutory obligations under the *Workplace Health and Safety Act 1995* had relevance in determining whether it breached its duty of care to Ms Smith;
(b) the subject matter also raised a further point of law, namely the extent of any "higher duty" of care owed by owners of commercial premises compared to those persons who own residential premises;
(c) the subject matter of the appeal raised a further point of law, namely whether Ms Smith's alcohol consumption contributed to her own loss when the impact of her force on the glass panel was not significant and the glass breaking was unexpected;
(d) the subject matter of the appeal raised a further point of law, namely the conflicting decisions within other State jurisdictions as to whether an owner of commercial premises in meeting its duty of care is required to upgrade glass panels to meet changing standards and codes;
(e) the decision was wrong in law and was manifestly unjust.

[101] Points (c), (d) and (e) raised no point of law. Ms Smith did not argue point (b) as a matter of law and I doubt whether any such rule of law exists. As to point (a), the body corporate conceded that breach of any statutory obligation would have been relevant in determining whether it breached its duty of care. It denied on the facts that it failed to meet its obligations. In oral submissions Ms Smith sought to expand the ground to encompass an argument that the judge at first instance failed to place sufficient weight on the breach of statutory duty. Expressed another way she submitted that the question of law would be, what is the response of a reasonable occupier to a notorious risk given that there was a statutory obligation to do something. Those were questions of fact.

[102] There may be cases, particularly cases of manifest injustice, where this court would grant leave to appeal on a question of fact. In practice, the court usually treats the hearing of the application as the hearing of the appeal and full argument is presented, so an assessment of the question of manifest injustice is possible. Leaving such cases aside, factual issues ought not generally be the subject of leave, even if appellate judges are of a different view of the facts from the District Court judge.

[103] There being no manifest injustice demonstrated in this case, I would have refused leave to appeal and dismissed the application. However as my colleagues are not agreed on the order, I am content for the reasons given above, and subject thereto for the reasons advanced by Fraser JA, to concur in the orders which his Honour proposes.