Rootes v Shelton - [1967] HCA 39

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HIGH COURT OF AUSTRALIA

Barwick C.J., McTiernan, Kitto, Taylor and Owen JJ.

ROOTES v. SHELTON
(1967) 116 CLR 383
18 October 1967

Negligence

Negligence—Duty of care—Sport—Pastime—Existence of duty—Breach—Risks inherent in sport or pastime—Risks not inherent—Voluntary assumption of risk—Burden of proof of assumption.

Decisions

October 18.
The following written judgments were delivered: -
BARWICK C.J. The appellant, an experienced water skier, was skiing on the Macquarie River at Dubbo, performing in company with other experienced water skiers an operation known as "crossovers", in which three skiers being towed with ropes of different lengths pass from side to side across the wake of the towing boat and across each other's paths. The appellant at the material time was the middle of the three men and thus in crossing had to pass his tow rope over the skier ahead of him and crouch under the rope of the skier behind him. (at p384)

2. The towing boat was being driven along a fairly straight and sufficiently wide stretch of river during the manoeuvre, travelling at thirty to thirty-five miles per hour. As the appellant was passing to the starboard side of the boat's wake he was temporarily blinded by spray and had need to clear his eyes before starting to turn inwards again. This may possibly have caused him to swing wider in executing his manoeuvre than otherwise he might have done. However, when he could see again he was faced with a stationary boat, as he says, about six feet away from him. He endeavoured to avoid colliding with it but was unable to do so. In the result he was severely injured. He sued the respondent who was the driver of the towing boat for failure to take due care in the control of the boat and for failure to warn him of the presence of the stationary boat. (at p384)

Following paragraph cited by:

James v USM Events Pty Ltd (14 June 2022) (Brown J)

234. As USM submitted, the mere fact that Mr Chaffey may have acted in breach of the rules in relation to the incident does not lead to a conclusion that USM has failed to take reasonable care. [106] Mr Chaffey was bound by the same rules as all other athletes including the rule to take care and was not free to act recklessly. It was submitted on behalf of Dr James that in the present case, the rules and protocols in place were not sufficient to meet the risk and further precautions were required to meet the risk.

via
[106] *Rootes v Shelton* (1968) 116 CLR 383 at 385

James v USM Events Pty Ltd (14 June 2022) (Brown J)

232. By engaging in sport, it is relevant to bear in mind, as was said by Barwick CJ in *Rootes v Shelton* , [105] that "the participants may be held to have accepted risks which are inherent in that sport … the tribunal of fact can make its own assessment of what the accepted risks are".

via
[105] (1967) 116 CLR 383 at 385.

Singh v Lynch (18 October 2019) (Fagan J)
Dickson v Northern Lakes Rugby League Sport and Recreation Club Inc and Anor (No.2) (23 August 2019) (Abadee DCJ)
Watson v Meyer (16 April 2012) (Gibson DCJ)

153. Concepts of duty of care owed by participants involved in recreation or sport have been the subject of analysis in a series of decisions. An early High Court decision, *Rootes v Shelton* (1967) 116 CLR 383, sets out (at 385) the parameters of the duty of care owed by participants in a sport:

"By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its

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own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist."

Appo v Stanley (13 October 2010) (McMeekin J)

44. Of course breach of the rules of racing, or of any such safety rule, is not the same as breaching the duty of care owed in all the circumstances. To put the case in a more familiar context, sometimes it is perfectly reasonable to drive on the wrong side of the road. So much is clear from the judgments in *Rootes v Shelton* , for example that of Barwick CJ where he said:

"By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist." [25]

via

[25] (1967) 116 CLR 383 at 385.

Drewes v. Toowoomba Volleyball Association Inc (16 January 2008) (Searles DCJ)

40. Relying upon that conclusion of Mr O'Sullivan, and the uncontroversial fact that the defendant was affiliated with the Queensland Volleyball Association Incorporated, the plaintiff then relied on Object 2(e) of the constitution of that body to visit upon the defendant the obligation to provide a three metre free zone. That constitution is Exhibit 16 and Object 2(e) relevantly reads:-

"The objects of the QVA shall be:

(a) …

(b) …

(c) …

(d) …

(e) To ensure that all Volleyball competitions and organised activities, which involve registered members of the member associations or participants in QVA activities do not infringe the Australian Volleyball Federation or Federation International de Volleyball regulations.

(f) …

(g) …

(h) …
(i) …

(j) …”

Of course the breach of the Objects of the QVA constitution does not necessarily constitute a breach of the duty owed by the defendant to the plaintiff. [44] But, that said, I am not persuaded there ever was such a breach of the constitution.

via

[44] *Rootes v Shelton* (1967) 116 CLR 383 at 385 per Barwick CJ .

Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone (20 May 2004)

23. It is clear (and was not contended otherwise) that the law of negligence extends into participation in a sport which involves inherent dangers. In *Rootes v. Shelton* (1967) 116 CLR 383 at 385 Barwick CJ said:

By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist.

At 387 Kitto J said:

I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or a game. Their kind is older by far than the common law itself. And though water skiing may be slightly faster than chariot-racing it is, like every other sport, simply an activity in which participants place themselves in a special relation or succession of relations to other participants, so that adjudication under the common law upon a claim by one participant against another for damages for negligence in respect of injuries sustained in the course of the activity requires only that the tribunal of fact apply itself to the same kind of questions of fact as arise in other cases of personal injury by negligence. It must do so, of course, under judicial guidance as to what the law has to say upon the questions whether, in the situation in which the plaintiff’s injuries were caused, the defendant owed him a duty to take care not to harm him, what the extent of the duty was if a duty did exist, and what causal relation the plaintiff must prove between an act or omission by the defendant which was a breach of the duty and the plaintiff’s injuries. We are here concerned mainly with the first two of these questions. They are questions to be answered by reference to the circumstances surrounding any act or omission of the respondent which the jury

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considered was a cause of the appellant's injuries. It was for the jury to identify that act or omission, and then to decide what were the circumstances in which it took place.

Waverley Municipal Council v Swain (03 April 2003) (Spigelman CJ, Handley and Ipp JJA)
Woods v Multi-sport Holdings Pty Ltd (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)
Reynolds v Katoomba RSL All Services Club Ltd (20 September 2001) (Spigelman CJ, Powell and Giles JJA)

27 This Court should be very slow indeed to recognise a duty to prevent self-inflicted economic loss. Loss of money by way of gambling is an inherent risk in the activity and cannot be avoided. (See e.g. *Rootes v Shelton* (1967) 116 CLR 383 at 385 per Barwick CJ ; *Prast v Town of Cottesloe* (2000) 22 WAR 474 at [32] per Ipp J.) Nevertheless, whether a duty arises in a particular case must depend on the whole of the circumstances, even in the case of an inherent risk. (See *Rootes v Shelton* (supra) at 390 per Kitto J and *Agar v Hyde* (supra) at [14] per Gleeson CJ.)

Flanders v Small (30 November 2000) (McGill DCJ)
Woods v Multi-Sport Holdings Pty Ltd (01 March 2000) (Malcolm CJ, Pidgeon J, Murray J)

9 Her Honour cited the leading High Court authority on the voluntary assumption of risk in connection with the playing of sport or pastimes of

(Page 5)

that kind, ***Rootes v Shelton*** (1967) 116 CLR 383, where at 385 Barwick CJ said:

3. It seems that it was usual, as the appellant, the respondent and the other participants conducted their water skiing, to have an observer as well as a driver in the towing boat: it was also usual for the driver or the observer to signal the presence of any obstacle which was seen in or on the water along which the tow was being made. Although on this occasion there was another person in the towing boat as well as the driver, as I read the evidence, that person was not acting as observer nor was any signal given by the driver warning of the presence of the stationary boat of whose presence or position it was conceded the driver at material times was aware. (at p385)

4. The jury found for the plaintiff: but the Supreme Court (Court of Appeal Division) set aside the verdict on the ground that the respondent driver of the towing vehicle owed no relevant duty to the appellant, both being participants in a sport who had, by engaging in it, accepted the risks of injury which might be involved in taking part in it. (at p385)

5. I am clearly of opinion that the Supreme Court was in error in setting aside the verdict of the jury and in the reasons expressed for doing so. I find it unnecessary to canvass these reasons in detail: it is sufficient in the circumstances if I set out my own conclusion as succinctly as possible. (at p385)

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6. By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist. (at p385)

Following paragraph cited by:

Peter Joseph Haylen v New South Wales Rugby Union Limited (15 March 2002) (Einstein J)

> 50 Assume for a moment that one was to accept for the purpose of argument, but without deciding this matter, that a workable distinction exists between, on the one hand, *non-inherent* risks (meaning risks representing events that ought not occur if the sport is conducted as it ought to have been, arguably termed 'sport not conducted according to specification') and, on the other hand, *inherent* risks (meaning risks that can materialise even though everything is carried out to specification) [See generally Opie supra at 138: "*[a]n inherent risk in a sport is one that can materialise even though everything is carried out to specification. Injuries can arise from the tackles and bumps promoted by the rules, as well as by the collisions, falls and spills that inevitably occur in any vigorous physical activity. Additionally, the inherent risks of a sport include physical contact even though they may constitute an accidental breach of the rules, provided they are not negligent in the circumstances of the sport. All of these incidents occur in varying degrees as normal adjuncts to sporting activity*"]. Even if it be the case that this form of distinction was appropriate to be drawn so that non-inherent risks may, depending upon the particular circumstances, give rise to a relevant duty of care, the plaintiff's claim here would seem clearly to fall into the category of inherent risks in this particular game. I note in this regard that in *Insurance Exchange of Australia Group v Dooley* (2000) 50 NSWLR 222, the Court of Appeal, dealing with a claim that a regional baseball league in Australia ought to have amended the rules of baseball affecting collisions occurring between fielders and base runners, regarded the prospect of collision in the circumstances to be a well-known and understood inherent risk of the sport. [I note in passing that the expression "inherent risks" may clearly be used in more than one sense. The recent decision in *Woods v Multi-Sport Holdings Pty Ltd* [Unreported, High Court of Australia, [2002] HCA 9, 7 March 2002] involved use by the trial judge of this expression to describe risks which are *"by their nature obvious to persons participating in the sport"*. In *Rootes v Shelton* (1967) 116 CLR 383 at 386 Bar wick CJ referred to risks that are inherent in a sport or pastime which may be regarded as accepted by participants]

Woods v Multi-sport Holdings Pty Ltd (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

7. No doubt there are risks inherent in the nature of water skiing, which because they are inherent may be regarded as accepted by those who engage in the sport. The risk of a skier running into an obstruction which, because submerged or partially submerged or for some other reason, is unlikely to be seen by the driver or observer of the towing boat, may well be regarded as inherent in the pastime. Or that situation may be analysed by saying that that driver or observer owes no duty in respect of the unobservable obstruction. But neither the possibility that the driver may fail to avoid, if practicable, or, if not, to signal the presence of an observed or observable obstruction nor that the driver will tow the skier dangerously close to such an obstruction is, in my opinion, a risk inherent in the nature of the sport. In this connexion an observable obstruction is one which would be observed by reasonable attention by the driver and observer to their respective tasks. That there is a recognized practice amongst participants that the driver or the observer should signal the presence of an observed obstruction is no more than emphatic that the skier does not accept these possibilities as risks which he must run without recourse. There was, in my opinion, no evidence that any of the risks to which I have referred were inherent in the sport. (at p386)

8. In my opinion, the appellant was entitled to have the respondent exercise reasonable care in carrying out his part of the operation in which they were co-operating: failure to signal the presence of the stationary launch and towing the appellant dangerously close to it, particularly if it was thought that the driver ought to have realized that the appellant might well be temporarily blinded at times by the spray from the wash of the boat during his manoeuvres, could clearly be regarded as breaches of that duty. (at p386)

9. If it is said that a participant in a sport or pastime has voluntarily assumed a risk which is not inherent in that sport or pastime so as to exclude a relevant duty of care, it must rest on the party who makes that claim to establish the case in accordance with recognized principles. In the present case there was, in my opinion, no evidence whatever to support the view that the appellant voluntarily assumed any of the risks which I have described. Further, having regard to the terms of the summing up of the trial judge, the jury, by its verdict, has negatived any such assumption of risk. (at p386)

10. In my respectful opinion, the respondent plainly owed a duty of care to the appellant: it would have been surprising indeed had the jury not thought that the respondent was in breach of his duty both in failing to signal the presence of the stationary launch and in taking the appellant dangerously close to it. I would restore the jury's verdict. (at p386)

MCTIERNAN J. The appeal should, in my opinion, be allowed. I agree with the conclusions of the Chief Justice and do not desire to add anything. (at p386)

Following paragraph cited by:

Vreman and Morris v Albury City Council (11 February 2011) (Harrison J)

90. In *Greater Taree City Council v Peck* [2002] NSWCA 331 at [65] , Einstein J described skateboarding at a skateboard park as " plainly an inherently dangerous sport". In *Shellharbour City Council v Rigby* [2006] NSWCA 308 at [300]; (2006) Aust Torts Reports 81-864, Basten JA commented as follows with respect to an accident to a rider that occurred at a BMX bike riding track:

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"[300] This was a constructed facility, not part of a natural environment. The fact that a recreational facility involved risks was a matter to be taken into account in making it available to the public without supervision: see [63] above, quoting *Woods v Multi-Sport Holdings Pty Ltd* at [37] (Gleeson CJ), referring to *Rootes v Shelton* (1967) 116 CLR 383 at 387. The ability to become airborne was undoubtedly part of the intended excitement of the feature, and the risk of an inexperienced airborne rider losing control of his or her bicycle was no doubt likely to be appreciated at some level by all riders, both experienced and inexperienced. However, the real concern related to inexperienced young riders who might lack the maturity and understanding to appreciate adequately the risks involved."

Freeleagus v Nominal Defendant (05 April 2007) (Williams and Keane JJA and Douglas J,)

20. The leading judgment in the Full Court was delivered by Dunn J. His Honour said:

"Had there been a jury in the case, the jury would have been entitled to judicial guidance as to whether the defendants' driver owed the plaintiff a duty to take care not to harm him (clearly he did) and what the extent of the duty was, having regard to the 'special relation' or succession of relations existing between defendant and plaintiff in the moments immediately preceding the accident, and what causal relationship the plaintiff must prove between an act or omission by the defendant which was a breach of duty and any damage suffered by the plaintiff. Cf. *Rootes v. Shelton* (1967) 116 C.L.R. 383, at p. 387. "

Shellharbour City Council v Rigby (27 November 2006) (Beazley JA; Ipp JA; Basten JA)

300 This was a constructed facility, not part of a natural environment. The fact that a recreational facility involved risks was a matter to be taken into account in making it available to the public without supervision: see [63] above, quoting *Woods v Multi-Sport Holdings Pty Ltd* at [37] (Gleeson CJ), referring to *Rootes v Shelton* (1967) 116 CLR 383 at 387. The ability to become airborne was undoubtedly part of the intended excitement of the feature, and the risk of an inexperienced airborne rider losing control of his or her bicycle was no doubt likely to be appreciated at some level by all riders, both experienced and inexperienced. However, the real concern related to inexperienced young riders who might lack the maturity and understanding to appreciate adequately the risks involved.

Shellharbour City Council v Rigby (27 November 2006) (Beazley JA; Ipp JA; Basten JA)
Shellharbour City Council v Rigby (27 November 2006) (Beazley JA; Ipp JA; Basten JA)
Action Paintball v Clarke (25 May 2005) (Handley, Tobias and Basten JJA)
Swain v Waverley Municipal Council (09 February 2005) (Gleeson CJ,McHugh, Gummow, Kirby and Heydon JJ)

109. *Shirt* considered what had been said by the Privy Council in *The Wagon Mound [No 2]* [89] , an appeal taken directly from the judgment of Walsh J in the Supreme Court of New South Wales. It is the treatment of *The Wagon Mound [No 2]* in *Shirt* which represents the law. In deciding the present appeal, to

speculate whether what was said by the Privy Council and adopted by this Court in *Shirt* took the law around a wrong turning and introduced "deleterious foreign matter into the waters of the common law" in which the courts "have no more than riparian rights" [90] would be inappropriate.

via

[90] The words are those of Kitto J in *Rootes v Shelton* (1967) 116 CLR 383 at 387.

Cattanach v Melchior (16 July 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)
Woods v Multi-sport Holdings Pty Ltd (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

37. As Kitto J pointed out in *Rootes v Shelton* [2] , people have taken pleasure in engaging in risky games since long before the law of negligence was formulated, and there is nothing new or mysterious about the application of the law to such conduct. But the sporting context may be of special significance in relation to a factual judgment that must be made. Depending upon the manner in which a plaintiff seeks to make out a case of negligence, the risky nature of a sporting activity in which an adult participant has chosen to engage may be of factual importance in a decision as to whether such a case has been established.

via

[2] (1967) 116 CLR 383 at 387.

Agar v Hyde, Agar v Worsley (23 March 2000) (Gleeson CJ; Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

Your Honours, in relation to duty of care, what we would submit is there is nothing very surprising about regarding those who are in control of the sport as being under a duty of care to participants. Could I take your Honours to *Rootes v Shelton* (1967) 116 CLR 383, to which I adverted earlier, and, your Honours, they were various participants in water skiing and one sees, if I could go first to what was said by Justice Kitto at page 387 , your Honours, could I start on the first new paragraph on that page and observing, if I may in passing, your Honours, that the Court might have to be a little more Trappist than it sometimes is if one were to follow what is in the preceding paragraph, but, your Honours, if one goes to the first new paragraph on page 387, your Honours will see that his Honour observes nothing:

Anderson v Mount Isa Basketball Association Incorporated (03 October 1997) (Davies JA. Demack J. Mackenzie J.)
Burnie Port Authority v General Jones Pty Ltd (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

Then, in Rickards v. Lothian, Lord Moulton delivering the opinion of the Privy Council said ((196) (1913) 116 CLR 387 at 400-401 ; (1913) AC

KITTO J. With the greatest respect to the learned judges who dealt with this case in the Supreme Court, I think it is a mistake to suppose that the case is concerned with "changing social needs" or with "a proposed new field of liability in negligence", or that it is to be decided by "designing" a rule. And, if I may be pardoned for saying so, to discuss the case in terms of "judicial policy" and "social expediency" is to introduce deleterious foreign matter into the waters of the common law - in which, after all, we have no more than riparian rights. (at p387)

2. I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or a game. Their kind is older by far than the common law itself. And though water skiing may be slightly faster than chariot-racing it is, like every other sport, simply an activity in which participants place themselves in a special relation or succession of relations to other participants, so that adjudication under the common law upon a claim by one participant against another for damages for negligence in respect of injuries sustained in the course of the activity requires only that the tribunal of fact apply itself to the same kind of questions of fact as arise in other cases of personal injury by negligence. It must do so, of course, under judicial guidance as to what the law has to say upon the questions whether, in the situation in which the plaintiff's injuries were caused, the defendant owed him a duty to take care not to harm him, what the extent of the duty was if a duty did exist, and what causal relation the plaintiff must prove between an act or omission by the defendant which was a breach of the duty and the plaintiff's injuries. We are here concerned mainly with the first two of these questions. They are questions to be answered by reference to the circumstances surrounding any act or omission of the respondent which the jury considered was a cause of the appellant's injuries. It was for the jury to identify that act or omission, and then to decide what were the circumstances in which it took place. (at p387)

Following paragraph cited by:

Seltsam Pty Ltd v Mcneill (26 June 2006) (Handley JA at 1; Tobias JA at 8; Bryson JA at 9)

> 33 Whether a duty of care exists falls to be decided upon both facts and law. The present it is not one of the cases where judicial decisions establish the existence of a duty of care. The process of decision was referred to in *Mount Isa Mines Ltd v Pusey* (1 970) 125 CLR 383 at 398-399 by Windeyer J. in these terms:
>
> > Whether at some time in the past the prospect of the happening of an event which in fact happened was such that it created an obligation to take precautions against it is called a question of fact. It is really a value judgment upon ascertained facts.
>
> In *Shirt v Wyong Shire Council* at 639 Glass JA said:
>
> > At the hearing before Ash J. and a jury, a ruling was made by the trial judge that, upon the evidence, a duty of care was owed by the defendant council to the plaintiff. There is authority to the effect that, when the answer to the duty question depends upon the resolution of factual problems of foreseeability, it should be remitted to the jury for decision with appropriate directions: *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202, at p. 220 ; *Rootes v Shelton* (196

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7) 116 CLR 383, at p. 388. But no complaint was made by the council that the question of duty or no duty had been determined by the trial judge.

In *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 the judgment of the majority of the High Court includes this passage:

> … It has been contended before us that it was for the judge to decide as a matter of law whether the appellant was under any duty of care, and if so what that duty was. It was, of course, for the judge to tell the jury what conclusions of fact they must reach before they could be entitled to treat the appellant as under a duty of care to users of the level crossing, and to describe in abstract terms the standard of that duty if it existed. This his Honour did; and in the circumstances of the case the rest was for the Jury.

This passage shows that in the view of the High Court there was a matter of law for the Judge to decide, that is whether the appellant was under a duty of care if some stated conclusions of fact were found. In *Rootes v Shelton* (1967) 116 CLR 383 observations of Kitto J. at 388 similarly illustrate the functions of judge and jury.

Seltsam Pty Ltd v Mcneill (26 June 2006) (Handley JA at 1; Tobias JA at 8; Bryson JA at 9)
Vairy v Wyong Shire Council (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

> 62. Whether in the given circumstances there exists a duty of care in negligence is a question of law. After all, *Donoghue v Stevenson* [57] itself was decided upon a demurrer type procedure used in Scotland. Of course, the existence of some or all of those "given circumstances" may depend upon issues of fact to be tried by the jury [58].

via

[58] *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 501-502 ; *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 221 ; *Rootes v Shelton* (1967) 116 CLR 383 at 388.

Shirt v Wyong Shire Council (31 July 1978) (Reynolds, Glass and Samuels Jj.A)

3. It was common ground that the appellant sustained his injuries by colliding with a boat that was stationary on a river, as he was being towed along the river on skis by a boat driven by the respondent. Two other skiers were also being towed behind the respondent's boat, and they and the appellant, grasping tow-lines of unequal lengths, were performing preconcerted manoeuvres which required that each should cross and recross the wake of the respondent's boat, the appellant being behind one of his fellows and ahead of another and zigzagging in directions opposite to theirs. Each skier, of course, went outwards from the centre-line of the towing boat on each leg of his zigzag course. On the evidence, the jury might think that the appellant collided with the stationary boat by

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going further out than usual; but he said that he was temporarily blinded by spray (which obviously might well have been thrown up as he crossed the wake of the boat or the wake of the skier ahead of him), and it was open to the jury to accept this evidence and to reach either or both of two further conclusions, namely that the appellant did not go further out than the respondent ought reasonably to have allowed for in deciding his course, and that the respondent ought reasonably to have apprised the appellant of the presence of the stationary boat in time for him to drop his tow-line and avoid the collision. (at p388)

4. If the jury came to either of these two conclusions, there remained for them the question whether the respondent's act in laying the course of his boat so near to the stationary boat that the appellant might collide with it if he were to travel unusually far to the side, or his omission in not apprising the appellant early enough of the presence of the stationary boat, or each of those things, was a breach of a duty of care which the respondent owed to the appellant; and they needed a direction from the trial judge in some appropriate form as to the findings that would be necessary before they could properly answer that question in the affirmative. (at p388)

5. The first finding they would need to make was that in the circumstances surrounding the relevant act or omission, the respondent, if he had directed his mind to the question of the distance he should maintain between his boat and the stationary boat, or to the question whether or not he should take steps to see that the appellant was aware soon enough of the presence of the stationary boat, ought reasonably to have had the appellant in contemplation as likely to be injured if reasonable care were not taken to save him from the danger of striking the stationary boat. The jury needed to be told that if they made that finding they should take it that the respondent owed the appellant a duty to take such care for the latter's safety in relation to the stationary boat as was reasonable in the circumstances, and that accordingly the appellant's right to a verdict in his favour depended upon whether they made a second finding, namely that the respondent, by steering his boat as he did or by not giving the appellant sufficient warning of the position of the stationary boat, failed to be as careful for the appellant's safety as an ordinary man in his position would have been in the like circumstances. The trial judge in fact gave the jury a direction in this sense, and there would be no purpose in setting out these matters were it not for the importance of recognizing that they provide the elements of the appellant's case to which the crucial point in the case needs to be related. (at p388)

Following paragraph cited by:

James v USM Events Pty Ltd (14 June 2022) (Brown J)
Goode v Angland (07 December 2017) (Beazley P, Meagher and Leeming JJA)

158. The second is that, as the respondent submitted, even if it was established that an unintentional movement constituted a breach of the two lengths rule, that was not determinative of the question of negligence. As Kitto J observed in *Rootes v Shelton* at 389 :

> "… the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one

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consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances."

Goode v Angland (07 December 2017) (Beazley P, Meagher and Leeming JJA)

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"… the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non- compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonable- ness; but it is only one, and it may be of much or little or even no weight in the circumstances."

Goode v Angland (22 July 2016) (Harrison J)
Seymour v Racing Queensland Limited (18 June 2012) (Richard Oliver, Senior Member, Michael Howe, Member)

42. Simply failing to stitch bandages as specified in the Gear Register is a breach of Rule 140B but not necessarily Rule 140A which incorporates the concept of duty of care. A person may breach the rules of a sport and not be acting unreasonably. Non-compliance with rules, conventions or customs is a consideration when determining the question of reasonableness, but not the only consideration, and it may hold much or hold little weight as the circumstances dictate [10] .

via

[10] *Rootes v Shelton* (1967) 116 CLR 383 at 389 per Kitto J .

Dodge v Snell (21 April 2011) (Wood J)

67. The finding of careless riding made against the defendant as a result of the Stewards' inquiry does not assist the plaintiff in proving that the defendant was negligent. It is no more than a finding by a tribunal based on the evidence before it, that the defendant has breached a rule of racing. In a similar fashion, a finding by Mr Hadley that Mr Snell breached the two lengths policy does not advance the plaintiff's case. An assessment of whether Mr Snell breached the two lengths policy must be based on the evidence in this trial. Furthermore, even if I determine upon the evidence before me that Mr Snell did not comply with a rule or policy of racing that non-compliance does determine the issue of negligence (*Rootes v Shelton* (1967) 116 CLR 383, per Kitto J at 389 , Barwick CJ at 385 ; *Kliese v Pelling* [1998] QSC 112, per Chesterman J, at 9).

The experts

Fallas v Mourlas (16 March 2006) (Ipp, Tobias and Basten JJA)

Ollier v Magnetic Island Country Club Inc (30 April 2004) (McMurdo P, McPherson JA and White J,)

37. The other ground argued on behalf of the appellant was a failure to apply the principles reflected in the maxim *volenti non fit injuria*. In *Rootes v Shelton* (1967) 116 CLR 383 Barwick CJ at 389 expressed the principle underlying the maxim as follows:

> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist."

As to the "rules of the game" Kitto J observed at 389:

> "Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the "rules of the game". Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances."

See also observations by Gleeson CJ in *Agar v Hyde* (2000) 201 CLR 552 at 561 and in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 472.

Gala v Preston (28 May 1991) (Mason C.j., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

1. A defendant's liability in negligence relates to the damage which the plaintiff has actually suffered, and to no other: The Wagon Mound (No.1), at p 425; Sutherland Shire Council v. Heyman (1985) 157 CLR 424, at pp 486-487 . 2. A defendant's liability for that damage arises from an act done or an omission made by the defendant (the relevant act or omission) which is a cause of the damage suffered: Chapman v. Hearse (1961) 106 CLR 112, at p 122. However, an omission cannot be said to be a

cause of damage unless the defendant was under a duty to act to avoid or prevent the damage and the omission is a breach of that duty: East Suffolk Rivers Catchment Board v. Kent (1941) AC 74 ; Jaensch v. Coffey (1984) 155 CLR 549, at p 578 ; Sutherland Shire Council v. Heyman, at pp 476-481. 3. A defendant's liability for damage does not extend to damage caused by the relevant act or omission unless the possibility of causing that damage or damage of the same kind was reasonably foreseeable at the time when the relevant act was done or the relevant omission made: Bolton v. Stone (1951) AC 850, at p 858 ; Hughes v. Lord Advocate (1963) AC 837 ; Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR 383, at pp 390, 392-393, 401-403, 413-414 ; Jaensch v. Coffey, at pp 562-563. 4. A defendant is liable if, and because, a reasonable person in the defendant's position foreseeing the possibility of causing the damage suffered or damage of the same kind would not have done the relevant act or made the relevant omission: Blyth v. The Birmingham Waterworks Company (1856) 11 Ex 781 (156 ER 1047); Heaven v. Pender (1883) 11 QBD 503, at p 509 ; Donoghue v. Stevenson (1932) AC 562, at pp 580-581 ; Fardon v. Harcourt-Rivington (1932) 146 LT 391, at pp 392,393 ; Bolton v. Stone, at pp 866-869. That is the foundation not only of every duty of care in torts of negligence but of the standard of care required to discharge the duty: Vaughan v. Menlove (1837) 3 Bing (NC)468, at p 475 (132 ER 490, at p 493). The standard of care is fixed by reference to the steps which the hypothetical reasonable person would take to avoid or prevent the possibility of the occurrence of the foreseeable damage: Glasgow Corporation v. Muir (1943) AC 448, at p 457 ; Wyong Shire Council v. Shirt (1980) 146 CLR 40, at p 45 ; Jaensch v. Coffey, at pp 562-563. 5. A legal duty does not always arise when the facts show that the kind of damage suffered by the plaintiff was reasonably foreseeable by the defendant. Elements in addition to reasonable foreseeability of damage are required to give rise to a duty of care to avoid or prevent damage other than physical damage to the person or to the property of the plaintiff; similarly, additional elements are required where the act or omission of the defendant amounts to a representation to the plaintiff on which the plaintiff relies in doing an act or abstaining from acting whereby the relevant damage is caused: Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd. (1964) AC 465 ; Shaddock and Associates Pty. Ltd. v. Parramatta City Council (No.1) (1981) 150 CLR 225, at pp 230-231 ; Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt (1968) 122 CLR 556, at pp 568-570 ; Jaensch v. Coffey, at pp 574-576; San Sebastian Pty. Ltd. v. The Minister (1986) 162 CLR 340, at p 369. Again, there may be special features of the circumstances in which the relationship between the plaintiff and the defendant exists which preclude the arising of a duty of care or modify the standard of care otherwise required to discharge the duty: Rootes v. Shelton (1967) 116 CLR 383 , at p 389 ; The Insurance Commissioner v. Joyce (1948) 77 CLR 39, at p 59 ; Cook v. Cook (1986) 162 CLR 376, at pp 391-394 .

Cook v Cook (02 December 1986) (Mason, Wilson, Brennan, Deane and Dawson JJ)
Bulstrode v Trimble (19 May 1970) (NEWTON, J)

Mr. Langslow submitted that in the present case there was in any event no scope for the operation of the rule in Browne v Dunn, because Bulstrode was never made available for cross-examination, so that Trimble's counsel never had the opportunity to put to Bulstrode in cross-examination the Trimble/ Ternock version of the collision. As against this Mr. Ormiston submitted by his submission (1) that the failure by Trimble to give notice pursuant to r79(6)(b) that he objected to the use of Bulstrode's affidavit was

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> equivalent to an omission by Trimble to put to Bulstrode in cross-examination the Trimble/Ternock version of the collision. It is unnecessary for me to decide this particular question, because, for the reasons already stated, I consider that Mr. Ormiston's submissions (2) (a) and (b) fail in any event. But as at present advised, I consider that Mr. Langslow's submission is correct, and that Mr. Ormiston's submission (1) is wrong. I think that where one party gives to the other a notice pursuant to r79(6) (a) of his intention to use an affidavit, he is thereby, inter alia, informing the other party that he does not wish to give to the other party an opportunity to cross-examine the deponent, and I see no reason why the other party should not accept the loss of that opportunity, if he thinks that this will advance his own case, or at all events not harm it, and notwithstanding that he intends to adduce evidence in contradiction of the affidavit. No doubt litigation is not in all respects to be treated as equivalent to war or something else in which all is notoriously fair (pace per Kitto, J, in Rootes v Shelton (1967) 116 CLR 383 , at p. 389 ; [1968] ALR 33), and indeed the rule in Browne v Dunn is an example of this. But I consider that to treat the rule in Browne v Dunn as operating upon r79(6)(b) so as to impose upon the opposite party a duty to take the positive step of giving notice of objection to the affidavit in question, if he proposes to contradict it, when the proposal to use the affidavit is his opponent's proposal, not his, would be to impose upon a party to litigation a compulsory concern for the efficient presentation of his adversary's case which would be unreasonable. As earlier stated, I consider that r79 (6)(b) is a provision wholly for the benefit of the opposite party to the party seeking to use the affidavit. Of course, as also earlier indicated, if a party (whom I shall call "the opposite party") failed to object pursuant to r(79)(6)(b) to his opponent's use of an affidavit upon what was to the knowledge of the opposite party certain or likely to become a controversial issue, and if his opponent at the hearing sought and obtained an adjournment for the purpose of calling the deponent, then the failure of the opposite party to give notice of objection to the use of the affidavit could, in some circumstances at least, operate against him in relation to the question of how the costs thrown away by the adjournment ought to be borne. But this would have nothing to do with the rule in Browne v Dunn. If the opposite party was ordered to bear costs thrown away by the adjournment, that would be because his failure to object to the affidavit was unreasonable from the point of view of the expeditious conduct of the case.

6. The learned members of the Supreme Court have held that on the evidence it was not open to the jury to conclude otherwise than that the appellant, by joining in the activity in which his injuries occurred, had voluntarily accepted the risk that the respondent unintentionally might omit to give him any sufficient warning of the danger from the stationary boat and might omit to keep far enough away from that boat to allow for the possibility that, being blinded by spray, he might swing out farther than usual. Their Honours considered that the risk of such omissions was an "inherent" risk of the sport, and that the acceptance of it by the skiers was effectual in law to exonerate the respondent from all duty of care of which the omissions would otherwise have been breaches. In so holding, their Honours were of course dealing not with a defence of volenti non fit injuria but with a challenge to the appellant's contention that the respondent had committed a breach of a duty of care owed to him. It may be a moot point, as Dixon J. regarded it in The Insurance Commissioner v. Joyce (1948) 77 CLR 39, at p 57 , whether, in a negligence action, a plaintiff's voluntary acceptance of a risk should be considered as bearing upon the question whether the relation between the parties was such that the defendant owed him a duty of care, or to the question whether the standard of care which the defendant was under a duty to maintain towards the plaintiff was higher than that which in

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fact his conduct reached. But the issue on either view is whether the defendant's act or omission was a breach of a duty of care which he owed to the plaintiff; and accordingly in a case such as the present it must always be a question of fact, what exoneration from a duty of care otherwise incumbent upon the defendant was implied by the act of the plaintiff in joining in the activity. Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the "rules of the game" Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances. (at p389)

Following paragraph cited by:

Reynolds v Katoomba RSL All Services Club Ltd (20 September 2001) (Spigelman CJ, Powell and Giles JJA)

27 This Court should be very slow indeed to recognise a duty to prevent self-inflicted economic loss. Loss of money by way of gambling is an inherent risk in the activity and cannot be avoided. (See e.g. *Rootes v Shelton* (1967) 116 CLR 383 at 385 per Barwick CJ; *Prast v Town of Cottesloe* (2000) 22 WAR 474 at [32] per Ipp J.) Nevertheless, whether a duty arises in a particular case must depend on the whole of the circumstances, even in the case of an inherent risk. (See *Rootes v Shelton* (supra) at 390 per Kitto J and *Agar v Hyde* (supra) at [14] per Gleeson CJ.)

7. We are not in fact dealing in this case with an activity which had any rules in that sense. What each skier was to try to do was of course mutually understood, as was the general nature of the function to be performed by the respondent as driver of the towing boat. The skiers placed themselves to an extent at the mercy of the respondent, and if the jury had thought that the skiers really authorized him to do what he liked, reasonably or unreasonably, short of intentionally injuring any of them, no doubt the proper conclusion would have been that the respondent kept within the limits within which the appellant had agreed that he might act, and therefore that he was not guilty of any breach of duty towards the appellant. But the jury was at least entitled to take the opposite view, that when the skiers placed themselves in the position of being towed by the respondent they intended, and he must have understood them as intending, to indicate that they were trusting him to tow them with the care which was reasonable having regard to the nature of the exercise they were engaged in and the physical characteristics of the locality. (at p390)

8. It seems to me that when a judge is directing a jury as to the acceptance of risk which a plaintiff's participation in a sport has implied, it is not satisfactory for him to confine their attention to the risks "inherent" in the sport, or the risks that are "recognized" (in the sense of "perceived") in it; for not only are these expressions imprecise - they may refer, for example, to risks necessarily incurred, or reasonably to be expected, or obviously possible - but the question to be decided is regarded by the

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common law rather from the defendant's point of view: was the defendant's conduct which caused injury to the plaintiff reasonable in all the circumstances, including as part of the circumstances the inferences fairly to be drawn by the defendant from the plaintiff's participation in what was going on at the time. (at p390)

9. Accordingly I am of opinion that the learned judges below should have held that on the evidence as to the nature of the skiing that was being carried on at the time of the accident it was open to the jury to find, first, that the appellant did not by his participation indicate to the respondent a willingness to accept either the risk of the respondent's steering a course which was closer to the stationary boat than was reasonable in the circumstances, or the risk of his omitting to take all reasonable measures to warn the appellant of the position of the stationary boat in time for him to avoid it; secondly, that the respondent did steer a course that was closer than was reasonable or omitted to take reasonable measures to warn the appellant, or both; and, thirdly, that that act or omission or each of them was a cause of the appellant's injuries. (at p391)

10. The learned trial judge, in my opinion, sufficiently directed the jury. I would allow the appeal and restore the verdict. (at p391)

TAYLOR J. There can be no doubt that a participant in a sport or game voluntarily assumes such risk of injury as is inherent in the sport itself. His participation precludes him from asserting otherwise. But the fact, merely, that he participates can in no way lead to the conclusion, either, that other participants have no duty of care towards him, or, that he has voluntarily assumed the risk that they will act in such a way as to constitute a breach of the duty which, in the circumstances, they owe towards him. What that duty may be in any particular case, whether there has been a breach of it and whether there has been a voluntary assumption of the risk of injury from a breach of that duty are questions of fact and, if there be evidence upon which these questions may be left to a jury, they are essentially matters for their determination. I have had the opportunity of considering the reasons prepared by Owen J. and I agree substantially with what he has to say on these matters. However I wish to add some observations for myself. (at p391)

Following paragraph cited by:

Dodge v Snell (21 April 2011) (Wood J)

> 201. I am satisfied that Mr Snell exposed Mr Dodge to a "risk to which his participation in the sport could not be said, necessarily or ordinarily, to expose a participant" (*Rootes v Shelton* , at 392).

Dodge v Snell (21 April 2011) (Wood J)

2. In the present case the learned trial judge recognized that there were certain risks inherent in the sport in which the participants, including the appellant, were engaged. He pointed out that there were obvious risks "about which the participants could not complain" and that it was for the jury to say, in effect, whether the appellant's injuries had resulted from his exposure to such a risk, or, whether they had resulted from his exposure to some other and additional risk. By way of illustration he added: "I am dealing here, by way of illustration, with only one of the heads of the plaintiff's claim. Similar considerations would have to be applied to the others. If, however, a failure

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to warn was tantamount to a breach of the rules of the game, rules which, although unwritten, each was entitled to expect the others to adhere to, then it will be open for the plaintiff to succeed on that ground. Whether he would succeed on it or not would depend on considerations which I will be putting before you in more detail a little later." I observe at this stage that it is, perhaps, unfortunate that his Honour used the expression "rules of the game" but it is clear enough upon reading his summing up as a whole that he did not intend to indicate that a mere breach of the rules regulating the manner in which the sport should be performed or played would give rise to a cause of action. So much is clear from what he said later: "May I suggest that you approach this by putting a reasonably careful member of this team of water skiers at the helm of Torpy. Let us call him Mr. X. Mr. X is a friend of the other skiers, he is a reasonably competent skier and he takes his turn with the other members of the group at driving the boat and Mr. X has been doing this regularly for several seasons. Mr. X could be the plaintiff or Mr. Walker or Mr. Wilton or the man we have not seen - he could be anyone of the five. Now assume that Mr. X is exercising the degree of care which this group of men voluntarily accepts as being appropriate. If he is doing that, if he is showing the degree of care which this group of five considers appropriate in this game or sport or pastime, then they cannot complain even if one of them sustains an injury because the rules of the game are not being broken. It would not matter if you as bystanders, sitting on the bank or sitting in the back seat of Torpy, took the view that hideous risks were being taken. That would not matter, provided Mr. X, the driver, was in fact exercising that degree of care which each of these men expected of the others." Then after discussing the evidence at some length he said: "Fundamentally the question you have to ask yourselves - to which the answer depends, you might think, on what I have just put - is this: would a reasonably careful driver (our Mr. X) exercising such degree of care that these men expected of each other, taking no risks other than the accepted risks of the game, have given an indication, a warning, of the whereabouts of the boat in all the circumstances? Would he have given the boat a wider berth by going closer to the other bank? That, you may think, will depend on answering the questions I have put." There was no objection taken by the respondent to the summing up and, indeed, no exception was taken to it upon the motion before the Court of Appeal. It seems to me that the issue which was substantially left to the jury was whether the appellant's injuries had resulted from a risk inherent in the sport or whether they had been caused by the respondent's conduct in unreasonably exposing him to some additional risk, that is to say, a risk to which his participation in the sport could not be said, necessarily or ordinarily, to expose a participant. This, in the circumstances of the case, was essentially a jury question and there was ample evidence upon which they could have answered it in the appellant's favour. (at p392)

3. I would allow the appeal. (at p392)

OWEN J. The appellant and the respondent were experienced water skiers and with several other enthusiasts formed a group which was accustomed to ski on the waters of the Macquarie River. The members of the group took it in turn to drive a speed launch behind which the skiers were towed and at the time when the events with which this case is concerned occurred the respondent was driving the launch at a speed of thirty to thirty-five miles per hour and the appellant and two other men, who were being towed by it, were executing a manoeuvre known as "crossing over" or "Russian Roulette". Each of the skiers held a towing line which was attached to the launch, each line being of a different length. The leading skier's line was about fifty to fifty-eight feet in length, the appellant's line was about sixty to sixty-four feet in length and that of the skier furthest from the launch was about seventy feet long. The manoeuvre known as "crossing over" is one in which the skier nearest to the launch moves to his left across the wash of the launch, the man in the centre of the line of skiers moves at the same time to his right and the man furthest from the launch moves to his left. Having gained considerable momentum, each skier then turns and moves in the opposite direction,

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and this manoeuvre is repeated a number of times. On one of the "crossovers" the appellant was momentarily blinded by spray thrown up by the skier closest to the launch. When he had dashed the spray from his eyes, he found himself within a few feet of another launch which was stationary and which he had not seen and, despite his endeavours to avoid it, he collided with it and was injured. He brought an action for damages against the respondent alleging that his injuries had been caused by the latter's negligence. (at p393)

2. The appellant claimed that the respondent had been negligent in two respects. He alleged that the latter, knowing of the presence of the stationary launch, had failed to draw the attention of the skiers to it and, further, that the respondent had steered a course which was too close to the stationary launch having regard to the fact that the skiers whom he was towing were doing "cross-overs". The first of these allegations was based upon the admitted fact that it was the practice amongst the group of skiers to which both parties belonged that if the man who drove the towing launch should see an obstruction in the water with which one of the skiers might collide, he would signal its presence by pointing to the obstruction and continuing to do so until he was satisfied that the skiers had seen his signal. It was conceded that the respondent had seen the stationary launch as the towing launch approached it and evidence was given upon which it could be found that he had failed to give the customary signal. The second head of negligence was based upon evidence from which it could have been inferred that the towing launch had been steered by the respondent so as to pass within forty feet or perhaps less of the stationary launch and the respondent agreed in cross-examination that, if this had occurred, it would be going "a bit too close" having regard to the fact that "crossing over" was in progress. (at p394)

3. At the close of the evidence counsel for the respondent submitted that the jury should be directed to find in favour of his client on the ground that the latter owed no duty of care to the appellant. The contention was based upon the fact that the parties were participating in a sport one of the recognized risks of which was that a skier might collide with some obstruction in the water and it was submitted that the appellant, well knowing of this risk must be taken to have voluntarily accepted it. In these circumstances, it was said, the respondent owed no duty of care to the appellant and could not be held liable even if he had neglected to warn the latter of the presence of the stationary launch or had steered a course which might result in the appellant colliding with it. The learned trial judge rejected the submission and left the case to the jury which found in favour of the appellant and awarded him damages. (at p394)

4. On appeal to the Court of Appeal the verdict was set aside and a verdict and judgment entered for the respondent, the Court holding that no duty of care was owed by the respondent to the appellant. In the course of his judgment Wallace P. said: "The learned trial judge directed the jury that they would have to decide whether the skiers (including the plaintiff) accepted the risk of failure to warn or failure to warn in time, but with respect, I do not think such an issue, conventional enough in other circumstances when the existence of a duty of care is under consideration, is acceptable here. This is because on any broad view of the material circumstances including of course the speed and the narrowness of the stream, there could be only one answer to such a question namely, of course they did. How otherwise could 'Russian Roulette' be carried on at all? " His Honour went on to say that the risks inherent in the manoeuvre of "crossing over" were obvious and that, on no view of the evidence could a "relevant duty in tort be said to have been established". His decision thus appears to have proceeded upon the basis that on the evidence the only conclusion open was that the appellant had voluntarily accepted the risk that the respondent might fail to give the customary warning of an obstruction of which he was aware and that, in these circumstances, the latter owed the former no duty of care. No doubt the risk of running into an obstruction in the water is one

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which is inherent in the sport of water skiing but if it is shown, as it was in the present case, that there was a practice - known to both parties - designed to avoid that risk I cannot agree that the appellant must be taken to have consented to bear the consequences that might foreseeably follow should the respondent fail to exercise due care to follow that practice. (at p395)

5. To say that the appellant voluntarily assumed the risk of colliding with an obstruction in the water is one thing. To say that the appellant voluntarily undertook the risk that the respondent would carelessly fail to warn him of the presence of such an obstruction or would fail to exercise due care in steering the launch of which he had control is a very different proposition and one for which I can find no support in the evidence. I am of opinion that in the present case the respondent owed a duty of care to the appellant and, if the former knew of the presence of the stationary launch - as was the fact - and failed to give warning of it, it was open to the jury to find that he had been guilty of a breach of that duty. Equally I have no doubt that the respondent owed the appellant a duty to take reasonable care to steer a course which would avoid the risk of a collision such as occurred and that the jury might properly find that there had been a breach of that duty. (at p395)

6. Jacobs J.A. was of opinion that in the case of a "recognized or perceived risk" involved in participating in a sporting activity, no duty of care was owed by one participant to another. The risk of collision with an object in the water was a "recognized or perceived risk" of water skiing and the respondent was, he considered, under no duty to take reasonable care to warn the appellant of the presence of such an object or to steer a course which would avoid the risk that the appellant would collide with it. (at p395)

Following paragraph cited by:

Liccardy v Daniel Payne t/as Sussex Inlet Pontoons Pty Ltd (05 July 2022) (Judge Levy SC)

> 143. The question of whether the plaintiff was *volens* to the risk because of his alleged knowledge of the risk, a subjective matter, is a question of fact that the first defendant must prove: *Rootes v Skelton* [1967] HCA 39; (1967) 116 CLR 383, at 396 ; s 5E of the *CL Act* .

7. The third member of the Court, Asprey J.A., said that he could not "conclude as a matter of judicial policy that in the joint performance of a sporting activity, pursued for the pleasure and not as a business, there is any legal duty of care imposed upon the participants to obey the laws, rules or practices of the sport so that the unintentional conduct of one of the players amounting to a breach of the law, rule or practice of the game . . . subjects him to an action at law for damages for negligence". His Honour considered that to hold otherwise, "would extend into unreasonable categories a legal duty of care for which there is presently no demand in our social system". And that the law did not regard "noncommercial sporting activities, intended to be played as healthy vigorous and often risky exercise, as a proper sphere into which to introduce the concept of the legal duty of care so that an unintentional infraction of the rules of the game brings about the legal liability of one player to another engaged in it". (at p396)

8. With all respect to their Honours, I cannot agree with these broad propositions. Whether in any

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particular case a duty of care is owed by one participant in a sport to another who is engaged in it depends upon the circumstances of that case. Prima facie the appellant in the present case was, it seems to me, entitled to have the respondent exercise reasonable care in carrying out his part of the operation and I can see nothing in the evidence upon which it could be found that the appellant had voluntarily assumed the risk that he might be injured as the result of a careless failure by the respondent to give the customary warning signal or to take the launch on a course which would avoid the risk of a collision with the stationary launch. To say that a participant in a sporting activity has voluntarily assumed the risk of injury from another participant's act or omission is to say that, with knowledge of the risk involved, he has impliedly consented to relieve that other participant of the legal consequences that would ordinarily follow should the latter, by some act or omission which no reasonable man would do or omit to do, cause injury to the former. Whether there has been such a voluntary assumption of risk is, of course, a question of fact and, if it be answered in favour of a defendant, the jury would be directed to find for the defendant since in such circumstances the latter would have owed no duty of care to the injured plaintiff. But, as Dixon J. (as he then was) pointed out in The Insurance Commissioner v. Joyce (1948) 77 CLR 39, at pp 54, 56 , the onus of establishing a voluntary assumption of risk lies on the defendant and in the present case there was, in my opinion, no evidence capable of supporting such a finding. (at p396)

9. I would allow the appeal. (at p396)

Orders

Appeal allowed with costs. Order of the Court of Appeal discharged. In lieu thereof order that the appeal to that Court be dismissed with costs.

Cited by:

Liccardy v Daniel Payne t/as Sussex Inlet Pontoons Pty Ltd [2022] NSWDC 246 (05 July 2022) (Judge Levy SC)

> 143. The question of whether the plaintiff was *volens* to the risk because of his alleged knowledge of the risk, a subjective matter, is a question of fact that the first defendant must prove: *Rootes v Skelton* [1967] HCA 39; (1967) 116 CLR 383, at 396 ; s 5E of the *CL Act* .

James v USM Events Pty Ltd [2022] QSC 63 (14 June 2022) (Brown J)

> 234. As USM submitted, the mere fact that Mr Chaffey may have acted in breach of the rules in relation to the incident does not lead to a conclusion that USM has failed to take reasonable care. [106] Mr Chaffey was bound by the same rules as all other athletes including the rule to take care and was not free to act recklessly. It was submitted on behalf of Dr James that in the present case, the rules and protocols in place were not sufficient to meet the risk and further precautions were required to meet the risk.

via

[106] *Rootes v Shelton* {1968) 116 CLR 383 at 385

James v USM Events Pty Ltd [2022] QSC 63 (14 June 2022) (Brown J)

234. As USM submitted, the mere fact that Mr Chaffey may have acted in breach of the rules in relation to the incident does not lead to a conclusion that USM has failed to take reasonable care. [106] Mr Chaffey was bound by the same rules as all other athletes including the rule to take care and was not free to act recklessly. It was submitted on behalf of Dr James that in the present case, the rules and protocols in place were not sufficient to meet the risk and further precautions were required to meet the risk.

via

[106] *Rootes v Shelton* {1968) 116 CLR 383 at 385

James v USM Events Pty Ltd [2022] QSC 63 (14 June 2022) (Brown J)
Rootes v Shelton (1967) 116 CLR 383 , considered

James v USM Events Pty Ltd [2022] QSC 63 (14 June 2022) (Brown J)

232. By engaging in sport, it is relevant to bear in mind, as was said by Barwick CJ in *Rootes v Shelton* , [105] that "the participants may be held to have accepted risks which are inherent in that sport ... the tribunal of fact can make its own assessment of what the accepted risks are".

via

[105] (1967) 116 CLR 383 at 385.

James v USM Events Pty Ltd [2022] QSC 63 -
James v USM Events Pty Ltd [2022] QSC 63 -
Archer v Garcia [2022] VSC 57 (17 February 2022) (Incerti J)

219. FMX is an inherently dangerous activity. The plaintiff's experiences are testament to that fact. The plaintiff has suffered numerous injuries, including broken bones, a dislocated shoulder, and ligament damage as a result of his training and performances since 2015, although the 2015 incident was by far the most serious of his career.[189] Nevertheless, the fact that this injury occurred in the context of such a sporting performance does not preclude the finding of a duty of care. Duties of care have been held to exist, and in some cases, found to have been breached in the context of participants in sports, games and recreational activities, even though they are frequently, and knowingly, risky endeavours. [190] As Gleeson CJ stated in *Agar v Hyde*:

> Voluntary participation in a sporting activity does not imply an assumption of any risk which might be associated with the activity, so as to negate the existence of a duty of care in any other participant or in any person in any way involved or connected with the activity. [191]

via

[191] (2000) 201 CLR 552, 561, citing generally *Rootes v Shelton* (1967) 116 CLR 383 .

Archer v Garcia [2022] VSC 57 (17 February 2022) (Incerti J)

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via

[190] See *Rootes v Shelton* (1967) 116 CLR 383 , although that case dealt with a duty owed by other participants and not an organiser or occupier.

Victorian WorkCover Authority v Rule [2021] VCC 1591 (22 October 2021) (Brookes J)

> 54 Counsel further relies on the comments of McMeekin J in *Appo v Stanley* :[47]
>
> "[39] Jockeys, like all of us, owe a duty of care to those around them. In the course of a race they are required to take reasonable care to avoid creating a foreseeable risk of injury to other riders. It is necessary, of course, to bring into account that they are engaged in a sport, that that sport has inherent risks, and that they are obliged to use their best endeavours to win.
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> [40] What the defendants were required to avoid doing in the circumstances here was 'unreasonably exposing [Appo] to some additional risk, that is to say, a risk to which his participation in the sport could not be said, necessarily or ordinarily, to expose a participant' per Taylor J in *Rootes v Shelton* . As Gleeson CJ observed in *Agar v Hyde*, citing *Rootes v Shelton* : 'Voluntary participation in a sporting activity does not imply an assumption of any risk which might be associated with the activity, so as to negate the existence of a duty of care in any other participant or in any person in any way involved in or connected with the activity.'
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> [41] It is difficult to improve on the summary of the competing considerations set out by Chesterman J (as his Honour then was) in *Kliese v Pelling* that the parties have referred me to:
>
> > '[T]he court ought not to be too delicate in its assessment of the defendant's conduct which is said to have been negligent. Thoroughbred horse racing is a competitive business which is played for high stakes. Its participants are large animals ridden by small men at high speed in close proximity. The opportunity for injury is abundant and the choices available to jockeys to avoid or reduce risk are limited. It is, no doubt,

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> for these reasons that claims for damages arising out of horse races have been rare and are likely to remain so. But where evidence reveals that a rider has failed to take reasonable care which could and therefore should have been taken, the court is required by law to make a finding of negligence.'

[42] Only one additional rule or guiding principle of racing was said to be relevant in this case. Australian Rule of Racing 136(1) provides: 'If a horse… crosses another horse so as to interfere with that, or any other horse… such horse… may be disqualified for the race.'

…

[44] Of course breach of the rules of racing, or of any such safety rule, is not the same as breaching the duty of care owed in all the circumstances. To put the case in a more familiar context, sometimes it is perfectly reasonable to drive on the wrong side of the road. So much is clear from the judgments in *Rootes v Shelton* , for example that of Barwick CJ where he said:

> 'By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist.'

…

[48] I bear in mind too the evidence concerning the ability of jockeys to control a horse. A jockey's capacity to ensure that his horse runs straight is limited. Horses can engage in unexpected manoeuvres. Mr Stanley gave some examples as a horse 'having trouble in the ground, change of stride, hanging out … runs away from another horse'. Wet conditions adversely affect the jockeys' ability to control their mounts. Ordinarily of course it is plain that a professional jockey can and does control his mount. As McGill QC DCJ observed in *Flanders v Small*, it would be difficult to conduct horse racing if that was not so."

Victorian WorkCover Authority v Rule [2021] VCC 1591 (22 October 2021) (Brookes J)

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Victorian WorkCover Authority v Rule [2021] VCC 1591 (22 October 2021) (Brookes J)

> 37 It is common ground between the parties that, subject to any voluntary assumption of risk, a participant in a sporting contest such as a horse race owes other participants a duty of care to avoid creating a foreseeable risk of injury to another jockey. [30]

via

[30] See *Rootes v Shelton* (1967) 116 CLR 383 ; *Appo v Stanley* [2010] QSC 383 at paragraph [39]

Victorian WorkCover Authority v Rule [2021] VCC 1591 -
Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354 -
Bowman v Nambucca Shire Council [2020] NSWSC 1121 (21 August 2020) (Walton J)

> 282. In support of the third element of the common law defence, namely, that the plaintiff "freely and voluntarily agreed to accept the risk", the defendant relied upon the following evidence:
>
> 1. According to Mrs Bowman's evidence, before James decided to enter the water to wash dog faeces off his foot, the intention of the party had been to take a walk towards the beach. It is unclear whether the plan had been to walk along the beach, or to go into the water.
>
> 2. It appears that after James entered the water, the plaintiff decided to walk down the ramp towards him, and slipped before he reached the water's edge. Mrs Bowman stayed standing on the grass on the north eastern side of the ramp. Mrs Bowman's actions suggest that the intention had not been to proceed down the ramp in a westerly direction.
>
> 3. The plaintiff chose to walk down the ramp towards James, even though he knew that the ramp, as with any marine boat ramp, might be slippery or very slippery, particularly in the weather conditions then present. In doing so, he freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it: *Letang v Ottawa Electric Ry Co* [1926] AC 725 at 731 ; *Rootes v Shelton* (1967) 116 CLR 383 .
>
> 4. If the Court is satisfied that the defence under the common law doctrine of *volent i non fit injuria* has been established, the defendant, it was submitted, is not liable for any injury the plaintiff suffered when the risk of slipping on the ramp surface came home.

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5. If the defendant is unsuccessful on its defences under s 5M and under the common law doctrine of *volenti non fit injuria*, it is necessary to consider whether the plaintiff has established that the defendant breached a duty of care to the plaintiff.

Singh v Lynch [2020] NSWCA 152 (23 July 2020) (Basten, Leeming, Payne and McCallum JJA, Simpson AJA)

20. Rootes v Shelton (1967) 116 CLR 383 .

Singh v Lynch [2020] NSWCA 152 -
Singh v Lynch [2019] NSWSC 1403 -
Dickson v Northern Lakes Rugby League Sport and Recreation Club Inc and Anor (No.2) [2019] NSWDC 433 -
Dickson v Northern Lakes Rugby League Sport and Recreation Club Inc and Anor (No.2) [2019] NSWDC 433 -
Goode v Angland [2017] NSWCA 311 (07 December 2017) (Beazley P, Meagher and Leeming JJA)

158. The second is that, as the respondent submitted, even if it was established that an unintentional movement constituted a breach of the two lengths rule, that was not determinative of the question of negligence. As Kitto J observed in *Rootes v Shelton* at 389 :

> "... the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances."

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Goode v Angland [2017] NSWCA 311 -
Goode v Angland [2017] NSWCA 311 -
Goode v Angland [2017] NSWCA 311 -
Nominal Defendant v Buck Cooper [2017] NSWCA 280 (03 November 2017) (McColl and Payne JJA, Garling J)

106. I agree with this passage. As *Rootes v Shelton* (1967) 116 CLR 383; [1967] HCA 39 itself explains, water skiing is an inherently risky activity and involves a number of inherent risks (such as hitting submerged objects). If, however, the risk of something occurring (in that case of colliding with another boat) could have been avoided by the exercise of reasonable care and skill it was not "inherent".

Nominal Defendant v Buck Cooper [2017] NSWCA 280 -

Goode v Angland [2016] NSWSC 1014 -
Schuller v S J Webb Nominees Pty Ltd [2015] SASCFC 162 (12 November 2015) (Acting Gray CJ; Stanley and Lovell JJ)

> 36. I should make clear at this point that I do not accept the submission put by the respondent that the common law did not always require proof that the plaintiff freely and voluntarily agreed to accept the risk in order to establish the defence of *volenti non fit injuria*. That submission relied upon the High Court's judgment in *Rootes v Shelton* . [23] This submission misunderstands the decision in *Rootes v Shelton* . *Rootes v Shelton* concerned an appeal from the dismissal of a claim for damages for personal injury suffered by a plaintiff who was water skiing and collided with a stationary boat whilst skiing on a river. The New South Wales Court of Appeal had reversed the verdict of a jury in favour of the plaintiff on the ground that the defendant, as the driver of the speedboat, owed no relevant duty of care to the plaintiff as he had accepted the risk of injury involved in participating in that sport. The High Court allowed the appeal and reinstated the jury's verdict. There were four substantial judgments delivered by the High Court. The reasoning of the High Court really focussed on the existence and content of the duty of care where a plaintiff engages in a sport or pastime involving inherent risk of injury. The reasons of each individual judge accept that it was for the jury to make its own assessment of what were the inherent risks in water skiing but that a finding such risks existed did not eliminate the existence of a duty of care on the part of the pilot of the speedboat, in the particular circumstances of this case, to avoid driving too close to an obvious obstacle in the water. A close reading of each set of reasons does not support the respondent's submission that establishment of the defence did not require proof that the plaintiff adverted his mind to the risk of suffering injury and voluntarily accepted the risk.

via

[23] [1967] HCA 39 , (1967) 116 CLR 383 .

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James v Surfers Jet [2015] QDC 233 (22 September 2015) (McGill SC DCJ)
Rootes v Shelton (1967) 116 CLR 383 – cited.

James v Surfers Jet [2015] QDC 233 (22 September 2015) (McGill SC DCJ)

17. It is clear that the defendant, as the operator and driver of the jet boat, owed a duty of care to the persons who are riding on it as his passengers. [8] It was plainly foreseeable that a want of reasonable care on his part for the safety of his passengers could lead to their suffering injury. For example, if he failed to keep a proper look out and as a result collided with another vessel and a passenger was injured, he would be liable for the injuries to the passenger in the same way that the driver of a motor vehicle who failed to keep a proper look out and as a result collided with another vehicle would be liable for the injuries to a passenger in the vehicle. The possibility of injury to a passenger is plainly foreseeable, even if the situation is such that, if nothing goes wrong, the actual risk of injury was almost nil, so that the likelihood of the injury occurring was quite low. [9] The jet boat ride involves travelling at some speed, and undertaking manoeuvres which, at the very least, produces effects for the passengers rather different from just sitting quietly on a seat.

via

[8] *Rootes v Shelton* (1967) 116 CLR 383 .

Hume v Patterson [2013] NSWSC 1203 -
AMA v State of Victoria [2012] VCC 1453 -
AMA v State of Victoria [2012] VCC 1453 -
Seymour v Racing Queensland Limited [2012] QCAT 241 (18 June 2012) (Richard Oliver, Senior Member, Michael Howe, Member)

42. Simply failing to stitch bandages as specified in the Gear Register is a breach of Rule 140B but not necessarily Rule 140A which incorporates the concept of duty of care. A person may breach the rules of a sport and not be acting unreasonably. Non-compliance with rules, conventions or customs is a consideration when determining the question of reasonableness, but not the only consideration, and it may hold much or hold little weight as the circumstances dictate [10] .

via

[10] *Rootes v Shelton* (1967) 116 CLR 383 at 389 per Kitto J .

Seymour v Racing Queensland Limited [2012] QCAT 241 (18 June 2012) (Richard Oliver, Senior Member, Michael Howe, Member)
Rootes v Shelton (1967) 116 CLR 383
Kliese v Pellling

Watson v Meyer [2012] NSWDC 36 (16 April 2012) (Gibson DCJ)

153. Concepts of duty of care owed by participants involved in recreation or sport have been the subject of analysis in a series of decisions. An early High Court decision, *Rootes v Shelton* (1967) 116 CLR 383, sets out (at 385) the parameters of the duty of care owed by participants in a sport:

"By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its

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Dodge v Snell [2011] TASSC 19 (21 April 2011) (Wood J)

201. I am satisfied that Mr Snell exposed Mr Dodge to a "risk to which his participation in the sport could not be said, necessarily or ordinarily, to expose a participant" (*Rootes v Shelton* , at 392).

Dodge v Snell [2011] TASSC 19 (21 April 2011) (Wood J)

67. The finding of careless riding made against the defendant as a result of the Stewards' inquiry does not assist the plaintiff in proving that the defendant was negligent. It is no more than a finding by a tribunal based on the evidence before it, that the defendant has breached a rule of racing. In a similar fashion, a finding by Mr Hadley that Mr Snell breached the two lengths policy does not advance the plaintiff's case. An assessment of whether Mr Snell breached the two lengths policy must be based on the evidence in this trial. Furthermore, even if I determine upon the evidence before me that Mr Snell did not comply with a rule or policy of racing that non-compliance does determine the issue of negligence (*Rootes v Shelton* (1967) 116 CLR 383, per Kitto J at 389 , Barwick CJ at 385 ; *Kliese v Pelling* [1998] QSC 112, per Chesterman J, at 9).

The experts

Dodge v Snell [2011] TASSC 19 (21 April 2011) (Wood J)

99. I treat Mr Gleeson's evidence describing Mr Snell's shift inwards as a "higher level of carelessness", as an opinion confined to the issue of the two lengths policy, and as a description of the nature of the breach as to whether it was a clear breach or a marginal breach of the policy. Of course, whether there has been a clear breach of the two lengths policy, or indeed any other policy, or a rule of racing, is not determinative of the question of whether there has been negligence by a jockey: *Rootes v Shelton* (supra) per Barwick CJ at 385 ; *Appo v Stanley* (supra), par[44]. Depending on the circumstances it may be that a clear breach of the two lengths policy does not amount to negligence.

Dodge v Snell [2011] TASSC 19 (21 April 2011) (Wood J)
Wyong Shire Council v Shirt (1980) 146 CLR 40; *Rootes v Shelton* (1967) 116 CLR 383 ; *Kliese v Pelling* [1998] QSC 112, discussed.

Dodge v Snell [2011] TASSC 19 -
Dodge v Snell [2011] TASSC 19 -
Vreman and Morris v Albury City Council [2011] NSWSC 39 (11 February 2011) (Harrison J)

90. In *Greater Taree City Council v Peck* [2002] NSWCA 331 at [65] , Einstein J described skateboarding at a skateboard park as " plainly an inherently dangerous sport". In *Shellharbour City Council v Rigby* [2006] NSWCA 308 at [300]; (2006) Aust Torts Reports 81-864, Basten JA commented as follows with respect to an accident to a rider that occurred at a BMX bike riding track:

"[300] This was a constructed facility, not part of a natural environment. The fact that a recreational facility involved risks was a matter to be taken into account in making it available to the public without supervision: see [63] above, quoting *Woods v Multi-Sport*

Holdings Pty Ltd at [37] (Gleeson CJ), referring to *Rootes v Shelton* (1967) 116 CLR 383 at 387. The ability to become airborne was undoubtedly part of the intended excitement of the feature, and the risk of an inexperienced airborne rider losing control of his or her bicycle was no doubt likely to be appreciated at some level by all riders, both experienced and inexperienced. However, the real concern related to inexperienced young riders who might lack the maturity and understanding to appreciate adequately the risks involved."

Appo v Stanley [2010] QSC 383 (13 October 2010) (McMeekin J)
Newberry v Suncorp Metway Insurance Limited [2006] 1 Qd R 519; [2006] QCA 48
Rootes v Shelton (1967) 116 CLR 383

Appo v Stanley [2010] QSC 383 (13 October 2010) (McMeekin J)

44. Of course breach of the rules of racing, or of any such safety rule, is not the same as breaching the duty of care owed in all the circumstances. To put the case in a more familiar context, sometimes it is perfectly reasonable to drive on the wrong side of the road. So much is clear from the judgments in *Rootes v Shelton* , for example that of Barwick CJ where he said:

"By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist." [25]

Appo v Stanley [2010] QSC 383 (13 October 2010) (McMeekin J)

44. Of course breach of the rules of racing, or of any such safety rule, is not the same as breaching the duty of care owed in all the circumstances. To put the case in a more familiar context, sometimes it is perfectly reasonable to drive on the wrong side of the road. So much is clear from the judgments in *Rootes v Shelton* , for example that of Barwick CJ where he said:

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via

[25] (1967) 116 CLR 383 at 385.

Appo v Stanley [2010] QSC 383 (13 October 2010) (McMeekin J)

40. What the defendants were required to avoid doing in the circumstances here was "unreasonably exposing [Appo] to some additional risk, that is to say, a risk to which his participation in the sport could not be said, necessarily or ordinarily, to expose a participant" per Taylor J in *Rootes v Shelton* . [21] As Gleeson CJ observed in *Agar v Hyde* , citing *Rootes v Shelton* : "Voluntary participation in a sporting activity does not imply an assumption of any

risk which might be associated with the activity, so as to negate the existence of a duty of care in any other participant or in any person in any way involved in or connected with the activity." [22]

via

[21] (1967) 116 CLR 383 .

Appo v Stanley [2010] QSC 383 (13 October 2010) (McMeekin J)

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Appo v Stanley [2010] QSC 383 -
Pollard v Trude [2008] QSC 119 (20 May 2008) (Chesterman J)

Rootes v Shelton (1967) 116 CLR 383 , cited

Pollard v Trude [2008] QSC 119 (20 May 2008) (Chesterman J)

18. The law which imposes a general duty of care on those whose activities might cause harm to others applies to participants in sporting activities, although the application of the law and the imposition of the duty is affected by the circumstances of the activity. No separate or different duty of care applies to those who take part in sporting or recreational pursuits. The test for the duty and its breach is what would the reasonable man in the particular situation have foreseen and done. See *Johnston v Frazer* (1990) 21 NSW LR 89 at 94. If there are hazards associated with a particular activity which are inherent in it participants will be taken to have consented to the risk of the harm from those inherent dangers. See *Rootes v Shelton* (1967) 116 CLR 383 .

Drewes v. Toowoomba Volleyball Association Inc [2008] QDC 1 (16 January 2008) (Searles DCJ)

40. Relying upon that conclusion of Mr O'Sullivan, and the uncontroversial fact that the defendant was affiliated with the Queensland Volleyball Association Incorporated, the plaintiff then relied on Object 2(e) of the constitution of that body to visit upon the defendant the obligation to provide a three metre free zone. That constitution is Exhibit 16 and Object 2 (e) relevantly reads:-

"The objects of the QVA shall be:

(a) ...

(b) ...

(c) ...

(d) ...

(e) To ensure that all Volleyball competitions and organised activities, which involve registered members of the member associations or participants in

QVA activities do not infringe the Australian Volleyball Federation or Federation International de Volleyball regulations.

(f) ...

(g) ...

(h) ...

(i) ...

(j) ..."

Of course the breach of the Objects of the QVA constitution does not necessarily constitute a breach of the duty owed by the defendant to the plaintiff. [44] But, that said, I am not persuaded there ever was such a breach of the constitution.

via

[44] *Rootes v Shelton* (1967) 116 CLR 383 at 385 per Barwick CJ .

Freeleagus v Nominal Defendant [2007] QCA 116 (05 April 2007) (Williams and Keane JJA and Douglas J,)

20. The leading judgment in the Full Court was delivered by Dunn J. His Honour said:

"Had there been a jury in the case, the jury would have been entitled to judicial guidance as to whether the defendants' driver owed the plaintiff a duty to take care not to harm him (clearly he did) and what the extent of the duty was, having regard to the 'special relation' or succession of relations existing between defendant and plaintiff in the moments immediately preceding the accident, and what causal relationship the plaintiff must prove between an act or omission by the defendant which was a breach of duty and any damage suffered by the plaintiff. Cf. *Rootes v. Shelton* (1967) 116 C.L.R. 383, at p. 387. "

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (27 February 2007) (Gleeson CJ; Kirby, Hayne, Callinan and Crennan JJ)

90. *Considerations of policy*: In *New South Wales v Lepore* [131] , I suggested that:

"When a final court is called upon to respond to a new problem ... it is inevitable that, as in the past, the common law will give an answer exhibiting a mixture of principle and pragmatism. ... In any re-expression of the common law in Australia, it is normal now [132] to have regard to considerations of legal principle and policy, as well as any relevant legal authority [133] ."

via

[132] Contrast *Rootes v Shelton* (1967) 116 CLR 383 at 386-387 per Kitto J .

Shellharbour City Council v Rigby [2006] NSWCA 308 (27 November 2006) (Beazley JA; Ipp JA; Basten JA)

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Rootes v Shelton (1967) 116 CLR 383
Rundle v State Rail Authority of New South Wales

Shellharbour City Council v Rigby [2006] NSWCA 308 (27 November 2006) (Beazley JA; Ipp JA; Basten JA)

> 300 This was a constructed facility, not part of a natural environment. The fact that a recreational facility involved risks was a matter to be taken into account in making it available to the public without supervision: see [63] above, quoting *Woods v Multi-Sport Holdings Pty Ltd* at [37] (Gleeson CJ), referring to *Rootes v Shelton* (1967) 116 CLR 383 at 387. The ability to become airborne was undoubtedly part of the intended excitement of the feature, and the risk of an inexperienced airborne rider losing control of his or her bicycle was no doubt likely to be appreciated at some level by all riders, both experienced and inexperienced. However, the real concern related to inexperienced young riders who might lack the maturity and understanding to appreciate adequately the risks involved.

Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 (26 June 2006) (Handley JA at 1; Tobias JA at 8; Bryson JA at 9)

> 33 Whether a duty of care exists falls to be decided upon both facts and law. The present it is not one of the cases where judicial decisions establish the existence of a duty of care. The process of decision was referred to in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 398-399 by Windeyer J. in these terms:
>
> > Whether at some time in the past the prospect of the happening of an event which in fact happened was such that it created an obligation to take precautions against it is called a question of fact. It is really a value judgment upon ascertained facts.
>
> In *Shirt v Wyong Shire Council* at 639 Glass JA said:
>
> > At the hearing before Ash J. and a jury, a ruling was made by the trial judge that, upon the evidence, a duty of care was owed by the defendant council to the plaintiff. There is authority to the effect that, when the answer to the duty question depends upon the resolution of factual problems of foreseeability, it should be remitted to the jury for decision with appropriate directions: *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202, at p. 220 ; *Rootes v Shelton* (1967) 116 CLR 383, at p. 388. But no complaint was made by the council that the question of duty or no duty had been determined by the trial judge.
>
> In *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 the judgment of the majority of the High Court includes this passage:
>
> > ... It has been contended before us that it was for the judge to decide as a matter of law whether the appellant was under any duty of care, and if so what that duty was. It was, of course, for the judge to tell the jury what conclusions of fact they must reach before they could be entitled to treat the appellant as under a duty of care to users of the level crossing, and to describe in abstract terms the standard of that duty if it existed. This his Honour did; and in the circumstances of the case the rest was for the Jury.
>
> This passage shows that in the view of the High Court there was a matter of law for the Judge to decide, that is whether the appellant was under a duty of care if some stated conclusions of fact were found. In *Rootes v Shelton* (1967) 116 CLR 383 observations of Kitto J. at 388 similarly illustrate the functions of judge and jury.

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Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 -
Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 -
Sestich v Van Heemst [2006] WADC 23 (24 March 2006) (Muller DCJ)

Rootes v Shelton (1967) 116 CLR 383

Fallas v Mourlas [2006] NSWCA 32 (16 March 2006) (Ipp, Tobias and Basten JJA)
Rootes v Shelton (1967) 116 CLR 383
Scanlon v American Cigarette Company (Overseas) Pty Ltd (No 3)

Fallas v Mourlas [2006] NSWCA 32 -
Vairy v Wyong Shire Council [2005] HCA 62 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

62. Whether in the given circumstances there exists a duty of care in negligence is a question of law. After all, *Donoghue v Stevenson* [57] itself was decided upon a demurrer type procedure used in Scotland. Of course, the existence of some or all of those "given circumstances" may depend upon issues of fact to be tried by the jury [58].

via

[58] *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 501-502 ; *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 221 ; *Rootes v Shelton* (1967) 116 CLR 383 at 388.

Action Paintball v Clarke [2005] NSWCA 170 (25 May 2005) (Handley, Tobias and Basten JJA)
Rootes v Shelton (1967) 116 CLR 383

Action Paintball v Clarke [2005] NSWCA 170 -
Carly McDevitt v James Irwin [2005] ACTSC 13 (25 February 2005) (Master Harper)

55. *Rootes v Shelton* remains good law, having being approved in a relatively recent decision of the High Court, *Woods v Multi-Sport Holdings Pty Limited* (2002) 208 CLR 460, where an appeal by a plaintiff who had failed at first instance and in the Court of Appeal of Western Australia was dismissed in circumstances where he had been struck in the eye by a ball while playing indoor cricket. Despite the outcome, it was accepted that the defendant, the operator of the indoor cricket venue, owed a duty to take reasonable steps to avoid a risk of injury to players arising from the dangers involved in the sport.

Carly McDevitt v James Irwin [2005] ACTSC 13 -
Carly McDevitt v James Irwin [2005] ACTSC 13 -
Swain v Waverley Municipal Council [2005] HCA 4 (09 February 2005) (Gleeson CJ,McHugh, Gummow, Kirby and Heydon JJ)

109. *Shirt* considered what had been said by the Privy Council in *The Wagon Mound [No 2]* [89] , an appeal taken directly from the judgment of Walsh J in the Supreme Court of New South Wales. It is the treatment of *The Wagon Mound [No 2]* in *Shirt* which represents the law. In deciding the present appeal, to speculate whether what was said by the Privy Council and adopted by this Court in *Shirt* took the law around a wrong turning and introduced "deleterious foreign matter into the waters of the common law" in which the courts "have no more than riparian rights" [90] would be inappropriate.

via

[90] The words are those of Kitto J in *Rootes v Shelton* (1967) 116 CLR 383 at 387.

Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone [2004] NSWCA 145 (20 May 2004)

23. It is clear (and was not contended otherwise) that the law of negligence extends into participation in a sport which involves inherent dangers. In *Rootes v. Shelton* (1967) 116 CLR 383 at 385 Barwick CJ said:

By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist.

At 387 Kitto J said:

> I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or a game. Their kind is older by far than the common law itself. And though water skiing may be slightly faster than chariot-racing it is, like every other sport, simply an activity in which participants place themselves in a special relation or succession of relations to other participants, so that adjudication under the common law upon a claim by one participant against another for damages for negligence in respect of injuries sustained in the course of the activity requires only that the tribunal of fact apply itself to the same kind of questions of fact as arise in other cases of personal injury by negligence. It must do so, of course, under judicial guidance as to what the law has to say upon the questions whether, in the situation in which the plaintiff's injuries were caused, the defendant owed him a duty to take care not to harm him, what the extent of the duty was if a duty did exist, and what causal relation the plaintiff must prove between an act or omission by the defendant which was a breach of the duty and the plaintiff's injuries. We are here concerned mainly with the first two of these questions. They are questions to be answered by reference to the circumstances surrounding any act or omission of the respondent which the jury considered was a cause of the appellant's injuries. It was for the jury to identify that act or omission, and then to decide what were the circumstances in which it took place.

Ollier v Magnetic Island Country Club Inc [2004] QCA 137 (30 April 2004) (McMurdo P, McPherson JA and White J,)

37. The other ground argued on behalf of the appellant was a failure to apply the principles reflected in the maxim *volenti non fit injuria*. In *Rootes v Shelton* (1967) 116 CLR 383 Barwick CJ at 389 expressed the principle underlying the maxim as follows:

> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this

connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist."

As to the "rules of the game" Kitto J observed at 389:

> "Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the "rules of the game". Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances."

See also observations by Gleeson CJ in *Agar v Hyde* (2000) 201 CLR 552 at 561 and in *Wo ods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 472.

Ollier v Magnetic Island Country Club Inc [2004] QCA 137 -
Smith v Capella State High School Parents and Citizens Association [2004] QSC 109 (01 March 2004)

35. A defence of *volenti non fit injuria* was raised on behalf of the third defendant.

I do not accept that the conduct of Mr Smith in using the laneway to walk from the arena to the yards could be seen to be such a disregard of obvious risk as to amount to an assumption of liability. The most appropriate expression of the rule in cases like the present is that of Barwick CJ in *Rootes v Shelton [11]* :

> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other."

Smith v Capella State High School Parents and Citizens Association [2004] QSC 34 (01 March 2004)

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> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other."

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Smith v Capella State High School Parents and Citizens Association [2004] QSC 109 (01 March 2004)

Rootes v Shelton (1967) 116 CLR 383 , referred to and distinguished

Smith v Capella State High School Parents and Citizens Association [2004] QSC 34 (01 March 2004)

Rootes v Shelton (1967) 116 CLR 383 , referred to and distinguished

Smith v Capella State High School Parents and Citizens Association [2004] QSC 109 -
Smith v Capella State High School Parents and Citizens Association [2004] QSC 34 -
Lynn v Apex Holiday Centre (Incorporated) [2003] WADC 169 (08 August 2003) (Commissioner Giles)

Rootes v Shelton (1967) 116 CLR 383
State Government Insurance Commission v Hitchcock, unreported; FCt SCt of WA Library No 970089; 11 March 1997

Lynn v Apex Holiday Centre (Incorporated) [2003] WADC 169 -
Cattanach v Melchior [2003] HCA 38 -
Waverley Municipal Council v Swain [2003] NSWCA 61 (03 April 2003) (Spigelman CJ, Handley and Ipp JJA)

Rootes v Shelton (1967) 116 CLR 383
RTA v McGuinness

Waverley Municipal Council v Swain [2003] NSWCA 61 -
Moore v Woodforth [2003] NSWCA 9 -
New South Wales v Lepore [2003] HCA 4 -
Peter Joseph Haylen v New South Wales Rugby Union Limited [2002] NSWSC 114 (15 March 2002) (Einstein J)

Rootes v Shelton (1967) 116 CLR 383

Peter Joseph Haylen v New South Wales Rugby Union Limited [2002] NSWSC 114 (15 March 2002) (Einstein J)

50 Assume for a moment that one was to accept for the purpose of argument, but without deciding this matter, that a workable distinction exists between, on the one hand, *non-inherent* risks (meaning risks representing events that ought not occur if the sport is conducted as it ought to have been, arguably termed 'sport not conducted according to specification') and, on the other hand, *inherent* risks (meaning risks that can materialise even though everything is carried out to specification) [See generally Opie supra at 138: "*[a]n inherent risk in a sport is one that can materialise even though everything is carried out to specification. Injuries can arise from the tackles and bumps promoted by the rules, as well as by the collisions, falls and spills that inevitably occur in any vigorous physical activity. Additionally, the inherent risks of a sport include physical contact even though they may constitute an accidental breach of the rules, provided they are not negligent in the circumstances of the sport. All of these incidents occur in varying degrees as normal adjuncts to sporting activity*"]. Even if it be the case that this form of distinction was appropriate to be drawn so that non-inherent risks may, depending upon the particular circumstances, give rise to a relevant duty of care, the plaintiff's claim here would seem clearly to fall into the category of inherent risks in this particular game. I note in this regard that in *Insurance Exchange of Australia Group v Dooley* (2000) 50 NSWLR 222, the Court of Appeal, dealing with a claim that a regional baseball league in Australia ought to have amended the rules of baseball affecting collisions occurring between fielders and base runners, regarded the prospect of collision in the circumstances to be a well-known and understood inherent risk of the sport. [I note in passing that the expression "inherent risks" may clearly be used in more than one sense. The recent decision in *Woods v Multi-Sport Holdings Pty Ltd* [Unreported, High Court of Australia, [2002] HCA 9, 7 March 2002] involved use by the trial judge of this expression to describe risks which are *"by their nature obvious to persons participating in the sport"*. In *Rootes v Shelton* (1967) 116 CLR 383 at 386 Barwick CJ referred to risks that are inherent in a sport or pastime which may be regarded as accepted by participants]

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

38. In *Rootes v Shelton* , the defendant sought to meet a case of negligence in the manner in which he controlled a speed-boat towing a water-skier by arguing that the plaintiff had voluntarily assumed the risk which eventuated. That argument failed. In the course of discussing the argument, Barwick CJ referred to risks that are inherent in a sport or pastime which may be regarded as accepted by participants [3] . There was an argument as to voluntary assumption of risk in the present case, but it was not the basis upon which the matter was decided at trial, and it was not pursued in the Full Court or in this Court. Nevertheless, French DCJ, and the Full Court, referred to the concept of inherent risks in the context of obvious risks, for the purpose of dealing with the appellant's case of failure to warn.

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

101. First, sporting activities do not occur in a law-free zone. Simply because people participate in sporting events [56] , or watch them as spectators [57] , they are not cast beyond the pale of the law's protection. It would be a serious mistake to derive any such principle from what this Court held in *Agar v Hyde* [58] . That case concerned the question whether a reasonably arguable foundation had been established for the issue of Australian process against members of the International Rugby Football Board for failing to alter or amend the rules of the game so as to avoid or minimise the risk of injury to players of that sport. The injured players lost their case because it was held by this Court that it was not arguable that the members of the Board owed the players a duty of care [59] . In the present case, the existence of a duty of care was not contested. Accordingly, no legal principle for which *Agar* stands presents an impediment to the appellant's success.

via

[56] *Rootes v Shelton* (1967) 116 CLR 383 ; *Smoldon v Whitworth* [1996] TLR 249.

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

117. The error in this reasoning is that, effectively, it surrendered the standard of care required by the law to the rules made by the Federation. As it happened, those rules did not absolutely forbid the use of headgear and protections by indoor cricket players. But it is on that flimsy footing that an inhibition was erected against imposing on the respondent a legal duty to take reasonable care to people such as the appellant. The decision in *Rootes v Shelton* [102] de nies the proposition that sporting rules expel the law from the respondent's operation. True, such rules may be taken into consideration. But they are not definitive of the existence and extent of the common law duty; nor could they be [103] . Were it otherwise, the law would, in this case, surrender its protection to rules that concentrate on issues such as colour co-ordination of clothing rather than the serious question of player safety. That is not the law of Australia.

via

[102] (1967) 116 CLR 383 .

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

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102. Secondly, when, in respect of a game of sport, a question arises as to the scope of the duty owed to participants or spectators, the answer necessarily depends, in each case, upon all of the circumstances. Relevant circumstances include such matters as the age and experience of the claimant, the nature of the sporting activity, the formal or informal character of the game on the occasion in question, whether there was any commercial element in its conduct and in the participation of the claimant, the rules and recognised practices of the sport and whether those rules were observed or breached in the particular case [60] .

via

[60] cf *Rootes* (1967) 116 CLR 383 .

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

37. As Kitto J pointed out in *Rootes v Shelton* [2] , people have taken pleasure in engaging in risky games since long before the law of negligence was formulated, and there is nothing new or mysterious about the application of the law to such conduct. But the sporting context may be of special significance in relation to a factual judgment that must be made. Depending upon the manner in which a plaintiff seeks to make out a case of negligence, the risky nature of a sporting activity in which an adult participant has chosen to engage may be of factual importance in a decision as to whether such a case has been established.

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

105. Although some older cases in England suggest that the sporting relationship is special and that, within it, liability is confined to deliberate or reckless harm [64] , this is neither the standard recently observed in sporting cases in England [65] nor that upheld by this Court [66] . The law, and specifically the law of negligence, promotes a greater consciousness of the need for safety, accident prevention and the avoidance of needless or excessive injury in sport. In doing so, it promotes the true values of sport rather than the brutal and excessive features that debase sport, leaving victims and their families to pick up the pieces over many years, long after the watching crowd's cheering has subsided.

via

[66] *Rootes* (1967) 116 CLR 383 .

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 (07 March 2002) (Gleeson CJ,McHugh, Kirby, Hayne and Callinan JJ)

37. As Kitto J pointed out in *Rootes v Shelton* [2] , people have taken pleasure in engaging in risky games since long before the law of negligence was formulated, and there is nothing new or mysterious about the application of the law to such conduct. But the sporting context may be of special significance in relation to a factual judgment that must be made. Depending upon the manner in which a plaintiff seeks to make out a case of negligence, the risky nature of a sporting activity in which an adult participant has chosen to engage may be of factual importance in a decision as to whether such a case has been established.

via

[2] (1967) 116 CLR 383 at 387.

Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 -
Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 -
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Kane Rundle by his next friend Gail Rundle v State Rail Authority of New South Wales [2001] NSWSC 862 (05 October 2001) (McClellan J)
Rootes v Shelton (1967) 116 CLR 383
Podrebersek v Australian Iron & Steel

Kane Rundle by his next friend Gail Rundle v State Rail Authority of New South Wales [2001] NSWSC 862 (05 October 2001) (McClellan J)

102 A plaintiff must be shown to have consented to a specific risk: see Roggenkamp at 300; and also Rootes v Shelton (1967) 116 CLR 383 .

Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234 (20 September 2001) (Spigelman CJ, Powell and Giles JJA)

27 This Court should be very slow indeed to recognise a duty to prevent self-inflicted economic loss. Loss of money by way of gambling is an inherent risk in the activity and cannot be avoided. (See e.g. *Rootes v Shelton* (1967) 116 CLR 383 at 385 per Barwick CJ; *Prast v Town of Cottesloe* (2000) 22 WAR 474 at [32] per Ipp J.) Nevertheless, whether a duty arises in a particular case must depend on the whole of the circumstances, even in the case of an inherent risk. (See *Rootes v Shelton* (supra) at 390 per Kitto J and *Agar v Hyde* (supra) at [14] per Gleeson CJ.)

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Flanders v Small [2000] QDC 461 (30 November 2000) (McGill DCJ)
Rootes v. Shelton (1967) 116 CLR 383 – applied

Flanders v Small [2000] QDC 461 -
Prast v Town of Cottesloe [2000] WASCA 274 (22 September 2000) (Ipp J, Wallwork J, Parker J)
Rootes v Shelton (1967) 116 CLR 383
SGIC v Hitchcock, unreported; FCt SCt of WA; Library No 970089; 11 March 1997

Prast v Town of Cottesloe [2000] WASCA 274 -
Agar v Hyde [2000] HCA 41 (03 August 2000) (Gleeson CJ,Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

14. Voluntary participation in a sporting activity does not imply an assumption of any risk which might be associated with the activity, so as to negate the existence of a duty of care in any other participant or in any person in any way involved in or connected with the activity [8] . That, however, is not to deny the significance of voluntary participation in determining the existence and content, in a given case, or category of cases, of an asserted duty of care.

via

[8] *Rootes v Shelton* (1967) 116 CLR 383 .

Agar v Hyde [2000] HCA 41 (03 August 2000) (Gleeson CJ,Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

> 88. Mr Worsley makes no allegation of any breach of the laws of the game. If there was no breach of the laws, Mr Worsley would have no claim against his opponents. Each participant in the match was adult and must be taken to have consented to the application of physical force in accordance with the laws of the game. And not only would there be no actionable trespass in the opposing team doing what it did, there is nothing which would suggest that any player conducted himself, in playing *within* the laws of the game, so as to have broken any duty of care which *he* owed to the respondent [48] .

via

[48] *Rootes v Shelton* (1967) 116 CLR 383 .

Benness v Town of Cambridge [2000] WADC 197 -
Agar v Hyde, Agar v Worsley [2000] HCATrans 110 (23 March 2000) (Gleeson CJ; Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

> **MR JACKSON:** No, your Honour, I was going to come in just a moment to what was said by members of the court in *Rootes v Shelton* where, in dealing with the duty of care owed by participants in a game, in a sport one to another, it was said that what had to be recognised was that people might not always obey the rules and that one might have, I suppose, instances of negligence happening by reason of people obeying the rules and people not obeying the rules. But, your Honour, what I was going to say more directly in response to your Honour was this, that you do have a situation where it would be possible to identify two causes which are the causes for the injury sustained by the plaintiff. One can say, well, it was caused by the players in the opposing team, by charging the others before the scrum was properly set and seeking

Agar v Hyde, Agar v Worsley [2000] HCATrans 110 (23 March 2000) (Gleeson CJ; Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

> **MR JACKSON:** Well, your Honour, could I put it this way. One could describe it as being a duty to reduce or avoid risks which are serious and unnecessary, having regard to the nature of the sport. One could describe it as a duty to reduce risk to an acceptable level, having regard to the nature of the sport and, your Honours, I will come to it in a moment, if I may. But this Court in *Root es v Shelton* in 1967 had no difficulty in applying the ordinary tests of negligence to a sport.

Agar v Hyde, Agar v Worsley [2000] HCATrans 110 (23 March 2000) (Gleeson CJ; Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

> Your Honours, in relation to duty of care, what we would submit is there is nothing very surprising about regarding those who are in control of the sport as being under a duty of care to participants. Could I take your Honours to *Rootes v Shelton* (1967) 116 CLR 383, to which I adverted earlier, and, your Honours, they were various participants in water skiing and one sees, if I could go first to what was said by Justice Kitto at page 387 , your Honours, could I start on the first new paragraph on that page and observing, if I may in passing, your Honours, that the Court might have to be a little more Trappist than it sometimes is if one were to follow what is in the preceding paragraph, but, your Honours, if one goes to the first new paragraph on page 387, your Honours will see that his Honour observes nothing:

Woods v Multi-Sport Holdings Pty Ltd [2000] WASCA 45 (01 March 2000) (Malcolm CJ, Pidgeon J, Murray J)

9 Her Honour cited the leading High Court authority on the voluntary assumption of risk in connection with the playing of sport or pastimes of

(Page 5)

that kind, ***Rootes v Shelton*** (1967) 116 CLR 383, where at 385 Barwick CJ said:

Woods v Multi-Sport Holdings Pty Ltd [2000] WASCA 45 (01 March 2000) (Malcolm CJ, Pidgeon J, Murray J)

Rootes v Shelton (1967) 116 CLR 383
Brunskill v Sovereign Marine & General Insurance Co Ltd

Woods v Multi-Sport Holdings Pty Ltd [2000] WASCA 45 -
Bollen v Condor of Bermuda [1999] FCA 1832 (23 December 1999) (Lindgren J)

100. In *Rootes v Shelton* (1967) 116 CLR 383 , Barwick CJ said this:

> *"By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist."* (at 385)

The defendant submits that I should find that the risk of a genoa block coming adrift and causing injury is an accepted risk of sailing. There was general agreement that genoa blocks come adrift from their tracks on occasion without any identifiable cause, such as a defective piece of equipment or a breakage. For example, while opining that "the system used on board Condor was suitable for both situation and circumstances", Mr Mitchell said that on one occasion in his experience, not only did the genoa block leave its pin-locked position, but in addition it ran along the track with such force that it "flicked up" a pin-locked stopper block as well and actually snapped it. He said:

> *"On that particular boat we didn't have end track fairings at all, so that's why we had the stoppers on the back and also because it was an ocean race and we were going to be sailing at night and those sorts of things"*

Hyde v Agar 45 NSWLR 487 (19 October 1998) (Spigelman CJ, Mason P and Stein JA)

In argument, counsel for the respondents raised the spectre of the popular sport that prices itself out of existence as its rule-making administrator is crushed by legal claims by athletes. Like all floodgates submissions, this needs to be taken with a grain of salt. After all, opposing players can already sue each other for intentionally and negligently inflicted injuries (cf Rootes v Shelton (1967) 116 CLR 383; Johnston v Frazer (1990) 21 NSWLR 89); they can sue the referee for negligent failure to enforce the rules (Smoldon v Whitworth (English Court of Appeal, 17 December 1996, unreported) (see The Times, 18 December 1996)); and the sports administrator that dons the mantle of an occupier assumes well-established duties of care towards players (Trevali Pty Ltd (t/as

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Campbelltown Roller Rink) v Haddad [1989] Aust Torts Reports ¶80-286), spectators (Hall v Brooklands Auto Racing Club [1933] 1 KB 205) and (in the case of golf clubs) neighbours. A duty of care is not negated merely because participation in the sport is voluntary: Rootes . Although it was common ground in the appeal that no case could be found suggesting any duty of care such as the one propounded here, such a duty was found (but on the facts not breached) in Hamstra v British Columbia Rugby Union (1989) 1 CCLT (2d) 78. That case involved a young rugby player who was rendered quadriplegic when a scrum collapsed.

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Hyde v Agar 45 NSWLR 487 -
Hyde v Agar 45 NSWLR 487 -
Woods v Roberts No. Scgrg-96-2299 Judgment No. S6467 [1997] SASC 6467 (05 December 1997)

We were referred to a number of cases involving golfing accidents. I find such cases unhelpful, as they each depend on their own particular circumstances, and are merely examples of the application of the general principles of tortious liability described by the High Court in *Rootes v Shelton* (1967) 116 CLR 383 especially per Kitto J at 387-388. In all the circumstances of this case I do not consider that the respondent was in breach of his duty of care to the appellant.

Anderson v Mount Isa Basketball Association Incorporated [1997] QCA 340 (03 October 1997) (Davies JA. Demack J. Mackenzie J.)

if it exists, depends on the circumstances of each case (Rootes v Shelton (1967) 116 CLR 383 ;

Anderson v Mount Isa Basketball Association Incorporated [1997] QCA 340 (03 October 1997) (Davies JA. Demack J. Mackenzie J.)
Rootes v. Shelton (1967) 116 C.L.R. 383

Anderson v Mount Isa Basketball Association Incorporated [1997] QCA 340 -
McPherson v Whitfield [1995] QCA 62 (15 March 1995)

There are, however, sound reasons for this. In the first place the plaintiff's consent to the risk, if it be established, cannot be said to affect the defendant's culpability for the accident, merely his liability. The effect then of a finding of *volenti* is to excuse the defendant from the foreseeable consequences of his conduct notwithstanding that that conduct remains a cause, and in many cases the only or a substantial cause, of the plaintiff's injuries. Bearing in mind the severity of the consequences from the plaintiff's point of view then, it is not at all surprising that a court would require very clear conduct indeed before reaching the conclusion that a person who had not expressly done so, had discharged the tortfeasor from liability in respect of the reasonably avoidable consequences of his conduct: see Cook, 389 and cf. Rootes v. Skelton (1967) 116 C.L.R. 383 .

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Additionally, and from a more general point of view, one might consider it more in accord with contemporary thinking that in the case of an injury produced by a multitude of causes, greater justice would be achieved by the court arriving at a "fair and reasonable allocation of the responsibility for the damage": Pennington v. Norris (1956) 96 C.L.R. 10, 17, rather than by allowing the loss to fall solely on the shoulders of one of the parties.

Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 (24 March 1994) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

Then, in Rickards v. Lothian, Lord Moulton delivering the opinion of the Privy Council said ((196) (1913) 116 CLR 387 at 400-401 ; (1913) AC

Gala v Preston [1991] HCA 18 (28 May 1991) (Mason C.j., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

1. A defendant's liability in negligence relates to the damage which the plaintiff has actually suffered, and to no other: The Wagon Mound (No.1), at p 425; Sutherland Shire Council v. Heyman (1985) 157 CLR 424, at pp 486-487 . 2. A defendant's liability for that damage arises from an act done or an omission made by the defendant (the relevant act or omission) which is a cause of the damage suffered: Chapman v. Hearse (1961) 106 CLR 112, at p 122. However, an omission cannot be said to be a cause of damage unless the defendant was under a duty to act to avoid or prevent the damage and the omission is a breach of that duty: East Suffolk Rivers Catchment Board v. Kent (1941) AC 74 ; Jaensch v. Coffey (1984) 155 CLR 549, at p 578 ; Sutherland Shire Council v. Heyman, at pp 476-481. 3. A defendant's liability for damage does not extend to damage caused by the relevant act or omission unless the possibility of causing that damage or damage of the same kind was reasonably foreseeable at the time when the relevant act was done or the relevant omission made: Bolton v. Stone (1951) AC 850, at p 858 ; Hughes v. Lord Advocate (1963) AC 837 ; Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR 383, at pp 390, 392-393, 401-403, 413-414 ; Jaensch v. Coffey, at pp 562-563. 4. A defendant is liable if, and because, a reasonable person in the defendant's position foreseeing the possibility of causing the damage suffered or damage of the same kind would not have done the relevant act or made the relevant omission: Blyth v. The Birmingham Waterworks Company (1856) 11 Ex 781 (156 ER 1047); Heaven v. Pender (1883) 11 QBD 503, at p 509 ; Donoghue v. Stevenson (1932) AC 562, at pp 580-581 ; Fardon v. Harcourt-Rivington (1932) 146 LT 391, at pp 392,393 ; Bolton v. Stone, at pp 866-869. That is the foundation not only of every duty of care in torts of negligence but of the standard of care required to discharge the duty: Vaughan v. Menlove (1837) 3 Bing (NC)468, at p 475 (132 ER 490, at p 493). The standard of care is fixed by reference to the steps which the hypothetical reasonable person would take to avoid or prevent the possibility of the occurrence of the foreseeable damage: Glasgow Corporation v. Muir (1943) AC 448, at p 457 ; Wyong Shire Council v. Shirt (1980) 146 CLR 40, at p 45 ; Jaensch v. Coffey, at pp 562-563. 5. A legal duty does not always arise when the facts show that the kind of damage suffered by the plaintiff was reasonably foreseeable by the defendant. Elements in addition to reasonable foreseeability of damage are required to give rise to a duty of care to avoid or prevent damage other than physical damage to the person or to the property of the plaintiff; similarly, additional elements are required where the act or omission of the defendant amounts to a representation to the plaintiff on which the plaintiff relies in doing an act or abstaining from acting whereby the relevant damage is caused: Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd. (1964) AC 465 ; Shaddock and Associates Pty. Ltd. v. Parramatta City Council (No.1) (1981) 150 CLR 225, at pp 230-231 ; Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt (1968) 122 CLR 556, at pp 568-570 ; Jaensch v. Coffey, at pp 574-576; San Sebastian Pty. Ltd. v. The Minister (1986) 162 CLR 340, at p 369. Again, there may be special features of the circumstances in which the relationship between the plaintiff and the defendant exists which preclude the arising of a duty of care or modify the standard of care otherwise required to discharge the duty: Rootes v. Shelton (1967) 116 CLR 383 , at p 389 ; The Insurance Commissioner v. Joyce (1948) 77 CLR 39, at p 59 ; Cook v. Cook (1986) 162 CLR 376, at pp 391-394 .

Johnston v Frazer 21 NSWLR 89 (29 October 1990) (Priestley, Clarke JJA and Hope A-Ja)

Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 . Condon v Basi [1985] 1 WLR 866 ; [1985] 2 All ER 453 . Cook v Cook (1986) 162 CLR 376 . Donoghue v Stevenson [1932] AC 562 . Rootes v Shelton (1967) 116 CLR 383 . Wilks v Cheltenham Homeguard Motor Cycle and Light Car Club [1971] 1 WLR 668 ; [1971] 2 All ER 369 . Wooldridge v Sumner [1963] 2 QB 43 .

Johnston v Frazer 21 NSWLR 89 (29 October 1990) (Priestley, Clarke JJA and Hope A-Ja)

> On that approach, it seems to me that the kind of contention of the duty contended for by the appellant cannot be supported. Any formulation which involves an ingredient of recklessness or attempting to cause harm, seems to me to be inconsistent with the question the tribunal is bound to deal with in such cases, whether in all the circumstances in which he found himself, the defendant had done what was reasonable. Although the formulation put by Finlay J is slightly different in terms from what which Professor Goodhart set out in the Law Quarterly Review long ago, Finlay J seems to me to have been expressing substantially the same concept, as indeed Kitto J was in Rootes v Shelton .

Johnston v Frazer 21 NSWLR 89 (29 October 1990) (Priestley, Clarke JJA and Hope A-Ja)

> To complete the picture so far as authority in England is concerned, I now mention Condon v Basi [1985] 1 WLR 866; [1985] 2 All ER 453. That was a decision, involving what was said to be a foul tackle by the defendant in what is in England referred to as a football game, in which Sir John Donaldson MR said that there was no authority as to what the standard of care which governs the conduct of players in competitive sports generally was. He thought that was surprising. The only cases apparently cited in argument to the court, beyond Donoghue v Stevenson [1932] AC 562 and Rootes v Shelton (1967) 116 CLR 383, were another Australian case, and a report from the criminal courts involving the meaning, I think, of recklessness. Nobody thought to rely on or refer to either Wooldridge or Wilks . As it happens, although that may be thought to weaken the authority of the decision in Condon , the way in which the Master of the Rolls dealt with Rootes v Shelton fits in with what, in my view, is the way the law has developed in Australia, in a way which makes it useful to refer to what he went on to say. He referred to Rootes v Shelton , saying he completely accepted the High Court's decision in that case. He referred to what could be said to be the different approaches of Barwick CJ and Kitto J in their separate reasons in that decision. He described Kitto J's approach as saying, in effect, that there is a general standard of care, namely that in Donoghue v Stevenson , that you are under a duty to take all reasonable care, taking account of the circumstances in which you are placed, which in a game of football are quite different from those which affect you when you are going for a walk in the countryside. He then went on to say that for his part, he preferred the approach of Kitto J. On the facts of the case that was before the Court of Appeal, it did not particularly matter whether the approach of Barwick CJ or that of Kitto J was adopted because on either view there had been a breach of the duty of care. Nevertheless, the case seems to me to be of some significance in that it shows that in 1985 the English Court of Appeal was approaching matters of this kind by reference to a general standard of care, being Lord Atkin's approach in Donoghue v Stevenson .

Johnston v Frazer 21 NSWLR 89 (29 October 1990) (Priestley, Clarke JJA and Hope A-Ja)
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Cook v Cook [1986] HCA 73 -
BOYLE v. DOWNS [1978] 2 NSWLR 381 (31 October 1978) (Master Allen)
Dunbar v. Perc [1956] V.L.R. 583 . Nash v. Layton [1911] 2 Ch. 71 . Potter's Sulphide Ore Treatment Ltd. v. Sulphide Corporation Ltd. (1911) 13 C.L.R. 101 . Rootes v. Shelton (1967) 116 C.L.R. 383 . Wisniewski v. Tolley (1967) 10 F.L.R. 157 .

Shirt v Wyong Shire Council [1978] 1 NSWLR 631 (31 July 1978) (Reynolds, Glass and Samuels Jj.A)

At the hearing before Ash J. and a jury, a ruling was made by the trial judge that, upon the evidence, a duty of care was owed by the defendant council to the plaintiff. There is authority to the effect that, when the answer to the duty question depends upon the resolution of factual problems of foreseeability, it should be remitted to the jury for decision with appropriate directions: Caledonian Collieries Ltd. v. Speirs

(1957) 97 C.L.R. 202, at p. 220.

; Rootes v. Shelton

(1967) 116 C.L.R. 383, at p. 388.

. But no complaint was made by the council that the question of duty or no duty had been determined by the trial judge. The submission that he had erred in ruling favourably to the plaintiff, and that there was no evidence capable of supporting the existence of such a duty, was developed in the following manner. Before him there were evidentiary materials which required a negative answer to the duty question. They included the shallowness of the lake in close proximity to the channel, the battered sides of the channel which took the normal bottom of the lake to a much greater depth than the surrounding area, so that the channel area could properly be described as deep when compared with the surrounding water, the paramount need to warn children that there existed a deep channel in close proximity to shallow waters, the position of the warning signs in a line running parallel to the length of the jetty, so as to mark the existence of a channel between the jetty on the east and the line of posts on the west, the fact that, before the signs were erected, water skiers had habitually skied in the lake and had followed an anti-clockwise course which commenced and finished close to the most seaward sign, that McPhan was entitled to assume that it would be obvious to anyone reading them that the deep water signs related exclusively to the danger created by the channel, and that he was also entitled to assume that skiers would continue to follow the established course irrespective of the signs. Because of these factual considerations, it was submitted that McPhan could not reasonably have foreseen that, in placing the signs where he did, he was either creating a likelihood of injury that had not previously existed, or increasing a likelihood of injury which had previously existed. Alternatively, it was submitted that, on the assumption that a duty was owed by the defendant to the plaintiff, the same considerations dictated a conclusion that there was no evidence that the duty had been broken.

Shirt v Wyong Shire Council [1978] 1 NSWLR 631 -
Shirt v Wyong Shire Council [1978] 1 NSWLR 631 -
BUCKLEY AND ANOTHER v. BENNELL DESIGN & CONSTRUCTIONS PTY. LTD. AND ANOTHER [1977] 1 NSWLR 110 (04 April 1977) (Reynolds, Hutley and Mahoney Jj.A)

Anderson v. Williams (1928) 29 S.R. (N.S.W.) 12 ; 45 W.N. 161 . Attorney-General for Manitoba v. Kelly [1922] 1 A.C. 268 . Attorney-General v. Shire of Kyneton (1875) 1 V.L.R. (E.) 269 . Attorney-General v. Wylde (1946) 47 S.R. (N.S.W.) 99 ; 63 W.N. 222 . Barras v. Aberdeen Steam Trawling & Fishing Co. Ltd. [1933] A.C. 402 . Bradshaw's Arbitration, Re (1848) 12 Q.B. 562 ; 116 E.R. 979 . Buckpitt v. Kimberley Investments Pty. Ltd. (1967) 87 W.N. (Pt. 1) (N.S.W.) 407 . Burns Johnson & Co. v. Frasers Ltd. [1913] Q.W.N. 22 . Campbell, Ex parte; Re Cathcart (1870) L.R. 5 Ch. App. 703 . Carr Brothers v. Dougherty (1898) 67 L.J.Q.B. 371 . Clark v. Sonnenschein (1890) 25 Q.B.D. 464 . Clyde Navigation Trustees v. Laird (1883) 8 App. Cas. 658 . Concrete Constructions Pty. Ltd. v. Barnes (1938) 61 C.L.R. 209 . Connolly v. Whitty (1895) 1 A.L.R. 105 . Connor v. Sankey [1976] 2 N.S.W.L.R. 570 . Cooke v. Newcastle & Gateshead Water Co. (1882) 10 Q.B.D. 332 . Dillon v. Gange (1941) 64 C.L.R. 253 . Dun v. Dun [1959] A.C. 272 . Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D. 20 . Dyke v. Cannell (1883) 11 Q.B.D. 180 . Glasbrook v. Owen (1890) 7 T.L.R. 62 . Goldman and Rule Nisi for Contempt of Court, Re (1968) 89 W.N. (Pt. 1) (N.S.W.) 175 . Hayward v. Mutual Reserve Association [1891] 2 Q.B. 236 . Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189 ; 140 E.R. 712 . Holgate v. Killick (1861) 7 H. & N. 418 ; 158 E.R. 536 . Holloway v. Francis (1861) 9 C.B.N.S. 559 ; 142 E.R. 219 . James, Ex parte; Re Condon (1874) L.R. 9 Ch. App. 609 . Jenkins, Ex parte (1871) 10 S.C.R. (N.S.W.) 231 . Johnson, Re (1887) 20 Q.B.D. 68 . Knight, Re

[1892] 2 Q.B. 613 . Kotsis v. Kotsis (1969) 14 F.L.R. 481 ; (1970) 122 C.L.R. 69 . Latham v. Foster's Australian Fibres Ltd. [1926] V.L.R. 427 . Louis Dreyfus & Co. and South Australian Milling & Trading Co., Re [1923] S.A.S.R. 75 . Macalpine & Co. v. Calder & Co. [1893] 1 Q.B. 545 . Macarthur v. Campbell (1833) 5 B. & Ad. 518 ; 110 E.R. 882 . Mansfield Union Guardians v. Wright (1882) 9 Q.B.D. 683 . Melbourne Corporation v. Barry (1922) 31 C.L.R. 174 . Miller v. Pilling (1882) 9 Q.B.D. 736 . Moore v. Fergusson (1892) 18 V.L.R. 266 . Munday v. Norton [1892] 1 Q.B. 403 . O'Brien v. Warringah Shire Council (Court of Appeal, 13th April, 1976, unreported) . O'Donoghue v. Oliphant (1903) 3 S.R. (N.S. W.) 47 ; 20 W.N. 19 . Olive v. Stirling [1941] V.L.R. 229 . Owen v. London and North Western Railway Co. (1867) L.R. 3 Q.B. 54 . Phillips v. Evans (1843) 12 M. & W. 309 ; 152 E.R. 1216 . Pillar v. Arthur (1912) 15 C.L.R. 18 . Platz v. Osborne (1943) 68 C.L.R. 133 . President of India v. Moor Line Ltd. No. 2 (1958) 99 C.L.R. 212 . R. v. Cain; Ex parte Evatt (1975) 50 A.L.J.R. 343 . R. v. Forbes (1865) 10 Cox C.C. 362 . R. v. Reynhoudt (1962) 107 C.L.R. 381 . R. v. Wallis (1949) 78 C.L.R. 529 . Rootes v. Shelton (1967) 116 C.L.R. 383 . Royal Crown Derby Porcelain Co. Ltd. v. Russell [1949] 2 K.B. 417 . Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation (1952) 85 C.L.R. 159 . Scranton's Trustee v. Pearse [192 2] 2 Ch. 87 . Small v. Murray (1899) 15 W.N. (N.S.W.) 231 . Sundell v. Queensland Housing Commission (No. 2) (1955) Q.S.R. 115 . Telsen Electric Co. Ltd. v. Eastick & Sons (No. 2) [1938] 1 All E. R. 436 . Travinto Nominees Pty. Ltd. v. Vlattas (1973) 129 C.L.R. 1 . Tuta Products Pty. Ltd. v. Hutcherson Bros. Pty. Ltd. (1972) 127 C.L.R. 253 . Walker v. Bunkell (1883) 22 Ch. D. 722 . Williams v. Official Assignee of Estate of William Dunn (1908) 6 C.L.R. 425 . Woolf v. Trebilco [1933] V.L.R. 180 . Young v. Tout (1933) 50 W.N. (N.S.W.) 234 .

Bulstrode v Trimble [1970] VR 840 (19 May 1970) (NEWTON, J)

Mr. Langslow submitted that in the present case there was in any event no scope for the operation of the rule in Browne v Dunn, because Bulstrode was never made available for cross-examination, so that Trimble's counsel never had the opportunity to put to Bulstrode in cross-examination the Trimble/ Ternock version of the collision. As against this Mr. Ormiston submitted by his submission (1) that the failure by Trimble to give notice pursuant to r79(6)(b) that he objected to the use of Bulstrode's affidavit was equivalent to an omission by Trimble to put to Bulstrode in cross-examination the Trimble/Ternock version of the collision. It is unnecessary for me to decide this particular question, because, for the reasons already stated, I consider that Mr. Ormiston's submissions (2) (a) and (b) fail in any event. But as at present advised, I consider that Mr. Langslow's submission is correct, and that Mr. Ormiston's submission (1) is wrong. I think that where one party gives to the other a notice pursuant to r79(6)(a) of his intention to use an affidavit, he is thereby, inter alia, informing the other party that he does not wish to give to the other party an opportunity to cross-examine the deponent, and I see no reason why the other party should not accept the loss of that opportunity, if he thinks that this will advance his own case, or at all events not harm it, and notwithstanding that he intends to adduce evidence in contradiction of the affidavit. No doubt litigation is not in all respects to be treated as equivalent to war or something else in which all is notoriously fair (pace per Kitto, J, in Rootes v Shelton (1967) 116 CLR 383 , at p. 389 ; [1968] ALR 33), and indeed the rule in Browne v Dunn is an example of this. But I consider that to treat the rule in Browne v Dunn as operating upon r79(6)(b) so as to impose upon the opposite party a duty to take the positive step of giving notice of objection to the affidavit in question, if he proposes to contradict it, when the proposal to use the affidavit is his opponent's proposal, not his, would be to impose upon a party to litigation a compulsory concern for the efficient presentation of his adversary's case which would be unreasonable. As earlier stated, I consider that r79(6)(b) is a provision wholly for the benefit of the opposite party to the party seeking to use the affidavit. Of course, as also earlier indicated, if a party (whom I shall call "the opposite party") failed to object pursuant to r(79)(6)(b) to his opponent's use of an affidavit upon what was to the knowledge of the opposite party certain or likely to become a controversial issue, and if his opponent at the hearing sought and obtained an adjournment for the purpose of calling the deponent, then the failure of the opposite party to give notice of objection to the use of the affidavit could, in some circumstances at least, operate against him in relation to the question of how the costs thrown away by the adjournment ought to be borne. But this would have nothing to do with the rule in Browne v Dunn. If the opposite party was ordered to bear costs thrown away by the adjournment, that would be because his failure to object to the affidavit was unreasonable from the point of view of the expeditious conduct of the case.

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Smith v Jenkins [1970] HCA 2 (06 February 1970) (Barwick C.j., Kitto, Windeyer, Owen and Walsh JJ)

> I do not understand this to mean that in all the cases, to which his Honour referred by way of illustration, the real basis of the failure of the action would be, in his opinion, an application of the principle of volenti non fit injuria or of the principle of contributory negligence. He seems to indicate that the plaintiff will be barred from recovery, on the ground of public policy and independently of other well-recognized defences, first, where the illegal act is a step in the execution of an illegal purpose common to himself and the defendant and, secondly, where in the course of committing a joint crime he suffers a harm which may be regarded as a necessary or contemplated incident of it. In stating the first of these grounds for barring a plaintiff from recovery his Honour referred to the observations of Lord Asquith in National Coal Board v. England (1954) AC 403, at p 429 . There his Lordship contrasted the case of the negligent handling of an explosive charge by one of two burglars whose common purpose was to open the safe by means of explosives with the case of the theft by one of them of the other's watch whilst they were proceeding to the scene of the intended crime. In the second of these cases his Lordship thought that an action in tort would lie, the theft being "totally unconnected with the burglary". It is clear that Adam J. did not regard either of the stated grounds as applicable to the case with which he was dealing. But if public policy provides a bar to recovery where the illegal act is a step in the execution of an illegal purpose common to the plaintiff and the defendant, it seems difficult to regard public policy as having no application to a case in which the illegal acts being committed by the plaintiff and the defendant at the time of the injury constitute the actual fulfilment of the illegal purpose which they had in common. It seems to me, with respect, that in the case with which his Honour was dealing the situation of the parties in regard to the execution of their illegal purpose corresponded more closely with the situation supposed in the first of Lord Asquith's illustrations than with that supposed in the second of them. In the passage which I have cited from his reasons Adam J. referred to the principle of volenti non fit injuria. But I do not think that this principle, as it has been expounded in Rootes v. Shelton (1967) 116 CLR 383 , can provide a satisfactory solution of the problem which this case presents. (at p431)

Mutual Life & Citizens' Assurance Co Ltd v Evatt [1968] HCA 74 (11 November 1968) (Barwick C.j., Kitto, Taylor, Menzies and Owen JJ)

> 21. But of course there must be significant differences between the nature of the relationships out of which a duty of care in utterance can be said to arise and the nature of those relationships out of which a duty of care in relation to acts or omissions springs. Also there must be a much greater number of occasions in connexion with the utterance of words which will not give rise to any duty than is the case with physical acts or omissions. Discussion and communication upon a social occasion when no legal relationships could possibly be in contemplation or utterances on matters of no serious or business import are instances of such occasions. But even on social occasions legal responsibility for acts or omissions may not arise as, for example, in the case of some physical acts or omissions in the course of a sport or pastime: see Rootes v. Shelton (1967) 116 CLR 383 and there are other occasions and situations in which legal liability will not be attracted, cf. Balfour v. Balfour (1919) 2 KB 571 and Rose and Frank Co. v. J. R. Crompton &Bros. Ltd. (1925) AC 445 . (at p569)