Roads and Traffic Authority of NSW v Dederer - [2007] HCA 42

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

ROADS AND TRAFFIC AUTHORITY
OF NSW APPELLANT

AND

PHILIP JAMES DEDERER & ANOR RESPONDENTS

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42
30 August 2007
S122/2007

ORDER

1. *Appeal allowed.*

2. *The first respondent to pay the appellant's costs.*

3. *Set aside orders 4, 5, 6 and 7 of the Court of Appeal of the Supreme Court of New South Wales made on 5 October 2006 and in their place order that:*

   (a) *the appeal to that Court by the Roads and Traffic Authority of NSW ("the RTA") be allowed;*

   (b) *set aside so much of the orders made by Dunford J in the Supreme Court of New South Wales on 18 March 2005 as disposed of the action against the RTA and in their place order that there be judgment for the RTA against the plaintiff; and*

   (c) *Mr Dederer to pay the costs of the RTA at trial and in the Court of Appeal.*

4. *Application for special leave to cross-appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with A C Casselden for the appellant (instructed by Henry Davis York Lawyers)

D F Jackson QC with D T Kennedy SC and G R Graham for the first respondent (instructed by Emery Partners)

Submitting appearance for the second respondent

CATCHWORDS

Roads and Traffic Authority of NSW v Dederer

Negligence – Duty of care – Scope of duty – Roads authority – The first respondent was injured after jumping into shallow water from a bridge erected by the appellant's predecessor – Whether the scope of the appellant's duty of care encompassed the circumstances in which the first respondent was injured – Distinction between the exercise of reasonable care and the prevention of harm.

Negligence – Breach – Standard of care – Prospective assessment of breach – Characterisation of relevant risk – Assessment of probability of risk – Assessment of gravity of risk – Assessment of practicability of precautions – Relevance of voluntary conduct and obviousness of risk – Relevance of "allurement" – Whether *Wyong Shire Council v Shirt* (1980) 146 CLR 40 was correctly applied.

Negligence – Contributory negligence – Reduction of damages by Court of Appeal – Whether Court of Appeal erred in disturbing trial judge's assessment.

Courts – Appeals – Limitations on appellate review of findings of fact – Meaning of "concurrent findings of fact".

Costs – *Sanderson* orders –– Circumstances in which it is appropriate to make a *Sanderson* order.

Words and phrases – "allurement", "concurrent findings of fact", "reasonable care", "roads authority", "scope of duty".

Civil Liability Act 2002 (NSW), s 5L .
Roads Act 1993 (NSW), s 7(4) .
Transport Administration Act 1988 (NSW), Pt 6, Sched 7 Div 5 .

1. GLEESON CJ. The principal question to be decided is whether this Court should overturn findings on negligence and causation made in the Supreme Court of New South Wales by the primary judge (Dunford J)[1] and the Court of Appeal (Ipp and Tobias JJA; Handley JA dissenting) [2] in an action for damages for personal injuries brought by the first respondent.

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[1] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792.

[2] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860.

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2. **Following paragraph cited by:**

Rockdale City Council v Simmons (17 April 2015) (Beazley P, McColl and Barrett JJA)

The facts and issues are set out in the reasons of Kirby J. The appellant is a public authority responsible for the construction and management of the Forster-Tuncurry bridge. The first respondent, then aged 14, dived from the bridge, with catastrophic consequences. It is not in dispute that the appellant owed the first respondent a duty to take reasonable care for his safety. That the first respondent's own serious carelessness contributed to his injuries is plain; a large deduction from the damages he was awarded was made on account of his contributory negligence. Nevertheless, the appellant owed him a duty of care, and there was an issue

whether, by its acts or omissions, it failed to take reasonable care for the safety of the first respondent. There was also an issue whether such failure was *a* cause of his injuries. Those issues, essentially factual, were resolved by the primary judge, and the Court of Appeal, adversely to the appellant. The bridge was not designed to be a platform from which people might, for their own amusement, jump or dive into the water below. That was not its intended use. Yet it was a use that was regularly made of it, even though diving was prohibited. A claim, by a young person who disregarded the prohibition, that the bridge authority failed to take reasonable care for his safety is not immediately attractive, and would not be accepted lightly. Its wider implications are obvious. Even so, the first respondent succeeded in his claim for damages (subject to a substantial reduction for contributory negligence) and his success was affirmed on appeal.

3. It is to be noted that the evidence in the case deals with the bridge and the railings as they were at the time of the injuries to the first respondent. They were still the same at the time of the trial. The bridge, in its present state, is there for anyone to see. At the time of the injury to the first respondent, and at the time of the trial, the railings on the northern side of the bridge consisted of three flat horizontal members. It was not difficult for a young person to mount the top rail and thereby use the bridge as a platform for jumping or diving. That is what the first respondent, and, according to the evidence, many others before him, did. The primary judge, and the majority in the Court of Appeal, criticised the appellant for not having installed a barrier (such as pool-type fencing) that would have been much more difficult to mount and use for diving. The fact that, in 1998, the design of the railings made it comparatively easy to climb on to or over the railings was an important part of the case against the appellant. There is no foundation in the evidence, or in common experience, for inferring that the only way to deter people from climbing and jumping would have been to adopt extreme and fanciful measures such as erecting a very high fence topped with shards of glass or razor wire. If the appellant had attempted, in argument, to persuade the Court to that view then it might have been challenged by questions prompted by the design of the present barrier.

4. The conclusion of the trial judge and the Court of Appeal that the appellant was negligent turned upon findings of primary fact, some of which were disputed and some of which were undisputed, inferences from those primary facts, and judgment as to what reasonableness required in the circumstances. Similarly, the issue of causation turned upon primary facts, inferences, and judgment on questions of probability.

5. In an appeal of this nature, the function of this Court, as a second appellate court and a court of final resort, is not simply to give a well-resourced litigant a third opportunity to persuade a tribunal to take a view of the facts favourable to that litigant. "It is well settled that a second appellate court, such as this Court is in the present case, should not, in the absence of special reasons such as plain injustice or clear error, disturb such concurrent findings" [3] . This is a principle of long standing, and its importance has not been diminished, but rather has been increased, in the circumstances of modern litigation.

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[3] *Louth v Diprose* (1992) 175 CLR 621 at 634 per Deane J.

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6. In *Graham Barclay Oysters Pty Ltd v Ryan* [4] , I referred to what was said about the principle by the House of Lords during the nineteenth century in *Owners of the "P Caland" and Freight v Glamorgan Steamship Co Ltd* [5] . That case concerned a collision between two ships. The question which vessel was to blame turned upon evidence about lighting. The Lord Chancellor, Lord Herschell, said that, weighing the probabilities, he would have been disposed to accept a particular view of the evidence, but he declined to give effect to that disposition because of what the House of Lords had said previously as to "the importance of not disturbing a mere finding of fact in which both the Courts below have concurred." [6] Suc h a step should be taken, he said, only "when it can be clearly demonstrated that the finding was erroneous." [7] Lord Watson said that it was "a salutary principle that judges sitting in a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at ... a tolerably clear conviction that [those] findings are erroneous." [8]

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[4] (2002) 211 CLR 540 at 568-569 [53]-[54] .

[5] [1893] AC 207 .

[6] [1893] AC 207 at 215.

[7] [1893] AC 207 at 215.

[8] [1893] AC 207 at 216.

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7. **Following paragraph cited by:**

   Horne v J K Williams Contracting Pty Ltd (31 March 2023) (Gleeson JA at [1]; Basten AJA at [2]; Griffiths AJA at [69].)

In *Major v Bretherton* [9] , a fraud case, Isaacs J discussed a "highly important question" which he said was raised "for the first time definitely in this Court". He referred to the "rule" as to the approach of a second appellate court to concurrent findings of fact. A judge in the Supreme Court of Victoria (Dixon AJ) had found that the defendant had not acted fraudulently. The Full Court of the Supreme Court upheld that finding. Isaacs J, after referring to decisions of the Privy Council and the House of Lords, said that the rule was as stated by Lord Herschell LC and Lord Watson in the case of *The P Caland*. He went on [10] :

> "By following it, I do not mean that as soon as I see there are concurrent findings I abstain from forming my own opinion. I am bound to consider the evidence and to form my own opinion consistently with judicial obligation and precedent. But when I have done so, the rule comes into play, and, unless I reach the point of clear conviction predicated by the House of Lords in the *P Caland Case*, the appeal should, in my opinion, fail."

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[9] (1928) 41 CLR 62 at 68.

[10] (1928) 41 CLR 62 at 70-71 (references omitted).

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8. The principle was referred to by Barwick CJ, with whom Stephen, Mason, Jacobs and Aickin JJ agreed, in *Baffsky v Brewis* [11] in relation to a finding as to whether a moneylender acted honestly and ought fairly to be excused for a breach of certain statutory requirements. It was also referred to by Mason J in connection with a finding about contributory negligence in *The Commonwealth v Introvigne* [12] .

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[11] (1976) 51 ALJR 170; 12 ALR 435.

[12] (1982) 150 CLR 258 at 274.

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9. In *Louth v Diprose* [13] (a case about unconscionable conduct) Deane J said:

> "[I]t is immaterial that the concurrent findings of fact by the court of first instance and the first appellate court encompass both findings of primary fact and conclusions and inferences of fact drawn from primary facts or that some conclusions or inferences of fact are based on different reasonings as between the two courts. Nor is it relevant that there has been a dissentient in the first appellate court."

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[13] (1992) 175 CLR 621 at 634 (references omitted).

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10. In the same case, Deane J referred to what he had earlier said in *Waltons Stores (Interstate) Ltd v Maher* [14] (concerning findings about mistaken belief in a contractual setting) as to the modern rationale of the principle, and the importance of litigious finality as a means of preserving equitable access to justice:

> "[I]t is in the overall interests of ... the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal."

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[14] (1988) 164 CLR 387 at 434-435 .

11. Callinan J and I invoked the principle in our dissenting reasons in *Bridgewater v Leahy* [15] . It is a principle that stands alongside, and applies in addition to, the principle concerning appellate intervention in factual judgments where a primary judge enjoys some particular advantage [16] . The principles exist for different reasons, although in many cases they work to the same end.

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[15] (1998) 194 CLR 457 at 471 [43] .

[16] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 569 [54] .

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12. In past times, in most Australian jurisdictions, including New South Wales, a decision on the issue of negligence in an action for damages for personal injuries would be made by a jury as the tribunal of fact. Since no reasons would be given for such a decision, the practical possibility of an appeal on the issue would be very limited [17] . Nowadays, as in the present case, the issue of negligence is normally dealt with by a trial judge who sits without a jury and who delivers a fully reasoned decision. This procedure facilitates (and in some cases invites) appellate review. The decision of a court of appeal also takes the form of a reasoned judgment, or of reasoned judgments, delivered after a reconsideration of all the evidence and arguments. The law continues to value finality [18] , which, as Deane J pointed out, is related to questions of reasonable and equal access to justice. The more litigation becomes a process of attrition, the greater will be the tendency for the outcome of litigation to depend upon the resources, or financial support, available to litigants. That is not good for the administration of civil justice. Given the substantial reduction of jury trials in the administration of civil justice, the respect which a second appellate court shows to concurrent findings of fact is an important counterweight to the seemingly inexorable tendency to prolong litigation. As Isaacs J said, it does not mean that this Court abdicates its own responsibilities; but it discharges those responsibilities with an appreciation that, for good reason, it requires to be clearly convinced of error before it will disturb such findings.

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[17] *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at 519-522 [1]-[8] .

[18] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

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13. Two examples involved in the findings on negligence and causation in the present case illustrate the point. The primary judge and the majority in the Court of Appeal found that the appellant was aware, over a period of years, of the propensity of many people to jump, and of some people to dive, from the bridge. That inference was based largely on two facts: first, a number of witnesses said they saw these things happen, and there is no reason to think such occurrences were not widely known; secondly, the appellant erected a sign which appeared to reflect an awareness of the practice. Again, the primary judge and the majority in the Court of

Appeal inferred that a more expansive sign, and a differently constructed railing or fence on the bridge, would have prevented the first respondent from diving. Those inferences were contestable, but they were open on the evidence, and the appellant's arguments on those matters were considered and rejected, for cogent reasons, by a trial judge and an appellate court.

14. A conclusion that a differently designed railing or fence on the bridge, or a differently expressed warning sign, would have deterred an over-confident youth, prepared to disregard an existing prohibition, from diving is a matter on which judgments may differ. Yet it is a judgment of a kind routinely made in negligence actions. When, in a given case, such a finding is reviewed and affirmed by an intermediate appellate court, then this Court should reverse the finding only when it is clearly convinced of error.

15. Subject to those additional observations as to the nature of the exercise that is involved, I agree with Kirby J, for the reasons he has given, that the findings on the issues of negligence and causation should not be overturned.

16. I also agree with what Kirby J has said about the matters of contributory negligence and costs, and with the orders he proposes.

17. GUMMOW J. In *Berrigan Shire Council v Ballerini* [19] , Callaway JA remarked that "[t]he relationship between duty and breach in the law of negligence is causing more perplexity than it used to do". This appeal bears out the force of that statement.

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[19] (2005) 13 VR 111 at 115.

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18. **Following paragraph cited by:**

Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)
Austen v Tran (29 November 2023) (McCallum CJ; Wheelahan J; Crowe AJ)

68 The Ipp Panel proposed that the “formula laid down in *Shirt* ” be modified by replacing the phrase “not far-fetched or fanciful” with a phrase indicating a risk that carries a higher probability of harm, favouring the phrase “not insignificant”. The result is s 43 of the *Civil Law (Wrongs) Act* and corresponding provisions which lay down a series of conditions and mandatory considerations for determining whether liability in negligence is established. They are of the first importance in identifying the proper starting point: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [11] (French CJ, Gummow, Hayne, Heydon and Crennan JJ). Although s 43 appears in Part 4.2 of the Act titled “Duty of care”, the conditions and mandatory considerations in s 43 are directed to the breach question: *Adeels Palace* at [13] ; see also, *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [202

2] HCA 11; 273 CLR 454 at [97]-[98] (Gordon, Edelman and Gleeson JJ). In relation to the magnitude of the risk, s 43(1)(b) provides for a threshold that the risk must have been "not insignificant". Subject to this threshold, the mandatory considerations in s 43(2) are similar to the type of things that would be relevant under the formulation in *Shirt* , and under the principles referred to by Gummow J in *Roads and Traffic Authority (NSW) v Dederer* at [18] with which there are clear parallels: see, *Cornwall v Jenkins as Trustee for the iSpin Family Trust* [2020] ACTCA 2; 15 ACTLR 233 at [27] (Burns and Loukas-Karlsson JJ, and Crowe AJ).

Austen v Tran (29 November 2023) (McCallum CJ; Wheelahan J; Crowe AJ)
Allied Pumps Pty Ltd v Hooker (05 May 2020) (Buss P, Murphy JA, Vaughan JA)
Allied Pumps Pty Ltd v Hooker (05 May 2020) (Buss P, Murphy JA, Vaughan JA)
Jadwan Pty Ltd v Rae & Partners (A Firm) (09 April 2020) (Bromwich, O'Callaghan and Wheelahan JJ)
Cornwall v Jenkins as Trustee for the iSpin Family Trust (19 February 2020) (Burns and Loukas-Karlsson JJ; Crowe AJ)
Lloyd v Thornbury (25 June 2019) (Meagher, Gleeson and White JJA)

58. The starting point is that breach must be assessed prospectively not retrospectively with the wisdom of hindsight: *Dederer* at [18] . The precaution which Mr Thornbury contended that Mr Lloyd failed to take against the relevant risk of harm was backfilling or barricading the holes. In determining whether a reasonable person in the position of Mr Lloyd would have taken those precautions against the risk of harm, s 5B(2) direct s attention to a number of non-exhaustive considerations: the probability of the harm occurring, the likely seriousness of the harm, the burden of taking precautions, and the social utility of the risk-taking activity. Mr Lloyd did not place any reliance on the last matter.

Lloyd v Thornbury (25 June 2019) (Meagher, Gleeson and White JJA)

Roads and Traffic Authority (NSW) v Dederer (2007) 234 CLR 330; [2007] HCA 42 at [18] ; *Civil Liability Act 2002* (NSW), ss 5B(1)(c), 5B(2)(a), 5B(2)(b) & 5B(2)(c) applied.

Jancevski v WR Engineering Pty Ltd (24 August 2018) (Murrell CJ, Elkaim and Charlesworth JJ)

38. The question is whether a reasonable person in WR's position, in possession of all of the information that WR knew, our ought reasonably to have known, would have taken the particular precaution: s 43(1)(c) of the Act. That question, in turn, cannot be answered without first articulating the actual risk of harm against which it is said the precaution ought to have been taken: *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 (*Dederer*) at [59] (Gummow J). The foreseeability of the risk is to be determined prospectively: *Wyong Shire*

Council v Shirt [1980] HCA 12; 146 CLR 40 at 47–48 (Mason J); *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [126]–[129] (Hayne J); *Dederer* at [18] and [65]–[66] (Gummow J) .

Libra Collaroy Pty Ltd v Bhide (04 August 2017) (McColl, Meagher and Ward JJA)
Libra Collaroy Pty Ltd v Bhide (04 August 2017) (McColl, Meagher and Ward JJA)
Libra Collaroy Pty Ltd v Bhide (04 August 2017) (McColl, Meagher and Ward JJA)
Gary Nigel Roberts v Westpac Banking Corporation (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)
Gary Nigel Roberts v Westpac Banking Corporation (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)
Gulic v Boral Transport Ltd (22 September 2016) (Macfarlan and Gleeson JJA, Garling J)
Downes v Affinity Health Pty Ltd (13 May 2016) (Holmes CJ and Morrison and Philip McMurdo JJA,)
Bitupave Ltd t/as Boral Asphalt v Pillinger (30 September 2015) (Ward, Emmett and Gleeson JJA)
Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

180. In *Grills v Leighton Contractors Pty Ltd* ,[122] Beazley P (Barrett and Gleeson JJA agreeing) referred to the observation of the High Court in *Ad eels Palace Pty Ltd v Mubarak* [123] that ss 5B and 5C of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**) are "evidently directly to questions of breach of duty" and that the heading to Div 2 of Part 1A of the Civil Liability Act (" Duty of Care ") is therefore "apt to mislead". On this basis her Honour said that it is an error to determine the existence and content of a duty of care by serial reference to the provisions of ss 5B and 5C . Her Honour also said that it risks confusion to refer to s 5B in the context of determining the existence of a duty of care: [124]

> "The factual circumstances in which injury occurs are relevant to the determination of the existence and scope of the duty of care. They are also relevant in respect of breach. However, the enquiry into the existence of the duty is different from the enquiry into breach. The existence of a duty of care is a question of law to be determined at a higher level of abstraction than the factual question of breach. In *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330, Gummow J observed, at [18] , that a duty of care imposed an obligation to exercise reasonable care. Breach requires the correct identification of the relevant risk of harm. This has not been altered by the *Civil Liability Act* which does not define or prescribe duty for the purposes of the law of negligence." (Some citations omitted.)

Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)
Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)

Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

149. I should add that the State's complaint that her Honour held it to too high a standard by using the language of obligation "*to ensure*" certain matters might have had force, if that language was taken by itself. As Gummow J explained in *Roads and Traffic Authority of NSW v Dederer* at [18] , " *a duty of care involves an obligation to exercise reasonable care*". There is no obligation to ensure harm does not occur. Thus, Gummow J explained, at [46], in respect of a road authority, that it "*is not obliged to exercise reasonable care in the abstract; still less is it obliged to ensure that a road be safe in all the circumstances*".

Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)
Liverpool Catholic Club Ltd v Moor (18 November 2014) (Meagher and Emmett JJA, Tobias AJA)

20. This ground may be disposed of shortly. As Gummow J noted in *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 at [18] , it is a basic and settled matter of principle that whatever its content or scope, a duty of care imposes an obligation to exercise reasonable care. That basic principle informs s 5B of the CL Act which provides that a person is not negligent in failing to take a precaution against a risk of harm unless a reasonable person in that person's position would have taken that precaution. See also *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [25] (McHugh J) and [118] (Hayne J).

Liverpool Catholic Club Ltd v Moor (18 November 2014) (Meagher and Emmett JJA, Tobias AJA)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

216. NSW's second proposition was that the duty analysis made by Walmsey AJ in *Warragamba Winery Pty Ltd v State of New South Wales (No 9)* [2012] NSWSC 701 (***Warragamba Winery***) is correct. This proposition involved a number of elements.

(1) The case is novel. None of the decisions referred to by the plaintiffs involve a public fire fighting service found liable in negligence for fighting a fire.

(2) The principles relevant to the determination of the issue of when a duty of care is to be identified in a novel case are brought together in *Graham Barclay Oysters* .

(3) Ordinarily, the common law does not impose a duty on a person to protect another from a risk of harm unless the person has created the

risk. Accordingly, the mere existence of a statutory scheme to empower an authority to protect the public from a particular harm does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [81]).

(4) The primary judge found two instances of negligence (failing to fight the Baldy spot fire on the morning of 9 January 2003 and failing to clear and back-burn from the River). As there is no appeal from those findings, it is right to characterise the case as one involving a failure to act.

(5) Merely because it is foreseeable that harm may result if a public authority fails to exercise its powers, that does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [145]). In *Sullivan* at [42] the Court said that:

> But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.

(6) A duty of care does not require the prevention of harm; it requires the taking of reasonable care (*Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; [2007] HCA 42 (***Dederer***) at [18]).

(7) The statute that empowers the authority to act must be closely examined (*Graham Barclay Oysters* at [78] and [146]). The purpose is to decide whether the legislation establishes a relationship whereby a duty is owed to specific individuals, as opposed to the public at large (*Graham Barclay Oysters* at [146] and [149]).

(8) Of particular importance are: - (i) the degree and nature of control exercised by the authority over the risk of harm that eventuated, (ii) the degree of vulnerability of those who depend on the proper exercise by the authority of its powers, and (iii) the consistency of the asserted duty of care with the terms, scope and purpose of the relevant statute (*Graham Barclay Oysters* at [84] and [149]).

(9) Also relevant are the considerations of inconsistency of a duty of care with other obligations (*Sullivan* at [60]) and indeterminacy of potential liability (*Sullivan* at [61]).

Lorrimar v Serco Sodexo Defence Services Pty Ltd (30 October 2014) (McColl and Macfarlan JJA, Tobias AJA)
Jackson v McDonald's Australia Ltd (26 May 2014) (McColl, Barrett and Ward JJA)
QBE v Orcher (23 December 2013) (McColl and Macfarlan JJA, Tobias AJA)
McKenna v Hunter & New England Local Health District (23 December 2013) (Beazley P, Macfarlan JA and Garling J)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Simon v Condran (20 November 2013) (Macfarlan and Leeming JJA, Sackville AJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

> 64. Thus the breach inquiry required the primary judge to identify accurately the actual risk of injury the appellant faced as it was only through the correct identification of the risk that her Honour could determine what a reasonable response to that risk would be: *Roads and Traffic Authority of New South Wales v Dederer* (at [18] , [59]) per Gummow J. As Gummow and Hayne JJ explained in *Graham Barclay Oysters Pty Ltd v Ryan* (at [192]), the inquiry as to breach "involves identifying, with some precision, what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk". In so saying, their Honours referred with approval to Isaacs A-CJ's observation in *Metr opolitan Gas Co v City of Melbourne* [1924] HCA 46; (1924) 35 CLR 186 (at 194), that "[n]o conclusion of negligence can be arrived at until, first, the mind conceives affirmatively what should have been done".

BHP Billiton Ltd v Parker (18 June 2012) (Doyle CJ; Gray and White JJ)
Roche Mining Pty Ltd v Jeffs (06 July 2011) (McColl and Basten JJA, Tobias AJA)
Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)

The errors of which the appellant rightly complains, regarding both the reasons of the trial judge and those of the New South Wales Court of Appeal, did not turn on factual matters upon which reasonable minds might differ. Rather, they concerned the misapplication of basic and settled matters of legal principle. These principles may be restated shortly. First, the proper resolution of an action in negligence depends on the existence and scope of the relevant duty of care. Secondly, whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct. Thirdly, the assessment of breach depends on the correct identification of the relevant risk of injury. Fourthly, breach must be assessed prospectively and not retrospectively. Fifthly, such an assessment of breach must be made in the manner described by Mason J in *Wyong Shire Council v Shirt* [20] .

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[20] (1980) 146 CLR 40 at 47-48 .

The facts

19. The facts are set out in greater detail in the reasons of Callinan J, but it is convenient to set out the main aspects here.

20. The estuary of the Wallamba River divides the twin towns of Forster and Tuncurry on the mid-north coast of New South Wales; Forster lying on the eastern bank, Tuncurry to the west. The estuary contains navigable channels as well as a large central sandbar of shifting depth and dimensions. The towns of Forster and Tuncurry are linked by a bridge which is 632 m long and which carries a two-lane bitumen roadway and a footpath on its northern side.

21. The facts established at the trial included the following. The footpath was enclosed by a wooden post and rail fence around 1.2 m high and consisting of a flat wooden top railing, two horizontal wooden cross-members, horizontal wires and vertical posts. Depending on tidal conditions, the top of the railing was around 9 m from the surface of the water. There was a pictogram indicating the prohibition "no diving" at each end of the bridge, and signs in words prohibiting fishing from, and climbing on, the bridge. The then current "no diving" pictograms were erected by the second respondent, the Great Lakes Shire Council ("the Council"), in 1995, with funding obtained from the appellant, the Roads and Traffic Authority of NSW ("the RTA").

22. The bridge was built in 1959 by the Department of Main Roads, the predecessor of the RTA. The RTA became the universal successor of that Department and the Commissioner for Main Roads pursuant to the *Transport Administration Act* 1988 (NSW), Sched 7 Div 5 , and now exercises the powers and functions set out in Pt 6 of that Act. Pursuant to s 7(4) of the *Roads Act* 1993 (NSW) , the Council was the relevant "roads authority" within the meaning of that statute. The extent of the obligations of such a "roads authority" was recently considered by this Court in *Leichhardt Municipal Council v Montgomery* [21] .

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[21] (2007) 81 ALJR 686; 233 ALR 200.

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23. The interplay between the statutory functions of the Council and the RTA with respect to the bridge was not fully considered at trial or in the Court of Appeal. It was concluded, however, that the RTA was responsible for the erection and maintenance of the bridge and that the Council was responsible for the day to day management of the bridge including, among other things, the enforcement of the prohibition contained in the various pictograms and signs. Each entity thus answered the common law description of a roads authority, namely, as Dixon J put it, "an authority exercising powers for the construction, maintenance, repair and control of highways" [22] .

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[22] *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 286.

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24. There was ample evidence that diving and jumping from the Forster-Tuncurry bridge was a widespread and longstanding practice among young people, although the precise frequency

and extent of this practice was disputed in this Court. Be that as it may, there was no dispute that until the accident that befell the first respondent, Mr Dederer, there were no reported injuries to those who jumped or dived from the bridge.

25. It was as a result of Council concern about jumping and diving that the "no diving" pictograms were erected. There had also been concern about the danger posed by divers to boats passing under the bridge rather than simply the danger to the divers themselves. Nor, for that matter, was the safety of divers the only potential risk associated with the bridge. Mr Alexander, an RTA officer, gave evidence that the safety issue relating to the bridge that was of most concern to the RTA was the potentially unsafe lack of separation between the traffic on the bridge and the large number of pedestrians and cyclists using the footpath.

26. **Following paragraph cited by:**

Ayre v Swan (16 August 2019) (Basten, Macfarlan and McCallum JJA)

On 31 December 1998, Mr Dederer was rendered partially paraplegic after he dived from the bridge into shallow water and struck his head on the estuary bed. Mr Dederer was then aged 14. He climbed onto the railing of the bridge and although he originally intended to jump into the water he changed his mind and dived head first instead. Mr Dederer and his family were familiar with the area, and he had seen many other young people jump or dive from the bridge. He had done so himself on the previous day without any harm. He admitted that he saw and understood the signs forbidding diving and climbing, and that he knew that the sandbar moved and that the channels were of variable depth.

The decision at trial

27. At trial in the Supreme Court of New South Wales (Dunford J sitting without a jury) Mr Dederer succeeded against both the RTA and the Council. His Honour found that Mr Dederer saw, understood, and deliberately disregarded the "no diving" pictograms, and that he knew that the water was of variable depth and that jumping from heights could cause injury. Nonetheless, Dunford J placed great emphasis on the fact that many people jumped or dived from the bridge both before and after the then current signs prohibiting diving were erected in 1995. He said [23] :

> "I am satisfied that almost from the time of its construction and certainly for many years prior to the plaintiff's accident young, and not so young, persons were regularly using the railing and ledge of the bridge as launching pads for jumping and diving into the water below, particularly, but not limited to, during the summer holidays. The reason why jumping and diving off the bridge was so popular was in part due to the flat topped railing along the outside boundary of the bridge, and the ease of access to that railing by reason of the wooden cross members which provided steps up to the top railing.
>
> Even if it was not anticipated prior to the construction of the bridge that it would be used in this way, it soon became apparent after its completion and foreseeable that the culture was likely to continue. Although the jumpers and divers entered

the water in or near the main navigation channel, both the RTA and the Council were aware of the moving sands and variable depths underneath the water, and it was therefore reasonably foreseeable, and not far fetched or fanciful, that if the practice continued someone engaging in the activity was liable to suffer serious injury.

I say this notwithstanding the fact that no one had in fact been injured in nearly 50 years, because the risks should have been so apparent to the officers of both defendants with knowledge of the estuary bed that it was in effect 'an accident waiting to happen'."

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[23] (2005) Aust Torts Reports ¶81-792 at 67,528-67,529 .

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28. The Council, but not the RTA, admitted that it was aware of this pattern of behaviour. Nonetheless, his Honour found that the RTA "must have known" of it, and because of the "continuing practice" or "culture" of diving Dunford J found that it was:

"not sufficient to ignore the fact that the signs were being disregarded and it is necessary to consider what, if any, further steps should reasonably have been taken by way of further warning signs, modification of the bridge or otherwise, to prevent injury to persons such as the plaintiff; or to put it another way, the content of the duty of care" [24] .

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[24] (2005) Aust Torts Reports ¶81-792 at 67,529.

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29. His Honour held that the RTA breached its duty of care and was negligent in failing to erect a "warning sign containing words similar to 'Danger, shifting sands, variable depth'"; in failing to replace the existing handrail with one composed of vertical (not horizontal) members like "a 'pool' type fence"; and in failing to modify the flat top of the handrail by attaching to it a triangular strip "making it difficult and uncomfortable to stand on, and almost impossible to balance on before jumping or diving" [25] . The evidence upon which the trial judge came to his conclusions respecting breach will require some explanation later in these reasons.

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[25] (2005) Aust Torts Reports ¶81-792 at 67,531.

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30. His Honour reduced Mr Dederer's damages by 25 per cent on account of his contributory negligence.

The decision of the Court of Appeal

31. An appeal by the Council was allowed on the basis that it was not liable to Mr Dederer because his injuries were "a result of the materialisation of an obvious risk of a dangerous recreational activity" within the meaning of s 5L of the *Civil Liability Act* 2002 (NSW) [26] . That Act did not apply to Mr Dederer's action against the RTA. The Council was joined as second respondent in this Court but played no active part in the appeal.

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[26] (2006) Aust Torts Reports ¶81-860 at 68,891-68,895 .

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32. The appeal by the RTA to the Court of Appeal regarding contributory negligence succeeded, and the proportion of Mr Dederer's contributory negligence was increased from 25 per cent to 50 per cent. That order is the subject of an application for special leave to cross-appeal to this Court, which is addressed later in these reasons. However, by majority (Ipp and Tobias JJA, Handley JA dissenting) the appeal by the RTA on liability failed.

33. The Court of Appeal rejected the RTA's ground of appeal relating to the trial judge's finding that it knew of the continued jumping and diving from the bridge [27] . In any event, Ipp JA held that:

> "the serious risk of devastating injuries to those engaged in such activities must have been obvious to the RTA. The RTA knew or ought to have known that particularly in the summer months, jumping and diving was occurring with startling frequency, involving at times, groups of young people every five or ten minutes, with a group capable of comprising 10 to 15 children aged 10 years to 16 years." [28]

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[27] (2006) Aust Torts Reports ¶81-860 at 68,899.

[28] (2006) Aust Torts Reports ¶81-860 at 68,900.

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34. Tobias JA, who agreed with Ipp JA's disposition of the appeal, endorsed these remarks and added that [29] :

> "given the knowledge of … the RTA that for children to jump from the bridge was dangerous and that diving from the bridge was *a fortiori* dangerous … it is but a small step to conclude that, with the knowledge that children continued to dive from the bridge in circumstances where the water below (depending upon tidal influences) was of variable depth and at times quite shallow, it would be reasonably foreseeable that at low tide in particular, when the water was shallow on the one hand and the height between the railing and the surface of the water is some 910 metres on the other, sooner or later a child would dive in a manner

resulting in serious injuries. As I have indicated, I would regard such a conclusion as a matter of common sense."

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[29] (2006) Aust Torts Reports ¶81-860 at 68,918.

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35. For the majority in the Court of Appeal, it was of central importance that the risk was one "created" by the RTA itself through its statutory predecessor. Ipp JA stated that [30] :

> "In the present case the RTA is to be regarded as having created the danger by erecting the bridge and by constructing it in a position and configuration that, since its construction, attracted young people to jump and dive from it into the water some nine to ten metres below. In a material sense, in the present context, *cr eating* the risk of harm is at least equivalent to *increasing* the risk." (emphasis in original)

Tobias JA agreed, saying that [31] :

> "the RTA had made the danger worse as its predecessors were responsible for the construction of the bridge and, in particular, the type of external railing which provided an easy platform to the RTA's knowledge for children to utilise for the purpose of jumping into the waters below".

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[30] (2006) Aust Torts Reports ¶81-860 at 68,908-68,909 . See also at 68,896, 68,901, 68,903.

[31] (2006) Aust Torts Reports ¶81-860 at 68,920-68,921 .

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36. Their Honours then fixed upon the fact that the "no diving" signs had not in fact prevented young people from diving from the bridge. Ipp JA stated [32] :

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[32] (2006) Aust Torts Reports ¶81-860 at 68,900.

> "There have been many decisions, including decisions of the High Court, holding that the erection of prohibitory signs is sufficient to discharge the duty of care owed by an entity in control of land on which dangerous activities may be undertaken by members of the public. But, breach of a duty of care is a question of fact, and each case depends on its own circumstances. In the present case, the signs that were erected (and that includes the signs prohibiting climbing on the

bridge as well as the pictographs) were not serving the purpose for which they had been erected. They were being ignored and the practice was continuing unabated. This was common knowledge. Mr Alexander referred to it as a 'well known event' and Mr [Pevitt] and the police had found enforcement of the prohibitions displayed on the sign impossible.

On the evidence of Mr Dederer, his father, Mr [Pevitt], Mr Keegan [two officers of the Council], Mr Cunial [a friend of Mr Dederer, born in 1980 who was with him on the day of the accident] and Mr Alexander himself, the practice of jumping and diving off the bridge continued with considerable frequency after 1995 notwithstanding the erection of the pictographs and the other prohibitory signs. The signs were not preventing children and young adults from endangering themselves in relatively large numbers on what seems to have been a daily basis over the summer months.

In these circumstances, the RTA must have known that the signs were, in a word, useless. And they must have known this from at least shortly after the pictographs were erected in 1995.

As part of the general duty of care owed by the RTA to users of the bridge, it should – in any event – have ascertained whether the pictograph signs were proving effective. On that basis, the RTA ought to have known that they were not".

His Honour amplified this conclusion under the heading "The reasonableness of the RTA's response to the risk" [33] :

"The obvious risks involved in jumping and diving off the bridge were not a deterrent. Many of the visitors to the bridge were children and young people. The RTA could not assume that these persons would take reasonable care for their own safety. Experience over many years had shown that, in large numbers, this was not what they were doing.

…

In my opinion, the RTA was not entitled to rely solely on the signs once it became apparent that they were not serving their purpose and were not having any noticeable effect on persons jumping or diving off the bridge."

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[33] (2006) Aust Torts Reports ¶81-860 at 68,900, 68,902.

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37. The result in the Court of Appeal was that the trial judge was correct to hold that "by the time Mr Dederer was injured … the erection of the signs was no longer a reasonable response to the risk that the RTA had created" [34] .

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[34] (2006) Aust Torts Reports ¶81-860 at 68,903.

38. Tobias JA held that it was not reasonable for the RTA "to simply ignore what it clearly knew to be a dangerous activity in which children were partaking and who could be expected to be oblivious to the risks involved" [35] . This statement sits rather oddly with the Court of Appeal's finding that the risk was of such obviousness even to a 14 year old that the Council was absolved of all liability.

[35] (2006) Aust Torts Reports ¶81-860 at 68,921.

39. The majority thus upheld the trial judge's ruling that the RTA was negligent in failing to attach a triangular top to the handrail and in failing to install vertical pool-type fencing [36] . Although the Court of Appeal correctly considered, contrary to the trial judge, that a sign of prohibition did constitute a "warning", the majority regarded a "mere" sign of prohibition to be unreasonable in the circumstances. However, their Honours considered the trial judge's proposed sign would have been similarly ineffective because "Mr Dederer in fact knew that there were shifting sands and variable depths and this did not prevent him from diving" [37] . Instead, their Honours found that a "composite sign" conveying the danger of "shallow water" would have been a reasonable response [38] . This conclusion was at odds with the trial judge's undisturbed finding that it was "probable that [such a] sign would also have been ignored, just as the 'diving prohibited' sign was ignored" [39] .

[36] (2006) Aust Torts Reports ¶81-860 at 68,905-68,906 .

[37] (2006) Aust Torts Reports ¶81-860 at 68,904.

[38] (2006) Aust Torts Reports ¶81-860 at 68,905.

[39] (2005) Aust Torts Reports ¶81-792 at 67,530.

40. Handley JA dissented. His Honour found that the trial judge had been in error in attributing to the RTA knowledge of continued *diving* from the bridge, as distinct from jumping therefrom, and that "[t]he absence of any recorded injury over the 39 years before the plaintiff's accident is eloquent testimony to the fact that the common practice of jumping off the bridge was not unsafe" [40] . His Honour added that "[i]f this was an accident waiting to happen it had been waiting for a very long time" [41] . So far as the exercise of reasonable care was concerned, his Honour summarised his views as follows [42] :

> "The signs proposed would not have told the plaintiff anything he did not already know, a triangular section on the handrail would not have discouraged the plaintiff

from diving off the ledge, and a pool type handrail would not have stopped him getting onto the ledge."

As his Honour pointed out, Mr Dederer did not give direct evidence about whether any of these matters would have caused him not to dive. A finding of causation in his favour was, at best, a matter of inference [43] .

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[40] (2006) Aust Torts Reports ¶81-860 at 68,876.

[41] (2006) Aust Torts Reports ¶81-860 at 68,876.

[42] (2006) Aust Torts Reports ¶81-860 at 68,880.

[43] (2006) Aust Torts Reports ¶81-860 at 68,880.

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41. Handley JA concluded that, in light of the State-wide obligations of the RTA and in light of Mr Dederer's voluntary participation in a recreational activity involving inherent risk, "the foreseeable risk of a diving accident from this bridge with a 39 year accident free history had no reasonable claim on [the RTA's] further attention or resources" [44] .

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[44] (2006) Aust Torts Reports ¶81-860 at 68,881-68,882 .

The appeal to this Court

42. The appeal by the RTA to this Court should be allowed. Unlike many recent appeals to this Court in negligence cases, the resolution of this appeal does not require consideration of factual matters regarding breach, upon which reasonable minds may differ [45] . Nor, despite submissions by the RTA, was the error of the Court of Appeal to be found in discrete and perhaps peripheral disputes of fact. Rather, the errors on the part of the majority of the Court of Appeal lay in fundamental matters of law: matters against which concurrent findings of fact are no insulation.

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[45] Examples include *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; *Neindorf v Junkovic* (2005) 80 ALJR 341; 222 ALR 631; *Roman Catholic Church Trustees for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161.

The scope of the RTA's duty of care

43. **Following paragraph cited by:**

State of New South Wales v T2 (by his tutor T1) (25 July 2025) (Bell CJ, Kirk JA and Price AJA)
Hassan v Minister for Home Affairs (22 April 2025) (Katzmann, Thawley and Kennett JJ)
Hassan v Minister for Home Affairs (22 April 2025) (Katzmann, Thawley and Kennett JJ)
Value Constructions Pty Ltd v Badra (31 July 2024) (Leeming and Kirk JJA, Griffiths AJA)
Collins v Insurance Australia Ltd (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

> 43. (2007) 234 CLR 330; [2007] HCA 42 at [43] (Gummow J, Heydon and Callinan JJ agreeing).

Collins v Insurance Australia Ltd (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

> 126. The judge referred, in the course of considering the existence of a duty, to the statement in *Roads and Traffic Authority of New South Wales v Dederer* , [43] that the obligations imposed by a duty of a care are "of a particular scope, and that scope may be more or less expansive depending on the relationship in question".

Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Lorrimar v Serco Sodexo Defence Services Pty Ltd (30 October 2014) (McColl and Macfarlan JJA, Tobias AJA)
Jackson v McDonald's Australia Ltd (26 May 2014) (McColl, Barrett and Ward JJA)
Parkview Constructions Pty Ltd v Abrahim (20 December 2013) (McColl and Gleeson JJA, Sackville AJA)
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management (04 April 2012) (McLure P, Pullin JA, Buss JA)
Council of the City of Greater Taree v Wells (01 July 2010) (Beazley, McColl and Basten JJA)
Council of the City of Liverpool v Turano (31 October 2008) (Beazley JA ; Hodgson JA; McColl JA)

> 117 The question of the content of the duty of care arose again recently in *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 238 ALR 761. Gummow J, with whose reasons Callinan and Heydon JJ agreed, stated at [43] :
>
> > "First, duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever

their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."

Hegarty v Queensland Ambulance Service (26 October 2007) (Jerrard and Keane JJA and Douglas J,)

Although the existence of a duty of care owed by the RTA to Mr Dederer was not in dispute, two points must be made about the nature and extent of that obligation. First, duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden.

44. Regarding the first point, a duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs). Sometimes, the determination of that legal obligation is more complicated than it was at the time Lord Atkin announced his "neighbour" principle in 1932 [46] . The law now recognises types of loss and kinds of relationships which are different from those of earlier days. Five members of this Court observed in their joint judgment in *Sullivan v Moody* [47] :

> "Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle." (citations omitted)

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[46] *Donoghue v Stevenson* [1932] AC 562 at 580.

[47] (2001) 207 CLR 562 at 579-580 [50] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

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45. **Following paragraph cited by:**

Russell v Carpenter (08 December 2022) (Meagher, Gleeson and Kirk JJA)

Jfit Holdings Pty Ltd t/as New Dimensions Health and Fitness v Powell (08 July 2021) (White JA, Simpson AJA and Harrison J)
Council of the City of Sydney v Bishop (28 June 2019) (Basten, Macfarlan and Brereton JJA)
Hawkesbury Sports Council v Martin (16 April 2019) (Meagher JA and Emmett AJA at [1]; Simpson AJA at [44])
Bruce v Apex Software Pty Ltd (18 December 2018) (Meagher, Leeming and White JJA)
Raad v VM & KTP Holdings Pty Ltd (01 August 2017) (Macfarlan and Simpson JJA, Sackville AJA)
Ratewave Pty Ltd v BJ Illingby (19 May 2017) (Macfarlan and Meagher JJA, Fagan J)
ALDI Foods Pty Ltd v Young (13 May 2016) (Meagher and Simpson JJA, Adamson J)
Australia and New Zealand Banking Group Ltd v Haq (03 May 2016) (Basten and Simpson JJA, Sackville AJA)

93. Reliance was placed on *Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy* [2015] NSWCA 253, in which Leeming JA said (*inter alia*):

> "53 Finally, the scope of an occupier's duty is delimited by the expectation that users will exercise reasonable care for their own safety … [and, citing *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; 234 CLR 330 at [45] , per Gummow J] the expectation that a potential plaintiff will exercise reasonable care in a case such as the present goes not merely to the assessment of breach, but is a 'specific element contained, as a matter of law, in the scope of the … duty of care'." (internal citations omitted)

Schultz v McCormack (23 October 2015) (McColl and Macfarlan JJA, Beech-Jones J)
Bitupave Ltd t/as Boral Asphalt v Pillinger (30 September 2015) (Ward, Emmett and Gleeson JJA)
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy (27 August 2015) (McColl, Basten and Leeming JJA)
Stenning v Sanig (27 July 2015) (Macfarlan, Hoeben and Gleeson JJA)

20. His Honour also relied upon the observation by Gleeson JA in *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 where his Honour said:

> "159 The scope of the occupier's duty of care is marked out by the relationship between the occupier and users exercising reasonable care for their own safety. Thus, "the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case": *Roads and Traffic Authority of New South Wales v Dederer and Another* [2007] HCA 42; 234 CLR 330 at [45] (*Dederer*). This involves a factual judgment which may depend on the circumstances of the case: *Thompson v Woolworths (Q'land) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [35] ."

Fabre v Lui (10 June 2015) (Basten, Macfarlan and Meagher JJA)

Rockdale City Council v Simmons (17 April 2015) (Beazley P, McColl and Barrett JJA)
Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

110. Accordingly, the circumstances as to whether Leighton owed of a duty of care is to be determined having regard to the following matters. Leighton was the operator of the ED. Its usual duty of care as a road operator, as it accepted, was "*to exercise reasonable care so that the road is safe for users exercising reasonable care for their own safety*": see *Roads and Traffic Authority of NSW v Dederer* at [45] per Gleeson CJ . The circumstances in which Leighton operated the motorway on 22 February and 25 February were different from the circumstances in which it usually operated the motorway in that there was a security operation that required the closure of the motorway to civilian traffic to ensure the safe passage of the Vice Presidential motorcade. The motorway was to be closed as and when directed by the police.

Jackson v McDonald's Australia Ltd (26 May 2014) (McColl, Barrett and Ward JJA)

8. Gleeson JA (with whom Emmett JA and Tobias AJA agreed) addressed the content of the assumption that an entrant uses reasonable care for his or her safety in his pellucid judgment in *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 (at [159]) as follows:

   "[159] The scope of the occupier's duty of care is marked out by the relationship between the occupier and users exercising reasonable care for their own safety. Thus, 'the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case': *Roads and Traffic Authority of New South Wales v Dederer and Another* [2007] HCA 42; 234 CLR 330 at [45] (***Dederer***). This involves a factual judgment which may depend on the circumstances of the case: *Thompson v Woolworths (Q'land) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [35] ."

Boral Bricks Pty Ltd v Cosmidis (No 2) (07 May 2014) (McColl, Basten and Emmett JJA)
Reid v Commercial Club (Albury) Ltd (03 April 2014) (Emmett and Gleeson JJA, Tobias AJA)
Reid v Commercial Club (Albury) Ltd (03 April 2014) (Emmett and Gleeson JJA, Tobias AJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

48. The respondent did not contend at trial, or on appeal, that the appellant owed him any duty of care higher than that of an ordinary occupier of land. That duty required the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent arising from the physical state of its land on the assumption that he used reasonable care for his safety: *A*

ustralian Safeways Stores Pty Ltd v Zaluzna [1987] HCA 7; (1987) 162 CLR 479 (at 488) per Mason, Wilson, Deane and Dawson JJ; *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; (2007) 234 CLR 330 (at [45]) per Gummow J. The basis of the appellant's duty, as an occupier in relation to the physical state or condition of the ramp, was its control over, and its knowledge (actual or constructive), of the state of the ramp: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 (at [18]) per Gleeson CJ.

Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)
Condos v Clycut Pty Ltd (16 July 2009) (McColl JA at 1; Campbell JA at 95; Macfarlan JA at 96)
Central Goldfields Shire v Haley & Ors (24 June 2009) (Neave and Redlich JJA and Pagone AJA)
Wynn Tresidder Management v Barkho (16 June 2009) (Tobias JA at 1; McColl JA at 2; Young JA at 114)

Many of those matters were canvassed in *Brodie v Singleton Shire Council* [48] . The result of that case is that a road authority is obliged to exercise reasonable care so that the road is safe "for users exercising reasonable care for their own safety" [49] . The expression of the scope of the RTA's duty of care in those terms has long antecedents in the law relating to occupiers' liability. In *Indermaur v Dames*, giving the judgment of the Court of Common Pleas[50], Willes J held that [51] :

> "we consider it settled law, that [a visitor], using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger".

The modern form of that principle has been frequently affirmed in recent times, both with regard to occupiers and roads authorities [52] . Of course, the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case [53] , but in the present case it was also a specific element contained, as a matter of law, in the scope of the RTA's duty of care.

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[48] (2001) 206 CLR 512 .

[49] (2001) 206 CLR 512 at 581 [163] .

[50] Erle CJ, Willes, Keating and Montague Smith JJ.

[51] (1866) LR 1 CP 274 at 288.

[52] Examples include *Phillis v Daly* (1988) 15 NSWLR 65 at 74 ; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 478 [123] ; *Neindorf v Junkovic* (2005) 80 ALJR 341 at 362 [99]; 222 ALR 631 at 656657 .

[53] *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234 at 246 [35] .

46. **Following paragraph cited by:**

Nightingale v Blacktown City Council (23 December 2015) (Beazley P, Basten, Macfarlan, Meagher and Simpson JJA)

A road authority such as the RTA is not obliged to exercise reasonable care in the abstract; still less is it obliged to ensure that a road be safe in all the circumstances. So much was recently reaffirmed in *Leichhardt Municipal Council v Montgomery* [54] . Such an expression of the duty's scope has an obvious and direct consequence when assessing breach. As Gaudron, McHugh and Gummow JJ stated in *Brodie* [55] :

> "In dealing with questions of breach of duty, whilst there is to be taken into account as a 'variable factor' the results of 'inadvertence' and 'thoughtlessness', a proper starting point may be the proposition that the persons using the road will themselves take ordinary care." (citations omitted)

Their Honours went on to observe that persons exercising reasonable care will be able to avoid injury in some situations, whereas others will present "a foreseeable risk of harm even to persons taking reasonable care for their own safety" [56] .

[54] (2007) 81 ALJR 686; 233 ALR 200.

[55] (2001) 206 CLR 512 at 580 [160] .

[56] (2001) 206 CLR 512 at 581 [163] .

47. **Following paragraph cited by:**

Hornsby Shire Council v Salman (27 June 2024) (White and Adamson JJA, Basten AJA)
Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales (25 February 2020) (Macfarlan and White JJA, Simpson AJA)
Raad v VM & KTP Holdings Pty Ltd (01 August 2017) (Macfarlan and Simpson JJA, Sackville AJA)
Novakovic v Stekovic (27 March 2012) (McColl and Whealy JJA, Tobias AJA)
Stephens v Giovenco; Dick v Giovenco (15 March 2011) (Allsop P, Hodgson and Tobias JJA)
Council of the City of Greater Taree v Wells (01 July 2010) (Beazley, McColl and Basten JJA)
Council of the City of Greater Taree v Wells (01 July 2010) (Beazley, McColl and Basten JJA)

Shire of Gingin v Coombe (25 May 2009) (Martin CJ)

The RTA's duty of care was owed to all users of the bridge, whether or not they took ordinary care for their own safety; the RTA did not cease to owe Mr Dederer a duty of care merely because of his own voluntary and obviously dangerous conduct in diving from the bridge. However, the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road is safe "for users exercising reasonable care for their own safety" [57] . The essential point is that the RTA did not owe a more stringent obligation towards careless road users as compared with careful ones. In each case, the same obligation of reasonable care was owed, and the extent of that obligation was to be measured against a duty whose scope took into account the exercise of reasonable care by road users themselves.

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[57] *Brodie* (2001) 206 CLR 512 at 581 [163] .

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48. In the Court of Appeal [58] , Ipp JA referred to and adopted remarks he made in the earlier case of *Edson v Roads and Traffic Authority* [59] , in which the plaintiff and many others exercised an obvious disregard for their own safety when they crossed a busy highway on foot. After referring to the passage from *Brodie* set out above, his Honour remarked that [60] :

> "the factual underpinning of the proposition that a road authority is duty bound only to require a road to be safe not in all circumstances but for pedestrians exercising reasonable care for their own safety, was absent. Here, the RTA long knew that the pedestrians were not exercising reasonable care for their own safety and, in large numbers, were constantly not doing so. The RTA could not rely on residents in the vicinity of the path to look after themselves and to act with due care."

In the present case, his Honour concluded that "the 'factual underpinning' was also absent" [61] . This was in error, as the expectation of reasonable care was not merely a "factual underpinning", but rather a legal aspect of the scope of the duty owed by the RTA.

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[58] (2006) Aust Torts Reports ¶81-860 at 68,901.

[59] (2006) 65 NSWLR 453 .

[60] (2006) 65 NSWLR 453 at 468.

[61] (2006) Aust Torts Reports ¶81-860 at 68,901.

Reasonable care, not prevention

49. **Following paragraph cited by:**

McLeod v Mainfreight Distribution Pty Ltd (10 September 2021) (Beach, Kaye and Osborn JJA)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Anwar v Mondello Farms Pty Ltd (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)

In simple and complicated cases alike, one thing is fundamental: while duties of care may vary in content or scope, they are all to be discharged by the exercise of *reasonable* care. In *V airy v Wyong Shire Council*, McHugh J explained [62] :

> "[T]he duty in negligence is generally described as a duty to take reasonable care. In some areas of the law of negligence, however, the duty is expressed in more limited and specific terms. Until the decision of this Court in *Zaluzna* [63] , for example, the duty owed to entrants upon privately owned land varied according to the category of the entrants. They were classified as invitees, licensees and trespassers. Similarly, the duty in respect of negligent statements is more specific and limited than a simple duty to take reasonable care in all the circumstances of the case. In negligence cases involving physical injury, however, the duty is always expressed in terms of reasonable care. As Prosser and Keeton have pointed out, 'the duty is always the same – to conform to the legal standard of reasonable conduct in the light of the apparent risk'[64]."

His Honour dissented from the outcome in *Vairy* , but that does not qualify the cogency of the above observations.

[62] (2005) 223 CLR 422 at 432 [25] .

[63] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

[64] *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 356.

50. Leaving aside matters such as vicarious liability and the potential existence of non-delegable duties of care – neither of which are presently relevant – the exercise of reasonable care is

always sufficient to exculpate a defendant in an action in negligence. In *Blyth v Birmingham Waterworks*, Alderson B laid down the nature of the action as long ago as 1856 [65] :

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Blyth was a case in which the exercise of reasonable care was sufficient to exonerate the defendants notwithstanding the plaintiff's injuries. However, the standard of reasonable care also results in the inculpation, rather than exoneration, of defendants. In the earlier case of *Va ughan v Menlove*, Tindal CJ was able to say that [66] :

> "The care taken by a prudent man has always been the rule laid down …
>
> > Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual ... we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

It was therefore insufficient, in the judgment of his Lordship, that the defendant had acted "honestly and bonâ fide to the best of his own judgment" [67] .

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[65] (1856) 11 Exch 781 at 784 [156 ER 1047 at 1049].

[66] (1837) 3 Bing (NC) 468 at 475 [132 ER 490 at 493].

[67] (1837) 3 Bing (NC) 468 at 474 [132 ER 490 at 493].

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51. **Following paragraph cited by:**

Russell v Carpenter (08 December 2022) (Meagher, Gleeson and Kirk JJA)
McKenna v Hunter & New England Local Health District (23 December 2013) (Beazley P, Macfarlan JA and Garling J)
Preti v Sahara Tours Pty Ltd (07 April 2008) (Mildren, Thomas & Riley JJ)

Such an obligation to exercise reasonable care must be contrasted with an obligation to prevent harm occurring to others. The former, not the latter, is the requirement of the law. In *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [68] , Gleeson CJ pointed to the remarks of Brennan J in *Sutherland Shire Council v Heyman* [69] and observed that "the common law distinguishes between an act affecting another person, and an omission to prevent harm to another. If people were under a legal duty to prevent foreseeable harm to others, the burden imposed would be intolerable." In *Heyman* [70] , Brennan J had emphasised that the common

law recognises "a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to another by that other, by a third person, or by circumstances for which nobody is responsible".

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[68] (2000) 205 CLR 254 at 266 [28].

[69] (1985) 157 CLR 424.

[70] (1985) 157 CLR 424 at 478.

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52. That recognition can be seen in the recent rejection by this Court in *Montgomery* [71] of the existence of a nondelegable duty of care owed by roads authorities to road users. Whatever its content, the existence of such a non-delegable duty was inconsistent with the general obligation of reasonable care owed by roads authorities to the users of roads, including pedestrians. Gleeson CJ observed in *Montgomery* [72]:

> "The formulation of the duty of care given in *Brodie*, in its application to cases of misfeasance, and to a case where a roads authority has exercised its powers by engaging an independent contractor … is not a special duty to ensure anything; certainly not a duty to ensure that no worker behaves carelessly. It is a duty to exercise reasonable care."

Likewise, as Hayne J succinctly put it, "the test for determining a highway authority's liability … [is] the ordinary test of liability in negligence" [73].

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[71] (2007) 81 ALJR 686; 233 ALR 200.

[72] (2007) 81 ALJR 686 at 695 [26]; 233 ALR 200 at 209.

[73] (2007) 81 ALJR 686 at 719 [148]; 233 ALR 200 at 241.

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53. The RTA correctly complains that this orthodox approach was not applied at trial or in the Court of Appeal. The trial judge and the majority in the Court of Appeal each fixed on the failure of the "no diving" pictograms and "no climbing" signs to *prevent* diving or jumping from the bridge. The trial judge was "satisfied" that the signs "were *not effective* in the sense that large numbers of young people continued to jump, dive, do somersaults, etc from the bridge into the water", and his Honour found it "not sufficient to ignore the fact that the signs were being disregarded" [74]. In the Court of Appeal, Ipp JA reasoned that the signs "were not serving the purpose for which they had been erected"; that is, they "were not *preventing* children and young adults from endangering themselves in relatively large numbers on what seems to have been a daily basis over the summer months" and they were being "ignored and the practice was continuing unabated" [75]. Tobias JA asked whether the "known fact" of continued jumping called "for different measures to be adopted by the RTA to *prevent* the

practice at least of jumping off the bridge". His Honour concluded that it was unreasonable "to ignore the well-known practice of children jumping from the bridge in defiance of 'No Diving' signs" [76] .

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[74] (2005) Aust Torts Reports ¶81-792 at 67,527, 67,529 (emphasis added).

[75] (2006) Aust Torts Reports ¶81-860 at 68,900 (emphasis added).

[76] (2006) Aust Torts Reports ¶81-860 at 68,919, 68,920 (emphasis added).

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54. The error in that approach lies in confusing the question of whether the RTA failed to prevent the risk-taking conduct with the separate question of whether it exercised reasonable care. If the RTA exercised reasonable care, it would not be liable even if the risk-taking conduct continued. If the contrary were true, then defendants would be liable in any case in which a plaintiff ignored a warning or prohibition sign and engaged in the conduct the subject of the warning. Whether or not other persons engaged in that conduct, such a defendant would *ipso facto* have failed to prevent at least the plaintiff from engaging in it. If this quasi-automatic form of liability represented the true state of the law, it would be startlingly at odds with the general proposition that liability in tort depends upon proof of fault through the intentional or negligent infliction of harm [77] . More particularly, it would also be at odds with the decision in *Montgomery* that roads authorities owe only a duty to take reasonable care, and do not owe a more stringent or non-delegable duty.

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[77] cf *Northern Territory v Mengel* (1995) 185 CLR 307 at 341-342 .

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55. The trial judge and the majority in the Court of Appeal impermissibly reasoned that if a warning is given, and if the conduct against which that warning is directed continues notwithstanding the warning, then the party who gave the warning is shown to have been negligent by reason of the warning having failed. Quite apart from its inconsistency with the scope of the RTA's duty of care, this reasoning erroneously short-circuits the inquiry into breach of duty that is required by *Shirt* , a matter discussed later in these reasons.

56. Even reasonable warnings can "fail", but the question is always the reasonableness of the warning, not its failure. Ipp JA's statement, based on a reference to another case [78] , to the effect that a warning sign is "not an automatic, absolute and permanent panacea" [79] was no substitute for a proper assessment of reasonableness. Whether or not the passage referred to by his Honour did in fact bear the meaning attributed to it by him, the words of Windeyer J in *Teubner v Humble* are apposite [80] :

> "[D]ecisions on the facts of one case do not really aid the determination of another case. Observations made by judges in the course of deciding issues of fact ought not to be treated as laying down rules of law. Reports should not be ransacked

and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application … That would lead to the substitution of a number of rigid and particular criteria for the essentially flexible and general concept of negligence."

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[78] *Waverley Council v Lodge* (2001) 117 LGERA 447 at 459.

[79] (2006) Aust Torts Reports ¶81-860 at 68,903.

[80] (1963) 108 CLR 491 at 503.

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57. What is demonstrated here is a by-product of the common law technique which looks to precedent and operates analogically as a means of accommodating certainty and flexibility in the law. Equity, by contrast, involves the application of doctrines themselves sufficiently comprehensive to meet novel cases. The question of a plaintiff "what is your equity?" [81] thu s has no common law counterpart.

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[81] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 216 [8] per Gleeson CJ.

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58. **Following paragraph cited by:**

Coles Supermarket Australia Pty Ltd v Harris (29 June 2018) (Mossop, Loukas-Karlsson and Charlesworth JJ)

37. In *Dederer* Gummow J issued a similar caution. His Honour said at [58] :

> The utility of factual parallels lies not in determining the correctness of decisions of fact, but rather in determining whether the correct legal tests were applied. Apothegms relating to factual matters are unlikely to focus the mind on the resolution of the legal questions that were presented.

The probability issue

The utility of factual parallels lies not in determining the correctness of decisions of fact, but rather in determining whether the correct legal tests were applied. Apothegms relating to factual matters are unlikely to focus the mind on the resolution of the legal questions that were presented.

The proper identification of the risk

59. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)
Austen v Tran (29 November 2023) (McCallum CJ; Wheelahan J; Crowe AJ)
Austen v Tran (29 November 2023) (McCallum CJ; Wheelahan J; Crowe AJ)
Farriss v Axford (26 October 2023) (Meagher and Mitchelmore JJA, Simpson AJA)
Venues NSW v Kane (18 August 2023) (Leeming and Adamson JJA, Simpson AJA)

> 55. In final address, counsel for Venues NSW introduced as the appropriate risk of harm "that of a patron losing their balance and falling and sustaining injuries whilst walking down steps within the stadium." There was no challenge to the formulation of the risk of harm, and thus this Court should proceed on that basis. However, I have some misgivings as to whether that is the appropriate risk. The point of identifying a risk of harm in a failure to act case is so that ss 5B and 5C (and perhaps other provisions) may be applied. After all, it is "only through the correct identification of the risk that one can assess what a reasonable response to that risk would be": *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [59] . The risk of harm should not be unduly narrow: see for example *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156 at [67] . The stairs were two way, and almost every spectator who travelled down the steps would also have ascended the same steps or other similar steps nearby. People can and do fall as they ascend steps and as they descend steps, and to my mind it is far from clear that s 5B is to be applied only to the risks presented by spectators descending the steps and is to be put to one side in respect of the risks presented by spectators ascending the steps.

Russell v Carpenter (08 December 2022) (Meagher, Gleeson and Kirk JJA)
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (23 October 2020) (Basten, Payne and McCallum JJA)
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (23 October 2020) (Basten, Payne and McCallum JJA)
Nikolich v Webb (21 October 2020) (Murphy, Beech and Vaughan JJA)
Menz v Wagga Wagga Show Society Inc (21 April 2020) (Leeming, Payne and White JJA)

> 50. This is one of the signal changes effected by the *Civil Liability Act* . While the correct identification of the risk of harm was stated to be essential to identify a reasonable response in decisions to which the statute did not apply (for example, *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [59]), the statute crystallises the position. It is not surprising that most of the decisions on

the way in which the risk of harm is to be formulated have been decisions to which the civil liability legislation applied.

Lloyd v Thornbury (25 June 2019) (Meagher, Gleeson and White JJA)
Jancevski v WR Engineering Pty Ltd (24 August 2018) (Murrell CJ, Elkaim and Charlesworth JJ)
Coles Supermarkets Australia Pty Ltd v Bridge (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

20. That said, we see no error in the approach taken by the primary judge. The provisions of the *Civil Liability Act* require the analysis to start with a risk of harm: see *Uniting Church in Australia Property Trust (NSW) v Miller; Miller v Lithgow City Council* (2015) 91 NSWLR 752; [2015] NSWCA 320 at [104]-[107] . It seems plain that there is no single correct "risk of harm", and that there are leeways of choice between formulations that are more or less general or specific: *Uniting Church in Australia Property Trust (NSW) v Miller* at [119] . However, it is "only through the correct identification of the risk that one can assess what a reasonable response to that risk would be": *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [59] (Gummow J, with whom Heydon J agreed).

Coles Supermarkets Australia Pty Ltd v Bridge (17 August 2018) (Leeming and Payne JJA, Emmett AJA)
Coles Supermarket Australia Pty Ltd v Harris (29 June 2018) (Mossop, Loukas-Karlsson and Charlesworth JJ)

13. On this appeal, it is the standard of care that is in issue, more precisely whether the appellant provided adequate safeguards against the risk of harm to which the respondent was exposed. It is not possible to answer that question without first identifying and articulating that risk: *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 (" *Dederer* ") at [59] (Gummow J) . In our view, the risk may be described as the risk of an injury should an employee lose balance and fall when dismounting sideways from the step. Whilst the risk might be articulated in a more general fashion, doing so in the present case would not affect the ultimate result.

Southern Colour (Vic) Pty Ltd v Parr (20 October 2017) (Santamaria, Kaye and Ashley JJA)
Nepean Blue Mountains Local Health District v Starkey (25 July 2016) (McColl and Payne JJA, Garling J)
Nepean Blue Mountains Local Health District v Starkey (25 July 2016) (McColl and Payne JJA, Garling J)
Uniting Church in Australia Property Trust (NSW) v Miller (16 December 2015) (Beazley P, Davies J and R S Hulme AJ)
Uniting Church in Australia Property Trust (NSW) v Miller (16 December 2015) (Beazley P, Davies J and R S Hulme AJ)

Uniting Church in Australia Property Trust (NSW) V Miller; Miller v Lithgow City Council (15 October 2015) (Basten, Leeming and Simpson JJA)
Uniting Church in Australia Property Trust (NSW) V Miller; Miller v Lithgow City Council (15 October 2015) (Basten, Leeming and Simpson JJA)
Collins v Clarence Valley Council (03 September 2015) (McColl, Macfarlan and Emmett JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Port Macquarie Hastings Council v Mooney (20 May 2014) (Emmett JA, Sackville AJA and Simpson J)

52. In order to apply both ss 5B and 5C of the Civil Liability Act it is necessary, just as it was under the pre-existing general law, to identify the relevant "risk of harm": *Bellingen Shire Council v Colavon Pty Ltd* [2012] NSWCA 34; 188 LGERA 169 at [56] (Beazley JA, with whom Whealy JA and I agreed). As Gummow J (with whom Heydon J agreed) pointed out in *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 at [59] , it is only through the correct identification of the risk of injury that a court can assess what a reasonable response to the risk might be.

BHP Billiton Ltd v Parker (18 June 2012) (Doyle CJ; Gray and White JJ)
Council of the City of Greater Taree v Wells (01 July 2010) (Beazley, McColl and Basten JJA)

Even if the trial judge and the Court of Appeal had properly ascertained the scope of the RTA's duty of care, and had accurately discerned that its obligation extended only to the exercise of reasonable care, their Honours would still have been led into error if they did not accurately identify the actual risk of injury faced by Mr Dederer. It is only through the correct identification of the risk that one can assess what a reasonable response to that risk would be. In this, too, the majority in the Court of Appeal erred.

60. **Following paragraph cited by:**

De Martin & Gasparini Pty Ltd v Bartlett (02 April 2025) (Leeming and McHugh JJA, Price AJA)
De Martin & Gasparini Pty Ltd v Bartlett (02 April 2025) (Leeming and McHugh JJA, Price AJA)
McLeod v Mainfreight Distribution Pty Ltd (10 September 2021) (Beach, Kaye and Osborn JJA)
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (23 October 2020) (Basten, Payne and McCallum JJA)
Singh v Lynch (23 July 2020) (Basten, Leeming, Payne and McCallum JJA, Simpson AJA)
Liprini v Hale (03 July 2020) (Macfarlan and McCallum JJA, Emmett AJA)

119. The primary judge noted that it is risk that is the focus of the inquiry under s 5B of the *Civil Liability Act 2002* (NSW) . To explain her approach to that inquiry, her Honour referred to the judgment of Gummow J in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [60] and concluded that risk is to be found by identifying the "true source of potential injury". She also referred to the judgment of Garling J (albeit in dissent) in *McKenna v Hunter & New England Local Health District* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476 (adopted by the Court of Appeal in *Perisher Blue Pty Ltd v Nair-Smith* (20 15) 90 NSWLR 1; [2015] NSWCA 90 at [98]) where, in reference to the same passage in *Dederer* , his Honour observed at [266] that "Gummow J was careful to include the general causal mechanism of the injury [or harm] sustained by the plaintiff".

Menz v Wagga Wagga Show Society Inc (21 April 2020) (Leeming, Payne and White JJA)

Menz v Wagga Wagga Show Society Inc (21 April 2020) (Leeming, Payne and White JJA)

Coles Supermarkets Australia Pty Ltd v Bridge (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

22. Both formulations use hindsight, in the sense that they insist that the legal analysis be framed so as to encompass the risk which is claimed to have materialised and caused the damage of which the plaintiff complains. That seems to be entirely unexceptional. It has been said that the formulation of risk of harm should identify the "true source of potential injury" (*Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [60]) and the "general causal mechanism of the injury sustained" (*Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [98]); see also *Avopiling Pty Ltd v Bosevski; Avopiling Pty Ltd v The Workers Compensation Nominal Insurer* [2018] NSWCA 146 at [43] . In *Erickson v Bagley* [2015] VSCA 220 at [33] and in *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 310 at [55] , the Victorian Court of Appeal said, "Necessarily, the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred." What is to be avoided is an unduly narrow formulation of risk of harm which then distorts the reasoning, because, for example, it obscures the true source of potential injury (as noted in *Dederer* at [60]) or because it too narrowly focusses on the particular hazard which caused the injury (as noted in *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156; [2014] Aust Torts Rep 82-172 at [67]), or because it fails to capture part of the plaintiff's case (as in *Garzo*).

Coles Supermarkets Australia Pty Ltd v Bridge (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

22. Both formulations use hindsight, in the sense that they insist that the legal analysis be framed so as to encompass the risk which is claimed to have materialised and caused the damage of which the plaintiff complains. That seems to be entirely unexceptional. It has been said that the formulation of risk of harm should identify the "true source of potential injury" (*Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [60]) and the "general causal mechanism of the injury sustained" (*Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [98]); see also *Avopiling Pty Ltd v Bosevski; Avopiling Pty Ltd v The Workers Compensation Nominal Insurer* [2018] NSWCA 146 at [43] . In *Erickson v Bagley* [2015] VSCA 220 at [33] and in *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 310 at [55] , the Victorian Court of Appeal said, "Necessarily, the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred." What is to be avoided is an unduly narrow formulation of risk of harm which then distorts the reasoning, because, for example, it obscures the true source of potential injury (as noted in *Dederer* at [60]) or because it too narrowly focusses on the particular hazard which caused the injury (as noted in *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156; [2014] Aust Torts Rep 82-172 at [67]), or because it fails to capture part of the plaintiff's case (as in *Garzo*).

Avopiling Pty Ltd v Bosevski (27 July 2018) (McColl, Payne and White JJA)
Avopiling Pty Ltd v Bosevski (27 July 2018) (McColl, Payne and White JJA)
Uniting Church in Australia Property Trust (NSW) v Miller (16 December 2015) (Beazley P, Davies J and R S Hulme AJ)
Uniting Church in Australia Property Trust (NSW) V Miller; Miller v Lithgow City Council (15 October 2015) (Basten, Leeming and Simpson JJA)

121. That passage accords with earlier decisions. In *Dederer* itself, Gummow J criticised the characterisation by the majority of the Court of Appeal of the risk as being "serious spinal injury flowing from the act of diving off a bridge": at [60] . His Honour said that "such a characterisation of the risk obscured the true source of potential injury". The proper characterisation was "the risk of impact upon jumping into the potentially shallow water and shifting sands of the estuary".

Sharp v Parramatta City Council (02 September 2015) (Meagher, Ward and Gleeson JJA)
Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)
Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)
Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)

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Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)
Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)
Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam (26 June 2014) (Refshauge, Penfold and Rares JJ)
Gosling v Lorne Foreshore Committee of Management Inc (08 October 2009) (Ashley, Redlich JJA and Kyrou AJA)

In the Court of Appeal, the risk faced by Mr Dederer was characterised by the majority as being "serious spinal injury flowing from the act of diving off the bridge" [82] . That risk, it was said, was one created by the RTA through the erection of the bridge by its predecessor. However, such a characterisation of the risk obscured the true source of potential injury. This arose not from the state of the bridge itself, but rather from the risk of impact upon jumping into the potentially shallow water and shifting sands of the estuary. This mischaracterisation of the risk led to two consequent errors. First, the majority were distracted from a proper evaluation of the probability of that risk occurring. Secondly, they erroneously attributed to the RTA a greater control over the risk than it possessed.

[82] (2006) Aust Torts Reports ¶81-860 at 68,892.

61. **Following paragraph cited by:**

Roads and Traffic Authority of NSW v Chandler (11 April 2008) (Mason P at 1; Basten JA at 5; Bell JA at 65)

> 42 As positive evidence that no such accidents had occurred, the weight to be given to Mr Dunlop's statement may have been limited in the absence of any express evidence of the existence of appropriate files and the searching of such files. On the other hand, the plaintiff did not cross-examine Mr Dunlop about this evidence, nor seek to call evidence suggesting there was a known history of accidents. Rejecting Mr Dunlop's evidence out of hand as having no weight was an error. Evidence that a particular risk has apparently not eventuated in the past may give rise to doubt as to whether the supposed risk is significant: see, eg, *Uni versity of Wollongong v Mitchell* [2003] NSWCA 94; Aust Torts Rep ¶81-708 at [14] (Meagher JA), [34]-[35] (Giles JA); *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705 at [5] (Priestley JA). Further, as explained by Handley JA in *Great Lakes Shire Council v Dederer* [2006] NSWCA 101; Aust Torts Rep ¶81-860 at [63], evidence of an extensive accident-free history may well demonstrate that the perceived risk gave rise to no reasonable claim on the attention or resources of the RTA: see also *Roads and Traffic Authority of*

NSW v Dederer [2007] HCA 42; 81 ALJR 1773 at [61] (Gummow J); *Romeo v Conservation Commission of the NT* [1998] HCA 5; 192 CLR 431 at [132] (Kirby J) and [274] (Callinan J); *In the Estate of MT Mutton v Howard Haulage Pty Ltd* [2007] NSWCA 340 at [169]-[172] (Ipp JA).

The first error can be seen in Ipp JA's characterisation of the "startling frequency" of "large numbers" of people jumping and diving from the bridge; a practice that was "continuing unabated" notwithstanding the pictograms [83] . Such a characterisation incorrectly focused attention on the frequency of an antecedent course of conduct, namely jumping and diving, and not on the probability of the risk of injury occurring as a result of that conduct, namely impact in shallow water. As Lord Porter observed in *Bolton v Stone*, "in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of *in jury being caused*" (emphasis added) [84] . In the present case, the frequency of jumping and diving was only startling if one ignored the fact that noone was injured until Mr Dederer's unfortunate accident. Far from being a risk with a high probability of occurrence, the probability was in truth very low, and this fact was masked by the Court of Appeal's characterisation of the relevant risk.

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[83] (2006) Aust Torts Reports ¶81-860 at 68,900.

[84] [1951] AC 850 at 858.

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62. Regarding the second error, by focusing on the RTA's role in constructing the bridge from which Mr Dederer dived, the majority in the Court of Appeal overlooked the limited nature of the RTA's control over the actual risk of injury faced by Mr Dederer. Ipp JA concluded that [85] :

> "The fact that a defendant actually created the structure that gave rise to the risk that materialised, and maintained the structure in a form that maintained the risk, has always been regarded as a matter of great importance in determining liability for negligence."

Perhaps that is so, but whatever its role in creating the bridge the RTA did not control Mr Dederer's voluntary action in diving, and nor did it create or control the natural variations in the depth of the estuary beneath the bridge. The present was not a case, for example, in which the plaintiff's injury arose because the bridge collapsed, or because the footpath was defective, or because the side handrail gave way. Nor was it a case in which the "incentives" discerned by Ipp JA were ones created by the RTA [86] . Rather, the risk arose because of the conjunction of the bridge's location and two factors outside the RTA's control: one human and the other environmental, namely Mr Dederer diving from the bridge and the natural variations of the estuary bed [87] .

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[85] (2006) Aust Torts Reports ¶81-860 at 68,912.

[86] (2006) Aust Torts Reports ¶81-860 at 68,901.

[87] cf *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 453 [92] .

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63. Both the RTA and Mr Dederer in this Court addressed the concept of "allurement" in their submissions. But this is a concept that is more likely to mislead than to assist. Even when the term had determinative legal significance, Barrowclough CJ was able to say in *Napier v Ryan* t hat the word "has been given a sanctity which I think it scarcely deserves" [88] . One can well agree with that sentiment today, especially as the former technical use of that term in occupiers' liability cases has long since been superseded by the decision in *Australian Safeway Stores Pty Ltd v Zaluzna* [89] .

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[88] [1954] NZLR 1234 at 1240.

[89] (1987) 162 CLR 479 .

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64. **Following paragraph cited by:**

Talbot-Price v Jacobs (12 August 2008) (Ipp JA ; McColl JA; Basten JA)

The continued use of the term "allurement" as a factual epithet tends to conceal more than it reveals. First, "allurement" might be used to indicate no more than that many people have encountered the risk, thus leading to a conclusion one way or another about the probability of that risk eventuating. Secondly, the term might focus attention on the responsibility of the defendant for creating the risk, or for encouraging or enticing people into a dangerous situation. However, in the present case the RTA did not create the risk of shallow water of variable depth, nor did it exhort or encourage young people to dive from the bridge. Thirdly, the term might simply indicate the factual proposition that the particular location or activity was attractive to certain kinds of people. Such an observation is of no legal consequence.

The proper assessment of breach

65. **Following paragraph cited by:**

Coles Supermarkets Australia Pty Ltd v Bridge (17 August 2018) (Leeming and Payne JJA, Emmett AJA)
Coles Supermarkets Australia Pty Ltd v Bridge (17 August 2018) (Leeming and Payne JJA, Emmett AJA)
Coles Supermarket Australia Pty Ltd v Harris (29 June 2018) (Mossop, Loukas-Karlsson and Charlesworth JJ)

Vincent v Woolworths Ltd (15 March 2016) (McColl, Macfarlan and Ward JJA)
BHP Billiton Ltd v Parker (18 June 2012) (Doyle CJ; Gray and White JJ)

18. This approach has been referred to as the " *Shirt* calculus". As Gummow and Hayne JJ said in *Fahy* :

> … The description may be convenient but it may mislead. Reference to "calculus", "a certain way of performing mathematical investigations and resolutions", may wrongly be understood as requiring no more than a comparison between what it would have cost to avoid the particular injury that happened and the consequences of that injury. *Shirt* requires a more elaborate inquiry that does not focus only upon how the particular injury happened. It requires looking forward to identify what a reasonable person *would* have done, not backward to identify what would have avoided the injury. [9]
>
> *Citation omitted*

The last sentence of that passage is significant. Their Honours went on to say:

> In *Vairy v Wyong Shire Council*, it was explained why it is wrong to focus exclusively upon the way in which the particular injury of which a plaintiff complains came about. In *Vairy* , it was said that:
>
> > "[T]he apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be "nothing"."
>
> It is only if the examination of breach focuses upon "what a reasonable man *would* do by way of response to the risk" (emphasis added) that it is sensible to consider "the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have". [10]
>
> *Citations omitted*

On this point we refer also to the reasons of Gummow J in *Dederer* at [65] and to the reasons of Hayne J in *Vairy v Wyong Shire Council* . [11]

S v State of New South Wales (17 July 2009) (Beazley JA at 1; Giles JA at 2; Macfarlan JA at 3)

Shire of Gingin v Coombe (25 May 2009) (Martin CJ)

47. More recently, Gummow J reiterated the proposition in ***Roads and Traffic Authority of New South Wales v Dederer*** [2007] HCA 42; (2007) 234 CLR 330 at [65] (see also Callinan J [264]).

Reasonable care, not prevention

Having dealt with the relevant risk, it is appropriate to return to the inquiry into the assessment of breach. Whether reasonable care was exercised in the particular case is a question of fact going to the breach of any duty owed, not to the existence of that duty. In each case, the question of whether reasonable care was exercised is to be adjudged prospectively, and not by retrospectively asking whether the defendant's actions could have prevented the plaintiff's injury. As Hayne J stated in *Vairy* [90] :

> "When a plaintiff sues for damages alleging personal injury has been caused by the defendant's negligence, the inquiry about breach of duty must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered. That inquiry must attempt, after the event, to judge what the reasonable person would have done to avoid what is now known to have occurred. Although that judgment must be made after the event it must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury." (emphasis omitted)

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[90] (2005) 223 CLR 422 at 461 [126] .

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66. Each of these principles was misapplied by the trial judge and the majority in the Court of Appeal. As explained earlier in these reasons, their Honours erred by focusing in retrospect on the failure of the RTA to *prevent* Mr Dederer's dive, as opposed to asking what, in prospect, the exercise of reasonable care would require in response to a foreseeable risk of injury. The use of phrases such as "an accident waiting to happen" was redolent of a retrospective, not prospective, approach to the matter.

67. What, then, was the correct approach towards assessing breach? The particular trap into which the majority of the Court of Appeal fell was that warned against by Hayne J in *Vairy* [91] :

> "If, instead of looking forward, the so-called *Shirt* calculus is undertaken looking back on what is known to have happened, the tort of negligence becomes separated from standards of reasonableness. It becomes separated because, in every case where the cost of taking alleviating action at the particular place where the plaintiff was injured is markedly less than the consequences of a risk coming to pass, it is well nigh inevitable that the defendant would be found to have acted without reasonable care if alleviating action was not taken."

[91] (2005) 223 CLR 422 at 462 [128] .

68. The relevant passage from the judgment of Mason J in *Shirt* should be set out yet again [92] :

> "[T]he tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not farfetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

[92] (1980) 146 CLR 40 at 47-48 .

69. **Following paragraph cited by:**

Allied Pumps Pty Ltd v Hooker (05 May 2020) (Buss P, Murphy JA, Vaughan JA)

> 12. A number of propositions may then be drawn from the judgment of Gummow J in ***Roads and Traffic Authority of NSW v Dederer*** . First, in assessing a reasonable response to a risk one must first accurately identify the relevant risk (ie the 'actual risk') of injury faced. [21] Second, the question of breach must be assessed prospectively and not retrospectively. [22] Third, the response to a foreseeable risk is to be judged by the criterion of reasonableness, not some more stringent requirement of prevention. [23] Hence why it is that an employer's duty is not to safeguard a worker completely from all perils. The necessary evaluation

is one of 'a contextual and balanced assessment of the reasonable response to a foreseeable risk'. [24]

via
[24] ***Roads and Traffic Authority of NSW v Dederer*** [69] .

Allied Pumps Pty Ltd v Hooker (05 May 2020) (Buss P, Murphy JA, Vaughan JA)
DC v State of New South Wales (10 August 2016) (Basten and Ward JJA, Sackville AJA)

267. The respondent says that the primary judge correctly accepted that s 46 of the *Civil Liability Act* (which provides in effect that the fact that a public or other authority exercises a particular function does not indicate that it was under a duty to do so or that the function should be exercised in particular circumstances or a particular way) applied in the present case ([30]). However, the respondent contends that the primary judge erred in treating the guidelines as establishing the requisite standard to be met by the respondent in the discharge of the identified common law duty of care. The respondent submits (at [43]) that in so doing, his Honour failed to apply the principle articulated in *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 234 CLR 330 requiring "a contextual and balanced assessment of the reasonable response to a foreseeable risk" (referring to what was said in *Dederer* at [69]).

MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] (21 May 2012) (Pullin JA, Newnes JA, Murphy JA)

The continuing authority of this passage has recently been reaffirmed by this Court in *New South Wales v Fahy* [93] . In that case, Gummow and Hayne JJ observed that [94] :

> "There may be cases when the principles stated in *Shirt* have not been applied accurately. In particular, arguments of the kind made, and rejected, in *Vairy* and in *Mulligan v Coffs Harbour City Council* [[95]] may suggest a misunderstanding of the so-called 'calculus' that would seek to determine questions of breach in some cases by balancing the cost of a single warning sign against the catastrophic consequences of a particular accident. But the fact, if it be so, that *Shirt* has not always been applied properly does not provide any persuasive reason to reconsider its correctness."

What *Shirt* requires is a contextual and balanced assessment of the reasonable response to a foreseeable risk. Ultimately, the criterion is reasonableness, not some more stringent requirement of prevention.

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[93] (2007) 81 ALJR 1021 .

[94] (2007) 81 ALJR 1021 at 1038 [78] .

[95] (2005) 223 CLR 486 .

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70. Here, the risk of injury consequent upon jumping or diving from the bridge into water of variable depth was reasonably foreseeable. Indeed, the Court of Appeal correctly found, contrary to the trial judge, that the risk was one that was obvious even to a 14 year old boy [96] , and it beggars belief that the RTA could not foresee the very conduct against which its signage warned. The RTA's evidentiary dispute about whether it did in fact know of the continued practice of diving is beside the point: reasonable foreseeability is to be determined objectively, and the present risk was plainly foreseeable on any objective standard.

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[96] Mr Dederer challenged that conclusion by way of a Notice of Contention dated 14 May 2007. That challenge should be rejected for the reasons given by the Court of Appeal: (2006) Aust Torts Reports ¶81860 at 68,89268,895 .

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71. The magnitude of the risk was self-evidently grave. Mr Dederer's partial paralysis is among the worst kinds of injuries imaginable. The probability of that injury occurring was, however, low. Despite the frequency of jumping and diving from the bridge, no-one was injured until Mr Dederer's unfortunate dive.

72. What, then, of the expense, difficulty and inconvenience of taking alleviating action? The erection of further warning signs would not have been expensive, but Mr Dederer provided no evidence that they would be reasonable. The installation of pool-type fencing and a triangular cap on the handrail would have been more expensive and intrusive. The estimate of the cost of the handrail modification was some $108,072, and it was accepted that the cost of new fencing would be around $150,000 but, again, the reasonableness of such measures is open to doubt.

The course of the evidence

73. In order to explain these doubts, it is necessary to return to the way the evidence unfolded at trial. Mr Dederer was never asked whether any of the suggested modifications would have deterred him from diving. Each suggestion arose only after he gave his testimony.

74. Mr Dederer called Mr Robert Fogg as an expert on safety and signage. Mr Fogg's uncontradicted evidence was that a "no diving" pictogram was a reasonable response to the risk. As it happens, Mr Fogg mistakenly believed that such a pictogram had not already been installed, but this misapprehension did not otherwise undermine the force of his evidence about what a reasonable response to the risk would have been.

75. The sign proposed by the trial judge was devised solely by his Honour and there was no evidence that such a sign would have been a reasonable response. The sign adopted by the Court of Appeal, a pictogram indicating "no diving, shallow water", scarcely seems reasonable in light of the trial judge's explicit finding that it would probably have been

ignored as well, particularly as the large number of young persons jumping and diving without incident indicated that the water under the bridge was not generally shallow. In any event, Mr Dederer admitted that he knew about the variable depth of the estuary and the moving sandbar. A warning sign would not have told him anything he did not already know.

76. The suggestion that it was negligent not to have installed "pool-type" fencing arose out of the 1992 Austroads Bridge Design Code, which recommended that bridges constructed after 1992 use such vertical balusters. That design code did not apply to bridges constructed before 1992, and the Forster-Tuncurry bridge conformed to the applicable standards at the time of its construction. The matter was put to Mr Fogg, whose evidence was that he would be satisfied with the provision of a sign as an alternative to such "pool-type" fencing, and that such fencing was unlikely to deter a person of Mr Dederer's height who wished to dive from the bridge. The Council's Works Engineer and Asset Manager, Mr Keegan, also gave evidence that such fencing had not prevented people jumping from the nearby Bulahdelah bridge.

77. The suggestion of affixing a triangular cap to the handrail emerged only in the cross-examination of Mr Keegan. It was not otherwise the subject of any evidence. Mr Keegan said that it would be "possible" to affix such a cap to the railing, and that it would be more difficult to balance on such a cap before diving or jumping. Significantly, Mr Dederer's safety expert, Mr Fogg, gave no evidence about this aspect of the case. Even if the cap made balancing more difficult, it might be doubted whether this would have impeded Mr Dederer's dive, especially as the risk and danger of diving were part of its attraction.

78. Returning, then, to the assessment of breach mandated by *Shirt* , it becomes apparent that the RTA did not breach its duty of care. Though grave, the risk faced by Mr Dederer was of a very low probability, and a reasonable response to that risk did not demand the measures suggested by him. Those measures lacked evidential support; were of doubtful utility; would have caused significant expense in the case of the modifications to the handrail and fencing; and were in some cases contrary to express findings of fact.

79. This was not a case in which the defendant had done nothing in response to a foreseeable risk. To the contrary, the RTA had erected signs warning of, and prohibiting, the very conduct engaged in by Mr Dederer. As this Court stated in *Nagle v Rottnest Island Authority*, a prohibition is "one form of notice – perhaps the most effective form of notice – warning of the danger of diving" [97] . In the circumstances, that was a reasonable response, and the law demands no more and no less.

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[97] (1993) 177 CLR 423 at 432. The suggestion to the contrary by the trial judge, supported by Mr Dederer in his Notice of Contention, should thus be rejected.

Conclusion

80. The appeal should be allowed with costs. The RTA did not breach the duty of care it owed to Mr Dederer. Handley JA was correct to conclude that the risk of a diving accident had "no reasonable claim on [the RTA's] further attention or resources" [98] .

[98] (2006) Aust Torts Reports ¶81-860 at 68,881-68,882 .

Mr Dederer's application for special leave to cross-appeal

81. The appeal having been decided in the RTA's favour, there is no occasion to address Mr Dederer's application for special leave to cross-appeal regarding contributory negligence. Likewise, each defendant having now succeeded on appeal, there is no occasion to address his request for a *Sanderson* costs order.

Orders

82. The appeal to this Court by the RTA should be allowed with costs against Mr Dederer, and his application for special leave to cross-appeal dismissed with costs. Orders 4, 5, 6 and 7 made by the Court of Appeal on 5 October 2006 should be set aside, and in their place it should be ordered that the appeal by the RTA to that Court be allowed; that so much of the orders made by Dunford J on 18 March 2005 as disposed of the action against the RTA be set aside, and in their place order that there be judgment for the RTA; and that Mr Dederer pay the costs of the RTA of the trial and the appeal to that Court.

83. KIRBY J. At about noon on 31 December 1998, Mr Philip Dederer, then a boy aged fourteen and a half years, dived from a bridge linking the adjoining towns of Forster and Tuncurry in New South Wales. He plunged some eight or nine metres to a water channel below. Having regard to the receding tide, the channel was then but two metres deep. Mr Dederer was a tall boy of about 182 cm (nearly six feet). His head came into abrupt contact with the bottom of the channel. As a result, he was rendered a partial paraplegic.

84. Mr Dederer sued the Roads and Traffic Authority of NSW ("the RTA") and the Great Lakes Shire Council ("the Council"), claiming damages for negligence. The damages to which Mr Dederer was entitled if he succeeded in his action were agreed between the parties before trial. In the event, he succeeded against both defendants in the Supreme Court of New South Wales before Dunford J ("the primary judge"). On appeal to the Court of Appeal of New South Wales, his judgment against the Council was unanimously set aside. That Court held that the *Civil Liability Act* 2002 (NSW) relieved the Council of legal responsibility for Mr Dederer's injuries [99] . However, a majority[100] upheld Mr Dederer's entitlement to recover against the RTA in negligence. Unanimously, the Court of Appeal set aside the primary judge's conclusion that contributory negligence should be assessed at 25% and increased that figure to 50% [101] . Moreover, in a supplementary decision on costs [102] , the Court of Appeal dismissed Mr Dederer's application for an order requiring the RTA to pay the Council's costs [103] .

[99] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,874 [1], 68,895 [173], 68,916 [325] .

[100] Ipp and Tobias JJA; Handley JA dissenting.

[101] (2006) Aust Torts Reports ¶81-860 at 68,874 [1], 68,915 [323], 68,916 [325] .

[102] *Great Lakes Shire Council v Dederer [No 2]* [2006] NSWCA 336.

[103] In accordance with the principle stated in the decision in *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

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85. By special leave, the RTA appeals to this Court challenging the judgment which the Court of Appeal upheld against it. Mr Dederer seeks special leave to cross-appeal against its decisions on contributory negligence and costs. The Council, which was joined as a party in this Court, submitted to the Court's orders.

86. As Tobias JA acknowledged at the end of his reasons in the Court of Appeal, the competing views expressed in that Court (and now urged upon this) "contain powerful arguments in favour and against the RTA's appeal being upheld" [104] . However, alike with his Honour, I have reached the same conclusions on the issues of negligence and contributory negligence as Ipp JA expressed in the Court of Appeal. The concurrent findings of fact relating to the negligence decision should stand. Those conclusions of the Court of Appeal contain no error of fact or law to justify disturbance by this Court. The costs order sought by Mr Dederer in the Court of Appeal should, however, be made. Otherwise, all of the orders of the Court of Appeal should be confirmed.

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[104] (2006) Aust Torts Reports ¶81-860 at 68,923 [375] .

The facts

87. *The Forster-Tuncurry bridge*: Mr Dederer and his family had a practice of spending summer holidays in the Tuncurry area. They regularly spent time swimming, water skiing and fishing in the estuary where Mr Dederer was later injured. He knew that the estuary was "very much given to tidal action" [105] . Over the years, Mr Dederer had frequently observed children and adults jumping and diving off the bridge at the Forster end near Forster beach. The area is well known as a tourist resort that attracts many families and visitors on vacation. Swimming and water sports constitute a major attraction of the district.

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[105] (2006) Aust Torts Reports ¶81-860 at 68,884 [90] .

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88. The bridge from which Mr Dederer dived is 632 metres long [106] . Along its northern side is a concrete walkway for pedestrians, which is about 1.5 metres wide and is bounded by a

railing on the outer edge. The bridge rests on reinforced concrete piles and 47 piers. It contains two elevated curves over channels respectively at the Forster and Tuncurry ends. These channels are used by "big trawler boats, fishing boats, ski boats and jet skis" passing up and down the estuary [107] . The channel on the Forster side of the estuary flows between piers 43 and 44. However, boats also used the water passage between piers 44 and 45, closer to the Forster shore.

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[106] (2006) Aust Torts Reports ¶81-860 at 68,883 [79] .

[107] (2006) Aust Torts Reports ¶81-860 at 68,883 [81] .

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89. On the water side of the railing, a ledge protruded northwards near the point where Mr Dederer dived. According to the evidence, this ledge and the more elevated upper railing on the northern side of the bridge (together with a water pipe on the southern side) constituted popular platforms for children and young people to dive or jump from the bridge into the water below. As Ipp JA found [108] :

> "Mr Dederer's dive was by no means an unusual phenomenon. For many years, almost from the time the bridge was constructed, young people – particularly over the summer months – frequently (often in groups) jumped and (less often) dived off the bridge into the estuary below. Apparently, until Mr Dederer was rendered paraplegic, no person had sustained injuries in these activities."

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[108] (2006) Aust Torts Reports ¶81-860 at 68,884 [85] .

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90. Construction of the bridge was completed in 1959 by the then Department of Main Roads ("the DMR") of the State. The bridge was (and remains) part of New South Wales Main Road No 111. In September 1959, in accordance with the *Main Roads Act* 1924 (NSW) , the Governor of the State directed the DMR to carry out maintenance of the bridge. This was done with the consent of the two Councils then concerned [109] .

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[109] Pursuant to the *Main Roads Act* 1924 (NSW), s 25 . See (2006) Aust Torts Reports ¶81-860 at 68,874 [2] .

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91. When the RTA was established, it became the statutory successor to the DMR [110] . The direction to maintain the bridge continues to apply to the RTA by virtue of later legislation [111] . By that legislation, the RTA is authorised to carry out road work, defined to include work upon any building or structure, including a bridge, constructed for the purpose of facilitating

the use of the road as a road [112] . Work as a "roads authority" in relation to the bridge is shared with the Council; but work of a capital nature is the responsibility of the RTA, where necessary acting through the Council pursuant to capital grants provided to the Council by the RTA [113] .

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[110] *Transport Administration Act* 1988 (NSW), Sched 7, Div 5 .

[111] *Roads Act* 1993 (NSW), ss 62, 63 . See (2006) Aust Torts Reports ¶81-860 at 68,874 [3] .

[112] *Roads Act* 1993 (NSW), s 71 .

[113] (2006) Aust Torts Reports ¶81-860 at 68,874 [5] .

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92. Mr Dederer gave evidence that, over the years of holidaying in the vicinity of Forster, he had frequently observed children and adults jumping and diving off the bridge, a sight that led him to assume that the water beneath "must be deep". He had been under the bridge from time to time in a boat. From that vantage point, he said, "the bridge looked fairly high but the water also looked very deep" [114] .

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[114] (2006) Aust Torts Reports ¶81-860 at 68,884-68,885 [92] .

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93. There was no suggestion that the bridge had been built other than in accordance with the standards applicable to such constructions in 1959. Two factors, however, were advanced to support the proposition that the RTA was aware of the particular dangers involved in the manner in which the bridge, as constructed, came to be used, especially by children and young people. The first was its knowledge of the practice of such people to use the bridge (and especially the ledge and the upper railing) as a departure point from which to enter the water below (to use a neutral expression). The second was its regular testing of the depth of the water channels below the bridge (and hence in the vicinity of the point of entry into the water from the bridge). Inferentially, this was done essentially for the purpose of ensuring the safety of the boating traffic beneath the bridge. In answers to interrogatories, the RTA conceded that from 1 December 1993 it was aware that the river bed levels under the bridge were continually altering and that thereafter soundings were carried out at approximately three-monthly intervals [115] .

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[115] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,527 [44] .

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94. *Children diving and jumping*: Whereas the Council admitted, for the purposes of the proceedings, that it was "aware of the fact persons had jumped and/or dived from the Bridge" before Mr Dederer's injury, the RTA steadfastly maintained that, although it was aware of *jumping* from the bridge, it had no notice that *diving* was also occurring. This point of distinction featured prominently in the RTA's submissions to the Court of Appeal. It was accepted by Handley JA and became an important feature of his dissenting reasons [116] . The same distinction was also pressed upon this Court. However, for reasons similar to those advanced by Ipp JA [117] and Tobias JA [118] in the Court of Appeal, the differentiation between "jumping" and "diving" is not ultimately material to, and certainly not determinative of, the RTA's liability to Mr Dederer.

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[116] (2006) Aust Torts Reports ¶81-860 at 68,875-68,876 [18]-[20] .

[117] (2006) Aust Torts Reports ¶81-860 at 68,897-68,899 [185]-[204] .

[118] (2006) Aust Torts Reports ¶81-860 at 68,916-68,918 [327]-[339] .

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95. Discovery prior to suit, and evidence otherwise given during the trial, established that for a long time, probably from soon after the bridge was opened in 1959, it came to be used by young people as a *de facto* point of entry into the water channels. Mr John Pevitt had been a ranger for the Council since 1988. He gave evidence that over the years he had seen many people jumping off the bridge, some of them doing somersaults, although he said that he had never seen anyone dive. Mr Pevitt stated that in about 1990, he had on three separate occasions spoken to people preparing to jump from the bridge. He had endeavoured to dissuade them from doing so and had, on at least one occasion, drawn to their attention signs forbidding such activities. Each time he had been wearing his official Council uniform. However, they had ignored him and jumped all the same [119] . Once, Mr Pevitt tried to pursue the offenders, but they swam to a sandbank some 20 metres out, waved to him and refused to come ashore.

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[119] (2006) Aust Torts Reports ¶81-860 at 68,886 [110] .

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96. As a result of these incidents, Mr Pevitt became convinced that the Council was unable to enforce the signed prohibition on entering the water from the bridge. He therefore endeavoured to secure the intervention of the police superintendent to ensure compliance with the signs. He later saw police speaking to people on the bridge. However, the people "just continued to jump". Even the use of the police patrol boat was unsuccessful in halting the practice.

97. The signs referred to by Mr Pevitt were the subject of more detailed evidence by Mr Michael Keegan, an officer of the Council. Mr Keegan was an asset manager responsible for roads, bridges and stormwater infrastructure within the Council area. He indicated that since the

earlier part of the 1990s, the RTA had provided funding to the Council under an annual "Block Grant Agreement" for activities that included the construction, maintenance and improvement of certain roads, including Main Road 111.

98. At some point prior to Mr Dederer's dive, there had been put in place at each end of the bridge a large sign containing words to the effect of "fishing and climbing prohibited". In addition, Mr Keegan stated that he had been aware of "no diving" pictograms (featuring a representation of a diver with arms outstretched superimposed by a prohibitory bar) positioned on the bridge from at least the late 1980s. In 1995 the Council, using funds derived from the Block Grant Agreement, replaced these pictograms, although it seems that the new signs had themselves deteriorated. The signs were certainly in place on the day of Mr Dederer's dive from the bridge. He acknowledged that he had seen and understood the pictogram [120] . His candour in this respect was an important reason why the trial judge was generally willing to accept his evidence as truthful [121] . Mr Dederer had been prepared to make admissions against his own interest.

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[120] (2006) Aust Torts Reports ¶81-860 at 68,882 [71] .

[121] (2005) Aust Torts Reports ¶81-792 at 67,524 [18] .

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99. Mr Keegan, like Mr Pevitt, was a resident of the Forster area. He too was well aware of the culture that had developed of children and young people jumping from the bridge into the water. In fact, he knew that it had been happening for years. He gave evidence that he had "actually remonstrated with his own children for jumping from the bridge" [122] . He accepted that, from an engineering point of view, it would have been comparatively simple and cheap to install a triangular attachment to the top railing of the bridge such as existed on the railing of the balustrade on the approach to the bridge from the town of Forster. This could have been added to deter the use of the top railing as a launching platform for entry into the water. However, Mr Keegan said that no request had been made for such a modification. He had no budget from the Council for such work. And anyway, he regarded the bridge structure as the responsibility of the RTA [123] .

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[122] (2005) Aust Torts Reports ¶81-792 at 67,526 [34] .

[123] (2005) Aust Torts Reports ¶81-792 at 67,526 [35] .

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100. *Council's complaint to the RTA*: The RTA, as a State-wide statutory authority, had no officer resident in the Forster-Tuncurry district. There were two officers identified as being conversant with signage issues within the area, but the RTA did not call them to give evidence. Instead, the RTA called Mr John Alexander, planning and analysis officer for the

Hunter Region. He had only joined the RTA in 1998. It was by that stage clear that the RTA had been expressly put on notice of the dangerous practice of young people jumping from the bridge to the water below.

101. On 28 January 1993, a committee of the Council resolved to express its concern to the RTA about this practice. On 11 February 1993, the Council sent a facsimile message to the works engineer of the RTA stating [124] :

> "Re Forster Tuncurry Bridge
>
> Problem currently being experienced with youths jumping into navigable channels from the higher parts of bridge. Danger to boating. Needs at least signs. Please advise."

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[124] (2006) Aust Torts Reports ¶81-860 at 68,875 [12], 68,887 [113] .

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102. Mr Alexander stated that he was not aware of any response to the facsimile on the part of the RTA.

103. In 1995, the Council replaced the pictogram signs on the bridge, as noted above. However, the new signs contained no information as to the special danger occasioned by the tidal character of the estuary and the shifting sands underneath the bridge. The RTA was, inferentially, aware of this danger by reason of its regular soundings of water depths. By 1995, alternative pictograms were available to symbolise the dangers of shallow water. Moreover, pictograms could be accompanied by verbal warnings where these were specially called for. Indeed, the relevant Australian Standard stipulated that signage indicating the fact of "shallow water" should be used in conjunction with the "diving prohibited" pictogram where it posed a risk of serious injury to divers [125] .

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[125] See (2006) Aust Torts Reports ¶81-860 at 68,904 [244]-[245] .

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104. *Changes to the bridge*: In 1992, a new Austroads Standard had come into force. This incorporated the Austroads Bridge Design Code. Under the Code, vertical and not horizontal members were made the norm for new bridge railings [126] . Evidence was adduced for Mr Dederer that other bridges in the area such as that at Bulahdelah (and others further afield, including the Anzac Bridge in Sydney) featured vertical bars compliant with the new prescription.

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[126] (2005) Aust Torts Reports ¶81-792 at 67,531 [71] .

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105. In the same year, wires attached to the northern bridge railings were found to be rusted. In mid-1993, the RTA released funds to allow the Council to replace the wires without any modification to the horizontal bars supporting them, even in the immediate area of the jumping platform. This was notwithstanding the introduction of the new Bridge Design Code, and the fact that the RTA had been put on express notice of the "problem" of people jumping from the bridge some three months earlier [127] .

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[127] (2005) Aust Torts Reports ¶81-792 at 67,531 [71] .

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106. By 1995, the narrowness (and consequent dangerousness) of the pedestrian walkway along the northern side of the bridge had become a focus of local community concern. As part of its response, the RTA engaged a firm of design consultants. The firm considered a number of options for widening the walkway, each of which involved the erection of a new handrail, featuring vertical members, along the northern edge of the bridge. The cost of its preferred option was estimated at approximately $1 million. However, the estimated cost of the new handrail alone was a modest sum. By inference, modification of the handrail confined to the area known to be used for access to the water would have been significantly cheaper still.

107. In the outcome, nothing was done about the structure of the walkway or the railing fence. Mr Alexander, although aware of the alarm expressed about the practice of youths jumping off the bridge in 1993, and the erection of (new) signs in 1995, was seemingly diverted into other concerns. When officers of the RTA inspected the bridge in April 1998, they too reported that people were still jumping off, and fishing from, the bridge notwithstanding the signs. By inference, the RTA working parties that engaged in maintenance of the bridge over the years [128] would also have observed the practice. Although no specific written reports had been made to it of people diving from the bridge, the RTA was certainly aware of the ongoing problem (contrary to the law) [129] of use of the bridge contrary to the pictogram signs it had paid for as the "least" response to the Council committee's expression of concern.

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[128] (2006) Aust Torts Reports ¶81-860 at 68,888 [119] per Ipp JA.

[129] Roads (General) Regulation 1994 (NSW), reg 17 .

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108. The primary judge found that "the RTA has no policy or programme for dealing with this type of issue, and there is no funding allocated for such an issue" [130] . Even six years after the injury to Mr Dederer, an internal memo of the RTA, in relation to the "latest proposal", stated [131] :

> "It is our intention to remove the handrail and to construct with a new handrail. The new handrail will have a top and bottom RHS 100 x 50 x 5. The

balustrades will be made from flat bar and will be centred at least 154 mm. The reason RTA have adopted a new design is to help prevent people jumping off the bridge. The existing handrail can easily be climbed over due to the middle rail. The proposed fence is more like a pool fence and is harder to climb over. RTA have taken this course of action as the authority is being sued by a man who jumped off the bridge and broke his neck when his head hit a sand bar".

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[130] (2005) Aust Torts Reports ¶81-792 at 67,527 [39] .

[131] (2005) Aust Torts Reports ¶81-792 at 67,527 [40] .

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109. *The fateful dive*: Mr Dederer's fateful dive was not the first time he had entered the water from the bridge. On 30 December 1998, the day before his injury, he had spent time with his friend Mr Grant Cunial and others swimming at Forster beach adjacent to the Forster end of the bridge. On two occasions that day, he had jumped into the estuary. He first entered the water from the ledge at the base of the bridge platform. He then jumped from the flat top of the bridge handrail [132] , which he accessed by using the two horizontal railings in the fence below the upper railing. Effectively, these provided helpful steps to the point of departure from the bridge. On both occasions, Mr Dederer's body became totally submerged in the water below. His feet did not touch the bottom. He gave evidence that he saw other people jumping and diving from the bridge that day, including, he believed, an adult who dived. Nothing untoward happened to any of them.

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[132] (2005) Aust Torts Reports ¶81-792 at 67,523 [10] .

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110. On the last day of 1998, Mr Dederer returned to the bridge with Mr Cunial. They crossed the bridge from the Forster side with the initial intention of jumping from the bridge later in the day. However, spontaneously, Mr Dederer made the easy climb again to the flat top of the rail, assisted by an adjacent light pole. He had previously had experience in elevated diving in a swimming pool. Initially, on this day, he had intended simply to jump from the bridge. However, as he described it [133] :

"At that time, I was a cocky 14 year old. I was not going to dive but jump, but when I got up there I changed my mind."

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[133] (2005) Aust Torts Reports ¶81-792 at 67,523 [12] .

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111. Mr Dederer said that he listened for any boats that might be approaching under the bridge. He stood on the platform for perhaps two or three minutes. He then proceeded into the water "almost straight, but at an angle". He said that this was similar to the angle at which he had seen other people dive from the bridge. He did not remember striking the water or hitting the bottom. However, he immediately became aware that he had lost feeling in the lower part of his body [134] . He was assisted from the water by Mr Cunial, who confirmed the description of the way the injury had occurred. Mr Cunial also confirmed that he "had seen persons (ranging from about 10 to 30 years old) jumping off the bridge at the channel near the Forster shore including diving, doing back flips, somersaults, 'peg-legs' and bombs" [135] . Mr Cunial had also been going to the area for holidays for years, in his case since 1992.

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[134] (2005) Aust Torts Reports ¶81-792 at 67,523 [14] .

[135] (2005) Aust Torts Reports ¶81-792 at 67,524 [20] .

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112. *The emerging claims*: In presenting his claim against the RTA, a number of suggested contentions of negligence, raised at earlier stages for Mr Dederer, fell away. Thus, no claim was advanced on the basis that the RTA, as successor to the DMR, had been negligent in the initial design of the bridge. Nor did Mr Dederer press a claim that the RTA had failed to ensure that safety on the bridge was enforced by police or by its own guards. Nor did he press a suggestion that a cage of some kind or some other impediment should have been erected to break the culture of young people entering the water from the bridge. Ultimately, his case asserted that the RTA had opted for the most inexpensive, but ineffective, gesture of installing verbal and pictorial signs which were defective for failure to convey the particular nature of the risk to which persons like himself were exposed. Instead of this minimal approach, of whose ineffectiveness the RTA was on notice, Mr Dederer claimed that it should have undertaken (but had failed to undertake) three initiatives:

(1) In addition to the existing pictogram, it should have provided further information, pictorial or verbal, concerning the reasons for the prohibition on diving, in particular that the shifting sands beneath the bridge, of which the RTA was aware, made entering the water from the bridge dangerous, and diving especially so;

(2) It should have modified the flat level railing that provided a virtual diving platform some 9 or 10 metres above the water level (subject to tidal variation). The flat railing plane should have been overlaid or replaced with a triangular surface to discourage use of the upper railing as a platform; and

(3) It should have removed, at least in the section of the bridge known to be used for entering the water, the horizontal railings which, adjacent to the light pole, afforded a very easy access to the upper railing. Vertical members should have been substituted so as to mimic some of the features of standard Australian swimming pool fencing. The need for such modification had been specifically and repeatedly brought to the notice of the RTA.

113. *The conclusions below*: The primary judge essentially upheld Mr Dederer's submission that the response of the RTA to a known danger to persons such as himself had been ineffective and inadequate. He concluded that, in combination, the initiatives proposed by Mr Dederer would have prevented him from diving as he did. With some variations in respect of the language of the signage required, the majority in the Court of Appeal found no error in the primary judge's approach in this respect and affirmed it, upholding the consequential judgment against the RTA in Mr Dederer's favour.

114. In this Court, Mr Dederer did not contest the unanimous conclusion of the Court of Appeal overturning his judgment at trial against the Council. The parties did not suggest that any statutory provisions apart from those referred to by the Court of Appeal affected the resolution of the issues before this Court. The RTA accepted that it owed a duty of care to Mr Dederer in the circumstances in which he was injured. However, it denied that it had breached that duty. Moreover, it submitted that any breach found had not caused, or materially contributed to, the injury that occurred.

The issues

115. In consequence of the foregoing description of the case, three issues arise in this Court:

(1) *Breach of duty issue*: The first is whether the Court of Appeal erred in failing to reverse the conclusion of the primary judge that Mr Dederer had established negligence on the part of the RTA in a way causative of his injury. As explained, this issue raises contested factual questions put in issue by each of the parties. Thus, the RTA contested the conclusion of the primary judge and the majority of the Court of Appeal that it had been aware of the risks not only of jumping but also of diving from the bridge over many years before Mr Dederer's injury. Mr Dederer sought to challenge the conclusion of the majority in the Court of Appeal that, even without a "no diving" pictogram, it should have been obvious to him that a dive was very dangerous and that the "no diving" pictogram, displayed on the bridge, impliedly warned against that danger.

Apart from disputing such factual findings (and others), the RTA complained that the primary judge and the majority in the Court of Appeal had applied an incorrect legal test in concluding the contested issues of negligence in favour of Mr Dederer. In particular, the RTA argued that the majority judges had determined the issues of negligence from a standpoint of hindsight rather than foresight, ie as the facts would have been perceived before Mr Dederer's injury;

(2) *Contributory negligence issue*: In the event that the first issue is resolved in favour of Mr Dederer, the second issue is whether he should be granted special leave to challenge the Court of Appeal's reassessment of his contributory negligence at 50%. He submitted that the assessment of the primary judge of 25% should be restored, having regard especially to his age and inexperience and the widespread practice of jumping and diving that he had witnessed before he was injured.

(3) *Special costs order issue*: In the event that the first issue is resolved in favour of Mr Dederer, the third issue is whether he should be granted special leave to

cross-appeal against the refusal of a special costs order obliging the RTA, as the defendant liable to him, to pay the costs of the Council, whose joinder was reasonable in the circumstances of the case.

Negligence: the factual findings

116. *The RTA knew of diving*: In its pleadings, the RTA made no admission that it knew, before Mr Dederer's injury, that children and other young persons habitually dived off the bridge. In argument in this Court, it conceded that the evidence sustained the conclusion below that jumping and diving had been occurring, but it maintained its claim that it was unaware of the diving. It is true that the documentary evidence produced by the RTA (and the Council) referred only to persons "jumping" from the bridge. Mr Keegan, who knew that children jumped from the bridge, was not aware of diving [136] . Mr Pevitt had never seen anyone dive [137] .

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[136] (2006) Aust Torts Reports ¶81-860 at 68,875 [18] , referring to (2005) Aust Torts Reports ¶81-792 at 67,526 [34] .

[137] (2006) Aust Torts Reports ¶81-860 at 68,876 [19] .

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117. The primary judge expressly found that Mr Keegan had been "aware for years that young persons have been in the habit of jumping and diving off the bridge and asserted it was common knowledge in the community". This does appear to be a slip in fact-finding. However, it was not one meriting the importance that Handley JA attributed to it.

118. The real question is not whether a particular officer of the RTA or the Council was aware that children and young people were entering the water from the bridge. It is whether an inference was available to the courts below that the RTA was on notice that this was a risk inherent in the use of the bridge, and that such risk extended to diving as well as jumping. On that issue, as the majority judges in the Court of Appeal pointed out, there was ample evidence to sustain the primary judge's conclusion that the RTA was on notice both of diving and of the risk of diving. The evidence included:

(1) The fact that the RTA was aware that "no diving" pictogram signs had been erected on the bridge in 1995;

(2) The fact that, with exuberant children incontestably known by the RTA to be "jumping" from the bridge, the risk was present that jumping manoeuvres could easily turn into diving;

(3) The proof of regular visits to the bridge and its environs by officers of the RTA, including to perform routine maintenance on the bridge. It could be inferred that such visits would have alerted the RTA to the presence of children jumping and diving from the northern side of the bridge;

(4) The actual awareness of the RTA (from the regular water depth assessments it conducted) of the special risks involved in any form of descent into the water from the bridge, taking into account the manifest failure of the installed signs to suppress the practice, and the specific alert which the RTA had of the desirability of replacing the railings that, in providing a kind of diving or jumping platform, comprised an allurement to children and young people; and

(5) The fact that the RTA omitted to call in its case the two officers (Messrs Saxby and Selway) said by its witness Mr Alexander to be much more familiar than he was with signage and other measures appropriate to the bridge in the circumstances.

119. On this issue, in my opinion, Tobias JA was correct to say [138] :

> "[G]iven the knowledge of Mr Alexander and, therefore, the RTA that for children to jump from the bridge was dangerous and that diving from the bridge was *a fortiori* dangerous … it is but a small step to conclude that, with the knowledge that children continued to dive from the bridge in circumstances where the water below (depending upon tidal influences) was of variable depth and at times quite shallow, it would be reasonably foreseeable that at low tide in particular, when the water was shallow on the one hand and the height between the railing and the surface of the water is some 9-10 metres on the other, sooner or later a child would dive in a manner resulting in serious injuries. As I have indicated, I would regard such a conclusion as a matter of common sense."

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[138] (2006) Aust Torts Reports ¶81-860 at 68,918 [340] . See also at 68,900 [212]-[214] per Ipp JA.

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120. *The signage was incomplete*: The RTA also complained about what it suggested was the invention of the signage that it should have put in place by the primary judge and the majority of the Court of Appeal. With Handley JA [139] , the RTA asked, in effect: if Mr Dederer read and understood the two signs (verbal and pictorial) put in place to prevent the type of action that he then took, how could it reasonably be inferred that any other or different sign or notice would have restrained him from diving from the bridge to the water below?

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[139] (2006) Aust Torts Reports ¶81-860 at 68,879 [43] .

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121. The specific complaint of Mr Dederer was that the pictogram sign actually used by the RTA did not (as it might have done) signal the specific danger of shallow water arising from tides and sand movements. The expert called in Mr Dederer's case, Mr Robert Fogg, acknowledged that either the "no diving" or "shallow water" pictogram would have been appropriate, whilst

expressing a preference for the latter. Inferentially, this preference was attributable to the additional relevant information which a warning about shallow water gave to those potentially inclined to use the bridge for the purpose of entering the water.

122. One possible interpretation of the prohibition of climbing on, and diving from, the bridge was that, like the prohibition of fishing, it was directed (as the facsimile message that the Council sent to the RTA itself suggested) to protecting boats using the channels beneath. Neither the verbal sign nor the pictogram communicated the essential fact of greatest importance for self-protection to those tempted to jump or dive.

123. Mr Dederer answered questions on this issue:

> "Q: Now you'd agree wouldn't you Mr Dederer, if a sign told you that you were not permitted to dive, another sign which told you that warned you against diving would be of no purpose?
>
> A: No I disagree.
>
> Q: Well once you're told not to dive that's the end of it isn't it?
>
> A: Well, 14 year olds you're always curious. If you [see] one sign that says yeah you shouldn't and then you see another sign that shows you the danger why you shouldn't, the one that shows you the danger is most likely going to affect you the most.
>
> Q: I see, you're saying that now with the benefit of hindsight, aren't you?
>
> A: Yes.
>
> …
>
> Q: Is what you're saying that you agree with me that this sign would tell you that if you dive from this location there was a risk that before your full body entered the water half of it would enter and your head would hit the bottom?
>
> A: I don't believe I would have looked at it in that degree. I believe I would have looked at it and seen that it was just shallow water. I don't think I would've started looking at where the water is at the person on the sign … I would have just looked at it as in it's shallow water, I wouldn't have judged saying alright well it must be just half a body length.
>
> …
>
> Q: This sign [the 'shallow water' pictogram] would've meant nothing to you, wouldn't you agree at this location?
>
> A: It would've told me danger yes."

124. At no point was it put to Mr Dederer that the evidence that he had given in his own case in this respect was false. In that evidence he had also said:

> "Q: … I'll just have you look at this [the 'shallow water' pictogram]. Are you able to tell us what message that sign would send to you?
>
> A: That's shallow water and if you dive you will hit bottom.
>
> Q: And if such a sign had been erected on the bridge on the day that you were there, the day of your accident, what would your attitude have been to diving from the bridge?
>
> A: I wouldn't have dived because I would have – it would show me that it was shallow water."

125. Evidence of such a kind is not necessarily decisive. It involves a response that, on one view, a person in the position of Mr Dederer could be expected to give. However, it assumes significance in the present case because, for the reasons which he gave, the primary judge was prepared to accept Mr Dederer as an honest witness, trying to give truthful answers to the court. Clearly, it was open to the primary judge to accept or reject Mr Dederer's evidence in this respect. He accepted it. Once that occurred, the RTA faced serious difficulties in overcoming that finding and in obtaining from an appellate court, which never saw or heard Mr Dederer, the opposite conclusion.

126. Further, in the light of the demonstrated fact that the form of the warning sign paid for by the RTA was certainly in issue at the trial, and given further the expert evidence concerning the various pictograms that might have been used, together or in combination and with or without verbal supplementation, there is no substance in the RTA's complaint that successively the primary judge and the majority in the Court of Appeal invented forms of signage which had not been properly litigated at trial.

127. It was Mr Dederer who complained that the RTA's pictogram did not convey to him the critical information specifically known to the RTA about the shallowness and variability of the water levels below the bridge, especially when the tide was receding or low. This point having been made in Mr Dederer's case, it was clearly open to the primary judge, and then to the Court of Appeal, to consider amongst the signs on offer, or by analogy to them, the type of sign that could have conveyed, in pictures and/or words, the critical information concerning the specific danger that diving from the bridge entailed.

128. *The RTA's failure to respond*: It was also open to the primary judge and the majority in the Court of Appeal to conclude, on the evidence, that the "least" measure (which is all that the RTA took, despite its knowledge of the constant and frequent use of the bridge as a platform for jumping) was proving ineffective to prevent such use because the use clearly continued. To the extent that the RTA's complaint about the sign which the primary judge proposed was that it was not one of the standard pictograms nor one supported by expert evidence, this criticism was met by the sign ultimately preferred by the majority in the Court of Appeal. This was a pictogram with the symbol for prohibited diving and the addition of the verbal warning "shallow water". As Ipp JA said [140] :

"[This sign] would provide an express reason for the prohibition and indicate the dangers of diving from the bridge. I would observe that the words 'shifting sands', if added to the words 'shallow water' would make the nature of the danger even clearer."

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[140] (2006) Aust Torts Reports ¶81-860 at 68,904 [246] .

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129. In seeking to modify behaviour in the face of a known danger, interdiction, on its own, is likely to have less practical utility and effect than when combined with relevant information explaining its purpose and seriousness.

130. Because Mr Dederer did not challenge in this Court the unanimous conclusion of the Court of Appeal adverse to his claim against the Council, the particular factual findings which he sought to contest by his notice of contention do not need to be decided as relevant to his claim to recover for the negligence of the RTA. Those findings are, however, relevant to his challenge to the reassessment of contributory negligence. They will be dealt with in that context.

131. *Conclusion: no factual errors*: The result is that the complaints of the RTA concerning factual findings are not sustained. No error is demonstrated to warrant the intervention of this Court or the correction of the reasons and orders of the Court of Appeal.

Negligence: breach of the duty of care

132. *The RTA's case on breach*: In resisting liability, the RTA substantially endorsed the reasoning of Handley JA in the Court of Appeal. On the issue of breach, it pointed out that it had installed a sign that Mr Dederer's expert regarded as appropriate (although not preferable); the installation of a cage was not feasible; there had been no serious accident in 39 years; its chief concern was pedestrian safety on the bridge; control of youthful jumping had proved impossible and some degree of individual autonomy and responsibility was to be expected; Mr Dederer was generally aware of the character of the estuary; and, in any case, the RTA had many State-wide responsibilities.

133. On the basis of such arguments, the RTA contended that the provision of the notices was a reasonable and proper discharge of its duty of care to a person such as Mr Dederer.

134. *The principle in Shirt*: It was common ground between the parties that the critical legal analysis to be applied to the circumstances was that stated by this Court in *Wyong Shire Council v Shirt* [141] . The principles expressed by Mason J in that decision [142] have been applied in countless cases in this and other Australian courts since they were expressed. The attempt in *New South Wales v Fahy* [143] to have this Court reconsider its authority in *Shirt* w as rejected.

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[141] (1980) 146 CLR 40 .

[142] (1980) 146 CLR 40 at 47-48 .

[143] (2007) 81 ALJR 1021 at 1026 [7], 1038 [78], 1046-1049 [119]-[133], 1065 [241] ; cf at 1064 [225].

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135. An important aspect of the Court's reasoning in *Fahy* , both amongst those who were part of the majority and those who dissented, was an emphasis on the nuanced character of the approach explained in *Shirt* ; the fact that the formula there stated is not mathematical in its application; and the fact that it permits a decision-maker, considering what a reasonable person would do by way of response to a foreseeable risk, to reach a conclusion that, in the particular circumstances of the case, it might indeed be that "nothing" or nothing more is required [144] . Like many decisions before it, *Fahy* emphasised that the formula in *Shirt* "doe s not focus only upon how the particular injury happened. It requires looking forward to identify what a reasonable person *would* have done, not backward to identify what would have avoided the injury" [145] .

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[144] (2007) 81 ALJR 1021 at 1034-1035 [57]-[58], 1046 [123] ; cf *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234 at 246-247 [36] .

[145] (2007) 81 ALJR 1021 at 1034 [57] .

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136. With these freshly restated principles in mind, it is relevant once again to remember the passage in *Shirt* explaining how a problem such as that now before this Court should be approached [146] :

> "[T]he tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

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

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137. *Correct application of Shirt*: The Court of Appeal majority considered the challenge to the primary judge's decision in favour of Mr Dederer, giving proper attention to the foregoing instruction. As well, the majority gave due consideration to later decisions of this Court concerning warning signs in the context of diving injuries [147] . There is no indication that the majority overlooked the holdings of this Court on the approach to be taken to problems of the present kind. To the contrary, the relevant authorities were cited and accurately applied.

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[147] *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Vairy v Wyong Shire Council* (2005) 223 CLR 422. See (2006) Aust Torts Reports 81-860 at 68,894 [168] -[172], 68,920-68,921 [355]-[356] .

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138. Nevertheless, as Gleeson CJ pointed out in *Fahy* , citing what Alderson B said in *Blyth v Birmingham Waterworks Co* [148] as long ago as 1856 [149] :

> "'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Reasonableness is the touchstone, and considerations of foreseeability and risk avoidance are evaluated in that context."

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[148] (1856) 11 Ex 781 at 784 [156 ER 1047 at 1049].

[149] (2007) 81 ALJR 1021 at 1026 [7] .

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139. There is no indication in the majority reasons in the Court of Appeal that Ipp JA or Tobias JA overlooked any of the strictures against mechanistic reasoning or hindsight analysis contained in *Fahy* and in the other cases to which reference is made in their Honours' reasons. They could scarcely have fallen into such a basic error of reasoning in the light of the strongly expressed dissenting reasons of Handley JA.

140. There being no misapprehension or oversight of the applicable law, the question is whether the majority in the Court of Appeal nevertheless reached a conclusion on the breach of duty issue that indicates error and warrants the intervention of this Court.

141. Having identified the ambit of the RTA's duty of care [150] and affirmed the primary judge's conclusion that the RTA knew of the continuing practice of children and young people jumping or diving off the bridge (a finding sustained for the reasons already stated) [151] , Ipp JA analysed, prospectively, what, armed with such knowledge, the RTA ought reasonably to have done.

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[150] (2006) Aust Torts Reports ¶81-860 at 68,896 [183]-[184] .

[151] (2006) Aust Torts Reports ¶81-860 at 68,897-68,899 [185]-[204] .

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142. Into the equation, Ipp JA added the knowledge that the RTA had gathered over the years about the sand movements and variable depth of the river bed beneath the bridge [152] . He also considered its inferred knowledge of the changeable drop from the bridge to both the water surface and the river bed, dependent upon tides [153] . Further, he noted that "[t]he RTA knew or ought to have known that particularly in the summer months, jumping and diving was occurring with startling frequency, involving at times, groups of young people every five or ten minutes, with a group capable of comprising 10 to 15 children aged 10 years to 16 years" [154] .

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[152] (2006) Aust Torts Reports ¶81-860 at 68,899 [205]-[210] .

[153] (2006) Aust Torts Reports ¶81-860 at 68,900 [211] .

[154] (2006) Aust Torts Reports ¶81-860 at 68,900 [214] .

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143. *The signs were useless*: Added to this factual matrix was the realisation, which Ipp JA reasonably attributed to the RTA, that the prohibitory signs that were in place "were, in a word, useless" [155] . He concluded that, having been alerted to the dangers of children jumping from the bridge structure, the RTA should "have ascertained whether the pictograph signs were proving effective. On that basis, the RTA ought to have known that they were not" [156] .

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[155] (2006) Aust Torts Reports ¶81-860 at 68,900 [219] .

[156] (2006) Aust Torts Reports ¶81-860 at 68,900 [220] citing *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 585 [180] .

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144. It is against this backdrop that Ipp JA addressed the reasonableness of the RTA's response to the clearly established risk to persons such as Mr Dederer [157] . Correctly, his Honour rejected the suggestion that the RTA was excused from action simply because no significant injury had previously occurred [158] . Handley JA's suggestion that the absence of prior injuries might demonstrate the effectiveness of the existing signs [159] was contradicted by the obvious fact that the signs were repeatedly and frequently ignored by a class of persons such as Mr Dederer, children and youths, who were amongst those most at risk.

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[157] (2006) Aust Torts Reports ¶81-860 at 68,900 [221] .

[158] (2006) Aust Torts Reports ¶81-860 at 68,902 [231] .

[159] (2006) Aust Torts Reports ¶81-860 at 68,878 [35]-[36] .

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145. The foregoing made it important that the RTA should respond to its demonstrated knowledge of the sources of the risk of which it was aware by taking accident prevention measures beyond mere reliance on signs, which can never be an "automatic, absolute and permanent panacea" for that purpose [160] . Both Ipp JA (with whom Tobias JA agreed) and the primary judge concluded that reasonable steps involved the installation of a sign with a combination of symbols and words [161] . The RTA's reliance alone on a sign of unexplained prohibition was inadequate. Although he rejected the primary judge's conclusion that the pictogram should have addressed the specific problem and contained the warning "Danger, shifting sands, variable depth" (which was described in argument as a product of "judicial engineering"), Ipp JA upheld Mr Dederer's contention in the Court of Appeal that a specific warning of "shallow water" should have been added to the pictogram to make "the nature of the danger even clearer" [162] .

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[160] (2006) Aust Torts Reports ¶81-860 at 68,903 [233] per Ipp JA, citing *Waverley Council v Lodge* (2001) 117 LGERA 447 at 459 [35] per Bryson J (Meagher and Heydon JJA concurring).

[161] (2006) Aust Torts Reports ¶81-860 at 68,903-68,905 [236][251]; (2005) Aust Torts Reports ¶81-792 at 67,530-67,531 [69]-[70] .

[162] (2006) Aust Torts Reports ¶81-860 at 68,904 [246] .

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146. The use of such a verbal warning together with a symbol – especially if placed near where children and young people were frequently seen to be entering the water from the bridge – would have been a reasonable response, in terms of signage. Questions of resources would scarcely come into such a modification. What was needed was something more than the "least" response to the problem which the Council committee drew to the notice of the RTA. This was not a case (as often occurs) where there was no warning or complaint about the risk that eventuated. Here, warnings and expressions of concern about the activities of children on the bridge were specifically drawn to the notice of the RTA. It was aware of them. What was needed was that someone in the RTA should consider the problem and do something effective about it.

147. Ipp JA dealt in a convincing way with the lack of cogency of the excuse about the "availability of resources", with the justiciability of Mr Dederer's contentions and with the RTA's passing concentration on the need to upgrade the walkway and the suggested lack of resources available to it for that purpose [163] . The fact that there was community concern over other aspects of the safety of the bridge did not relieve the RTA of its obligation to

address reasonably the notice it had received about the particular risks to young persons jumping from its structure.

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[163] (2006) Aust Torts Reports ¶81-860 at 68,907 [266], 68,907-68,910 [268]-[279], 68,913-68,914 [304]-[306].

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148. *More than signs needed*: Given the fact that the existing signs were ineffective to deter or prevent children diving from the bridge, Ipp JA supported, apart from improved signage, the two further initiatives which the primary judge had held that the RTA should have taken. In doing so, he gave effect to the observation of the Privy Council in *Southern Portland Cement Ltd v Cooper* that [164]:

> "[S]o far as their Lordships are aware no difficulty was ever felt in holding that, in a case where any warning would have been ineffective, the occupier was bound to do a good deal more than merely give warning."

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[164] (1973) 129 CLR 295 at 308 per Lord Reid; [1974] AC 623 at 643.

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149. **Following paragraph cited by:**

Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

First, Ipp JA favoured the modification of the flat top of the upper railing of the bridge, which afforded an allurement to children tempted to use that railing as a platform for entry into the water [165]. The installation of a triangular surface would have been inexpensive. A similar surface is shown in a photograph in evidence of the balustrade leading to the bridge. Ipp JA acknowledged that such a modification would not, of itself, prevent access to the water from the bridge [166]. However, for a relatively insignificant amount of money, it would have diminished or removed what, unaltered, both facilitated and encouraged the kind of activities drawn to the RTA's attention in February 1993.

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[165] See *Munnings v Hydro-Electric Commission* (1971) 125 CLR 1 at 35 per Windeyer J.

[166] (2006) Aust Torts Reports ¶81-860 at 68,905 [257].

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150. Secondly, Ipp JA accepted the opinion of the primary judge that the horizontal railings should have been removed and replaced with vertical pool-type railings [167] . At the least, this should have been done in the section of the bridge which was obviously presenting an allurement to the children and young people who were using it as a platform for jumping and diving. Specifically, Ipp JA endorsed the comment of the primary judge [168] :

> "Pool fences have been around for many years and there is no reason why such a structure could not have been installed earlier."

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[167] (2006) Aust Torts Reports ¶81-860 at 68,906 [260]-[261] .

[168] (2006) Aust Torts Reports ¶81-860 at 68,906 [260] , quoting (2005) Aust Torts Reports ¶81-792 at 67,531 [73] .

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151. Three developments, noted in the evidence, lend strength to Ipp JA's conclusion. The first was the introduction of the new Bridge Design Code in 1992, of which the RTA was aware. The second was the opportunity provided in 1993 by the replacement of wire in the area of the horizontal railings which afforded such ease of access to the flat upper railing. The third was the growing familiarity of the Australian community with the special need to protect young people in the vicinity of water. If it was good enough to impose such an obligation on domestic pool owners, in all of their variety and with their many different means, it was not unreasonable, at least from the 1990s, to expect a similar sense of responsibility on the part of a public authority which had been alerted to the special dangers and risks to young persons in the use of a structure for which it was responsible. Clearly Ipp JA and Tobias JA so concluded. That conclusion was open to them.

152. *Conclusion: no error on breach*: It follows that the majority in the Court of Appeal did not err in holding that the RTA did not apply its mind to the question of whether it should remedy the dangers which its bridge presented to children and young persons who were attracted to use it as a platform for jumping and diving. The RTA did not give any, or any reasonable, consideration to the fact that because of its position, construction and configuration in relation to the water below, the bridge presented special dangers, particularly to children and young persons [169] . With respect, I do not agree that an allurement to children is a defendant's responsibility only if that party encourages the alluring feature [170] . This is not how allurement has been dealt with in the past. Allurements often arise in run-down, abandoned or disused premises. The question is not one of encouragement. It is one of foresight and responsibility.

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[169] (2006) Aust Torts Reports ¶81-860 at 68,913 [300] .

[170] cf reasons of Gummow J at [64].

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153. This was not a case, as the RTA suggested, of wisdom after the event. Instead, it was well open to the majority in the Court of Appeal to conclude, with the primary judge, that it was an instance of an "accident waiting to happen" [171] . Moreover, the RTA was put on specific notice of the accident risk, if in no other way, by reason of the communication to it on behalf of the Council committee in February 1993.

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[171] (2006) Aust Torts Reports ¶81-860 at 68,912 [293], 68,919 [342] .

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154. The approach of the majority of the Court of Appeal on the issue of breach of duty disclosed no error of legal analysis or of factual conclusion. The opinion of the majority that the RTA breached its duty of care to Mr Dederer should be affirmed.

Negligence: causation

155. *The RTA's case on causation*: This leaves the alternative basis upon which the RTA challenged the conclusion of the majority of the Court of Appeal. Essentially, the RTA supported, in this respect also, the dissenting reasons of Handley JA. Those reasons sought to take apart the elements of the preventive measures urged for Mr Dederer and to suggest that, even if they had been taken, they would not have avoided the injury that occurred [172] .

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[172] (2006) Aust Torts Reports ¶81-860 at 68,880 [50] .

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156. So far as the signage was concerned, the RTA submitted that a youth of Mr Dederer's age, who would "deliberately" ignore the sign which he had read and understood as prohibiting diving, would not be likely to obey a different sign, whether it contained words or symbols or a combination of both. Similarly, the RTA submitted that the suggested triangular section on the top of the handrail would not ultimately have prevented Mr Dederer from standing there. It might even have added a frisson of challenge. The vertical railings would likewise not have barred physical access to the bridge. In the case of a tall youth, such as Mr Dederer, the momentary difficulty of securing access to a chosen diving platform on the bridge would readily have been overcome. These arguments convinced Handley JA. However, the majority reasons, once again, are to be preferred.

157. **Following paragraph cited by:**

Dean v Pope (14 December 2022) (Ward P, Macfarlan, Meagher, White and Brereton JJA)

The primary judge's conclusions: As Ipp JA correctly pointed out, conclusions on questions of causation demand the drawing of sensible inferences, including on the basis of hypothetical

facts that, by definition, have not occurred. Responding to such questions depends very much on the assessment of the character and personality of the plaintiff and what he or she would have done had other and different precautions been taken by the defendant [173] . Trial judges' assessments of such matters are conventionally given considerable respect by appellate courts, called upon to reconsider conclusions reached at trial on nothing more than a transcript and their own assessment of how individuals, whom they have never seen or heard, would react to changed circumstances [174] .

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[173] *Rosenberg v Percival* (2001) 205 CLR 434 at 447 [36] .

[174] *Fox v Percy* (2003) 214 CLR 118 at 127 [26] .

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158. These observations do not deny the right and duty of an appellate court to discharge its own functions, as statute envisages. Nor do they revive an exaggerated deference to trial assessments which reasonably appear to defy appellate commonsense. However, for reasons given, the primary judge formed a good opinion of Mr Dederer's truthfulness as a witness. It was open to him, on the basis of Mr Dederer's oral evidence concerning the effect of a more informative sign alone, to conclude that causation was established. That conclusion is reinforced by the fact that the RTA failed, over an extended period and although on notice, to take the other measures that the primary judge and the Court of Appeal concluded it should have. In these circumstances, no error is demonstrated in the conclusion of Ipp JA (Tobias JA concurring) that [175] :

> "Taking into account the fact that Mr Dederer dived after changing his mind, and, moreover, on impulse, I think that, had the RTA altered the signs as I have proposed, modified the top railing, and installed pool-type fencing, it is probable that Mr Dederer would not have dived as he did and he would not have sustained his injuries."

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[175] (2006) Aust Torts Reports ¶81-860 at 68,915 [315] .

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159. The reference in this passage to the momentary indecision and to the last-minute initiative of Mr Dederer to dive, rather than jump, is an answer to Handley JA's statement that the injury was the result of a "deliberate" act on Mr Dederer's part [176] . That characterisation of Mr Dederer's actions seriously overstates the will that is to be attributed to him in the circumstances disclosed by the uncontested evidence.

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[176] (2006) Aust Torts Reports ¶81-860 at 68,879 [43] .

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160. Further, as Tobias JA pointed out in his reasons, in matters of causation "we are dealing with probabilities and not certainties" and "[t]here was no suggestion that [Mr Dederer] was of reckless or unthinking disposition" [177] . To picture Mr Dederer as a person blindly fixed upon a course of defying the signs on the bridge is not fairly to reflect his conduct which, according to the evidence, was not so different from that of many other young people, acting with holiday enthusiasm. The RTA's response to the risk that such conduct presented was minimal, ineffective and apparently lacking in proper consideration. More was required of a public authority. In particular this was so because the RTA had been specifically warned of substantial and ongoing danger to many children in a popular holiday resort in connection with a bridge under its control.

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[177] (2006) Aust Torts Reports ¶81-860 at 68,923 [370], [372] .

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161. *Conclusion: no error on causation*: It follows that I cannot, with respect, agree with the opinion[178] that the preventive measures suggested for Mr Dederer would not have been effective. That opinion is contrary to findings of the primary judge, who had advantages on this issue that this Court lacks. It disregards Mr Dederer's own evidence without warrant to do so. And it effectively condones the attitude of neglect and inactivity by the RTA which was inconsistent with the principles and purposes of the law of negligence.

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[178] Reasons of Gummow J at [75]-[77], reasons of Callinan J at [275]-[276].

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162. In the result, the conclusion of the majority of the Court of Appeal on the issue of causation is unattended by error. It too should be affirmed. Accordingly, Mr Dederer's judgment against the RTA should stand.

Negligence: reversing concurrent findings of fact

163. I accept that, in a final court such as this, no legal principle bars the court from reversing a conclusion based on concurrent findings of fact made by the primary judge and confirmed by the intermediate court. Whatever might have been the opinion of the Privy Council or the earlier practice of this Court, it cannot prevail against the statutory and constitutional functions that we possess [179] . To this extent I agree in the approach of Heydon J as to the jurisdiction and power of this Court to reach, and give effect to, contrary factual conclusions [180] . No principle of law or judicial practice stands in the way [181] .

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[179] *Warren v Coombes* (1979) 142 CLR 531 at 551 explained in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 495-496 [112]-[114] .

[180] See reasons of Heydon J at [293].

[181] cf reasons of Gleeson CJ at [5] and see *Louth v Diprose* (1992) 175 CLR 621 at 634.

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164. Nevertheless, more than a passing nod is required to a sense of "trepidation" against interfering in concurrent findings of fact [182] . Reasons in this Court in recent times have repeatedly explained why this is so [183] . It is not ordinarily the function of this Court to perform the tasks of fact-finding and factual review. The Court lacks advantages that other courts possess in this respect. Under the Constitution , the "appeal" we hear has been held to be a strict "appeal", concerned with error. It is not an appeal by way of rehearing, still less a trial [184] .

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[182] Reasons of Heydon J at [287].

[183] cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 274 [58] ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 634 [262] ; *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 212 CLR 411 at 447-448 [95] ; *Nominal Defendant v GLG Australia Pty Ltd* (2006) 80 ALJR 688 at 702 [74]; 225 ALR 643 at 660 ; *Fahy* (2007) 81 ALJR 1021 at 1052 [153] .

[184] *Mickelberg v The Queen* (1989) 167 CLR 259 at 267.

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165. These considerations and others as to the appropriate and seemly deployment of the time and functions of a final court combine to make such a court properly reluctant to condescend to substitute different conclusions on factual questions. Apart from anything else, such factual decisions cannot be further appealed if errors of fact or appreciation are revealed for the first time in the final court's opinion.

166. It is for these reasons that a clear case of error is needed for interference in concurrent findings of fact made below. The present appeal is far from such a case. All that has occurred is the substitution of different factual opinions, in harmony with a trend that I have earlier called to notice [185] . That trend reflects a retreat from communitarian concepts of mutual legal responsibility and from concern with accident prevention. It evidences an attitude to the claims of plaintiffs and to the law of negligence that I cannot share.

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[185] *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 499-500 [107] ; *Neindorf v Junkovic* (2005) 80 ALJR 341 at 346-347 [19]-[20], 359-360 [84]-[85]; 222 ALR 631 at 635-636, 653 ; *Fahy* (2007) 75 ALJR 1021 at 1055-1056 [172] .

Contributory negligence

167. *The Court of Appeal's intervention*: Two subsidiary questions arise. The first concerns the issue of contributory negligence and the unanimous decision of the Court of Appeal to double the discount on this basis to 50% of the verdict otherwise recoverable from the RTA [186] . In the Court of Appeal, the RTA raised the quantification of the reduction for contributory negligence, on the assumption that Mr Dederer was entitled to recover against it. In this Court, Mr Dederer sought special leave to cross-appeal so as to have the apportionment ordered by the primary judge restored.

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[186] (2006) Aust Torts Reports ¶81-860 at 68,874 [1], 68,915 [320]-[321], 68,916 [325] .

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168. **Following paragraph cited by:**

Nominal Defendant v Buck Cooper (03 November 2017) (McColl and Payne JJA, Garling J)

This Court has said many times that appellate courts must show restraint in disturbing the apportionment ordered for contributory negligence as between a plaintiff and a defendant, having regard to their respective shares of responsibility for the damage [187] . The point is self-evident. Involved in such an apportionment is a comparative examination of the whole conduct of each negligent party in relation to the circumstances of the accident and an evaluation of the comparative importance of the respective acts and omissions of the parties in causing the damage. Such decisions are evaluative and multi-factorial. Generally speaking, a trial judge, who has full knowledge of all of the evidence, will be in a better position to make such an apportionment correctly. An appellate court, even if it would have reached a different conclusion, will usually be hard pressed to identify an error that warrants disturbance of the primary judge's conclusion on such an issue. Tinkering with apportionments is to be discouraged.

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[187] *Pennington v Norris* (1956) 96 CLR 10 at 15-16 ; *Podrebersek v Australian Iron and Steel Ltd* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532.

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169. On the other hand, an intermediate appellate court is required by its statute to discharge its own functions of appellate review. If error is shown in the apportionment, it is not only entitled but obliged to set the apportionment aside and to substitute its own decision [188] . In a proper case, this Court will uphold the intermediate court's determination in that regard [189] , although sometimes it will be divided over where the correct line is to be drawn.

[188] *Fox v Percy* (2003) 214 CLR 118 at 127-128 [27]-[29] .

[189] *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879 [65]; 179 ALR 321 at 336.

170. *Criticisms of appellate conclusion*: For Mr Dederer, a number of criticisms were advanced of the decision of the Court of Appeal to disturb the primary judge's apportionment in this case. First, it was said, with some justification, that the treatment of this issue, of great significance to Mr Dederer, was extremely brief, especially by comparison to the very detailed analysis of the negligence issues that had gone before. Mr Dederer complained of a lack of reasoning to justify doubling the measure of his responsibility for his damage and the lack of a convincing analysis of the respective conduct of the RTA and himself in causing that damage.

171. Secondly, Mr Dederer pointed to the specific advantages which the trial judge had enjoyed in his case, including the conduct of a view of the bridge and estuary which was not undertaken by the Court of Appeal. As against this, the primary judge accepted that it was impossible, on a view conducted many years after the event, to re-create exactly the circumstances of the moment of Mr Dederer's injury [190] .

[190] (2005) Aust Torts Reports ¶81-792 at 67,524 [19] .

172. Thirdly, Mr Dederer pointed to an element of tension in the majority reasoning in the Court of Appeal. For the purpose of determining the issue of negligence and meeting, in that context, the assertion that the danger of diving was obvious, the Court of Appeal emphasised Mr Dederer's age and the spontaneous, unconsidered character of his last-minute decision to effect a dive. On the other hand, when it came to the determination of the application of the *Civil Liability Act* to the claim against the Council and the apportionment for contributory negligence, emphasis was placed on the obviousness of the risk of a dangerous recreational activity engaged in by him [191] .

[191] See (2006) Aust Torts Reports ¶81-860 at 68,891-68,892 [148]-[150] , discussing *Civil Liability Act* 2002 (NSW), ss 5L, 5K .

173. *The conclusion was open*: As against these criticisms, the treatment of contributory negligence by Ipp JA (with whom on this issue Handley JA and Tobias JA agreed) followed immediately a most detailed examination of all of the facts of the case essential to a decision on the negligence issues. This was an appeal which could not have been decided, either in the Court of Appeal or in this Court, without the most painstaking examination of the facts. That

was clearly undertaken by all of the members of the Court of Appeal. A separate statement or repetition of the facts to determine that part of the RTA's appeal which challenged the apportionment of contributory negligence was not essential. The alteration ordered by the Court of Appeal was certainly not subject to the criticism of tinkering. Obviously, all of the judges considered that the primary judge had erred, if only in the innominate way of reaching a conclusion which, in their view, was plainly wrong.

174. There were many facts in the evidence at trial that made that conclusion available to the Court of Appeal. Although Mr Dederer was only fourteen and a half years of age, the evidence showed that he was an experienced diver. He would have known that a safe dive always requires water of adequate depth. He acknowledged that, notwithstanding visual inspection and the recollection of seeing other children entering the water, he was not aware of the actual depth into which he plunged. He was aware of the signs placed on the bridge and of the prohibition which each entailed. Whilst the standard of care that could be expected of him was only that of an ordinary person of his age [192] , even a much younger Australian child with less experience of diving would have known that serious risks were involved in proceeding as Mr Dederer did.

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[192] *McHale v Watson* (1964) 111 CLR 384 at 397 per Windeyer J.

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175. *Conclusion: apportionment stands*: It follows that a conclusion of error on the issue of contributory negligence was open to the Court of Appeal. In a full appeal by way of rehearing, I might not myself have concluded that the primary judge's view of contributory negligence was wrong. That is not the present question. The principles of restraint which limit intermediate courts' interference in apportionments of this kind are even more clearly applicable to any disturbance by this Court of the new apportionment unanimously arrived at by the Court of Appeal. That Court's apportionment of 50% for contributory negligence is not attended by doubt, and no new point of principle is raised by the challenge. Special leave to cross-appeal on this issue should therefore be refused. Mr Dederer's additional proposed ground of cross-appeal, complaining that the Court of Appeal erred in holding that a reasonable fourteen and a half year old boy should have appreciated that it was highly dangerous to dive as he did, must also be rejected.

Costs: *Sanderson* order

176. *How the issue arose*: The final issue before this Court relates to the second aspect of Mr Dederer's application for special leave to cross-appeal. It concerns a costs order made by the Court of Appeal in consequence of its determination that the judgment that Mr Dederer recovered at trial against the Council should be set aside.

177. Initially, Mr Dederer brought his proceedings solely against the RTA. The Council was not joined as a defendant to the action until 22 September 2003. At the time the proceedings were initiated against the RTA, the *Civil Liability Act* had not commenced. However, by the time the Council was joined, that Act was in force [193] . It exempts defendants from liability in negligence for harm suffered by a plaintiff "as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff" [194] .

[193] (2006) Aust Torts Reports ¶81-860 at 68,891 [146] per Ipp JA.

[194] *Civil Liability Act* 2002 (NSW), s 5L . See (2006) Aust Torts Reports ¶81-860 at 68,891 [147] .

178. Although the primary judge rejected the Council's defence based on the *Civil Liability Act* on the footing that the risk would not have been obvious to Mr Dederer, even if it would have been to a mature adult [195] , that decision was unanimously reversed by the Court of Appeal. As stated, that conclusion was not challenged in this Court. Necessarily, it meant that Mr Dederer was ordered to pay the Council's costs, arising both from the trial and from its successful appeal. Self-evidently, such costs would be substantial. Obviously, they would diminish any recovery by Mr Dederer, itself already reduced by the reapportionment for contributory negligence.

[195] (2005) Aust Torts Reports ¶81-792 at 67,533 [87] .

179. Normally, this Court will not become involved in disputes over costs. This is because, of their nature, such disputes usually involve large discretionary considerations, insusceptible of principled appellate review, especially in a final court. On the other hand, cases arise where this Court's intervention is warranted because the misapplication of a relevant consideration results in an erroneous order [196] . Mr Dederer urged that this was such a case. Moreover, the fact that the order in question, with its large practical consequences for the parties, was first made by the Court of Appeal means that the appeal to this Court, if special leave were granted, would be the first and only opportunity for its appellate reconsideration.

[196] *CSR Ltd v Eddy* (2005) 226 CLR 1 at 34-36 [78]-[81], 48-49 [117]-[120] .

180. *Principle governing special orders*: In the Court of Appeal, Mr Dederer sought what Ipp JA described as "a *Sanderson* order (that is, an order by which an unsuccessful defendant is ordered to pay the costs of the successful defendant directly to that defendant)" [197] . As his Honour pointed out, the *Sanderson* order is a type of *Bullock* order, although the latter involves the unsuccessful defendant being ordered to pay to the plaintiff the costs of the successful defendant for which the plaintiff is directly liable. Unsurprisingly, the principles governing such orders are substantially the same. Writing of a *Bullock* order, Gibbs CJ in *Gould v Vaggelas* [198] approved a dictum of Blackburn CJ to the effect that [199] :

"[T]here is a condition for the making of a *Bullock* order, in addition to the question whether the suing of the successful defendant was reasonable, namely that the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant."

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[197] *Great Lakes Shire Council v Dederer [No 2]* [2006] NSWCA 336 at [4] .

[198] (1985) 157 CLR 215 at 230.

[199] *Steppke v National Capital Development Commission* (1978) 21 ACTR 23 at 30-31 .

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181. The latter aspect of the exercise of the costs discretion in cases of this kind is no more than a consequence of the usual rule that one party is not ordinarily liable for the costs of another unless that party is found answerable to a judgment against it and in favour of the party seeking the order. The RTA said, in effect, that the Council's costs were Mr Dederer's responsibility and should not be a burden on it. Neither Mr Dederer nor the RTA challenged the governing rule expressed by the Court of Appeal. It is appropriate for this Court to approach the present application on that footing.

182. In support of Mr Dederer's application for a *Sanderson* order, an affidavit of his former solicitor, Mr Philip Watson, was read before the Court of Appeal. It was not contested, in the Court of Appeal or in this Court, that it was reasonable for Mr Dederer to have sued the Council. Upon the basis that the *Civil Liability Act* did not disentitle Mr Dederer from recovery against the Council, the primary judge upheld the claim against the Council for what was found to have been its separate liability in negligence to Mr Dederer [200] . The primary judge ordered the Council to bear 20% of the aggregate agreed damages and costs [201] . Mr Watson's affidavit was therefore addressed to the second issue identified by Blackburn CJ, namely whether it was fair to impose some liability on the RTA for the costs of the Council following the decision of the Court of Appeal.

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[200] (2005) Aust Torts Reports ¶81-792 at 67,534 [91] .

[201] (2005) Aust Torts Reports ¶81-792 at 67,534-67,535 [97] .

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183. *RTA was responsible for added costs*: The affidavit discloses that Mr Dederer was in hospital when Mr Watson first received instructions from his parents in February 1999. Mr Watson immediately set about attempting to identify the public authority that was responsible in law for the conditions of, and signage on, the bridge. Letters were sent in March 1999 both to the Council and the RTA, asking each whether it was "the authority responsible for the Bridge

and for the signs positioned at each end of the Bridge and along its length". In April 1999 both the Council and the RTA responded, advising, to quote the letter from the RTA, that:

> "[The RTA] is the authority responsible for the Forster/Tuncurry Bridge and for signs positioned at each end of and along the length of the Bridge."

184. At the time of receipt of these letters, Mr Dederer's entitlements to damages for negligence were substantially governed by the common law. Moreover, because of his then minority, he had some years within which to commence proceedings. However, in March 2002, the Government of New South Wales announced its intention to seek amendments to the law affecting plaintiffs' rights from the State Parliament. After consultation with counsel, and as a matter of prudence, Mr Watson decided to commence proceedings in Mr Dederer's and other cases at once. In light of the concurrent advice of the two authorities, such proceedings were filed in the State Supreme Court on 3 April 2002, naming the RTA as the sole defendant.

185. The action proceeded in the normal way. On 20 May 2002, the statement of claim was sent to the RTA. On 20 August 2002, the RTA caused a defence to be filed. By that defence, the RTA admitted that it was the authority responsible for the bridge. Particulars were exchanged. The matter was listed for hearing in Newcastle on 8 September 2003.

186. However, a week before the notified hearing date, the RTA signalled an intention to seek an adjournment because it wished to join the Council as a party to the proceedings. According to Mr Watson, this was "the first indication from the RTA that it believed the Council had any responsibility for the Plaintiff's accident". The adjournment application was opposed for Mr Dederer, as was the filing of an amended defence and joinder of the Council. However, a judge of the Supreme Court granted leave to the RTA to take these steps. The consequence was the postponement of the hearing at which, on the basis of the Court of Appeal's decision and these reasons, Mr Dederer would have recovered against the RTA alone, without joinder of the Council.

187. When the Council was joined as a defendant on the RTA's application, it was, according to Mr Watson, "clearly necessary" for Mr Dederer to commence his own proceedings against the Council. He was not privy to the details of the RTA's case or to any arrangements that might sustain the new contention that liability for the bridge belonged to the Council. The RTA's evidence might conceivably have shown that it belonged to the Council alone.

188. This was the factual background to the costs application. Ipp JA, who gave the reasons for the Court of Appeal's dismissal of the application for a special costs order, concluded that the steps taken for Mr Dederer might have been understandable. However, as Mr Dederer was separately advised, it was for his advisers to obtain accurate information, including information concerning the operation of the supervening provisions of the *Civil Liability Act* [2002] . Ipp JA pointed out that the RTA only withdrew its admission of responsibility for the bridge and signage when it filed its defence to the further amended statement of claim in October 2004. By that time the Council had been joined as a party for more than a year. Ipp JA observed that, in any case, the potential liability of the Council was obvious, as was the application of the *Civil Liability Act* once it had commenced operation. By inference, the suggestion was that Mr Dederer's advisers should have commenced proceedings against

the Council at the time they began the action against the RTA. This would have left it to the defendants to fight out their respective liabilities. Mr Dederer would also have avoided any disentitlement under the *Civil Liability Act*.

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[202] *Great Lakes Shire Council v Dederer [No 2]* [2006] NSWCA 336 at [22] .

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189. *Conclusion: Sanderson order required*: Whilst this is a view compatible with the way in which common law litigation was traditionally fought, protecting the "treasured right of each litigant to store up, in secret, as many unpleasant surprises for his opponent as he could muster, and only reveal them at the last minute at the trial … in the presence of the judicial umpire" [203] , it would not have been an ideal, economic or fair way of conducting Mr Dederer's proceedings. An analogous opinion was expressed by Heydon JA in *Nowlan v Marson Transport Pty Ltd* [204] .

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[203] *Donaldson v Harris* (1973) 4 SASR 299 at 302 per Wells J.

[204] (2001) 53 NSWLR 116 at 127 [27] quoting Sir George Jessel; cf *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 195-196 [115]-[117] .

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190. The enquiry made by Mr Dederer's solicitor at the outset, the concurrent responses to it and the RTA's initial defence admitting its responsibility for the bridge and signage made the course that was adopted, of suing only the RTA, a perfectly reasonable one. Had the matter proceeded to trial on that footing, the problem of the Council's costs being ordered against Mr Dederer would not have arisen. Although it is true that Mr Dederer was professionally advised, he and his then solicitor were entitled at the outset to act on the admission made by the RTA, a responsible public authority. The RTA might have responded in the traditional manner, informing the solicitor that Mr Dederer must rely on his own enquiries. However, having indicated an acceptance of responsibility for the bridge and its signs (an acceptance reflected in the effective admission at trial and thereafter that the RTA owed Mr Dederer a duty of care) it was the switch of tactics by the RTA that changed the dynamic of the litigation.

191. That switch of tactics virtually forced those representing Mr Dederer to bring their own proceedings against the Council lest the RTA was saving up some "unpleasant surprises" for the trial which would prove fatal to Mr Dederer's claim against it. In these circumstances, whatever the risks involved in proceeding against the Council by reason of the *Civil Liability Act*, Mr Dederer was obliged to accept those risks against the greater potential danger that the RTA might escape liability wholly or in large part.

192. In the event there were no such large surprises. But the intervening commencement of the new legislation put Mr Dederer at a serious disadvantage. In the course of the events just described, the Court of Appeal erred in concluding that the conduct of the RTA had not been

such as to make it fair to impose some liability on the RTA for the costs of the Council. Indeed, the correct conclusion is that the RTA, by its belated switch of tactics, was the true cause of the joinder of the Council at all. It is therefore fair to impose on it the entire costs that Mr Dederer is, by the Court of Appeal's order, obliged to pay the Council. This Court should therefore order the RTA to assume those costs and to pay them directly to the Council on a *Sanderson* basis.

193. *Resulting order for costs*: To give effect to these conclusions, Mr Dederer should have special leave to cross-appeal on this point. The cross-appeal should be allowed. The costs order of the Court of Appeal should be set aside and a *Sanderson* order made. This conclusion justifies Mr Dederer's application for special leave and his cross-appeal. Although, in the conclusion that I favour, he has lost one point of the application, he has substantially succeeded in it. It is therefore just that the RTA should pay two-thirds of the costs of his application and cross-appeal.

Orders

194. The following orders should therefore be made by this Court:

(1) The appeal by the Roads and Traffic Authority of NSW dismissed with costs; and

(2) In the application for special leave to cross-appeal by Philip James Dederer:

(a) Dismiss the application for special leave to cross-appeal against the judgment of the Court of Appeal of the Supreme Court of New South Wales made on 5 October 2006;

(b) Grant special leave to cross-appeal against the order made by the Court of Appeal on 29 November 2006; set aside that order; and in its place order that the Roads and Traffic Authority of NSW pay to the Great Lakes Shire Council the costs payable in the appeal by Mr Dederer to the Great Lakes Shire Council pursuant to orders (1) and (2) of the orders made by the Court of Appeal on 5 October 2006; and

(c) Order that the Roads and Traffic Authority of NSW pay two-thirds of Mr Dederer's costs in respect of his application and cross-appeal.

195. CALLINAN J. The questions which this appeal raises are whether the primary judge and the Court of Appeal of New South Wales properly applied settled principles of breach of duty of care to the evaluation of the parties' conduct, and of causation.

Facts

196. On 31 December 1998, the first respondent, who was then 14, dived from a bridge across the Wallamba River in New South Wales. Steadying himself by holding on to a lamppost, he launched his dive from the highest of three horizontal railings on the northern side of the bridge. The top of the railing was flat and about nine metres above the surface of the water. He struck a submerged sandbank and suffered a very severe spinal injury.

197. There were pictograph signs on the approaches to the bridge prohibiting diving, and signs in words prohibiting climbing on the bridge. The first respondent saw and understood the signs before he dived. He chose to disregard them.

198. The first respondent sued the appellant and the municipality in which the bridge was situated ("the Council") the second respondent in this matter[205], in the Supreme Court of New South Wales in negligence.

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[205] The second respondent's only interest in the proceedings in this Court was in retaining orders for costs made in its favour.

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199. The trial judge, Dunford J, found for the first respondent against both defendants. He held, further, that the first respondent had been guilty of contributory negligence and assessed his responsibility for his injuries at 25 per cent. As between the appellant and the Council, his Honour found that the appellant was 80 per cent responsible for the first respondent's damages (after the deduction for contributory negligence) and the Council 20 per cent. The quantum of damages was not in issue and judgment was entered for the first respondent in the sum of $1,050,000.

200. The bridge links the twin towns of Forster and Tuncurry. It runs east to west. It spans the estuary at the mouth of the Wallamba River and is about one kilometre south-west of the junction of Wallis Lake and the Pacific Ocean.

201. There are recreational parks on each side of the bridge. The Tuncurry town centre is about 500 metres to the north-west, and that of Forster, about 200 metres to the east. There is a small marina immediately to the north of the bridge, and a camping reserve adjoining it.

202. The area attracts a large number of tourists: its population swells during the summer months. Families and children are among those tourists. Some families come annually.

203. There is a parking area on the Forster side of the bridge with an amenities block including lavatories, a park, bench seats and tables.

204. The bridge is constructed of steel and concrete, and is 632 metres long. It carries a two-lane bitumen roadway. There is a concrete walkway for pedestrians on its northern side. Each lane is 3.66 metres wide, and the walkway is 1.525 metres wide. Three people can walk abreast on the walkway. The roadway is part of Main Road 111. There was evidence that it was "extremely" busy. There is no physical separation between the walkway and the roadway.

205. The bridge rests on reinforced concrete piles and 47 piers, numbered 1 to 47 from the Tuncurry side. It passes over a large sandbar as it traverses the estuary. The southern tip of the sandbar is about level with pier 41.

206. Boats, including big trawlers, fishing boats, ski boats, and jet skis pass in deep channels near the Forster and Tuncurry sides of the estuary. Clearance for vessels using the channels was provided "by introducing a crest vertical curve [described by witnesses as 'humps'] into the longitudinal grade line over each channel". The level of the bridge therefore rises over the navigable channels and is correspondingly lower over the sandbar. The main channel for navigation on the Forster side is between piers 43 and 44. Boats also use the passage between piers 44 and 45. The first respondent dived between piers 44 and 45.

207. The tidal flow in the area is strong. The action of the tide has a scouring and dispersing effect on sand from the sandbar causing the depths of the water in the estuary to change continually. The first respondent dived at a point where the visible edge of the sandbar above the surface of the water was about ten metres to his left. The depth of water where he dived was about two metres. According to the first respondent's father, although the position of the sandbar generally remained constant, its length and width changed from week to week.

208. The tides on the day varied by about 1.4 metres. High tide was at 7.53 am and low at 2.08 pm. The first respondent dived at about midday.

209. The first respondent's dive was by no means a rare event. For many years, almost from the time that the bridge was constructed, young people, particularly during the summer months, frequently, often in groups, jumped, and, less often, dived from the bridge into the water. There was no suggestion that anyone else had suffered injuries by doing so.

210. The railing and ledge on the northern side of the bridge were apparently the more popular diving platforms, although people had also dived from a water pipe pinned along the south side of it.

211. The pictograph sign that the first respondent saw before he dived was located on a telegraph pole between pier 47 and the Forster end of the bridge. It depicted a person diving with a diagonal line through the person. Other signs, in words, prohibiting fishing from, and climbing on the bridge, stood at each entrance to it.

212. The first respondent was about 182 centimetres tall and "a fairly solid person" at the time of the accident. He was an able sportsman who played rugby league as a front row forward, and in 1998 was given the "Player of the Year Award" at his school. He participated in other sports. He had previously dived from a 10-metre tower at a swimming pool.

213. The first respondent and his family had spent holidays in the area since he was a very small boy. They stayed at a caravan park north of the Tuncurry township over weekends and during school holidays. They regularly spent time swimming, water skiing and fishing in the estuary.

214. The first respondent was aware that, in the area of the bridge, the estuary was "very much given to tidal action". He and his family often ran their boat on to the sandbar, jumped off the back of it and swam in the channel. He knew that the depth of the water dropped suddenly at

the edge of the sandbar, and the water in the channel was "very deep". His feet had not, on these occasions, touched the bottom in that area. He knew that the tide shifted the sand around and resulted in scouring, particularly in and about the channel. He said that there were not "sudden shift[s] of sand" in the middle of a channel, but at times it was noticeable that "some sort of a shallowing up of the bottom" had occurred. When the water was clear he could see yellow patches in the channel. These were long stretches of sand indicating shallower areas. Whether the shallower areas within the channels could be seen depended on the tide at the time, and "a number of [other] factors". He accepted that the depth of the water in the channels was hard to judge "due to the flow of the water going under the bridge".

215. Over the years, the first respondent had often seen children and adults jump and dive from the bridge. He assumed therefore that the water "must be deep". He had passed under the bridge from time to time in a boat. He said that from the boat, "the bridge looked fairly high but the water also looked very deep".

216. On 30 December 1998, the day before the accident, the first respondent went with a friend, Mr Cunial, to Forster. They walked on to the bridge. As they approached it, the first respondent saw what he described as the "big sign" at the side of the bridge that read "Fishing and climbing on bridge prohibited". He had seen that sign and an identical sign at the Tuncurry end of the bridge previously.

217. The first respondent advanced some distance along the bridge and jumped into the river twice, first from the ledge at the base of the bridge, and the second time from the top of the handrail. Both times his body was totally submerged after he jumped, and his feet did not touch the bottom. This was the first occasion on which he had jumped or dived from the bridge. That day he saw other people (whom he described as "a group of kids") jumping and diving from the bridge.

218. On 31 December 1998, he and the same friend drove to the parking area on the Forster side of the bridge. It was a hot day and they sat for five to ten minutes on one of the benches. From there, they watched about 10 to 15 people jumping from the bridge.

219. They walked on to the bridge intending to swim. The first respondent said that jumping from the bridge was an easy way to get into the water. He saw the pictograph sign. It "just showed, just told me I shouldn't dive. It didn't sort of put any danger to it."

220. The first respondent climbed on to the rail without difficulty. When he reached the top of it he looked at the water for about two to three minutes or maybe longer. He said:

> "You couldn't make out the bottom, the water [was] a green murky colour, and it was a real dark green which told me it was deep."

He explained why he thought it was safe to dive:

> "Just the look of it and on my knowledge of sort of that area with the boats passing by and people jumping and diving off that area and the colour in the water and sort of being in the middle of the channel I always thought it was deep."

221. Initially, he had intended to jump, but on impulse, as he stood on the top railing, he decided to dive. He listened to make sure that no boats were approaching before diving, with his arms outstretched. He said:

> "At that time I was sort of a cocky 14 year old that had the attitude, well I wasn't going to dive, I was jump [sic], but then once I got up there I for some reason changed my mind."

222. He said he dived "almost straight", but at an angle, similar to the way in which other people had dived. He said:

> "I didn't jump straight down but I didn't sort of belly-flop either, I sort of went in almost straight, but not dead straight."

223. His next recollection was of coming up from under the water, and being unable to feel any sensation in the lower part of his body. His friend jumped in to assist him. By now, there was a very strong ebb tide. The first respondent was worried that they might end up in the sea. It took two hours for them both to be brought ashore.

224. The first respondent's father first went to the area in the late 1960s or early 1970s. He regularly stayed there for about four weeks at a time. Every time, he saw people either jumping or diving from the bridge on the Forster side. He said that, while people were "jumping all the time", he had seen some "diving on a few occasions". Most of the people jumping and diving were 12 to 16 year olds.

225. Later, the first respondent's father took his own family to the region for holidays. He had taken a van at the caravan site at the Wallamba River for about 22 years. He had driven over the bridge many times. When the weather was warm, it was not unusual for him to see groups of four to six young people jumping from the bridge at a time.

226. The first respondent, from the age of about six or seven years, had seen people jump and dive from the bridge at the channel near the Forster shore. They were of all ages, but most were young. He said that he would see "a steady flow of people jumping and diving" and, "you'd get one group every five, ten minutes". He said a group would comprise from about three to about ten people. Their ages ranged from 10 years to adults.

227. Mr Cunial had been visiting the area for holidays since about 1992 and had seen persons, from about 10 to 30 years old, jumping, diving, doing back flips, somersaults, "peg-legs" and "bombs" from the bridge at the channel near the Forster shore.

228. Mr Keegan, who was called in the appellant's case, was the Asset Manager of the Council's roads, bridges and stormwater systems. Earlier he had been Works Engineer in charge of construction and maintenance. He had worked for the Council since 1975. He was aware that for years young people were in the habit of jumping from the bridge. He said that it was common knowledge in the community: he had actually remonstrated with his own children about it.

229. Mr Keegan said that he was aware, 15 or 16 years before the trial in 2004, that there were signs on the bridge referring to "no diving". He knew from the records that the pictograph

signs installed in 1995 had replaced other signs. The trial was conducted on the basis that in December 1995 the Council had replaced the existing pictorial "no diving" signs. The Council had informed the appellant that signs were needed.

230. Mr Pevitt had been employed by the Council as a ranger since November 1988. He had seen many people, over the years, jump from the bridge. Some had done somersaults, but he had never seen anyone dive. He was asked whether jumping was a "constant thing, particularly in holiday periods" and he replied, "Most definitely, yes."

231. Mr Alexander was the Planning and Analysis Officer of the appellant's Road Safety and Traffic Management Section. He had been employed by the appellant since 1998. He said that, from its records, he was aware of concerns expressed in February 1993 about persons jumping from the bridge. Officials inspected the bridge in April 1998 and reported that people were still jumping from it: that was general knowledge in his office.

232. The first respondent had never seen police officers or Council rangers talking to any of the very many people whom he had seen jumping or diving. The first respondent's father had never seen a police officer patrolling the area or any rangers. This was his experience throughout the "countless times" that he had been there since the late 1960s or early 1970s.

233. Mr Pevitt, on three separate occasions in about 1990, wearing his official Council uniform, spoke to persons who were climbing on to and appeared to be about to jump from the bridge. They were 16 years of age or younger. He drew their attention to the pictograph sign and told them not to jump. They ignored him and jumped all the same. He could not catch them. On one of these occasions Mr Pevitt tried to remonstrate with people who had jumped but "they just sat on the centre island, 20 yards away, and waved and laughed".

234. At about the same time, Mr Pevitt raised his concerns with police officers. The police agreed to attempt to prevent people jumping from the bridge. Mr Pevitt, thereafter, did see police officers on numerous occasions, stop, and speak to persons who appeared to be ready to jump. They however ignored the warnings and continued to jump. Mr Pevitt said that he had seen police officers drive into the adjacent park and speak to people about jumping from the bridge. He had also seen a police boat being used to try to round up some youths who had jumped. People were still jumping while the police boat was there. This continued for about 30 minutes. The police attempts to prevent the practice were fruitless. He said that he had seen police in boats about three times, and other officers talking to youths near the bridge about five or six times, but all to no avail.

235. Mr Pevitt said that the police from time to time telephoned the Council and asked the Council to take enforcement action to prevent people from jumping and diving from the bridge. Mr Pevitt, however, found that "it was just unenforceable". He said "the people just wouldn't take any notice". Mr Pevitt agreed that, since 1990, the practice of people jumping from the bridge was "a constant thing, particularly in holiday periods".

236. On 11 February 1993, the Council sent a facsimile to the appellant expressing the concerns of the Council regarding "young persons jumping from the ... bridge". The facsimile referred to "[d]anger to boating" and "[the n]eed … [for] at least signs". It was after this, in 1995, that the Council replaced the existing signs and erected the "no diving" pictograph signs near each end of the bridge.

The trial judge's findings

237. The trial judge found that both the appellant and the Council owed users of the bridge, including the first respondent, a duty of care. His Honour, Dunford J, said [206] :

> "I am satisfied that almost from the time of its construction and certainly for many years prior to the plaintiff's accident young, and not so young, persons were regularly using the railing and ledge of the bridge as launching pads for jumping and diving into the water below, particularly, but not limited to, during the summer holidays. The reason why jumping and diving off the bridge was so popular was in part due to the flat topped railing along the outside boundary of the bridge, and the ease of access to that railing by reason of the wooden cross members which provided steps up to the top railing.
>
> Even if it was not anticipated prior to the construction of the bridge that it would be used in this way, it soon became apparent after its completion and foreseeable that the culture was likely to continue. Although the jumpers and divers entered the water in or near the main navigation channel, both the [appellant] and the Council were aware of the moving sands and variable depths underneath the water, and it was therefore reasonably foreseeable, and not far fetched or fanciful, that if the practice continued someone engaging in the activity was liable to suffer serious injury.
>
> I say this notwithstanding the fact that no one had in fact been injured in nearly 50 years, because the risks should have been so apparent to the officers of both defendants with knowledge of the estuary bed that it was in effect 'an accident waiting to happen'."

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[206] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,528-67,529 [54]-[56] .

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238. His Honour described the bridge as an allurement [207] :

> "The bridge, being a launching pad for jumping or diving into generally clear water at a holiday resort, particularly in summer was, I believe, a very strong allurement to youths of the plaintiff's age group, particularly as in a colloquial, though not accurate, sense, 'everybody else' was doing it."

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[207] (2005) Aust Torts Reports ¶81-792 at 67,530 [65] .

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239. Dunford J who viewed the scene said this of it [208] :

"My own observations at the view on 8 October 2004 were that from the place where the plaintiff indicated he dived what appeared to be the bottom could be seen, there were certainly different hues of green and there appeared to be some yellow patches some distance below the surface. The water in the navigation channel appeared to be a much deeper green and therefore much deeper ... But, of course, I saw it nearly 8 years after the plaintiff's accident at a different tide and when the sands had undoubtedly moved in the meantime."

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[208] (2005) Aust Torts Reports ¶81-792 at 67,524 [19] .

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240. His Honour referred to the response made by the Council, with the consent, and at the expense of the appellant, to erect the "no diving" pictograph signs in 1995. He said that he was satisfied that the signs on the bridge were not effective "in the sense that large numbers of young people continued to jump, dive, do somersaults, etc from the bridge into the water" [209] .

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[209] (2005) Aust Torts Reports ¶81-792 at 67,527 [46] .

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241. The Council admitted that it knew that the practice was continuing. The appellant did not. Although the appellant did not have an office or depot in Forster or Tuncurry, it had maintenance and other crews working in the area and taking soundings of the water. Dunford J found that because the practice of persons diving and jumping was so widespread, and because of the presence that the appellant had in the area, "it must have known of the continuing practice": certainly the appellant "had direct knowledge after its representatives reported it in April 1998" [210] .

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[210] (2005) Aust Torts Reports ¶81-792 at 67,529 [57] .

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242. His Honour pointed to the fact that, unlike the plaintiffs in some other diving cases before the courts, the first respondent "dived from an artificial structure erected by the [appellant]" [211] . His Honour said [212] :

"In my opinion, it was not sufficient to ignore the fact that the signs were being disregarded and it is necessary to consider what, if any, further steps should reasonably have been taken by way of further warning signs, modification of the bridge or otherwise, to prevent injury to persons such as the plaintiff; or to put it another way, the content of the duty of care."

[211] (2005) Aust Torts Reports ¶81-792 at 67,529 [60] .

[212] (2005) Aust Torts Reports ¶81-792 at 67,529 [58] .

243. The first respondent argued that the appellant should have erected "shallow water" pictograph signs showing a person diving and striking his head on the bottom. His Honour said that it was "highly problematic" whether such "shallow water" signs would have been any more effective [213] :

> "Because of the large number of young persons jumping and diving without incident, it would have been obvious that the water was not generally shallow, and in those circumstances, I consider it probable that that sign would also have been ignored, just as the 'diving prohibited' sign was ignored."

[213] (2005) Aust Torts Reports ¶81-792 at 67,530 [68] .

244. Dunford J continued [214] :

> "The 'no diving' pictogram was a prohibition, it did not convey a warning of danger. On reflection it is easy to reason, as the plaintiff subsequently did, that the prohibition on diving was probably put in place because diving from the railing was dangerous, but that was not immediately apparent. Many prohibitory signs are disobeyed and not all of them are put in place because what they prohibit is dangerous to the persons to whom the signs are directed. For example, the sign prohibiting fishing on the bridge was also ignored but the prohibition was presumably in place because of the danger to boats passing underneath or pedestrians using the footway, not because fishing constituted a danger to the persons doing the fishing. The reasonable response to the risk of injury was a notice warning of the danger, not a mere prohibition for reasons unspecified.
>
> The danger here was not that the water was generally shallow, but that the sands were constantly shifting and accordingly, along with the tides, the depth of the water was variable. These facts were known to the defendants but not to the youths doing the jumping and diving. In my opinion, a warning sign containing words similar to 'Danger, shifting sands, variable depth' should have been displayed either on the telegraph post or the bridge railing near where the plaintiff dived. Such a sign would have alerted the plaintiff to the real danger and probably have inhibited him from diving, particularly if it inhibited large numbers of others from doing likewise and so tended to break the culture or practice which had developed."

[214] (2005) Aust Torts Reports ¶81-792 at 67,530-67,531 [69]-[70] .

245. His Honour then gave consideration to the construction of the bridge. He accepted that in 1959, when it was built, the flat top railing and the horizontal flat central members complied with current standards [215] . By 1993 however, when the appellant's attention was drawn to what was happening on the bridge, standards had changed [216] . Vertical, rather than horizontal, pool-type members had become "the norm" and were specified in the 1992 Austroads Bridge Design Code [217] . His Honour did not overlook that the Design Code applied only to new bridges [218] . Nonetheless, he pointed out that when the wires spanning the railings rusted in 1993, they were replaced without modification to the horizontal members [219] .

[215] (2005) Aust Torts Reports ¶81-792 at 67,531 [71] .

[216] (2005) Aust Torts Reports ¶81-792 at 67,531 [71] .

[217] (2005) Aust Torts Reports ¶81-792 at 67,531 [71] .

[218] (2005) Aust Torts Reports ¶81-792 at 67,531 [72] .

[219] (2005) Aust Torts Reports ¶81-792 at 67,531 [71] .

246. His Honour found that the appellant was confronted with a risk that required remedial action. Proposals were put before it in 1995, and thereafter, for a new cycleway and walkway. These included a new handrail and vertical members [220] .

[220] (2005) Aust Torts Reports ¶81-792 at 67,531 [72] .

247. His Honour said that a "comparatively simple" modification could have been made to the flat top surface of the railing by attaching to it a triangular strip [221] . This would make the handrail difficult and uncomfortable to stand on, and almost impossible to balance on, before jumping or diving. His Honour pointed out that a similar result could have been achieved by replacing the top flat member with an angled member such as already existed on the approaches to the bridge at both the Forster and Tuncurry ends.

[221] (2005) Aust Torts Reports ¶81-792 at 67,531 [74] .

248. His Honour was of the view that a pool-type fence would be difficult to climb. He said [222] :

> "Subsequently plans have been prepared and funds approved for widening of the walkway and replacement of the post and rail fence with a fence containing vertical members in accordance with the [1992] Austroads Standard."

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[222] (2005) Aust Torts Reports ¶81-792 at 67,527 [46] .

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249. The judge said that pool fences had been used for many years and there was no reason why one could not have been installed earlier [223] .

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[223] (2005) Aust Torts Reports ¶81-792 at 67,531 [73] .

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250. His Honour, after referring to the notional modification to the handrail and the possible installation of vertical, pool-type members, went on [224] :

> "I am satisfied that the failure to make either or both of these modifications to the railing constituted a lack of reasonable care on the part of the [appellant] and that if they had been in place, the plaintiff would probably not have dived and suffered his injuries."

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[224] (2005) Aust Torts Reports ¶81-792 at 67,531 [74] .

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251. His Honour concluded that, in failing to provide appropriate warning signs, and in constructing and repairing the railings without modification, the appellant failed to take reasonable care for the safety of the first respondent. He was therefore entitled to judgment against it [225] .

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[225] (2005) Aust Torts Reports ¶81-792 at 67,531 [76] .

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252. With respect to the Council, Dunford J said [226] :

> "I am satisfied it owed a duty of care to persons jumping and diving off the bridge to warn them of the danger, and when the 'no diving' pictograms proved to be

ineffective in this regard and the practice continued, it was not sufficient to do nothing, but it required the provision of warning, as opposed to prohibition, signs. I am therefore satisfied that on this issue, like the [appellant] and on common law principles, the Council was in breach of its duty to take reasonable care."

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[226] (2005) Aust Torts Reports ¶81-792 at 67,532-67,533 [83] .

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253. The Council had relied on Pt 1A of the *Civil Liability Act* 2002 (NSW) which was, because of the later joinder of it as a defendant, available to it as an arguable defence[227]. It submitted that [228] :

"the plaintiff's action in diving off the bridge was a 'dangerous recreational activity', as defined by s 5K … the risk of harm was an 'obvious' risk as defined by s 5F … the plaintiff is therefore presumed to have been aware of the risk of harm: s 5G, and … accordingly, there was no proactive duty to warn of the risk: s 5H".

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[227] "**5F Meaning of 'obvious risk'**

(1) … an ***obvious risk*** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

…

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

…

5G Injured persons presumed to be aware of obvious risks

(1) In determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

5H No proactive duty to warn of obvious risk

(1) A person (***the defendant***) does not owe a duty of care to another person (***th e plaintiff***) to warn of an obvious risk to the plaintiff.

…

Division 5 Recreational activities

…

5K Definitions

…

dangerous recreational activity means a recreational activity that involves a significant risk of physical harm.

…

recreational activity includes:

…

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure …

5L No liability for harm suffered from obvious risks of dangerous recreational activities

(1) A person (***the defendant***) is not liable in negligence for harm suffered by another person (***the plaintiff***) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

(2) This section applies whether or not the plaintiff was aware of the risk.

5M No duty of care for recreational activity where risk warning

(1) A person (***the defendant***) does not owe a duty of care to another person who engages in a recreational activity (***the plaintiff***) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

…

(3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity.

…

(5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

…"

[228] (2005) Aust Torts Reports ¶81-792 at 67,533 [84] .

254. Although he was prepared to accept that the first respondent had been engaged in a "dangerous recreational activity" [229] his Honour was not satisfied that diving from the bridge presented an "obvious risk" [230] . His Honour said [231] :

> "Here the plaintiff was a 14 year old who had seen a large number of persons jumping and diving off the bridge over many years, without any apparent attempt by police or Council rangers to stop them and no known cases of injury. He may have been aware that sandbars shifted (if he thought of it) and know of the variable depth of the water, but from what he had observed and having regard to his age and lack of maturity, the fact that he knew vessels passed through the channel, he looked and saw the water was dark murky green and he could not see the bottom, all of which indicated to him that the water was deep, the risk of serious permanent physical injury would not have been obvious to him, even if it would have been obvious to a mature adult. Accordingly s 5H does not apply in the circumstances of this case, and neither does s 5L which also depends on an 'obvious risk' as defined in s 5F. The Council also relies on s 5M which provides that there is no duty of care in respect of a recreational activity if the risk was the subject of a risk warning to the plaintiff, but for reasons already given, I do not consider that the signs which were displayed constituted a warning."

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[229] (2005) Aust Torts Reports ¶81-792 at 67,533 [85] .

[230] (2005) Aust Torts Reports ¶81-792 at 67,533 [85] .

[231] (2005) Aust Torts Reports ¶81-792 at 67,533 [87] .

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255. Accordingly, his Honour held that the Council too was in breach of its duty of care to the first respondent in failing to provide adequate warning signs notifying of the danger of diving from the bridge [232] .

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[232] (2005) Aust Torts Reports ¶81-792 at 67,534 [91] .

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256. Concerning the appellant's and the Council's alternate claims of contributory negligence, on the part of the first respondent, his Honour said [233] :

> "[A]lthough the plaintiff did not at the time regard the 'no diving' pictogram as denoting danger, he knew it meant that he should not dive, but he deliberately disregarded it. He also knew that the depth of the water was variable, that jumping from heights could result in injury and he said that part of the thrill of diving and jumping from the bridge was the risk. He was however only a 14 year old, and the standard of care for his own safety required of him was that of a 14 year old person ...

In all the circumstances, I am satisfied that the plaintiff was guilty of contributory negligence and I apportion his share of responsibility for his own injury at 25 per cent."

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[233] (2005) Aust Torts Reports ¶81-792 at 67,534 [92]-[93] .

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257. In the result his Honour concluded that the appellant and the Council should bear 60 per cent and 15 per cent respectively of the responsibility for the first respondent's injuries and damages, and the first respondent himself 25 per cent.

The Court of Appeal

258. The appellant and the Council appealed to the Court of Appeal of New South Wales. That Court (Ipp and Tobias JJA, Handley JA dissenting) was satisfied that the practice of diving was so widespread that, although the appellant did not have an office or depot in Forster or Tuncurry, because it had maintenance and other crews working in the area and taking soundings of the water under the bridge, it must be taken to have known of the practice [234] .

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[234] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,899 [204] per Ipp JA, 68,918 [339] per Tobias JA.

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259. The majority accepted that the "no diving" signs were ineffective [235] . The appellant was in breach therefore, they held, of its duty of care, by failing to take further steps to prevent injury to persons such as the first respondent [236] .

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[235] (2006) Aust Torts Reports ¶81-860 at 68,900 [217]-[219] per Ipp JA, 68,918 [339] per Tobias JA.

[236] (2006) Aust Torts Reports ¶81-860 at 68,901 [222], 68,903 [235] per Ipp JA.

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260. Their Honours referred to *Wyong Shire Council v Shirt* [237] . The majority were of the view that the appellant's reasonable response to the risk should have been to install swimming pool fencing (vertical posts without horizontal cross members) and to modify the top railing by adding to it an upward facing triangular section so as to make it more difficult to climb on to and balance on the top before diving [238] .

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[237] (1980) 146 CLR 40 .

[238] (2006) Aust Torts Reports ¶81-860 at 68,914-68,915 [310], [314] per Ipp JA.

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261. As to the trial judge's holding that the appellant should have erected a "Danger, shifting sands, variable depth" warning sign [239] the majority of the Court of Appeal thought a composite sign containing the "no diving" pictograph with the words "shallow water" [240] was preferable and should have been erected.

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[239] (2005) Aust Torts Reports ¶81-792 at 67,531 [70] .

[240] (2006) Aust Torts Reports ¶81-860 at 68,914-68,915 [312]-[315] per Ipp JA, 68,923 [372]-[373] per Tobias JA.

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262. The Court of Appeal took a different view of the Council's responsibility, concluding that the *Civil Liability Act* 2002 (NSW) relieved it from liability [241] .

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[241] (2006) Aust Torts Reports ¶81-860 at 68,874 [1] per Handley JA, 68,891-68,895 [146]-[173] per Ipp JA, 68,916 [325] per Tobias JA.

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263. The majority of the Court of Appeal also adjusted the trial judge's assessment of the first respondent's responsibility for his injuries [242] , increasing it from 25 per cent to 50 per cent [243] .

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[242] (2005) Aust Torts Reports ¶81-792 at 67,534 [93] .

[243] (2006) Aust Torts Reports ¶81-860 at 68,915 [320] per Ipp JA. See also at 68,874 [1] per Handley JA.

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264. **Following paragraph cited by:**

Shire of Gingin v Coombe (25 May 2009) (Martin CJ)

> 62. The character of the activity undertaken by the person claiming to be owed a duty of care is also relevant to the assessment of its scope or

content. Many recreational activities are inherently dangerous, and the activities undertaken by the class of persons entering the ORVA amply illustrate that point. In ***Agar v Hyde*** [2000] HCA 41; (2000) 201 CLR 552 [127], it was observed that adults voluntarily participating in a sport may be assumed to have an appreciation of the risks involved in that sport, just as those diving from a rock platform into the sea might be taken to have some knowledge of the risk of submerged objects. Similarly, those resorting to large sand dunes in order to use offroad vehicles may be assumed to have a knowledge and appreciation of the general risks associated with that activity. This does not, of course, mean that those persons are not owed a duty of care, but it is relevant to the ascertainment of the scope and content of that duty. Further, the fact that such persons undertake such hazardous recreational activities voluntarily, places them in a different category to those such as road users and employees, who have little or no practical choice in relation to the risks to which they are subjected - see Callinan and Heydon JJ in ***Vairy*** at [216] [217] , Callinan J in ***Dederer*** at [264] .

The significance of prior injuries

It is relevant to refer to the dissenting judgment of Handley JA because, in my opinion, in substance, his Honour's reasoning and conclusions are correct [244] :

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[244] (2006) Aust Torts Reports ¶81-860 at 68,879-68,881 [41]-[59] .

"Ipp JA holds that the No Diving signs did not comply with the 1995 Standard (AAS 2416-1995), and that a sign which prohibited diving with the words 'Shallow Water' would have been more effective. This involved a reversal of the Judge's finding that a shallow water sign of the kind recommended by Mr Fogg [safety expert for the first respondent] would also have been ignored by the plaintiff.

With respect I consider that the trial Judge's inference based finding, which I accept, that a 'Beware of shallow water when diving' sign of the type recommended by Mr Fogg would probably have been ignored just as the 'Diving Prohibited' sign was ignored leaves no room for a finding that a diving prohibited sign with the words 'shallow water' would have been effective. The plaintiff knew, as the Judge recorded, that the sand moved with the current, that the depth of the channels was hard to judge and some parts were shallower than others.

The Judge found that the plaintiff saw the sign, and knew that it meant that he should not dive, but he deliberately disregarded it. He also knew that the depth of the water was variable, and that diving from heights could cause injury. Thus none of the suggested signs would have told the plaintiff anything he did not

already know and the failure to erect them could not be a breach of any duty owed to the plaintiff, and if there was any breach it was not a cause of his injuries [245] .

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[245] *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 427 [7] per Gleeson CJ and Kirby J, 467 [148] per Hayne J, 479-480 [210] per Callinan and Heydon JJ.

The plaintiff's case is essentially that when he dived he was not aware of the full extent of the risk and that the No Diving signs did not give him that information. However this does not establish a breach of duty. The question was addressed by Gleeson CJ in *Woods v Multi-Sport Holdings Pty Ltd* [246] , quoted by Gummow J in *Vairy* [247] :

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[246] (2002) 208 CLR 460 at 473-474 [43] .

[247] (2005) 223 CLR 422 at 452-453 [91] .

'It was argued that the appellant was not aware of the precise nature, and full extent, of the risk. But warnings of the kind here in question are not intended to address matters of precision.'

The Judge was not satisfied that a cantilevered barrier outside the railing would have been effective, and thought it may only have encouraged jumpers to attempt to jump over it with a risk of serious injury if they failed to clear it. The plaintiff did not pursue this allegation in this Court.

The other steps which the Judge held should have been taken were the installation of an external handrail with pool fencing and a triangular section on the top, or the addition of such a section to the existing handrail. Ipp JA could not decide whether a triangular handrail would have dissuaded the plaintiff from diving, but he holds that the attraction of the bridge as a place for jumping or diving would have been substantially reduced had the horizontal railings been replaced with pool fencing.

The presence of a triangular section fitted to the external handrail would make it uncomfortable and difficult, but not impossible, for someone to stand on the top railing and dive into the water. It may have deterred the plaintiff from diving from the top railing but not from diving from the ledge which was only 1.2 metres lower. He would still have dived from a height of some 8 metres into 2 metres of water. There is no evidence and no basis for an inference that diving from the

lower height would have made any difference. The plaintiff failed to prove that such a railing would have stopped him from diving from the ledge or prevented or substantially diminished his injuries.

The installation of an external handrail of pool type fencing would have prevented the plaintiff and others from using the existing horizontal rails to climb up or over the handrail, but would not have stopped him getting over. It had to be suitable for use by pedestrians for hand support and would have been no obstacle to an agile teenager. Mr Keegan was shown a photograph of the handrail on the ANZAC Bridge and asked whether it would be exceedingly difficult to climb. He said that it would be harder to climb than the existing railing on the Forster /Tuncurry Bridge, but this would still be possible. His evidence continued:

'Q. It'd be a lot harder wouldn't it?

A. Depending on the size of the person. A young person, I think, would have difficulty getting over it. An adult or a teenager, I think they'd be able to spring over that.'

The plaintiff was approximately 6 feet tall and the proposed pool type fencing would have been approximately 1.2 metres high. There is every reason for accepting Mr Keegan's evidence that such a fence would not have deterred a fit teenager such as the plaintiff who wished to jump or dive from the ledge.

The signs proposed would not have told the plaintiff anything he did not already know, a triangular section on the handrail would not have discouraged the plaintiff from diving off the ledge, and a pool type handrail would not have stopped him getting onto the ledge. I conclude therefore that the plaintiff failed to establish that any breach of duty by the [appellant] was a cause of his injuries and its appeal should succeed on this ground.

The appeal should also succeed on wider grounds. In the cases since *Australian Safeway Stores Pty Ltd v Zaluzna* [248] that have come before the higher courts arising out of diving accidents on public land outside enclosed and controlled swimming pools, the plaintiff's complaint has been that there was no or no sufficient warning of the danger of diving [249] . This does not involve the reversal of a credit-based finding. The plaintiff did not give direct evidence of his reaction to a triangular section on the top of the handrail or pool type fencing or both. A finding on causation in his favour requires the drawing of inferences.

It is always possible after the event, with the wisdom of hindsight, to identify some further step or steps that could have been taken by the defendant to avoid or reduce the risk of injury. However, as the High Court has held, the enquiry must always be prospective.

The cases arising from injuries caused by diving in areas open to the public have not raised the question posed in this case where No Diving signs in prominent positions were seen, understood, and ignored by the diver.

Although the bridge was an allurement to teenagers the Council and the [appellant], unlike the public authorities in *Nagle*, *Berrigan* and *Mulligan*, had not encouraged persons to use the bridge as a diving or jumping platform. This was considered relevant in *Vairy* [250] and *Mulligan* [251] .

The public, including unaccompanied teenagers, were entitled to use the walkway as of right, and short of closing it under the Act, which has not been suggested, neither the Council nor the [appellant] could stop them. The fact that the public can enter public land as of right was also considered relevant in *Vairy* [252] .

Just as in *Vairy* where attempts by Council lifesavers to stop diving off the rock platform were unsuccessful and provoked abuse from intending divers [253] , earlier efforts in this case by uniformed Council officers and police to stop youths jumping or diving off the bridge were also conspicuously unsuccessful.

Participation in recreational activity, and particularly where it involves inherent risks, is voluntary. Such activity is of a different character from that undertaken in the work place, on the roads, in the market place and in other areas where people must venture [254] . In [*Vairy*] Gummow J quoted [255] a statement from the joint judgment in *Brodie v Singleton Shire Council* [256] that the use of roads is a 'basic right and necessity'.

The [appellant] knew that the No Diving signs had not stopped the practice of jumping off the bridge, but teenagers may reasonably have understood from the signs that this was not prohibited. It was not aware that youths were diving from the bridge and it is somewhat unreal to consider what its duty would have been if it was. Ipp JA refers to *Wilkins v Council of the City of Broken Hill* [257] where the failure by Council staff at an enclosed swimming pool to enforce a prohibition on diving was held to be a breach of its duty of care to a teenager. In my judgment that case did not establish any principle relevant to the duty of care owed by a public authority to persons using an unpatrolled bridge open to the public as a diving platform contrary to No Diving signs on the bridge.

The [appellant] has State wide responsibilities for roads and road traffic in general, and for the State's freeways in particular. The focus in this case on the diving accident involving one person on one day on one bridge is inherently retrospective. This was not perceived as a risk before it happened." (some references omitted)

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[248] (1987) 162 CLR 479 .

[249] *Public Trustee v Sutherland Shire Council* (1992) Aust Torts Reports ¶81-149; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Swain v Waverley Municipal Council* (2005) 220 CLR 517; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; *Berrigan Shire Council v Ballerini* (2005) 13 VR 111.

[250] (2005) 223 CLR 422 at 442 [57], 450 [82]-[83], 453 [92] per Gummow J, 465 [139] per Hayne J.

[251] (2005) 223 CLR 486 at 502 [53] per Hayne J, 504 [66] per Callinan and Heydon JJ.

[252] (2005) 223 CLR 422 at 426 [5] per Gleeson CJ and Kirby J, 449-450 [81] per Gummow J, 459 [116], 461 [123] per Hayne J.

[253] (2005) 223 CLR 422 at 437 [41]-[42] per McHugh J, 450 [83] per Gummow J, 475-476 [194], 484-485 [226] per Callinan and Heydon JJ.

[254] (2005) 223 CLR 422 at 481-482 [217] per Callinan and Heydon JJ.

[255] (2005) 223 CLR 422 at 449 [80] .

[256] (2001) 206 CLR 512 at 574 [141] .

[257] [2005] NSWCA 468 .

The appeal to this Court

265. It is necessary first to revisit questions which were recently considered by this Court in *Fox v Percy* [258] : whether an intermediate appellate court, or this Court may escape its expressly imposed statutory duty to intervene in cases in which the primary judge has made errors of, or in respect of fact, in the exercise of some quite unstated residual discretion to do so, by reason of judicial solidarity, misplaced sympathy [259] for a severely disabled, however personally careless plaintiff, expediency, accommodation of an executive failure to appoint a sufficiency of judges, misconceived application of the uncertain principles of distributive justice, or a determined disinclination to distinguish between the roles of a department of social security and the courts, or otherwise; and the meaning and significance of "concurrency".

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[258] (2003) 214 CLR 118 at 126-127 [24]-[25] per Gleeson CJ, Gummow and Kirby JJ, 157-166 [130]-[148] per Callinan J.

[259] I say "misplaced sympathy" because of the consequences of undue generosity to plaintiffs in particular cases for deserving plaintiffs and would-be plaintiffs in other cases. The consequences, inevitably, have been enactments to reinforce and even extend defences of contributory negligence and the like, restrict access to the courts and to cap damages. See for example, *Civil Liability Act* 2002 (NSW) , *Wrongs Act* 1958 (Vic) as amended by the *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic) and by the *Wrongs and Other Acts (Law of Negligence) Act* 2003 (Vic) , *Civil Liability Act* 1936 (SA) as amended by the *Law Reform (Ipp Recommendations) Act* 2004 (SA) , *Civil Liability Act* 2003 (Q) , *Civil Liability Act* 2002 (WA) , *Civil Liability Act* 2002 (Tas) , *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) , *Civil Law (Wrongs) Act* 2002 (ACT) . As to contributory negligence see: ss 5R, 5S, 5T (NSW); ss 62 , 63 (Vic); ss 44 to 50 (SA); ss 23, 24 (Q); ss 5K, 5L (WA); ss 5, 23 (Tas); ss 14 to 17

(NT); s 47 (ACT). As to damages caps see: ss 12, 16, 18, 21 (NSW); ss 28F to 28H (Vic); ss 52, 54, 56 (SA); ss 52, 54, 60 to 62 (Q); ss 9 to 11 (WA); ss 26, 27 (Tas); ss 19, 20, 27, 29 (NT); s 98 (ACT).

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266. **Following paragraph cited by:**

Liprini v Hale (03 July 2020) (Macfarlan and McCallum JJA, Emmett AJA)

The High Court is under at least as heavy an obligation to dispose of appeals to it on their legal and factual merits as an intermediate appellate court. This obligation is imposed by s 73 of the Constitution [260] and, in further pursuance of it, ss 35 [261] and 35AA[262] of the *Judiciary Act* 1903 (Cth) . Once this Court is satisfied that a case has qualified for a grant of special leave [263] it is bound to decide it. Because one or two other courts have earlier decided the questions one way, does not mean that this Court may stand aside and hold, that despite the grant of special leave and the correctness or otherwise of the decisions below, they should be left undisturbed, simply because they are the decisions of the courts below. Deference is one thing: abstention from righting a wrong is an altogether different matter.

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[260] "The High Court shall have jurisdiction … to hear and determine appeals from all judgments, decrees, orders, and sentences:

…

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

…

and the judgment of the High Court in all such cases shall be final and conclusive."

[261] "(1) The jurisdiction of the High Court to hear and determine appeals from:

(a) judgments of the Supreme Court of a State, whether given or pronounced in the exercise of federal jurisdiction or otherwise; or

(b) judgments of any other court of a State given or pronounced in the exercise of federal jurisdiction;

whether in civil or criminal matters ..."

[262] "(1) … the High Court has jurisdiction to hear and determine appeals from judgments of the Supreme Court of a Territory."

[263] Section 21 of the *Judiciary Act* 1903 (Cth) :

"(1) Applications for special leave to appeal to the High Court from a judgment of another court may be heard and determined by a single Justice or by a Full Court and the Rules of Court may provide for enabling such applications to be dealt with, subject to conditions prescribed by the Rules, without an oral hearing."

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267. The task of an appellate court is not to deny any litigant, whether rich or poor the recourse to it that the Constitution , and the relevant legislation say that the litigant should have. Whether a distinction is to be made by appellate courts in carrying out their duties, between a well-resourced litigant and some other litigant, or a special advantage is to be conferred upon the former, are for the legislature, and not the courts to say. And, not surprisingly, no legislature has said that. Both the relevant legislation and the Constitution in providing for appeals draw no distinction between questions of fact and law. For my own part I have no doubt that an error of fact is just as capable of causing an injustice, whether it is to be described as a plain, manifest, or gross error or some other form of error, as a mistake of law.

268. If one thing is clear from a review of some of the recent cases in this Court in which pronouncements have been made about findings of fact, it is that the foundation for a more tender treatment of them than holdings of law is unsound. It is unsound because it has in the past been largely based upon the practice of appellate courts in relation to decisions at first instance in the unique admiralty jurisdiction. I drew attention to this in *Fox v Percy* . *The "P Caland"* [264] , with which I did not specifically deal, is also an admiralty case. The judge who decided that case at first instance, Jeune J, was a very experienced admiralty judge well accustomed to consulting the Trinity Masters in almost all cases of any doubt regarding seamanship [265] . Indeed, in the volume of the reports in which *The "P Caland"* appears, there are several stated instances of his Lordship's reference to his consultation with the Trinity Masters [266] . It is more than speculation to think that there was, there, in any event, a nineteenth century judicial reluctance to hear, let alone decide appeals [267] on questions of fact by reason of the novelty of their availability, and a condescending view that facts were for juries and not judges[268]. There is more than a hint of this in the language of the Lord Chancellor, Lord Herschell, in *The "P Caland"* [269] in his description of a finding of fact as a "mere" matter [270] . What is remarkable about the cases referred to in *Fox v Percy* , and in other judgments of this Court in this case, namely *Major v Bretherton* [271] , *Baffsky v Brewis* [272] , *The Commonwealth v Introvigne* [273] , *Waltons Stores (Interstate) Ltd v Maher* [274] , *Louth v Diprose* [275] and *Bridgewater v Leahy* [276] , is that there is not the slightest reference in any of them to the enactment under which each appeal was brought and in which nowhere is there any distinction made between appeals on questions of law and appeals on questions of fact.

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[264] [1891] P 313 .

[265] In the admiralty jurisdiction, if a cause depended upon "questions of nautical science and skill, relating to the management and movement of ships" the court would be assisted by two nautical assessors who were "not only technical advisers" but also were "sources of evidence as to the facts … [The court] obtain[ed] its information from them, not from sworn witnesses called by the parties": *The Australia* [1927] AC 145 at 152 per

Lord Sumner. The assessors were members of the Corporation of the Trinity House, a charitable organization established by Royal Charter in 1514 to regulate the pilotage of ships in the King's streams, and drawn from the ranks of the Royal and Merchant Navies.

See Derrington and Turner, *The Law and Practice of Admiralty Matters*, (2007) at 222-226 for a good discussion of the role of nautical assessors in admiralty, and of the Corporation of Trinity House.

[266] For example, *The Orion* [1891] P 307 at 310.

[267] A similar reluctance can be discerned to the upholding of appeals in criminal cases for years after the enactment of the Criminal Appeal Acts in the various Australian States: eg in relation to the *Criminal Appeal Act* 1912 (NSW) in *Hargan v The King* (191 9) 27 CLR 13 at 23 where Isaacs J refers to the three grounds of appeal specified by s 6 of the Act as, if made out, providing only a "prima facie" basis for the allowance of appeals. See also *Mallard v The Queen* (2005) 224 CLR 125 at 128-129 [4] per Gummow, Hayne, Callinan and Heydon JJ.

[268] Prior to the enactment of the *Judicature Acts* 1873-1875 (UK) the general appeal was unknown in England outside the courts of equity. In early times, the only form of review was the writ of attaint, by which the unsuccessful litigant might challenge the decision against him by charging the jury with fraud. The proceedings were brought against the members of the jury themselves, and if successful the verdict was set aside and the jurors punished. The writ of attaint was in due course supplemented and later superseded by the writ of error which survived until 1875. The writ of error was concerned exclusively with questions of law.

The *Judicature Act* 1875 (UK) provided for the hearing of a general appeal of the kind available in the past only in equity by the new Court of Appeal. Equity, however, had never made use of juries nor of the common law mode of trial at which, by reason of the presence and role of the jury, evidence was given orally. See Jolowicz, "Appeal and Review in Comparative Law: Similarities, Differences and Purposes", (1986) 15 *Melbourne University Law Review* 618 at 623-625.

[269] [1893] AC 207 .

[270] [1893] AC 207 at 215.

[271] (1928) 41 CLR 62 .

[272] (1976) 51 ALJR 170; 12 ALR 435.

[273] (1982) 150 CLR 258 .

[274] (1988) 164 CLR 387 .

[275] (1992) 175 CLR 621 .

[276] (1998) 194 CLR 457 .

269. Something should also be said about "concurrency" of findings of fact. Very often concurrency is no more than the acquiescence by the intermediate appellate court in the findings made at first instance. The *Supreme Court Act* 1970 (NSW) and its analogues elsewhere demand more than that. They require that the appellate court properly and fully review the case at trial, as onerous a task as that might on occasion be.

270. In this case however, neither at first instance nor on appeal, were there any primary factual matters of substance in dispute. This is apparent from the material facts that I have summarized at some length, most of which are taken from the first respondent's evidence at trial. It is on the basis of that evidence that the first respondent's case should have failed in the courts below, and must be rejected here. It is not without irony however, that as to a key inferential matter of fact, indeed the one upon which the result turned in each court, there was no concurrency, actual or supposed, between the trial judge and the Court of Appeal, that is, as to the contents of the notional sign which it is said would have deterred the first respondent from climbing on, and diving from the bridge. It is a further irony that, as Gummow J points out, the first respondent was not asked about his likely reaction to the contents of the sign which the Court of Appeal favoured. Responses to that sort of question are predictable and usually not very convincing [277] , but the first respondent was asked and did answer such a question at the trial about a different one from the one preferred by the Court of Appeal. There was a sense of improvisation in the conduct of the first respondent's case in both of the courts below as to appropriate measures of deterrence of jumping and diving, both generally and in particular. Unfortunately the improvisation in question accepted and adopted in each of the courts differed. As to duty and the nature and extent of the obligations owed in circumstances of the kind in question here, I agree with Gummow J.

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[277] See *Rosenberg v Percival* (2001) 205 CLR 434 at 501-502 [214] per Callinan J.

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271. All parties, as did the courts below, accepted that the well-known formulation of Mason J in *Wyong Shire Council v Shirt* [278] should be applied here [279] :

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

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[278] (1980) 146 CLR 40 .

[279] (1980) 146 CLR 40 at 47-48 per Mason J.

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272. The evidence shows that there was a basis for holding that both the appellant and the second respondent should reasonably have foreseen that the bridge and the railing on it, in its current state might present these risks: that the latter might provide a platform for divers and jumpers; and that they might thereby injure themselves, severely, either by jumping or diving on to a passing boat or a submerged bank, or indeed in the water itself.

273. The question then becomes, what was an appropriate response to those risks? That has to be answered by balancing the magnitude of the risk, the degree of probability of its occurrence, and the expense, difficulty and inconvenience of taking alleviating action, and any other conflicting responsibilities of the defendants.

274. In my opinion the trial judge and the majority of the Court of Appeal erred, by failing to undertake this balancing exercise in a sufficient and proper way. Had they done so they would have identified and given full weight to these matters. As to "magnitude", I accept that diving from a height of 8 to 10 metres was itself a risky activity. It was for this reason that it was discouraged by police and officials, banned, and the subject of the pictograph signs. But even so, and despite flagrant defiance of the ban, not one out of the many who had dived in the 40 or so years that had elapsed since the construction of the bridge had been injured, so far as anyone could recall, let alone severely injured. This is to say that the risk, although undisputedly present, had a very low degree of probability of realization. And although the first respondent's injuries were grave, that is of great magnitude, seemingly minor mishaps can sometimes cause grave injuries.

275. Also to be balanced, are the interests of the community in being able to walk across the bridge, to enjoy the view, and to pause and lean in comfort on a flat surface of a top rail as they do so. Only an extremely high unscaleable fence, with perhaps shards of glass embedded in its top, or barbed, or electric, or razor wire, might, on the evidence, have deterred determined and adventurous youths from climbing and jumping. Equally, the substitution of vertical bars for horizontal rails is unlikely to have been an effective deterrent. Other measures such as the provision permanently of a sufficient number of police or other officials would exceed the requirements of a reasonable response. It was only during the course of the trial, during the cross-examination of Mr Keegan, and as a matter of understandable opportunism rather than of deliberation, that the other measure came to be suggested as one apt to deter climbing and diving: the erection, either in substitution of, or in addition to the top rail, of a metal or wooden rail triangular in shape, laid flat so that a diver would have had to balance himself on its sharp edge before diving. It may be accepted that this measure might have been a relatively inexpensive one, but again, one not so formidable as to constitute a substantial deterrent. It would, in any event, have had these further disadvantages: that a person on it might more easily teeter, overbalance, fall unprepared into the water, or backwards, on to the unfenced roadway, and into the path of a motor vehicle.

276. **Following paragraph cited by:**

Korda v Aldi Foods Pty Ltd (15 March 2018) (Burns, Mossop and Bromwich JJ)

29. In a "warning case", it is clear that evidence by a plaintiff asserting that a warning would have altered the plaintiff's behaviour must be carefully examined (see for example *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; 234 CLR 330 at [276] ; *Rosenberg v Percival* [2001] HCA 18; 205 CLR 434 at [221] ; *Hoyts Pty Ltd v Burns* [2003] HCA 61; 77 ALJR 1934 at [23]). That fact emphasises, rather than detracts from, the need for a court to make findings about what warning was required and how, in the particular circumstances of the case, the existence of that warning would have altered behaviour in a manner which avoided the injury suffered by the plaintiff. In undertaking that exercise, the court needs to have regard to the inherent probabilities in the particular circumstances and general characteristics of human behaviour: *Shire of Gingin v Coombe* at [80] .

In any event, the notion that the first respondent and other youths would have heeded a worded sign when they flagrantly disregarded a pictograph sign of unmistakeable import, strains credibility. Indeed, the making of the excruciatingly fine distinctions, as each of the courts below did, between the content of the signs actually erected, and other allegedly preferable ones, as to which those courts themselves were not in agreement, was quite unconvincing.

277. The first respondent was engaged in an activity of a purely recreational kind. The thrill of making, as he did, a high dive which he knew to be banned must have been an attraction for him. To say, as if it were an answer, that the bridge was therefore an allurement [280] which the defendants should, on that account, have rectified, is to cease the inquiry at, or to treat as effectively decisive, the state of affairs antecedent to the first respondent's entirely voluntary, and premeditated, prohibited act of diving. But even so, it is something of an exaggeration, to describe a perfectly orthodox bridge constructed to endure for many years, and in accordance with the standards of the time, as an allurement, as if, because youths were accustomed to misuse it, it should be modified to put beyond all chance, that they would do so in the future.

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[280] [2007] HCATrans 233 at 3465-3535 .

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278. A defendant is not an insurer. Defendants are not under absolute duties to prevent injury, or indeed even to take all such measures as might make it less likely to occur. They are obliged only to make such responses as can be seen to be reasonable in the circumstances. A proper balancing exercise which takes all of the relevant circumstances into account leads inescapably to the conclusion that the appellant, in responding to a risk that had not been realized for 40 years, by erecting the pictograph signs, acted reasonably and adequately.

279. The first respondent seeks to rely on a notice of contention as follows:

> "1. The majority of the Court of Appeal was in error in determining, contrary to the determination of the trial judge, that even without the sign ('no diving' pictogram) it should have been obvious to a reasonable 14 and a half year old that such a dive was dangerous and could lead to catastrophic injuries.
>
> 2. That the majority of the Court of Appeal, was in error in determining, contrary to the determination of the trial judge, that the 'no diving' pictogram displayed on the bridge impliedly warned against danger."

280. It is unnecessary to give that notice any additional consideration. What I have said, and the reasoning of Handley JA in the Court of Appeal to which I have referred are an answer to it.

281. Causation was also argued. If it were necessary to determine the question, I would hold for the appellant on it also. The cause was the first respondent's defiance of the sign in full awareness of the presence of the sandbars.

282. For these, and the reasons given by Handley JA which I have quoted, I would allow the appeal. I agree with the orders proposed by Gummow J.

283. **Following paragraph cited by:**

Gosling v Lorne Foreshore Committee of Management Inc (08 October 2009) (Ashley, Redlich JJA and Kyrou AJA)

> 51. The significance of the frequency with which a risky practice was being followed again fell for consideration in *Roads and Traffic Authority of New South Wales v Dederer*. [23] The respondent had dived from a bridge and hit his head in the bed of an estuary. Diving from the bridge was a widespread and longstanding practice. The respondent had dived from the bridge before. Signs had been erected prohibiting diving from or climbing on the bridge. The respondent understood the signs and knew that the estuary contained channels of variable depth. Gummow J, who was in the majority, and with whom Heydon J agreed, [24] cautioned against too close a focus upon the frequency with which persons are exposed to a risk, observing that to do so might result in distraction 'from a proper evaluation of the probability of [the] risk occurring'. [25] His Honour said:
>
> The first error can be seen in Ipp JA's characterisation of the 'startling frequency' of 'large numbers' of people jumping and diving from the bridge; a practice that was 'continuing unabated' notwithstanding the pictograms. Such a characterisation incorrectly focused attention on the frequency of an antecedent course of conduct, namely jumping and diving, and not on the probability of the risk of injury occurring as a result of that

conduct, namely impact in shallow water. As Lord Porter observed in *Bolt on v Stone.* 'in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of *injury being caused*' (emphasis added). In the present case, the frequency of jumping and diving was only startling if one ignored the fact that no-one was injured until Mr Dederer's unfortunate accident. Far from being a risk with a high probability of occurrence, the probability was in truth very low, and this fact was masked by the Court of Appeal's characterisation of the relevant risk. [26]

via

[26] Ibid [61] (citations omitted).

Gosling v Lorne Foreshore Committee of Management Inc (08 October 2009) (Ashley, Redlich JJA and Kyrou AJA)

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via

[24] Ibid , [283] .

Gosling v Lorne Foreshore Committee of Management Inc (08 October 2009) (Ashley, Redlich JJA and Kyrou AJA)

HEYDON J. I agree with the orders proposed by Gummow J and with the reasons he gives, and would add only the following.

Concurrent findings of fact?

284. This is not an appeal in which it can be said that the courts below made "concurrent findings of fact" in such a way as to inhibit this Court from allowing the appeal.

285. *Discordant findings.* The findings of the courts below on issues which were crucial to the resolution of the question whether the RTA was in breach of its duty of care were discordant, not concurrent. It is true that the trial judge and a majority of the Court of Appeal agreed that there had been a breach of duty, and in that sense their findings on breach were concurrent. The question of breach of duty is an issue of fact, but the ultimate conclusion about that issue of fact is one which operates at an extremely general level. The crucial findings of the courts below in relation to what measures the RTA, exercising reasonable care, should have adopted were not "concurrent" in the ordinary meaning of language.

(a) The trial judge found that a sign warning of "shallow water" would have been ignored by the plaintiff [281] ; the Court of Appeal majority disagreed [282] .

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[281] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,530 [68] .

[282] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,904-68,905 [247]-[249] .

(b) The trial judge thought that the relevant sign should have warned of "Danger, shifting sands, variable depth" and that that sign would probably have prevented the plaintiff's dive [283] ; the Court of Appeal majority disagreed, saying that that sign would have been unlikely to have inhibited the plaintiff from diving, and that the RTA should have erected a composite sign containing a "No Diving" pictogram and the words "shallow water" [284] .

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[283] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,531 [70] .

[284] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,904-68,905 [243]-[251] per Ipp JA and 68,923 [373] per Tobias JA.

(c) The trial judge said that the RTA should have ensured either that the fence had a triangular top or that the fence should have been of swimming-pool style [285] ; the Court of Appeal majority differed by saying that the triangular top "may have dissuaded" the plaintiff from diving, but declining to hold that it would have [286] , rather saying that that change, taken in combination with pool-type fencing and the different sign, would probably have prevented the accident [287] .

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[285] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,531 [73]-[74] .

[286] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,906 [258] .

[287] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,906 [259]-[261] and 68,914 [310] .

(d) The trial judge thought that the prohibition against diving communicated by the RTA was not a warning; the Court of Appeal majority said it was [288] .

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[288] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,903 [237] .

(e) The trial judge thought that the risk was not obvious to a 14 year old boy [289] ; the Court of Appeal majority thought it was [290] .

(f) The concurrency of the findings is further damaged by the fact that Handley JA, dissenting in the Court of Appeal, was at odds with many of the findings made by both the trial judge and the majority.

(g) Further, there is discordance on issues not directly material to the question whether the RTA was in breach of its duty of care, but factually closely related to that question:

(i) The trial judge found the RTA 80 percent liable for the plaintiff's damages and the Council 20 percent liable [291] ; the Court of Appeal found that the Council was not liable at all [292] .

(ii) And the trial judge found 25 percent contributory negligence on the part of the plaintiff [293] ; but the Court of Appeal found 50 percent [294] .

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[289] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,533 [87] and 67,534 [93] .

[290] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,894 [172] .

[291] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,534 [94] .

[292] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,874 [1] per Handley JA, 68,891-68,895 [146]-[173] per Ipp JA and 68,916 [325] per Tobias JA.

[293] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,534 [92]-[93] .

[294] *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860 at 68,874 [1] per Handley JA and 68,915 [316]-[321] per Ipp JA.

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286. If the basis of the supposed concurrent findings principle is that what two courts have found to be the case may be safely assumed to be the case, it has no operation here, for in every crucial respect the two courts below were in disagreement. It is true that some conclusions may be more acceptable if different lines of reasoning support them. But where conclusions are supported by inconsistent lines of reasoning, one's confidence in the correctness of those conclusions often declines rather than rises. If this case is an instance where the concurrent findings principle is to be applied, it has been misnamed: it should be called a concurrent orders principle.

287. *The authorities.* It is common for lawyers to speak of the difficulties facing appellants seeking to overcome "concurrent findings" in two courts below. In one sense, all that is meant is that if four judges have agreed on what the facts are, it will be difficult in a practical sense to persuade three more to disagree. From this perspective, the existence of "concurrent findings" creates no technical or rigid bar to appellate intervention. But in another sense, what is meant is that concurrent findings create a barrier to appellate correction, that appellate correction will not take place if only error is demonstrated, and that the appellant must go further and show a different kind of error – error which is in some sense "clear" or which

works a plain or manifest injustice. And in *Louth v Diprose* Deane J said that the relevant principle about concurrent findings applied even if "some conclusions or inferences of fact are based on different reasonings as between the two courts", and even if there was "a dissentient in the first appellate court" [295] . In principle these last two propositions are difficult to understand in modern Australian conditions. As to the first of Deane J's propositions, it is understandable that a third court might feel trepidation in disagreeing with factual findings on which all the judges of two other courts have already agreed: but it is difficult to understand the trepidation in cases like the present, where the courts below not only did not agree, but were at odds on almost every crucial issue except the ultimate issue of whether there had been a breach of duty. And, as to the second of Deane J's propositions, in cases like the present, where questions of credit are not involved, and where four judges have sat in the courts below, it is hard to see why the supposed concurrent findings principle applies where the dissentient judge sat in the intermediate appellate court and not where the dissentient judge was the trial judge.

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[295] (1992) 175 CLR 621 at 634.

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288. The reason assigned by Deane J in an earlier case for the concurrent findings principles he enunciated was the desirability of ending "litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal". He noted that "the cost of litigation has gone a long way towards effectively denying access to the courts to the ordinary citizen who lacks access to government or corporate funding". He saw the finality of which he was speaking as being "in the overall interests of the administration of justice and of the preservation of at least some vestige of practical equality before the law" [296] . The reduction of cost and the non-denial of access to justice are, of course, important considerations. However, Deane J appears to treat them as supporting the view that it is unjust for a litigant who has succeeded twice on an issue of fact to be deprived of the fruits merely because a final appellate court thinks the courts below were wrong. A competing view is that it is also in the overall interests of the administration of justice that judges reach correct conclusions, and that if their conclusions are erroneous they be corrected on appeal. It may be thought that the likelihood of judges having reached a correct conclusion is greater where they are unanimous, and reduced if there is a dissentient. If so, it remains unclear why the precise court in which the dissentient sits is crucial, so that there is a concurrent findings principle if the dissentient was in the intermediate appellate court but not if the dissentient was the trial judge.

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[296] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 434-435 .

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289. Deane J cited authority for the two propositions quoted above – that the concurrent findings principle applies even if the courts below differ in their reasoning, and even if there is a

dissentient in the first appellate court. That authority was the Privy Council decision of *Devi v Roy*. In that appeal, decided in 1946, the Board (Lord Thankerton, Lord du Parcq and Sir Madhavan Nair) examined many Privy Council decisions reached over the previous 85 years. They concluded that the Privy Council had a practice of not disturbing concurrent findings of fact. Two aspects of that practice were [297] :

> "(2) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore a dissent by a member of the appellate court does not obviate the practice [[298]] .
>
> (3) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice."

They also said [299] :

> "(7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country."

That was a consideration mentioned as well in some of the authorities they analysed, and, for the Privy Council, it may well remain a powerful one. In 1946 it was a particularly powerful consideration. In that year, and for many decades earlier, the Privy Council could hear appeals from numerous jurisdictions spread across all five continents. Many appeals would have been heard by judges lacking an understanding of local conditions in these extremely diverse jurisdictions. The position of the Privy Council at that time and earlier was very different from that of this Court, which with limited exceptions hears appeals only from the federal courts and States and mainland Territories of Australia, to which one Constitution applies, and to which a single common law applies unless modified by Commonwealth legislation, usually of universal application, or State or Territorial legislation, often uniform in character. What is more, while there is some social heterogeneity to be observed among the residents affected by the laws of each jurisdiction, there is no radical difference between the jurisdictions in this respect. It is not the case that there are particular aspects of local conditions with which trial judges and intermediate appellate courts are far better equipped to deal than this Court. That difference in position is a reason for strongly doubting the applicability of the concurrent findings principle to this Court [300] .

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[297] [1946] AC 508 at 521.

[298] In this respect *South Australia v Johnson* (1982) 42 ALR 161 at 167 may qualify the doctrine, for there Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ said:

> "This appeal requires the court to review and evaluate a vast body of evidence, much of which is in conflict, yet upon which the findings of the learned trial judge have been substantially confirmed by a unanimous Full Court. In such a case, the appellant naturally faces a difficult task in showing that the challenged findings were erroneous ... This court will give the greatest respect to such concurrent findings, although free of course to depart from them if convinced that they are wrong."

Depending on the force of the word "convinced", that is a more defensible proposition. It would not assist the plaintiff, for here the Court of Appeal did not "substantially" confirm the trial judge's findings, nor was there unanimity in the Court of Appeal.

[299] [1946] AC 508 at 521.

[300] See *Muschinski v Dodds* (1985) 160 CLR 583 at 590-591 per Gibbs CJ.

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290. A further reason for doubting the applicability of the principle to this Court is that among the propositions stated at the end of the Privy Council's reasoning is the following [301] :

> "(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect."

It cannot be the law in Australia that this Court will only depart from concurrent findings where what "happened [was] not in the proper sense of the word judicial procedure at all". That is not how exceptions to the concurrent findings principle have been stated in this Court. If the second and third propositions quoted above lead to, or are integrally linked with, a proposition which is in this Court as erroneous as the fourth is, the applicability in this Court of the second and third propositions themselves must be questionable.

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[301] [1946] AC 508 at 521. The language derives from that of Viscount Dunedin in *Robins v National Trust Co* [1927] AC 515 at 518.

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291. Further, as the Privy Council made plain in *Robins v National Trust Co* [302] :

> "The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed."

It must be seriously doubted whether it is right for this Court to adopt for itself a rule of conduct which the Board laid down without reference to any statutory provision, at least without counsel appearing before this Court, and the Court itself, conducting a close analysis of the constitutional and statutory provisions concerning appeals to this Court in a case in which the existence or non-existence of the supposed concurrent findings principle is crucial to the outcome.

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[302] [1927] AC 515 at 517 per Viscount Dunedin.

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292. Finally, apart from Privy Council cases, the authorities that support the concurrent findings principle are, with respect, slight. The point is usually put in passing, as a makeweight for conclusions arrived at on other, more specific and substantial grounds. Thus in the first case on the point in this Court, *Major v Bretherton* , only Isaacs J devoted much attention to it [303] . Starke J mentioned it very briefly [304] . Knox CJ and Gavan Duffy J did not mention it at all. The fifth judge, Higgins J, said [305] :

> "The attitude of the Judicial Committee as the final tribunal of the Empire as to its own practice is not necessarily to be the attitude of this Court; and the question whether we shall treat ourselves as being subject to such a rule in our endeavours to do justice after weighing all the circumstances of the case before us should not be decided until the subject has received much more attention than has been possible in this case. In my opinion, the question should be left open until such a decision becomes necessary."

The subject received no attention in argument from the parties on the present appeal, apart from a short submission by the plaintiff that there were some concurrent findings. The reports of the other well-known cases in this Court do not suggest that the subject received attention in argument in them [306] . What is more, Gibbs CJ maintained that this Court had not adopted the Privy Council rule of practice, and said: "Where concurrent findings are challenged, it remains the duty of this Court to depart from them if it considers them to be erroneous." [307] And in the House of Lords the Earl of Halsbury LC said of the Privy Council doctrine: "I have repeatedly protested against the views cited. I feel that where a tribunal has to review a question of fact, it must do it to the best of its ability." [308] In the same case Lord Davey said that the Privy Council doctrine was sound if "regarded merely as a guide to the judgment of the tribunal and not as a rule of law or practice." [309] He also said [310] :

> "In every case the appellant assumes the burden of shewing that the judgment appealed from is wrong, and when it depends on an estimate of probabilities or inferences so nicely balanced that it is impossible to say that a decision either way would be wrong, every material fact having received due consideration, your Lordships would, I make no doubt, be disposed to affirm the concurrent decision of the Courts below."

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[303] (1928) 41 CLR 62 at 68-71 .

[304] (1928) 41 CLR 62 at 74.

[305] (1928) 41 CLR 62 at 74.

[306] *Baffsky v Brewis* (1976) 51 ALJR 170; 12 ALR 435; *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 274 (recording a concession by counsel); *South Australia v Johnson* (1982) 42 ALR 161 at 167

; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Louth v Diprose* (1992) 175 CLR 621; *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 618 [39] ; *Bridgewater v Leahy* (1998) 194 CLR 457; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.

[307] *Muschinski v Dodds* (1985) 160 CLR 583 at 590-591 .

[308] *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 at 75 (in argument).

[309] *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 at 83.

[310] *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 at 83.

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293. In these circumstances it is undesirable to treat the concurrent findings principle as beyond argument until proper argument has taken place in a case in which "such a decision becomes necessary".

294. *Exception to concurrent findings principle.* In any event, even if it is appropriate to treat the concurrent findings principle as a rule of law until such time as it is examined closely after full argument, the statements of it in the House of Lords and in this Court accept that it does not apply if the supposedly concurrent findings are "clearly demonstrated ... [to be] erroneous" [311] , or there is "a tolerably clear conviction" [312] or a "clear conviction" [313] that they are erroneous, or there are "special reasons such as plain injustice or clear error" [314] . The errors of factual inference identified by Gummow J and by Callinan J are clear, and they led to a plain injustice.

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[311] *Owners of the "P Caland" and Freight v Glamorgan Steamship Co Ltd* [1893] AC 207 at 215 per Lord Herschell LC.

[312] *Owners of the "P Caland" and Freight v Glamorgan Steamship Co Ltd* [1893] AC 207 at 216 per Lord Watson.

[313] *Major v Bretherton* (1928) 41 CLR 62 at 71 per Isaacs J.

[314] *Louth v Diprose* (1992) 175 CLR 621 at 634 per Deane J.

Breach of duty

295. In recent years attempts to argue that the test stated in *Wyong Shire Council v Shirt* [315] is erroneous have not succeeded. Until they do, it is necessary to apply that test, properly understood. I agree with the reasons given by Gummow J for deciding that its application leads to the conclusion that the RTA was not in breach of duty.

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[315] (1980) 146 CLR 40 at 47-48 per Mason J.

Costs

296. In view of the fact that a majority favour the allowing of the appeal, it is not necessary to consider whether the Court of Appeal was correct in refusing the plaintiff's application for a *Sanderson* order. Had it been necessary to do so, I would have agreed with the reasoning of Kirby J on this point[316], and would add only the following.

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[316] Reasons of Kirby J at [176]-[193].

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297. Though no doubt this was not its purpose, the effect of the RTA's conduct was to mislead the plaintiff's advisers into a course which led to him not starting an action against the Council at a propitious time, only starting an action against it at an unpropitious time, failing in that action, and as a result incurring a responsibility for payment of the Council's costs. Counsel for the RTA defended the Court of Appeal's approach by saying that it was not for the RTA to advise the plaintiff's professional advisers as to whether the Council had any responsibility for the bridge and for the signs positioned on it. To this there are two answers.

298. First, it may be open to some potential defendants to take that stand. It seems wrong for a corporation like the RTA to do so in resistance to an application for a *Sanderson* order. The RTA is, for the purposes of any Act, a statutory body representing the Crown: *Transport Administration Act* 1988 (NSW), s 46(2)(b) . Its affairs are managed and controlled by its Chief Executive, who is appointed by the Governor: ss 47(1) and 48(1). The Chief Executive is, in the exercise of his or her functions, subject to the control and direction of a Minister: s 49. The RTA is in that sense a governmental organisation. It is a truism that statutory bodies of that kind should be model litigants: counsel for the RTA accepted that this was so "without question". A terrible thing had happened to a child. The solicitors for that child were not busybodies. Their request of the RTA was not a trivial one. It was possible that the RTA – a very wealthy and powerful organisation – was liable in tort. It was also possible that the Council – doubtless much less wealthy, but better resourced than the plaintiff and his parents – was liable. There is nothing wrong with wealthy and powerful defendants requiring plaintiffs to prove their cases, but in the circumstances, as a matter of common humanity, not legal duty, the RTA ought not only to have attempted to tell the plaintiff's advisers who controlled the bridge, as it did, but also to have stated the underlying facts correctly. This was particularly so in view of what the trial judge eventually found was the close relationship between the RTA and the Council [317] . Counsel for the RTA submitted that no responsibility could be attributed to the RTA because the plaintiff had "professional advisers who bring equality of arms", and hence there was no duty on the RTA to have answered the query of the plaintiff's solicitors at all. "Equality of arms" is a blessed phrase. However, many of the factual matters on which the trial judge relied to reach his conclusions as to the responsibilities of the RTA and the Council for the bridge were far from being readily

ascertainable by an outsider, being internal to the workings of government, and to some extent being ancient. There was no equality of arms at all in that respect. If it be said that the question of who controlled the bridge was not an easy one even for insiders, the insiders had no apparent difficulty in making allegations in the RTA's pleadings about the control of the bridge which turned out to be correct.

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[317] *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792 at 67,528 [48]-[53].

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299. But whether or not the RTA was under any obligation to respond to the request made by the plaintiff's solicitors, and whether or not it was under any obligation to respond more fully or to respond correctly, the fact is that it did respond in the way it did. Its response was confirmed by the identical response from the Council. The response was erroneous. That error led the plaintiff to lose an opportunity to start proceedings against the Council at an advantageous time, before the germination and enactment of legislation which eventually caused his claim against the Council to fail. More crucially for present purposes, the reversal by the RTA of the stand it had taken about who was responsible for the bridge, and the RTA's suggestion, by its indication that it wished to amend its pleadings in September 2003, that the Council might be liable to the plaintiff, which it had up to that point denied, caused the plaintiff's advisers to join the Council, but at a much more disadvantageous time. Thus whether or not the RTA had any duty to cooperate when it was originally asked about who was responsible for the bridge, the fact that it responded as it did, and thereafter behaved as it did, would have made a *Sanders on* order just had the plaintiff succeeded against the RTA.

Cited by:

Hays Specialist Recruitment (Australia) Pty Ltd v Carey-Schofield; Civeo Pty Ltd v Carey-Schofield [2025] QCA 161 -
Hays Specialist Recruitment (Australia) Pty Ltd v Carey-Schofield; Civeo Pty Ltd v Carey-Schofield [2025] QCA 161 -
Hays Specialist Recruitment (Australia) Pty Ltd v Carey-Schofield; Civeo Pty Ltd v Carey-Schofield [2025] QCA 161 -
State of New South Wales v T2 (by his tutor T1) [2025] NSWCA 165 (25 July 2025) (Bell CJ, Kirk JA and Price AJA)

Victoria v Bryar (1970) 44 ALJR 174; *Commonwealth v Introvigne* (1982) 150 CLR 258; [1982] HCA 40; *Trustees of Roman Catholic Church for Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161; [2005] HCA 31; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62; *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330; [2007] HCA 42; *Electricity Networks Corporation v Herridge Parties* (2022) 276 CLR 271; [2022] HCA 37; *Geyer v Downs* [1975] 2 NSWLR 835; *Collins v Insurance Australia Ltd* (2022) 109 NSWLR 240; [2022] NSWCA 135; *Gugiatti v Servite College Council Inc* [2004] WASCA 5; (2004) Aust Torts Reports 81-724, referred to.

State of New South Wales v T2 (by his tutor T1) [2025] NSWCA 165 -
Cootharinga North Queensland v Wolfs [2025] QCA 106 (20 June 2025) (Bond JA; Ryan and Cooper JJ)

16. In that context, Cootharinga emphasised the importance of correctly identifying the risk of harm, because it is only through correct identification of the risk that one can assess what a reasonable response to that risk would be. [3] The risk that must be identified must be that which materialised in the case of the injured person seeking to claim for breach of duty. [4] Further, the risk must be characterised at an appropriate level of generality because addressing the questions and considerations in a provision such as s 305B makes it necessary to formulate a plaintiff's claim in a way which takes account of the precautions which it is alleged should have been taken and identifies the risk or risks of harm which the plaintiff alleges eventuated and to which those precautions should have been directed. [5] Because the enquiry is concerned with determining what person, thing or set of circumstances gave rise to the potential for the harm for which the plaintiff seeks damages, the characterisation of the relevant risk should not obscure the true source of the potential injury. [6]

via

[3] *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, 351 [59].

Cootharinga North Queensland v Wolfs [2025] QCA 106 -
Hassan v Minister for Home Affairs [2025] FCAFC 57 -
Hassan v Minister for Home Affairs [2025] FCAFC 57 -
De Martin & Gasparini Pty Ltd v Bartlett [2025] NSWCA 56 -
De Martin & Gasparini Pty Ltd v Bartlett [2025] NSWCA 56 -
State of New South Wales v Cullen [2024] NSWCA 310 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 (18 December 2024) (Ward P, Leeming JA and Basten AJA)

193. Mr Hodson points out that any assessment of breach depends upon an identification of the relevant risk of injury (noting *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 (*Dederer*), at [18] and [59] per Gummow J); and that assessment is required to be undertaken prospectively (both as to foreseeability and materiality) and not by reference to the precise circumstances in which it materialised (*Stojan (No 9) v Kenway* [2009] NSWCA 364 at [136] per McColl JA). Reference is also made to *Collins v Insurance Australia Ltd* (2022) 109 NSWLR 240; [2022] NSWCA 135, at [134] per Basten AJA (with whom Meagher JA agreed). Mr Hodson notes that the purpose of such an assessment is to facilitate the determination of whether a reasonable person in the position of the defendant would have taken precautions the defendant did not (*Dederer* at [59]).

Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Commonwealth of Australia v Sanofi [2024] HCA 47 -
Commonwealth of Australia v Sanofi [2024] HCA 47 -
Commonwealth of Australia v Sanofi [2024] HCA 47 -
Commonwealth of Australia v Sanofi [2024] HCA 47 -
Commonwealth of Australia v Sanofi [2024] HCA 47 -
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Commonwealth of Australia v Sanofi [2024] HCA 47 -

Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 (08 November 2024) (Mitchell, Hall and Vandongen JJA)

> 70. The identification of the risk of harm to which the provisions of s 5B of the CLA are to be applied is of central importance. As Gummow J observed in ***Roads and Traffic Authority (NSW) v Dederer*** ,[66] it is only through the correct identification of the risk that one can assess what a reasonable response to that risk would be. The CLA , by various provisions which focus on the risk of harm (including s 5B) , crystallises that position. [67]

via

[66] ***Roads and Traffic Authority (NSW) v Dederer*** [2007] HCA 42; (2007) 234 CLR 330 [59].

Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 (08 November 2024) (Mitchell, Hall and Vandongen JJA)

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Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
Hornsby Shire Council v Salman [2024] NSWCA 155 (27 June 2024) (White and Adamson JJA, Basten AJA)

> 7. In *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42, Gummow J said (at [46]-[47]):
>
> > "[46] A road authority such as the RTA is not obliged to exercise reasonable care in the abstract; still less is it obliged to ensure that a road be safe in all the circumstances. So much was recently reaffirmed in *Leichhardt Municipal Council v Montgomery*. Such an expression of the duty's scope has an obvious and direct consequence when assessing breach. As Gaudron, McHugh and Gummow JJ stated in *Brodie* :
> >
> > > 'In dealing with questions of breach of duty, whilst there is to be taken into account as a "variable factor" the results of "inadvertence" and "thoughtlessness", a proper starting point may be the proposition that the persons using the road will themselves take ordinary care.'
> > >
> > > (Citations omitted.)
> >
> > Their Honours went on to observe that persons exercising reasonable care will be able to avoid injury in some situations, whereas others will present 'a foreseeable risk of harm even to persons taking reasonable care for their own safety'.
> >
> > [47] The RTA's duty of care was owed to all users of the bridge, whether or not they took ordinary care for their own safety; the RTA did not cease to owe Mr Dederer a duty of care merely because of his own voluntary and obviously dangerous conduct in diving from the bridge. However, the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road is safe 'for users exercising reasonable care for their own safety'. The essential point is that the RTA did not owe a more stringent obligation towards careless road users as

compared with careful ones. In each case, the same obligation of reasonable care was owed, and the extent of that obligation was to be measured against a duty whose scope took into account the exercise of reasonable care by road users themselves."

Hornsby Shire Council v Salman [2024] NSWCA 155 -
Austen v Tran [2023] ACTCA 44 (29 November 2023) (McCallum CJ; Wheelahan J; Crowe AJ)

68 The Ipp Panel proposed that the "formula laid down in *Shirt* " be modified by replacing the phrase "not far-fetched or fanciful" with a phrase indicating a risk that carries a higher probability of harm, favouring the phrase "not insignificant". The result is s 43 of the *Civil Law (Wrongs) Act* and corresponding provisions which lay down a series of conditions and mandatory considerations for determining whether liability in negligence is established. They are of the first importance in identifying the proper starting point: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [11] (French CJ, Gummow, Hayne, Heydon and Crennan JJ). Although s 43 appears in Part 4.2 of the Act titled "Duty of care", the conditions and mandatory considerations in s 43 are directed to the breach question: *Adeels Palace* at [13] ; see also, *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2022] HCA 11; 273 CLR 454 at [97]-[98] (Gordon, Edelman and Gleeson JJ). In relation to the magnitude of the risk, s 43(1)(b) provides for a threshold that the risk must have been "not insignificant". Subject to this threshold, the mandatory considerations in s 43(2) are similar to the type of things that would be relevant under the formulation in *Shirt* , and under the principles referred to by Gummow J in *Roads and Traffic Authority (NSW) v Dederer* at [18] with which there are clear parallels: see, *Cornwall v Jenkins as Trustee for the iSpin Family Trust* [2020] ACTCA 2; 15 ACTLR 233 at [27] (Burns and Loukas-Karlsson JJ, and Crowe AJ).

Austen v Tran [2023] ACTCA 44 -
Austen v Tran [2023] ACTCA 44 -
Austen v Tran [2023] ACTCA 44 -
Austen v Tran [2023] ACTCA 44 -
Farriss v Axford [2023] NSWCA 255 -
Farriss v Axford [2023] NSWCA 255 -
Venues NSW v Kane [2023] NSWCA 192 (18 August 2023) (Leeming and Adamson JJA, Simpson AJA)

55. In final address, counsel for Venues NSW introduced as the appropriate risk of harm "that of a patron losing their balance and falling and sustaining injuries whilst walking down steps within the stadium." There was no challenge to the formulation of the risk of harm, and thus this Court should proceed on that basis. However, I have some misgivings as to whether that is the appropriate risk. The point of identifying a risk of harm in a failure to act case is so that ss 5B and 5C (and perhaps other provisions) may be applied. After all, it is "only through the correct identification of the risk that one can assess what a reasonable response to that risk would be": *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [59] . The risk of harm should not be unduly narrow: see for example *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156 at [67] . The stairs were two way, and almost every spectator who travelled down the steps would also have ascended the same steps or other similar steps nearby. People can and do fall as they ascend steps and as they descend steps, and to my mind it is far from clear that s 5B is to be applied only to the risks presented by spectators descending the steps and is to be put to one side in respect of the risks presented by spectators ascending the steps.

Blue Op Partner Pty Ltd v De Roma [2023] NSWCA 161 -
Horne v J K Williams Contracting Pty Ltd [2023] NSWCA 58 -
Horne v J K Williams Contracting Pty Ltd [2023] NSWCA 58 -
Horne v J K Williams Contracting Pty Ltd [2023] NSWCA 58 -
Dean v Pope [2022] NSWCA 260 -
Russell v Carpenter [2022] NSWCA 252 -
Russell v Carpenter [2022] NSWCA 252 -

Russell v Carpenter [2022] NSWCA 252 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

127. This consideration diverted attention from the simple proposition that the duty of the insured to other road users was to exercise proper care in driving so as not to cause a collision. The content of the duty was unremarkable (as was breach). The statement in *Dederer* did not limit the class of persons to whom the RTA owed a duty: there was no doubt that the duty of care was owed to "all users of the bridge, whether or not they took ordinary care for their own safety". [44] The extent of the duty to take care in respect of Mr Dederer's conduct might not extend to taking a precaution which was not necessary in the case of a person exercising reasonable care for their own safety. No such issue arose in the present case.

Collins v Insurance Australia Ltd [2022] NSWCA 135 (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

43. (2007) 234 CLR 330; [2007] HCA 42 at [43] (Gummow J, Heydon and Callinan JJ agreeing).

Collins v Insurance Australia Ltd [2022] NSWCA 135 (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

126. The judge referred, in the course of considering the existence of a duty, to the statement in *Roads and Traffic Authority of New South Wales v Dederer* , [43] that the obligations imposed by a duty of a care are "of a particular scope, and that scope may be more or less expansive depending on the relationship in question".

Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
National Express Group Australia (Bayside Trains) Pty Ltd v McDonald [2022] VSCA 109 (10 June 2022) (Beach, McLeish and Kennedy JJA)

47. By reference to identified shortcomings in the appellant/plaintiff's evidence in *Maloney v Commissioner for Railways (NSW)* ,[36] and the judgment of Gummow J in *Traffic Authority of NSW v Dederer* , [37] the defendant submitted that evidence needed to establish negligence was not called by the plaintiff and the judge had 'erroneously short-circuit[ed] the enquiry into breach of duty that is required by *Shirt* '. [38]

via

[37] (2007) 234 CLR 330 ('*Dederer*').

National Express Group Australia (Bayside Trains) Pty Ltd v McDonald [2022] VSCA 109 -
National Express Group Australia (Bayside Trains) Pty Ltd v McDonald [2022] VSCA 109 -
National Express Group Australia (Bayside Trains) Pty Ltd v McDonald [2022] VSCA 109 -
National Express Group Australia (Bayside Trains) Pty Ltd v McDonald [2022] VSCA 109 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Kozarov v Victoria [2022] HCA 12 -
Kozarov v Victoria [2022] HCA 12 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 (06 April 2022) (Kiefel CJ, Keane, Gordon, Edelman and Gleeson JJ)

106. The proper assessment of the alleged breach of duty depends on "the correct identification of the relevant risk of injury" [123] , because it is only then that an assessment can take place of what a reasonable response to that risk would be [124] . The enquiry is concerned with determining what person, thing or set of circumstances gave rise to the potential for the harm for which the plaintiff seeks damages [125] . The characterisation of the relevant risk should not obscure the true source of the potential injury [126] .

via

[124] *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 351 [59] .

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Storry v Office of Fair Trading [2021] QCA 255 -
AFD21 v Minister for Home Affairs [2021] FCAFC 167 (15 September 2021) (Kenny, Kerr and Wheelahan JJ)

53. We commence with an obvious point, which is that this Court is not bound by findings of fact made in other cases: see *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 37 (Windeyer J); *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 at [56]-[58] (Gummow J) . Rather, the Court is concerned with the application of principles to the facts as they present themselves in this case. The primary judge correctly identified the applicable principles. Mainly, the principles concerning whether a claim that is not expressly made nonetheless arises on the material derive from the reasons for judgment of the Full Court in *NABE* . At [58], Black CJ, French and Selway JJ explained that judicial formulations that an unarticulated claim must arise "squarely" do not convey any precise standard, but indicate that a claim not expressly advanced will attract an obligation to consider it when it is apparent on the face of the material before the decision-maker. There is no reason to think that the reference by Nettle, Gordon and Edelman JJ in their joint judgment in *Applicant S270* to circumstances where non-refoulement has not been "squarely raised" should be understood in any different sense.

McLeod v Mainfreight Distribution Pty Ltd [2021] VSCA 255 (10 September 2021) (Beach, Kaye and Osborn JJA)

49. The enquiry as to whether a defendant has breached a relevant duty of care is prospective. The Court must determine what response would have been made by a reasonable person looking forward at the prospect of the risk of the particular injury that occurred. [25] Further, as the Court observed in *Southern Colour (Vic) Pty Ltd v Parr* : [26]

> ... it is well recognised that a court may, and indeed should, rely on common sense and common knowledge in determining whether a particular risk is foreseeable, and in determining the reasonable and appropriate precautions which a defendant should have taken to avert such a risk. [27]

via

[25] *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 461–2 [126]–[127] (Hayne J). See also *Dederer* (2007) 234 CLR 330, 353 [65]–[67] (Gummow J) .

McLeod v Mainfreight Distribution Pty Ltd [2021] VSCA 255 (10 September 2021) (Beach, Kaye and Osborn JJA)

> 44. The duty of care falls to be discharged by the exercise of reasonable care. [19] In order to assess the scope of the obligation to exercise reasonable care it is necessary to accurately identify the actual risk of reasonably foreseeable injury faced by the applicant. As Gummow J observed in *Roads and Traffic Authority of NSW v Dederer* , [20] it is only through the correct identification of the risk that one can assess what a reasonable response to that risk would be. The mischaracterisation of the relevant risk in that case was apt to distract from a proper evaluation of the probability of the risk occurring and to an attribution to the defendant of a greater control over the risk than it in fact possessed.

McLeod v Mainfreight Distribution Pty Ltd [2021] VSCA 255 -
McLeod v Mainfreight Distribution Pty Ltd [2021] VSCA 255 -
McLeod v Mainfreight Distribution Pty Ltd [2021] VSCA 255 -
McLeod v Mainfreight Distribution Pty Ltd [2021] VSCA 255 -
R v GJL [2021] QCA 175 -
Jfit Holdings Pty Ltd t/as New Dimensions Health and Fitness v Powell [2021] NSWCA 137 -
Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 (12 March 2021) (Quinlan CJ; Murphy and Vaughan JJA)

> Roads and Traffic Authority (NSW) v Dederer [2007] HCA 42 ; (2007) 234 CLR 330

Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2020] NSWCA 263 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2020] NSWCA 263 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2020] NSWCA 263 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2020] NSWCA 263 -
Nikolich v Webb [2020] WASCA 169 (21 October 2020) (Murphy, Beech and Vaughan JJA)

> 65. It may be accepted that, in the application of s 5O of the CLA, much depends on the degree of generality or precision with which the risk (or its constituent elements) is stated. [56] In the context of grounds 1 and 2 it will be necessary to consider this argument in determining whether, as contended therein, the primary judge was incorrect in holding that there was an obvious risk for the purpose of s 5O . For now, however, it is essential to appreciate what his Honour was conveying by the finding that the relevant risk of injury was the risk of a person slipping and falling on the wet bathroom floor. On a fair reading of the primary judge's reasons as a whole, the finding addressed the 'actual risk of injury' faced by Mrs Nikolich [57] (or, in terms of s 5B of the CLA, identified the relevant 'risk of harm'). In so identifying the risk of harm, having identified the duty of care and its content and before considering breach, the primary judge was acting in accordance with principle. [58]

> *via*

> [57] See ***Roads and Traffic Authority of New South Wales v Dederer*** [2007] HCA 42; (2007) 234 CLR 330 [59].

Nikolich v Webb [2020] WASCA 169 -
Nikolich v Webb [2020] WASCA 169 -
Nikolich v Webb [2020] WASCA 169 -
Singh v Lynch [2020] NSWCA 152 -
Liprini v Hale [2020] NSWCA 130 (03 July 2020) (Macfarlan and McCallum JJA, Emmett AJA)

> 119. The primary judge noted that it is risk that is the focus of the inquiry under s 5B of the *Civil Liability Act 2002* (NSW) . To explain her approach to that inquiry, her Honour referred to

the judgment of Gummow J in *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [60] and concluded that risk is to be found by identifying the "true source of potential injury". She also referred to the judgment of Garling J (albeit in dissent) in *McKenna v Hunter & New England Local Health District* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476 (adopted by the Court of Appeal in *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [98]) where, in reference to the same passage in *Dederer* , his Honour observed at [266] that "Gummow J was careful to include the general causal mechanism of the injury [or harm] sustained by the plaintiff".

Liprini v Hale [2020] NSWCA 130 (03 July 2020) (Macfarlan and McCallum JJA, Emmett AJA)

Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330; [2007] HCA 42 ; *McKenna v Hunter & New England Local Health District* (2013) Aust Torts Reports 82-158; [2013] NSWCA 476; *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90, referred to.

Liprini v Hale [2020] NSWCA 130 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 (15 June 2020) (Blow CJ, Estcourt and Pearce JJ)

137. His Honour's analysis of this issue appears at [61]-[77] of his reasons for judgment as follows:

"[61] If negligence is pleaded, the question of whether the defendant is susceptible to an action in negligence arises as a preliminary issue. Relevant to that question is *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, 211 CLR 540 [8] (Gleeson CJ); *Vairy v Wyong Shire Council* [2005] HCA 62, 223 CLR 422 [59][60] (Gummow J). The issue can be a complex one, indicative of the need for a carefully articulated plea to the effect that the common law duty is engaged. In the joint judgment of Gummow and Hayne JJ in *Graham Barclay Oysters* (above) at 596-597 :

> '[146] The existence or otherwise of a common law duty of care allegedly owed by statutory authority turns on a close examination of the terms, scope and purpose of the relevant statutory regime. The question is whether that regime erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence.'

[62] Before that issue is required to be considered, there is a threshold matter raised by the defendant relating to the pleadings.

[63] That issue arose in this way. In closing the defendant submitted that the plaintiff had failed to plead a breach of any common law duty. Indeed the defendant says that it was not until the plaintiff's opening address that it was aware that any common law duty was alleged to have been breached. Senior counsel for the defendant, Mr McTaggart SC, said that 'it is the first time in approximately five years of litigation that such a duty has been alleged, notwithstanding that there have been three amendments to the statement of claim ...'.

[64] It was only in closing that senior counsel for the plaintiff, Mr Reid (sic) SC, identified the basis for a common law duty, when he said 'this is not a novel duty case and falls within the *Donoghue v Stevenson* type of duty category regarding the provision of products and services for valuable consideration'. The plaintiff

submitted that the defendant was aware of the common law action at least at the time the plaintiff opened its case. At no time during the trial has there been an application to amend the pleadings in this respect.

[65] The defendant's contention is that an action in negligence is not pleaded. It further submits that the case does not fall within an established category of duty, because the plaintiff did not pay for the installation or maintenance of the pole, and the defendant has never been a retailer of electricity to the plaintiff. The distribution business for which it assumed responsibility (and exposure to liability) is defined in the transfer notices (1988 and 2014) to mean the activities relating to or associated with the distribution of electricity, including construction, maintenance and operation of that network. Since the disaggregation of the electricity industry, the defendant has not engaged in the retailing of electricity and, as recorded elsewhere, it has not assumed legal responsibility for damage arising from that activity by those entities.

[66] It is of course the pleadings which are determinative of the claim, not counsel's submissions. The pleadings are for the parties to determine, not the court; the court will deal with an application to amend or strike out the pleadings if it is made. It will not otherwise involve itself in their content. The pleadings must state the material facts and any statutory or regulatory provisions relied upon, identify the issues required to be resolved and the relief claimed. Rule 227 of the *Supreme Court Rules* 2000 requires that pleadings are to give 'reasonably explicit notice to any other party of all grounds of action or all defences on which the party pleading intends to rely at the trial'. I am aware of the decision of Blow J (as he then was) in *Jones v Clyde Welshpool Pty Ltd* (2009) 9 Tas R 391; [2000] TASSC 130, on an interlocutory application to strike out an action for failing to plead a duty. Neither party referred me to this case, but different considerations apply in that context. It predates the CLA [*Civil Liability Act* 2002] which in my view requires a pleading to address its elements, including the duty, and the scope of the duty. If the Supreme Court Rules are silent as to such a requirement I do not think it follows that a pleading which ignores the issue survives curial scrutiny, as if the authorities on the matter did not exist.

[67] The importance of pleadings as a foundation for procedural fairness was observed in *Banque Commerciale SA v Akhill Holdings* (1990) 169 CLR 279 at 286 by Mason CJ and Gaudron J who reiterated that the function of pleadings is to state with sufficient clarity the case which must be met. This ensures that a party understands the case put against it and can frame its response.

[68] This principle is subject to the qualification that if the parties run the case on a different basis it should be decided on that basis: *Banque Commerciale SA* (ab ove). That course requires the acquiescence of the defendant in the conduct of the action on such different basis. The defendant has taken this point since it emerged at trial. There is no interpretation of its conduct of the proceedings that could be construed as acquiescence in an action in negligence.

[69] Turning to the pleadings, at par 18 of the statement of claim (above) the plaintiff alleges that each of the matters pleaded as a breach of the relevant *statut ory* duty constituted a '*negligent* breach of duty'. This is followed by 'Particulars of negligence'. The plaintiff submits that this is a pleading of an action in negligence. It says that since a breach of statutory duty does not include any element of negligence, the articulation of the claim in terms of *negligent* breach of duty necessarily pleads an action in negligence, arising from the same factual circumstances.

[70] The defendant described this is an invitation to imply a cause of action not otherwise pleaded.

[71] As a matter of language and sentence structure, 'negligent' is used in par 18 as an adverb qualifying the word 'breach', the breach being a reference to the alleged departures from the statutory duty set out in the preceding paragraphs.

[72] The pleadings omit a statement, explicitly pleaded or by reference to some other aspect of the pleadings, of the legal relationship relied upon for the purposes of establishing a duty of care at common law. A duty of care is a particular and defined legal obligation arising out of a relationship between plaintiff and defendant; *Roads and Traffic Authority of NSW v Dederer* [2007] 234 CLR 330 ; at [44] per Gummow J.

[73] An assessment of breach of duty requires an answer to the anterior question of the nature of the duty of care. The importance of the relationship and, in turn, its relevance to the content of the duty is evident in cases such as *CA L No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47, 239 CLR 390. The existence of a statutory duty can never be a sufficient basis on its own for the creation of a common law duty of care. There will always be some other element, such as obligations flowing from a relationship between the parties; *Sut herland Shire Council v Heyman* (1985) 157 CLR 424, 459–60, 463 (Mason J); *Stovin* [1 996] AC 923, 935 (Lord Nicholls); *Crimmins v Stevedoring Industry* [1999] HCA 59, 200 CLR 1, 60–61 (Gummow J).

[74] Whilst the statutory obligations pleaded can simultaneously inform the content of the defendant's common law obligations (which must be met to satisfy the duty of care), merely adding the label 'negligent' does not elevate a reference to them, to the pleading of an action in negligence.

[75] In the circumstances, the defendant quite properly asks 'is the plaintiff relying upon an established duty or a novel one?' The pleadings should say. It should not be left to a closing submission as it was by the plaintiff.

[76] As Kirby J observed in *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at [122] :

'It is one thing to hold that a person owes a duty of care of some kind to another. But the critical question is commonly the measure or scope of that duty. The failure to distinguish these concepts can only lead to confusion'.

[77] I conclude that no action for negligence at common law is pleaded. I uphold the defendant's submissions."

Discussion as to ground 1

Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 (05 May 2020) (Buss P, Murphy JA, Vaughan JA)

116. Reasonable foreseeability is determined objectively. [168] Regard is had not only to what the defendant knew, but also what a reasonable person in the defendant's position ought reasonably to have known, or ought to have found out. [169]

via

[168] ***Roads and Traffic Authority of NSW v Dederer*** [2007] HCA 42; (2007) 234 CLR 330 [70].

Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 (05 May 2020) (Buss P, Murphy JA, Vaughan JA)

12. A number of propositions may then be drawn from the judgment of Gummow J in ***Roads and Traffic Authority of NSW v Dederer*** . First, in assessing a reasonable response to a risk one must first accurately identify the relevant risk (ie the 'actual risk') of injury faced. [21] Second, the question of breach must be assessed prospectively and not retrospectively. [22] Third, the response to a foreseeable risk is to be judged by the criterion of reasonableness, not some more stringent requirement of prevention. [23] Hence why it is that an employer's duty is not to safeguard a worker completely from all perils. The necessary evaluation is one of 'a contextual and balanced assessment of the reasonable response to a foreseeable risk'. [24]

via

[24] ***Roads and Traffic Authority of NSW v Dederer*** [69] .

Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Menz v Wagga Wagga Show Society Inc [2020] NSWCA 65 (21 April 2020) (Leeming, Payne and White JJA)

50. This is one of the signal changes effected by the *Civil Liability Act* . While the correct identification of the risk of harm was stated to be essential to identify a reasonable response in decisions to which the statute did not apply (for example, *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [59]), the statute crystallises the position. It is not surprising that most of the decisions on the way in which the risk of harm is to be formulated have been decisions to which the civil liability legislation applied.

Menz v Wagga Wagga Show Society Inc [2020] NSWCA 65 -
Menz v Wagga Wagga Show Society Inc [2020] NSWCA 65 -
Menz v Wagga Wagga Show Society Inc [2020] NSWCA 65 -
Jadwan Pty Ltd v Rae & Partners (A Firm) [2020] FCAFC 62 -
Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52 -
Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 -
Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 -
Cornwall v Jenkins as Trustee for the iSpin Family Trust [2020] ACTCA 2 -
Cornwall v Jenkins as Trustee for the iSpin Family Trust [2020] ACTCA 2 -
Cornwall v Jenkins as Trustee for the iSpin Family Trust [2020] ACTCA 2 -
Cornwall v Jenkins as Trustee for the iSpin Family Trust [2020] ACTCA 2 -
J-Corp Pty Ltd v Thompson [2019] WASCA 173 (07 November 2019) (Murphy JA, Mitchell JA, Vaughan JA)

37. The above passage was cited with approval by Gummow J (Heydon J agreeing) in ***Roads and Traffic Authority of NSW v Dederer*** . [52] In that case Gummow J also recognised that it is only through correct identification of the risk that one can assess what a reasonable response to that risk would be. [53]

via

[52] ***Roads and Traffic Authority of NSW v Dederer*** [2007] HCA 42; (2007) 234 CLR 330 [67]. Hayne J's judgment was also cited with approval in ***Fahy*** [58] . The passages in ***Vairy*** and/or ***Fahy*** have been further cited with approval in decisions of this court in ***Department of Housing and Works v Smith [No 2]*** [2010] WASCA 25; (2010) 41 WAR 217 [87] (which was in turn cited with approval in ***Taylor v Fisher*** [2018] WASCA 126 [58]); ***Davies v Tomkins*** [2009] WASCA 228 [72] ; ***Jasmina Investments Pty Ltd v Vlahos*** [2009] WASCA 190 [14] ; ***The Quadriplegic Centre Board of Management v McMurtrie*** [2009] WASCA 173 [83] ; ***Hanna-Pauley v AMP Shopping Centres Pty Ltd*** [2007] WASCA 174 [41] ; ***Alinta Gas Networks Pty Ltd v James*** [2007] WASCA 155 [39] ; ***Fitzpatrick v Job*** [2007] WASCA 63 [203] ; ***Shire of Toodyay v Walton*** [2007] WASCA 76 [29], [96] .

J-Corp Pty Ltd v Thompson [2019] WASCA 173 -
D'Arcy v Caltex Australia Petroleum Pty Ltd [2019] ACTCA 27 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 (06 September 2019) (Blue, Lovell and Hinton JJ)

Wynbergen v Hoyts Corporation Pty Ltd (1997) 149 ALR 25; *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Shaw v Thomas* [2010] NSWCA 169; *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 ; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; *Macks v Viscariello* (2017) 130 SASR 1; *D&V Services Pty Ltd v SA Power Networks* [2018] SASCFC 92; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; *Wallace v Kam* [2013] HCA 19; *Barnes v Hay* (1988) 12 NSWLR 337; *Henville v Walker* 206 CLR 459; *Chappel v Hart* (1998) 195 CLR 232; *Rogers v Whitaker* (1992) 175 CLR 479; *Banovic v Perkovic* (1982) 30 SASR 34; *McIntyre v Ridley District Council* (1991) 56 SASR 343; *Pennington v Norris* [1956] HCA 26; *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492; *Stoeckl v Harpas* (1971) 1 SASR 172; *Van Den Heuvel v Tucker* (2003) 85 SASR 512; *Brooks v Police* (2013) 116 SASR 234; *Walton v Rowbottom* [1986] SASC 9362 (17 September 1986); *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197; *Wardle v Fowler* [2002] SASC 380; *Grantham v State of South Australia* (1975) 12 SASR 74, considered.

Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 (06 September 2019) (Blue, Lovell and Hinton JJ)

27. The approach to be adopted by courts in a negligence case was discussed by Gummow J in *Roads and Traffic Authority of NSW v Dederer* . [7] Gummow J stated: [8]

> First, the proper resolution of an action in negligence depends on the existence and scope of the relevant duty of care. Secondly, whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct. Thirdly, the assessment of breach depends on the correct identification of the relevant risk of injury. Fourthly, breach must be assessed prospectively and not retrospectively. Fifthly, such an assessment of breach must be made in the manner described by Mason J in *Wyong Shire Council v Shirt* .
>
> (Citations omitted)

via

[8] *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 337-338 per Gummow J .

Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Ayre v Swan [2019] NSWCA 202 (16 August 2019) (Basten, Macfarlan and McCallum JJA)

26. (2007) 234 CLR 330; [2007] HCA 42 .

Ayre v Swan [2019] NSWCA 202 (16 August 2019) (Basten, Macfarlan and McCallum JJA)

60. I do not understand the passage in *Dederer* referred to by Basten JA to compel a different conclusion. First and foremost, the defendant owed a duty of care not to turn across the traffic until it was safe to do so. I do not think the fact that the plaintiff was not taking ordinary care for his own safety justified the approach of turning before a clear view of both lanes was available. For those reasons, I would not disturb the finding of the primary judge on liability.

Ayre v Swan [2019] NSWCA 202 -
Ayre v Swan [2019] NSWCA 202 -
Council of the City of Sydney v Bishop [2019] NSWCA 157 -
Lloyd v Thornbury [2019] NSWCA 154 (25 June 2019) (Meagher, Gleeson and White JJA)

58. The starting point is that breach must be assessed prospectively not retrospectively with the wisdom of hindsight: *Dederer* at [18] . The precaution which Mr Thornbury contended that Mr Lloyd failed to take against the relevant risk of harm was backfilling or barricading the holes. In determining whether a reasonable person in the position of Mr Lloyd would have taken those precautions against the risk of harm, s 5B(2) directs attention to a number of non-exhaustive considerations: the probability of the harm occurring, the likely seriousness of the harm, the burden of taking precautions, and the social utility of the risk-taking activity. Mr Lloyd did not place any reliance on the last matter.

Lloyd v Thornbury [2019] NSWCA 154 (25 June 2019) (Meagher, Gleeson and White JJA)

Roads and Traffic Authority (NSW) v Dederer (2007) 234 CLR 330; [2007] HCA 42 at [18] ; *Civil Liability Act 2002* (NSW), ss 5B(1)(c), 5B(2)(a), 5B(2)(b) & 5B(2)(c) applied.

Lloyd v Thornbury [2019] NSWCA 154 -
Lloyd v Thornbury [2019] NSWCA 154 -
Hawkesbury Sports Council v Martin [2019] NSWCA 76 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Bruce v Apex Software Pty Ltd [2018] NSWCA 330 -
Bruce v Apex Software Pty Ltd [2018] NSWCA 330 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 (04 September 2018) (Kourakis CJ; Kelly and Lovell JJ)

37. The approach to be adopted by courts in a negligence case was discussed by Gummow J in *Roads and Traffic Authority of NSW v Dederer* . [11] Gummow J stated:

> First, the proper resolution of an action in negligence depends upon the existence and scope of the relevant duty of care. Secondly, whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct. Thirdly, the assessment of breach depends on the correct identification of the relevant risk of injury. Fourthly, breach must be assessed prospectively and not retrospectively. Fifthly, such an assessment of breach must be made in the manner described by Mason J in Wyong Shire Council v Shirt. [12]

D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -

Jancevski v WR Engineering Pty Ltd [2018] ACTCA 34 (24 August 2018) (Murrell CJ, Elkaim and Charlesworth JJ)

38. The question is whether a reasonable person in WR's position, in possession of all of the information that WR knew, our ought reasonably to have known, would have taken the particular precaution: s 43(1)(c) of the Act. That question, in turn, cannot be answered without first articulating the actual risk of harm against which it is said the precaution ought to have been taken: *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 (*Dederer*) at [59] (Gummow J). The foreseeability of the risk is to be determined prospectively: *Wyong Shire Council v Shirt* [1980] HCA 12; 146 CLR 40 at 47–48 (Mason J); *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [126]–[129] (Hayne J); *Dederer* at [18] and [65]–[66] (Gummow J) .

Jancevski v WR Engineering Pty Ltd [2018] ACTCA 34 -
Jancevski v WR Engineering Pty Ltd [2018] ACTCA 34 -
Jancevski v WR Engineering Pty Ltd [2018] ACTCA 34 -
Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 -
Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 -
Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

22. Both formulations use hindsight, in the sense that they insist that the legal analysis be framed so as to encompass the risk which is claimed to have materialised and caused the damage of which the plaintiff complains. That seems to be entirely unexceptional. It has been said that the formulation of risk of harm should identify the "true source of potential injury" (*Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [60]) and the "general causal mechanism of the injury sustained" (*Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [98]); see also *Avopiling Pty Ltd v Bosevski; Avopiling Pty Ltd v The Workers Compensation Nominal Insurer* [2018] NSWCA 146 at [43] . In *Erickson v Bagley* [2015] VSCA 220 at [33] and in *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 310 at [55] , the Victorian Court of Appeal said, "Necessarily, the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred." What is to be avoided is an unduly narrow formulation of risk of harm which then distorts the reasoning, because, for example, it obscures the true source of potential injury (as noted in *Dederer* at [60]) or because it too narrowly focusses on the particular hazard which caused the injury (as noted in *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156; [2014] Aust Torts Rep 82-172 at [67]), or because it fails to capture part of the plaintiff's case (as in *Garzo*).

Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

16. By grounds 1(a) and 9(a) of its amended notice of appeal, Coles also maintained that the judgment at first instance disclosed an error of principle, namely, that the primary judge had formulated the risk of harm retrospectively. There is no doubt that that is what his Honour did. He said at [43] that the starting point of the inquiry required by s 5B , as with the previous common law, "is to accurately identify actual risk of injury for the purpose of elucidating the true source of potential injury." At [44], his Honour reproduced what he had said in *Vincent v Woolworths Ltd* [2015] NSWSC 435; [2015] Aust Torts Rep 82-215 at [27] to the same effect:

> "It should be recognised that there is an implicit degree of artificiality in assessing breach, after the event, prospectively. But the air of artificiality becomes overwhelming if one eschews all hindsight when correctly, or accurately, identifying

> the risk of injury at the outset. In putting it this way I am not attempting to defy authority binding on me rather, I am attempting to apply it in the ordinary, everyday business of the trial court. It seems to me, reading Gummow J's judgment in *Dederer* , especially from p 351 to 355, as a whole, the question of the proper identification of the risk is a precursor to the assessment of breach. That is to say it is a question logically anterior to, and separate from, the assessment of breach. At that preliminary point it is permissible, indeed necessary, to know what happened and what act or omission the plaintiff says constitutes negligence. These matters involve hindsight. When these things are known, one then embarks upon (*returns to*, as Gummow J put it: *Dederer* at [65]) "to the inquiry into the assessment of breach". From *this* point on, all hindsight reasoning is impermissible because hindsight diverts attention from what reasonable care required in foresight, to whether in hindsight the defendant could have prevented the accident which befell the plaintiff: *Dederer* at [65] ; *Vairy* at [128]; *Neindorf* at [97]." (emphasis in original)

Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

20. That said, we see no error in the approach taken by the primary judge. The provisions of the *Civil Liability Act* require the analysis to start with a risk of harm: see *Uniting Church in Australia Property Trust (NSW) v Miller; Miller v Lithgow City Council* (2015) 91 NSWLR 752; [2015] NSWCA 320 at [104]-[107] . It seems plain that there is no single correct "risk of harm", and that there are leeways of choice between formulations that are more or less general or specific: *Uniting Church in Australia Property Trust (NSW) v Miller* at [119] . However, it is "only through the correct identification of the risk that one can assess what a reasonable response to that risk would be": *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [59] (Gummow J, with whom Heydon J agreed).

Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 (17 August 2018) (Leeming and Payne JJA, Emmett AJA)

22. Both formulations use hindsight, in the sense that they insist that the legal analysis be framed so as to encompass the risk which is claimed to have materialised and caused the damage of which the plaintiff complains. That seems to be entirely unexceptional. It has been said that the formulation of risk of harm should identify the "true source of potential injury" (*Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at [60]) and the "general causal mechanism of the injury sustained" (*Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [98]); see also *Avopiling Pty Ltd v Bosevski; Avopiling Pty Ltd v The Workers Compensation Nominal Insurer* [2018] NSWCA 146 at [43] . In *Eri ckson v Bagley* [2015] VSCA 220 at [33] and in *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 310 at [55] , the Victorian Court of Appeal said, "Necessarily, the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred." What is to be avoided is an unduly narrow formulation of risk of harm which then distorts the reasoning, because, for example, it obscures the true source of potential injury (as noted in *Dederer* at [60]) or because it too narrowly focusses on the particular hazard which caused the injury (as noted in *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156; [2014] Aust Torts Rep 82-172 at [67]), or because it fails to capture part of the plaintiff's case (as in *Garzo*).

Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 -
Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 -
Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183 -
Avopiling Pty Ltd v Bosevski [2018] NSWCA 146 -
Avopiling Pty Ltd v Bosevski [2018] NSWCA 146 -
Avopiling Pty Ltd v Bosevski [2018] NSWCA 146 -

Avopiling Pty Ltd v Bosevski [2018] NSWCA 146 -
Coles Supermarket Australia Pty Ltd v Harris [2018] ACTCA 25 (29 June 2018) (Mossop, Loukas-Karlsson and Charlesworth JJ)

13. On this appeal, it is the standard of care that is in issue, more precisely whether the appellant provided adequate safeguards against the risk of harm to which the respondent was exposed. It is not possible to answer that question without first identifying and articulating that risk: *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 (" *Dederer* ") at [59] (Gummow J) . In our view, the risk may be described as the risk of an injury should an employee lose balance and fall when dismounting sideways from the step. Whilst the risk might be articulated in a more general fashion, doing so in the present case would not affect the ultimate result.

Coles Supermarket Australia Pty Ltd v Harris [2018] ACTCA 25 (29 June 2018) (Mossop, Loukas-Karlsson and Charlesworth JJ)

37. In *Dederer* Gummow J issued a similar caution. His Honour said at [58] :

> The utility of factual parallels lies not in determining the correctness of decisions of fact, but rather in determining whether the correct legal tests were applied. Apothegms relating to factual matters are unlikely to focus the mind on the resolution of the legal questions that were presented.

The probability issue

Coles Supermarket Australia Pty Ltd v Harris [2018] ACTCA 25 (29 June 2018) (Mossop, Loukas-Karlsson and Charlesworth JJ)

35. As has already been observed, the task of ascertaining the standard of care involves, as a critical step, the proper articulation of the risk of harm against which it is alleged a defendant ought to have taken precautions. The risk in *Vincent* was the risk of a collision and fall should the plaintiff step backwards into a moving obstacle. The risk in *Cowie* was the risk of a two footed ladder toppling over should the user lean sideways. The task of articulating the risk, and thus the standard of care, is highly fact specific. As a consequence, there cannot be, for the purposes of the law of negligence, a fixed category of case (such as a "ladder case") according to which the outcome may be predicted. Attempts to use factual precedents and parallels are likely to detract from the legal principles and so lead to error: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 ("*Vairy* ") at [21], [28] – [32] (McHugh J); *Dederer* at [56] – [58] (Gummow J) . The cases do not support the allegation of obviousness on the facts in the present case. Nor do the cases establish any proposition that there is, or is not, a duty to "warn" of the risks of injury when using a device in the nature of a step or ladder.

Coles Supermarket Australia Pty Ltd v Harris [2018] ACTCA 25 -
Coles Supermarket Australia Pty Ltd v Harris [2018] ACTCA 25 -
Korda v Aldi Foods Pty Ltd [2018] ACTCA 6 (15 March 2018) (Burns, Mossop and Bromwich JJ)

29. In a "warning case", it is clear that evidence by a plaintiff asserting that a warning would have altered the plaintiff's behaviour must be carefully examined (see for example *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; 234 CLR 330 at [276] ; *Rosenberg v Percival* [2001] HCA 18; 205 CLR 434 at [221] ; *Hoyts Pty Ltd v Burns* [2003] HCA 61; 77 ALJR 1934 at [23]). That fact emphasises, rather than detracts from, the need for a court to make findings about what warning was required and how, in the particular circumstances of the case, the existence of that warning would have altered behaviour in a manner which avoided the injury suffered by the plaintiff. In undertaking that exercise, the court needs to have regard to the inherent probabilities in the particular circumstances and general characteristics of human behaviour: *Shire of Gingin v Coombe* at [80] .

LCY Pty Ltd v Ma [2017] VSCA 383 -
Nominal Defendant v Buck Cooper [2017] NSWCA 280 -
Nominal Defendant v Buck Cooper [2017] NSWCA 280 -
Southern Colour (Vic) Pty Ltd v Parr [2017] VSCA 301 -
Southern Colour (Vic) Pty Ltd v Parr [2017] VSCA 301 -
Southern Colour (Vic) Pty Ltd v Parr [2017] VSCA 301 -
Southern Colour (Vic) Pty Ltd v Parr [2017] VSCA 301 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
Raad v VM & KTP Holdings Pty Ltd [2017] NSWCA 190 -
Ratewave Pty Ltd v BJ Illingby [2017] NSWCA 103 -
Ratewave Pty Ltd v BJ Illingby [2017] NSWCA 103 -
Greater Shepparton City Council v Clarke [2017] VSCA 107 (09 May 2017) (Santamaria, Beach and Kaye JJA)

118. It is self-evident that in determining whether a defendant has failed to exercise reasonable care to prevent injury from a foreseeable risk for which the defendant is responsible, the Court must make an assessment of the degree of probability that harm would occur if the defendant did not take that care. That requirement is specified in s 48(2)(a) of the *Wrongs Act 1958* , which, as we noted, replicates an important aspect of the test expounded by Mason J in *Shirt* . Clearly, the fact that a risk of injury is reasonably foreseeable does not, of itself, dictate whether steps should be taken to alleviate that risk, nor does it, of itself, dictate the type of steps which a reasonable person would undertake in respect of it. [73] The critical question, then, is whether the judge did make an assessment of the probability of the risk of injury, such as to provide an appropriate basis for his conclusion that the applicant had breached its duty of care to the respondent by failing to take steps to alleviate the risk of injury constituted by the location and shape of the pit in the reserve.

via

[73] See *Vairy* (2005) 223 CLR 422, 456 [107], 452 [127], 468 [153]–[155] (Hayne J); *Dederer* (2007) 234 CLR 330, 353–5 [65]–[71] (Gummow J) .

Greater Shepparton City Council v Clarke [2017] VSCA 107 -
Greater Shepparton City Council v Clarke [2017] VSCA 107 -
Greater Shepparton City Council v Clarke [2017] VSCA 107 -
Fairall v Hobbs [2017] NSWCA 82 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420 ; [2009] HCA 48 Ashrafi Persian Trading Co Pty Ltd t/as Roslyn Gardens Motor Inn v Ashrafinia (2002) Aust Torts Rep 81636 ; [2001] NSWCA 243 Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301 ; [1986] HCA 20 Basha v Vocational Capacity Centre Pty Ltd [2009] NSWCA 409 Bilta (UK) Ltd (in liq) v Nazir (No 2) [2015] WLR 1168 ; [2015] UKSC 23 Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520 ; [1994] HCA 13 Calvo v Ellimark Pty Ltd (No 2) [2016] NSWCA 197 Coles Supermarkets Australia Pty Ltd v Haleluka [2012] NSWCA 343 Commonwealth of Australia v Gretton [2008] NSWCA 117 Costa v The Public Trustee of NSW (2008) 1 ASTLR 56 ; [2008] NSWCA 223 Darling Island Stevedoring and Lighterage Company Ltd v Long (1957) 97 CLR 36 ; [1957] HCA 26 Director General, Department of Education and Training v MT (2006) 67 NSWLR 237 ; [2006] NSWCA 270 Doherty v State of New South Wales [2010] NSWSC 450 Graham v The Queen (1998) 195 CLR 606 ; [1998] HCA 61 Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 ; [2002] HCA 54 Gray v Richards (2014) 253 CLR 660 ; [2014] HCA 40 Gulic v Boral Transport Ltd [2016] NSWCA 269 Hamilton v Nuroof (WA) Pty Ltd (1956) 96

CLR 18 ; [1956] HCA 42 House v The King (1936) 55 CLR 499 ; [1936] HCA 40 Jackson v Mazzafero [2012] NSWCA 170 Kable v State of New South Wales (2012) 268 FLR 1 ; [2012] NSWCA 243 King v Philcox (2015) 255 CLR 304 ; [2015] HCA 19 Kondis v State Transport Authority (1984) 154 CLR 672 Leichhardt Municipal Council v Montgomery (2007) 230 CLR 22 ; [2007] HCA 6 Lepore v State of New South Wales (2001) 52 NSWLR 420 ; [2001] NSWCA 112 Malec v JC Hutton Pty Ltd (1990) 169 CLR 638 ; [1990] HCA 20 Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254 ; [2000] HCA 61 Nicol v Whiteoak (No 2) [2011] NSWSC 1486 Perisher Blue Pty Ltd v Nair-Smith (2015) 90 NSWLR 1 ; [2015] NSWCA 90 Perre v Apand Pty Ltd (1999) 198 CLR 180 ; [1999] HCA 36 Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd [2016] FCAFC 78 Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330 ; [2007] HCA 42 Rogers v Whitaker (1992) 175 CLR 479 ; [1992] HCA 58 Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431 ; [1998] HCA 5 Shaw v Thomas [2010] Aust Torts Rep 82065 ; [2010] NSWCA 169 State of New South Wales v Lepore (2003) 212 CLR 511 ; [2003] HCA 4 Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317 ; [2002] HCA 35 Tesco Supermarkets Ltd v Nattrass [1972] AC 153 TNT Australia Pty Ltd v Christie (2003) 65 NSWLR 1 ; [2003] NSWCA 47 Uniting Church in Australia Property Trust (NSW) v Miller (2015) 91 NSWLR 752 ; [2015] NSWCA 320 Vozza v Tooth & Co Ltd (1964) 112 CLR 316 ; [1964] HCA 29 Wallace v Kam (2013) 250 CLR 375 ; [2013] HCA 19 Watson v Foxman (1995) 49 NSWLR 315 Wicks v State Rail Authority of New South Wales (2010) 241 CLR 60 ; [2010] HCA 22 Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515 ; [2004] HCA 16 Wright bht Wright v Optus Administration Pty Ltd [2015] Aust Torts Rep 82203; [2015] NSWSC 160 Wright bht Wright v Optus Administration Pty Ltd (No 2) [2015] NSWSC 288

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
R v Bucic [2016] NSWCCA 297 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
Gulic v Boral Transport Ltd [2016] NSWCA 269 -
DC v State of New South Wales [2016] NSWCA 198 (10 August 2016) (Basten and Ward JJA, Sackville AJA)

267. The respondent says that the primary judge correctly accepted that s 46 of the *Civil Liability Act* (which provides in effect that the fact that a public or other authority exercises a particular function does not indicate that it was under a duty to do so or that the function should be exercised in particular circumstances or a particular way) applied in the present case ([30]). However, the respondent contends that the primary judge erred in treating the guidelines as establishing the requisite standard to be met by the respondent in the discharge of the identified common law duty of care. The respondent submits (at [43]) that in so doing, his Honour failed to apply the principle articulated in *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 234 CLR 330 requiring "a contextual and balanced assessment of the reasonable response to a foreseeable risk" (referring to what was said in *Dederer* at [69]).

DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114 -
Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114 -
ALDI Foods Pty Ltd v Young [2016] NSWCA 109 (13 May 2016) (Meagher and Simpson JJA, Adamson J)

82. In *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 , Gummow J said:

> "47 The RTA's duty of care was owed to all users of the bridge, whether or not they took ordinary care for their own safety; *the RTA did not cease to owe Mr Dederer a duty of care merely because of his own voluntary and obviously dangerous conduct in diving from the bridge*. However, the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road is safe 'for users exercising reasonable care for their own safety' ... The *essential point is that the RTA did not owe a more stringent obligation towards careless road users as compared with careful ones*. In each case, the same obligation of reasonable care was owed, and the extent of that obligation was to be measured *against a duty whose scope took into account the exercise of reasonable care by road users themselves*." (italics added, citations omitted)

Downes v Affinity Health Pty Ltd [2016] QCA 129 (13 May 2016) (Holmes CJ and Morrison and Philip McMurdo JJA,)
Roads and Traffic Authority (NSW) v Dederer (2007) 234 CLR 330; [2007] HCA 42 , followed

Downes v Affinity Health Pty Ltd [2016] QCA 129 -
Downes v Affinity Health Pty Ltd [2016] QCA 129 -
ALDI Foods Pty Ltd v Young [2016] NSWCA 109 -
Australia and New Zealand Banking Group Ltd v Haq [2016] NSWCA 93 (03 May 2016) (Basten and Simpson JJA, Sackville AJA)

93. Reliance was placed on *Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy* [2015] NSWCA 253, in which Leeming JA said (*inter alia*):

> "53 Finally, the scope of an occupier's duty is delimited by the expectation that users will exercise reasonable care for their own safety ... [and, citing *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; 234 CLR 330 at [45] , per Gummow J] the expectation that a potential plaintiff will exercise reasonable care in a case such as the present goes not merely to the assessment of breach, but is a 'specific element contained, as a matter of law, in the scope of the ... duty of care'." (internal citations omitted)

Vincent v Woolworths Ltd [2016] NSWCA 40 -
Boon v Summs of Qld Pty Ltd [2016] QCA 38 -
Boon v Summs of Qld Pty Ltd [2016] QCA 38 -
Boon v Summs of Qld Pty Ltd [2016] QCA 38 -
Boon v Summs of Qld Pty Ltd [2016] QCA 38 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Uniting Church in Australia Property Trust (NSW) v Miller [2015] NSWCCA 320 -
Uniting Church in Australia Property Trust (NSW) v Miller [2015] NSWCCA 320 -
Uniting Church in Australia Property Trust (NSW) v Miller [2015] NSWCCA 320 -
Uniting Church in Australia Property Trust (NSW) v Miller [2015] NSWCCA 320 -
R v Moore [2015] NSWCCA 316 (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

106. In the well-known passage in his judgment in *Sutherland Shire Council v Heyman* [1985] HCA 41; 157 CLR 424, Brennan J emphasised (at 487) that "a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered and in reference to the plaintiff or a class of which the plaintiff is a member": see also *Tame v New South Wales* [2002] HCA 35; 211 CLR 317 (*Tame*) at [249] ; *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; 234 CLR 330 at [43]-[44] ; *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [59]-[60] . Further, reasonable foreseeability of the damage suffered is a necessary, but not sufficient, condition for liability: see *Crimmins* at [72] ; *Sullivan v Moody* [2001] HCA 59; 207 CLR 562 at [42] ; *Tame* at [45], [103] .

R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
Brown v Hewson [2015] NSWCA 393 -
Brown v Hewson [2015] NSWCA 393 -
Allen v Chadwick [2015] HCA 47 -
Schultz v McCormack [2015] NSWCA 330 -
Uniting Church in Australia Property Trust (NSW) V Miller; Miller v Lithgow City Council [2015] NSWCA 320 (15 October 2015) (Basten, Leeming and Simpson JJA)

121. That passage accords with earlier decisions. In *Dederer* itself, Gummow J criticised the characterisation by the majority of the Court of Appeal of the risk as being "serious spinal injury flowing from the act of diving off a bridge": at [60] . His Honour said that "such a characterisation of the risk obscured the true source of potential injury". The proper characterisation was "the risk of impact upon jumping into the potentially shallow water and shifting sands of the estuary".

Uniting Church in Australia Property Trust (NSW) V Miller; Miller v Lithgow City Council [2015] NSWCA 320 -
Uniting Church in Australia Property Trust (NSW) V Miller; Miller v Lithgow City Council [2015] NSWCA 320 -
Bitupave Ltd t/as Boral Asphalt v Pillinger [2015] NSWCA 298 -
Bitupave Ltd t/as Boral Asphalt v Pillinger [2015] NSWCA 298 -
Bitupave Ltd t/as Boral Asphalt v Pillinger [2015] NSWCA 298 -
Collins v Clarence Valley Council [2015] NSWCA 263 (03 September 2015) (McColl, Macfarlan and Emmett JJA)

134. Unlike *Dederer* , in this case the risk arose from the state of the bridge. As his Honour explained, the more probable injury would be occasioned by impact with the bridge deck itself, or collision with traffic on the bridge. The mechanism of the appellant's injury (being thrown off the bridge) was a "more remote possibility". [124]

Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Collins v Clarence Valley Council [2015] NSWCA 263 -
Sharp v Parramatta City Council [2015] NSWCA 260 -
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 -
Erickson v Bagley [2015] VSCA 220 -
Erickson v Bagley [2015] VSCA 220 -
Erickson v Bagley [2015] VSCA 220 -
Erickson v Bagley [2015] VSCA 220 -
Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

74. I have done so notwithstanding the use of the language "*scope of duty*" in the respondent's challenge to the finding at [91]-[92] and [257] in ground 1 of the his notice of contention, and more particularly, notwithstanding that the High Court authorities use the language of "*conte nt*" and "*scope*" interchangeably: see *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 discussed below. In *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422

Gummow J observed, at [58] , that the essential issue on the appeal in that case was the "*conte nt of the duty of care*". At [97] his Honour found that the trial judge in that case had "*erred in merging the question of the scope or content of the duty of care and the question of breach*".

Trial judge's findings on content of the duty of care

Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Stenning v Sanig [2015] NSWCA 214 (27 July 2015) (Macfarlan, Hoeben and Gleeson JJA)

20. His Honour also relied upon the observation by Gleeson JA in *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 where his Honour said:

> "159 The scope of the occupier's duty of care is marked out by the relationship between the occupier and users exercising reasonable care for their own safety. Thus, "the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case": *Roads and Traffic Authority of New South Wales v Dederer and Another* [2007] HCA 42; 234 CLR 330 at [45] (*Dederer*). This involves a factual judgment which may depend on the circumstances of the case: *Thompson v Woolworths (Q'land) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [35] ."

Stenning v Sanig [2015] NSWCA 214 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

180. In *Grills v Leighton Contractors Pty Ltd* ,[122] Beazley P (Barrett and Gleeson JJA agreeing) referred to the observation of the High Court in *Adeels Palace Pty Ltd v Mubarak* [123] that ss 5B and 5C of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**) are "evidently directly to questions of breach of duty" and that the heading to Div 2 of Part 1A of the Civil Liability Act (" Duty of Care ") is therefore "apt to mislead". On this basis her Honour said that it is an error to determine the existence and content of a duty of care by serial reference to the provisions of ss 5B and 5C . Her Honour also said that it risks confusion to refer to s 5B in the context of determining the existence of a duty of care: [124]

> "The factual circumstances in which injury occurs are relevant to the determination of the existence and scope of the duty of care. They are also relevant in respect of breach. However, the enquiry into the existence of the duty is different from the enquiry into breach. The existence of a duty of care is a question of law to be determined at a higher level of abstraction than the factual question of breach. In *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330, Gummow J observed, at [18] , that a duty of care imposed an obligation to exercise reasonable care. Breach requires the correct identification of the relevant risk of harm. This has not been altered by the *Civil Liability Act* which does not define or prescribe duty for the purposes of the law of negligence." (Some citations omitted.)

Fabre v Lui [2015] NSWCA 157 -
Rockdale City Council v Simmons [2015] NSWCA 102 -
Rockdale City Council v Simmons [2015] NSWCA 102 -

Rockdale City Council v Simmons [2015] NSWCA 102 -
Rockdale City Council v Simmons [2015] NSWCA 102 -
Rockdale City Council v Simmons [2015] NSWCA 102 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
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Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

110. Accordingly, the circumstances as to whether Leighton owed of a duty of care is to be determined having regard to the following matters. Leighton was the operator of the ED. Its usual duty of care as a road operator, as it accepted, was "*to exercise reasonable care so that the road is safe for users exercising reasonable care for their own safety*": see *Roads and Traffic Authority of NSW v Dederer* at [45] per Gleeson CJ . The circumstances in which Leighton operated the motorway on 22 February and 25 February were different from the circumstances in which it usually operated the motorway in that there was a security operation that required the closure of the motorway to civilian traffic to ensure the safe passage of the Vice Presidential motorcade. The motorway was to be closed as and when directed by the police.

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42; 234 CLR 330 ; *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; 59 ALJR 492; *Central Darling Shire Council v Greeney* [2015] NSWCA 51; *Parkview Constructions Pty Ltd v Abrahim* [2013] NSWCA 460.

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

149. I should add that the State's complaint that her Honour held it to too high a standard by using the language of obligation "*to ensure*" certain matters might have had force, if that language was taken by itself. As Gummow J explained in *Roads and Traffic Authority of NSW v Dederer* at [18] , " *a duty of care involves an obligation to exercise reasonable care*". There is no obligation to ensure harm does not occur. Thus, Gummow J explained, at [46], in respect of a road authority, that it "*is not obliged to exercise reasonable care in the abstract; still less is it obliged to ensure that a road be safe in all the circumstances*".

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

102. Leighton then analysed what it contended were the salient features of this case by reference to the approach in *Stavar* to demonstrate that it owed no duty of care to the appellant at all, or alternatively, no duty having the content found by her Honour. On Leighton's submission, control and responsibility for the closure of the ED lay with the police, who had ordered the closure as part of a State-controlled security operation. It contended that it did not, in these unique and particular circumstances, close the ED of its own volition, but rather, was "[*a*]*cting under dictation*". According to Leighton, this factor impacted significantly on the "*usual duty*" owed by a road operator to the user of the road. The scope of that "*usual duty*" included requiring a road authority "*to exercise reasonable care to make the road safe for users exercising reasonable care for their own safety*": *Roads and Traffic Authority of NSW v Dederer* at [43]-[48] ; *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 at [163] .

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Stewart v Ackland [2015] ACTCA 1 -
BHP Billiton Limited v Van Soest [2014] SASCFC 135 (19 December 2014) (Gray, Nicholson and Bampton JJ)

28. In *Roads and Traffic Authority of New South Wales v Dederer* , Gummow J observed: [14]

> ... First, the proper resolution of an action in negligence depends on the existence and scope of the relevant duty of care. Secondly, whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct. Thirdly, the assessment of breach depends on the correct identification of the relevant risk of injury. Fourthly, breach must be assessed prospectively and not retrospectively. Fifthly, such an assessment of breach must be made in the manner described by Mason J in *Wyong Shire Council v Shirt* .

via

[14] *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 337.

BHP Billiton Limited v Van Soest [2014] SASCFC 135 (19 December 2014) (Gray, Nicholson and Bampton JJ)

Bendix Mintex Pty Ltd v Barnes (1997) 42 NSWLR 307; *BHP Billiton Limited v Parker* (2012) 113 SASR 206; *BHP Billiton Ltd v Hamilton* (2013) 117 SASR 329; *BI (Contracting) Pty Limited v University of Adelaide* (2008) 6 DDCR 382; *Cockatoo Dockyard Pty Ltd v Browne* [2001] NSWCA 58; *Czatyrko v Edith Cowan University* (2005) 79 ALJR 839; *Dasreef Pty Ltd v Hawchar* [2010] NSWCA 154; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; *Parker v BHP Billiton Limited* [2011] SADC 104; *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 ; *Stevedoring Finance Committee v Henderson* (2000) 2 VR 396 ; *Thompson v Johnson and Johnson Pty Ltd* [1991] 2 VR 449; *Trevorrow v State of South Australia (No 5)* (2007) 98 SASR 136; *Wyong Shire Council v Shirt* (1980) 146 CLR 40, considered.

BHP Billiton Limited v Van Soest [2014] SASCFC 135 -
BHP Billiton Limited v Van Soest [2014] SASCFC 135 -
BHP Billiton Limited v Van Soest [2014] SASCFC 135 -
Henderson v Queensland [2014] HCA 52 -
Liverpool Catholic Club Ltd v Moor [2014] NSWCA 394 (18 November 2014) (Meagher and Emmett JJA, Tobias AJA)

20. This ground may be disposed of shortly. As Gummow J noted in *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 at [18] , it is a basic and settled matter of principle that whatever its content or scope, a duty of care imposes an obligation to exercise

reasonable care. That basic principle informs s 5B of the CL Act which provides that a person is not negligent in failing to take a precaution against a risk of harm unless a reasonable person in that person's position would have taken that precaution. See also *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [25] (McHugh J) and [118] (Hayne J).

Liverpool Catholic Club Ltd v Moor [2014] NSWCA 394 -
Liverpool Catholic Club Ltd v Moor [2014] NSWCA 394 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

216. NSW's second proposition was that the duty analysis made by Walmsey AJ in *Warragamba Winery Pty Ltd v State of New South Wales (No 9)* [2012] NSWSC 701 (***Warragamba Winery***) is correct. This proposition involved a number of elements.

(1) The case is novel. None of the decisions referred to by the plaintiffs involve a public fire fighting service found liable in negligence for fighting a fire.

(2) The principles relevant to the determination of the issue of when a duty of care is to be identified in a novel case are brought together in *Graham Barclay Oysters* .

(3) Ordinarily, the common law does not impose a duty on a person to protect another from a risk of harm unless the person has created the risk. Accordingly, the mere existence of a statutory scheme to empower an authority to protect the public from a particular harm does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [81]).

(4) The primary judge found two instances of negligence (failing to fight the Baldy spot fire on the morning of 9 January 2003 and failing to clear and back-burn from the River). As there is no appeal from those findings, it is right to characterise the case as one involving a failure to act.

(5) Merely because it is foreseeable that harm may result if a public authority fails to exercise its powers, that does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [145]). In *Sullivan* at [42] the Court said that:

> But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.

(6) A duty of care does not require the prevention of harm; it requires the taking of reasonable care (*Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; [2007] HCA 42 (***Dederer***) at [18]).

(7) The statute that empowers the authority to act must be closely examined (*Graham Barclay Oysters* at [78] and [146]). The purpose is to

decide whether the legislation establishes a relationship whereby a duty is owed to specific individuals, as opposed to the public at large (*Graham Barclay Oysters* at [146] and [149]).

(8) Of particular importance are: - (i) the degree and nature of control exercised by the authority over the risk of harm that eventuated, (ii) the degree of vulnerability of those who depend on the proper exercise by the authority of its powers, and (iii) the consistency of the asserted duty of care with the terms, scope and purpose of the relevant statute (*Graham Barclay Oysters* at [84] and [149]).

(9) Also relevant are the considerations of inconsistency of a duty of care with other obligations (*Sullivan* at [60]) and indeterminacy of potential liability (*Sullivan* at [61]).

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Lorrimar v Serco Sodexo Defence Services Pty Ltd [2014] NSWCA 371 -
Lorrimar v Serco Sodexo Defence Services Pty Ltd [2014] NSWCA 371 -
Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22 (26 June 2014) (Refshauge, Penfold and Rares JJ)

82. Gummow J's comment about the risk under consideration having a low probability of occurrence was made not in relation to whether the risk was foreseeable but in relation to whether the defendant in *Dederer* had exercised reasonable care having regard to the nature of what was accepted to be a foreseeable risk. However, his Honour's reminder that the risk to be considered is the risk of injury being caused by the defendant's conduct rather than the risk of an event that, in turn, carries a risk of injury is consistent with the statutory position applicable in this case, specifically that under s 43(1)(a), negligence requires a failure to take precautions against "a risk **of harm**" (emphasis added) that was foreseeable and not insignificant.

Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22 -
Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 (26 May 2014) (McColl, Barrett and Ward JJA)

8. Gleeson JA (with whom Emmett JA and Tobias AJA agreed) addressed the content of the assumption that an entrant uses reasonable care for his or her safety in his pellucid judgment in *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 (at [159]) as follows:

"[159] The scope of the occupier's duty of care is marked out by the relationship between the occupier and users exercising reasonable care for their own safety. Thus, 'the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case': *Roads and Traffic Authority of New South Wales v Dederer and Another* [2007] HCA 42; 234 CLR 330 at [45] (***Dederer***). This involves a factual judgment which may depend on the circumstances of the case: *Thompson v Woolworths (Q'land) Pty Ltd* [2005] HCA 19; 221 CLR 234 at [35] ."

Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Port Macquarie Hastings Council v Mooney [2014] NSWCA 156 (20 May 2014) (Emmett JA, Sackville AJA and Simpson J)

52. In order to apply both ss 5B and 5C of the Civil Liability Act it is necessary, just as it was under the pre-existing general law, to identify the relevant "risk of harm": *Bellingen Shire Council v Colavon Pty Ltd* [2012] NSWCA 34; 188 LGERA 169 at [56] (Beazley JA, with whom Whealy JA and I agreed). As Gummow J (with whom Heydon J agreed) pointed out in *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 at [59] , it is only through the correct identification of the risk of injury that a court can assess what a reasonable response to the risk might be.

Port Macquarie Hastings Council v Mooney [2014] NSWCA 156 (20 May 2014) (Emmett JA, Sackville AJA and Simpson J)

Bellingen Shire Council v Colavon Pty Ltd [2012] NSWCA 34; 188 LGERA 169; *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 ; *Garzo v Liverpool / Campbelltown Christian School* [2012] NSWCA 151; applied.

Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139 -
Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98 -
Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98 -
AV8 Air Charter Pty Limited v Sydney Helicopters Pty Limited [2014] NSWCA 46 (12 March 2014) (Barrett, Hoeben and Ward JJA)

82. The importance of identifying the "risk of harm" was stressed in *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 . In the Court of Appeal the majority characterised the risk to the plaintiff as "serious spinal injury flowing from the act of diving off the bridge". This was a risk said to have been created by the erection of the bridge. However, Gummow J noted that this characterisation of the risk obscured the true source of potential injury which was not the erection of the bridge or any characteristic of the bridge, but rather the possibility of impact upon jumping into the potentially shallow water arising from the shifting sands of the estuary ([60] - [62]). This mis-characterisation of the risk led to two further errors. First it incorrectly focused attention on the frequency of the antecedent conduct, namely jumping and diving, and not the probability of the risk occurring as a result of that conduct, namely impact in shallow water. This prevented a proper evaluation of the probability of that risk occurring. Second it resulted in a focus on the RTA's role in creating the bridge and overlooked the lack of control the RTA had over the events that gave rise to the risk properly identified, namely the plaintiff's voluntary action in diving and the natural variations in the depth of the estuary beneath the bridge.

AV8 Air Charter Pty Limited v Sydney Helicopters Pty Limited [2014] NSWCA 46 -
State of Queensland v Kelly [2014] QCA 27 -
State of Queensland v Kelly [2014] QCA 27 -
Transfield Services (Australia) Pty Ltd v Wieland [2014] WASCA 41 (21 February 2014) (Martin CJ; Pullin and Newnes JJA)

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 ; (2007) 234 CLR 330
Villasevil v Pickering

Transfield Services (Australia) Pty Ltd v Wieland [2014] WASCA 41 -
Transfield Services (Australia) Pty Ltd v Wieland [2014] WASCA 41 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
QBE v Orcher [2013] NSWCA 478 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
Parkview Constructions Pty Ltd v Abrahim [2013] NSWCA 460 -
Takla v Nasr [2013] NSWCA 435 -
Takla v Nasr [2013] NSWCA 435 -

Kiriwellage v Best & Less Pty Ltd [2013] VSCA 355 -
Kiriwellage v Best & Less Pty Ltd [2013] VSCA 355 -
Kiriwellage v Best & Less Pty Ltd [2013] VSCA 355 -
Simon v Condran [2013] NSWCA 388 -
Motorcycling Events Group Australia Pty Ltd v Kelly [2013] NSWCA 361 (29 October 2013) (Basten, Meagher and Gleeson JJA)

138. Secondly, that the primary judge failed to apply the approach to negligence mandated in *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; (2007) 234 CLR 330 at [46]-[47]. It was contended by the appellant that this would have resulted in a finding that the appellant was not subject to a duty to remove all other users of the track at the time of the Level II courses.

Motorcycling Events Group Australia Pty Ltd v Kelly [2013] NSWCA 361 -
BHP Billiton Ltd v Hamilton [2013] SASCFC 75 (15 August 2013) (Kourakis CJ; Blue and Stanley JJ)
Amaca Pty Ltd v Hannell [2007] WASCA 158; (2007) 34 WAR 109; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; *Betts v Whittingslowe* (1945) 71 CLR 637; *Bull v Attorney-General (NSW)* (1913) 17 CLR 370; *Burch v South Australia* (1998) 71 SASR 12; *Chanter v Blackwood* (1904) 1 CLR 39; *Easther v Amaca Pty Ltd* [2001] WASC 328; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 ; *Fox v Percy* [2002] HCA 22; (2003) 214 CLR 118; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540; *Hamilton v Nuroof (WA) Pty Ltd* [2012] SADC 25; *IW v City of Perth* (1997) 191 CLR 1 ; *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503; *Joyce v Pioneer Tourist Coaches Pty Ltd* [1969] SASR 501; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Mabo v Queensland (No 2)* (1995) 175 CLR 1; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; *Nemer v Holloway* [2003] SASC 372; (2003) 87 SASR 147; *Owen v South Australia* (1996) 66 SASR 251; *Police v Cadd* (1997) 69 SASR 150; *R v Place* [2002] SASC 101; (2002) 81 SASR 395; *Roads and Traffic Authority v Royal* [2008] HCA 19; (2008) 82 ALJR 870; *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; (2007) 234 CLR 330 ; *South Australian Housing Trust v State Government Insurance Commission* (1989) 51 SASR 1; *Stateliner Pty Ltd v Legal & General Assurance Society Ltd* (1981) 28 SASR 16; *The State of South Australia v Ellis* [2008] WASCA 200; (2008) 37 WAR 1; *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153; *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316; *Wakeline v London and South Western Railway Co* (1886) 12 App Cas 41, considered.

BHP Billiton Ltd v Hamilton [2013] SASCFC 75 -
Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

64. Thus the breach inquiry required the primary judge to identify accurately the actual risk of injury the appellant faced as it was only through the correct identification of the risk that her Honour could determine what a reasonable response to that risk would be: *Roads and Traffic Authority of New South Wales v Dederer* (at [18] , [59]) per Gummow J. As Gummow and Hayne JJ explained in *Graham Barclay Oysters Pty Ltd v Ryan* (at [192]), the inquiry as to breach "involves identifying, with some precision, what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk". In so saying, their Honours referred with approval to Isaacs A-CJ's observation in *Metropolitan Gas Co v City of Melbourne* [1924] HCA 46; (1924) 35 CLR 186 (at 194), that "[n]o conclusion of negligence can be arrived at until, first, the mind conceives affirmatively what should have been done".

Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

48. The respondent did not contend at trial, or on appeal, that the appellant owed him any duty of care higher than that of an ordinary occupier of land. That duty required the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent arising from the physical state of its land on the assumption that he used reasonable care for his safety: *Australian Safeways Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479 (at 488) per Mason, Wilson, Deane and Dawson JJ; *Roads and Traffic Authority of New South Wales v Dederer* [2007]

HCA 42; (2007) 234 CLR 330 (at [45]) per Gummow J. The basis of the appellant's duty, as an occupier in relation to the physical state or condition of the ramp, was its control over, and its knowledge (actual or constructive), of the state of the ramp: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 (at [18]) per Gleeson CJ.

Shoalhaven City Council v Pender [2013] NSWCA 210 -
Shoalhaven City Council v Pender [2013] NSWCA 210 -
Donnellan v Woodland [2012] NSWCA 433 -
Certain Lloyd's Underwriters v Cross [2012] HCA 56 (12 December 2012) (French CJ, Hayne, Crennan, Kiefel and Bell JJ)

70. Whilst consideration of extrinsic materials should not displace the clear meaning of the text of a provision [102] , the purpose of a provision may be elucidated by appropriate reference to them [103] . It has often been said that the clear meaning of the text of a statute or a statutory provision is the surest guide to the meaning of "the intention of the legislature" [104] , an expression used metaphorically [105] . Nevertheless, it is uncontroversial that in determining the meaning of the text of a statute or provision a court may take into account the general purpose and policy of a provision and, in particular, the mischief that it is intended to remedy [106] . It was for the latter purpose that the Court of Appeal had recourse to the extrinsic materials. This did not involve error [107] . The extrinsic materials indicated that the Liability Act was enacted to deal with a perceived problem involving the high cost of *negligence* claims and the impact of such claims on the cost of insurance. This conclusion is uncontroversial [108] . Was it right to conclude that Div 5B of Pt 11 of the 1987 LP Act was enacted to remedy the same problem? The extrinsic materials suggest that it was. So does the retrospective operation of the Division. The latter is a strong indication that the scheme was enacted as part of the legislative response to the perceived crisis involving negligence claims. The enactment of Div 5B in a Schedule to the Liability Act and the choice to describe "personal injury damages" by reference to the meaning of the expression in the Li ability Act support that conclusion. The definition of "personal injury damages" in the Liabilit y Act is not elaborate and the scope and operation of the Liability Act is clearly stated in s 3B . Something more than economy may be discerned in the choice to incorporate the meaning of the expression in the Liability Act into Div 5B.

via

[108] *Harriton v Stephens* (2006) 226 CLR 52 at 93-94 [134]-[135] per Kirby J; [2006] HCA 15 ; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 402-403 [265] per Callinan J ; [2007] HCA 42 ; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 155 [14]; [2011] HCA 16.

Certain Lloyd's Underwriters v Cross [2012] HCA 56 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 (17 August 2012) (Beazley and Barrett JJA, Sackville AJA)

84. In *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 , Gummow J, in referring with approval to the statement of McHugh J in *Vairy* (albeit that McHugh J was in dissent in the result in *Vairy)*, stated, at [49] 347:

"In simple and complicated cases alike, one thing is fundamental: while duties of care may vary in content or scope, they are all to be discharged by the exercise of *reasonable* care." (original emphasis)

Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 -

18. This approach has been referred to as the "*Shirt* calculus". As Gummow and Hayne JJ said in *Fahy* :

> ... The description may be convenient but it may mislead. Reference to "calculus", "a certain way of performing mathematical investigations and resolutions", may wrongly be understood as requiring no more than a comparison between what it would have cost to avoid the particular injury that happened and the consequences of that injury. *Shirt* requires a more elaborate inquiry that does not focus only upon how the particular injury happened. It requires looking forward to identify what a reasonable person *would* have done, not backward to identify what would have avoided the injury. [9]
>
> *Citation omitted*

The last sentence of that passage is significant. Their Honours went on to say:

> In *Vairy v Wyong Shire Council,* it was explained why it is wrong to focus exclusively upon the way in which the particular injury of which a plaintiff complains came about. In *Vairy* , it was said that:
>
> > "[T]he apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be "nothing"."
>
> It is only if the examination of breach focuses upon "what a reasonable man *woul d* do by way of response to the risk" (emphasis added) that it is sensible to consider "the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have". [10]
>
> *Citations omitted*

On this point we refer also to the reasons of Gummow J in *Dederer* at [65] and to the reasons of Hayne J in *Vairy v Wyong Shire Council* . [11]

BHP Billiton Ltd v Parker [2012] SASCFC 73 (18 June 2012) (Doyle CJ; Gray and White JJ)
Czatyrko v Edith Cowan University [2005] HCA 14; (2005) 79 ALJR 839; *Lamb v Cotogno* (1987) 164 CLR 1 ; *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; (2007) 234 CLR 330 ; *State of New South Wales v Fahy* [2007] HCA 20; (2007) 232 CLR 486; *The Council of the Shire of Wyong v Shirt* [1980] HCA 12; (1980) 146 CLR 40, discussed.

Warren Shire Council v Kuehne [2012] NSWCA 81 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Novakovic v Stekovic [2012] NSWCA 54 -
Laoulach v Ibrahim [2011] NSWCA 402 -
Juric v State of Victoria [2011] VSCA 419 -
Loose Fit Pty Limited v Marshbaum [2011] NSWCA 372 (30 November 2011) (Campbell JA at 1, Handley AJA at 2, Sackville AJA at 3)

68. There was no dispute that Loose Fit, as the occupier of the premises (including the staircase), owed a duty under the general law to take reasonable care to avoid a foreseeable risk of injury to the Plaintiff: *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479. The obligation is to exercise reasonable care to prevent injury to an entrant who uses reasonable care for his or her own safety: *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; 234 CLR 334 , at 345-346 [45] , per Gummow J ; *Laresu Pty Ltd v Clark* [2010] NSWCA 180, at [38], per Macfarlan JA (with whom Tobias JA and Handley AJA agreed). What constitutes the exercise of reasonable care will depend on the circumstances of the particular case: *Wilkinson v Law Courts Ltd* [2011] NSWCA 196, at [32], per Heydon JA (with whom Meagher JA and Rolfe AJA agreed).

Gulic v O'Neill [2011] NSWCA 361 -
Price v State of New South Wales [2011] NSWCA 341 -
Price v State of New South Wales [2011] NSWCA 341 -
Nominal Defendant v Stephens [2011] NSWCA 312 -
Lithgow City Council v Jackson [2011] HCA 36 -
Lithgow City Council v Jackson [2011] HCA 36 -
Harmer v Hare [2011] NSWCA 229 -
Harmer v Hare [2011] NSWCA 229 -
Harmer v Hare [2011] NSWCA 229 -
Harmer v Hare [2011] NSWCA 229 -
Roche Mining Pty Ltd v Jeffs [2011] NSWCA 184 -
Roche Mining Pty Ltd v Jeffs [2011] NSWCA 184 -
Burton v Brooks [2011] NSWCA 175 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Stephens v Giovenco; Dick v Giovenco [2011] NSWCA 53 (15 March 2011) (Allsop P, Hodgson and Tobias JJA)

96. It could be argued that this statement by Gummow J counts against the existence of any duty, because (it could be argued) a risk of electrocution exists only in relation to persons not taking reasonable care for their own safety. In my opinion, that aspect of what was said by Gummow J (and of the decision of the majority) in *Dederer* , adopting and applying the decision in *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512, relates to the duty of road authorities, the extent of which is in general measured by reference to the requirements of road users who take reasonable care. In other areas, the principles stated in cases such as *Nagel* and *Bus* confirm that the scope of the duty of care is not so narrow.

Stephens v Giovenco; Dick v Giovenco [2011] NSWCA 53 -
Stephens v Giovenco; Dick v Giovenco [2011] NSWCA 53 -
Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd [2010] VSCA 355 -
Watson v Ebsworth & Ebsworth [2010] VSCA 335 -
Arabi v Glad Cleaning Service Pty Ltd [2010] NSWCA 208 -
Arabi v Glad Cleaning Service Pty Ltd [2010] NSWCA 208 -

Laresu Pty Ltd v Clark [2010] NSWCA 180 (04 August 2010) (Tobias and Macfarlan JJA, Handley AJA)
Roads and Traffic Authority of New South Wales v Dederer [2007] HCA 42; (2007) 234 CLR 330
Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd

Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 (30 July 2010) (Pullin JA, Newnes JA, Mazza J)

Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330

Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 -
Shaw v Thomas [2010] NSWCA 169 -
Council of the City of Greater Taree v Wells [2010] NSWCA 147 -
Council of the City of Greater Taree v Wells [2010] NSWCA 147 -
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Swanson v Kedesh Rehabilitation Services Ltd [2010] NSWCA 25 (24 June 2010) (Beazley and Macfarlan JJA, Handley AJA)

43. The appellant's submission that Kedesh had a duty to "ensure" that the appellant did not go on weekend leave without his medication must also fail for legal reasons (*RTA v Dederer* [2007] HCA 42, 234 CLR 330, 338 , 346 , 348 , 354 , 356). Kedesh could have no duty to ensure a particular result. Its duty was to take reasonable care for the safety of its residents.

Swanson v Kedesh Rehabilitation Services Ltd [2010] NSWCA 25 -
Erwin v Iveco Trucks Australia Ltd [2010] NSWCA 113 -
Erwin v Iveco Trucks Australia Ltd [2010] NSWCA 113 -
DAVIES v Tomkins [2009] WASCA 228 -
DAVIES v Tomkins [2009] WASCA 228 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 (12 November 2009) (Ipp, McColl and Basten JJA)
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 ; (2007) 234 CLR 330
Schubert v Lee

Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 -
CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47 -
Sydney Water Corporation v Turano [2009] HCA 42 (13 October 2009) (French CJ, Gummow, Hayne, Crennan and Bell JJ)

47. In considering the liability of the Council, Beazley JA referred to the observations of Gummow J (with whose reasons in this respect Callinan and Heydon JJ agreed) in *Roads and Traffic Authority (NSW) v Dederer* [55] :

> "First, duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."

Sydney Water Corporation v Turano [2009] HCA 42 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 (08 October 2009) (Ashley, Redlich JJA and Kyrou AJA)

51. The significance of the frequency with which a risky practice was being followed again fell for consideration in *Roads and Traffic Authority of New South Wales v Dederer.* [23] The respondent had dived from a bridge and hit his head in the bed of an estuary. Diving from the bridge was a widespread and longstanding practice. The respondent had dived from the bridge before. Signs had been erected prohibiting diving from or climbing on the bridge. The respondent understood the signs and knew that the estuary contained channels of variable depth. Gummow J, who was in the majority, and with whom Heydon J agreed, [24] cautioned against too close a focus upon the frequency with which persons are exposed to a risk, observing that to do so might result in distraction 'from a proper evaluation of the probability of [the] risk occurring'. [25] His Honour said:

> The first error can be seen in Ipp JA's characterisation of the 'startling frequency' of 'large numbers' of people jumping and diving from the bridge; a practice that was 'continuing unabated' notwithstanding the pictograms. Such a characterisation incorrectly focused attention on the frequency of an antecedent course of conduct, namely jumping and diving, and not on the probability of the risk of injury occurring as a result of that conduct, namely impact in shallow water. As Lord Porter observed in *Bolton v Stone.* 'in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of *injury being caused*' (emphasis added). In the present case, the frequency of jumping and diving was only startling if one ignored the fact that no-one was injured until Mr Dederer's unfortunate accident. Far from being a risk with a high probability of occurrence, the probability was in truth very low, and this fact was masked by the Court of Appeal's characterisation of the relevant risk. [26]

via

[26] Ibid [61] (citations omitted).

Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 (08 October 2009) (Ashley, Redlich JJA and Kyrou AJA)

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via

[24] Ibid , [283] .

Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Gosling v Lorne Foreshore Committee of Management Inc [2009] VSCA 228 -
Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -
Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -
Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -
Leighton Contractors Pty Ltd v Fox [2009] HCA 35 (02 September 2009) (French CJ,Gummow, Hayne, Heydon and Bell JJ)

49. The obligation imposed on Leighton under the Regulation , while not founding an action for breach of statutory duty, is central to the Court of Appeal's conclusion that a common law duty existed. While it is true that obligations under statutory or other enactments have relevance to determining the existence and scope of a duty, it is necessary to exercise caution in translating the obligations imposed on employers, principal contractors and others under the OHS Act and the Regulation into a duty of care at common law. This is because, as Gummow J explained in *Roads and Traffic Authority (NSW) v Dederer* [70] , "whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."

Leighton Contractors Pty Ltd v Fox [2009] HCA 35 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Dominello v Dominello (No 2) [2009] NSWCA 257 -
Dominello v Dominello (No 2) [2009] NSWCA 257 -
Dominello v Dominello (No 2) [2009] NSWCA 257 -
S v State of New South Wales [2009] NSWCA 164 -
S v State of New South Wales [2009] NSWCA 164 -
Condos v Clycut Pty Ltd [2009] NSWCA 200 -
Kekatos v Sanson & Ano [2009] NSWCA 171 -
Kekatos v Sanson & Ano [2009] NSWCA 171 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

50. The majority judgment in *Brodie* has been considered in later decisions of the High Court [47] and has been applied in this court. [48] The scope of the duty stated in *Brodie* was the subject of exposition by Gummow J in *Roads and Traffic Authority of NSW v Dederer.* [49] Gummow J with whom Heydon J agreed referred to *Brodie* in these terms:

> The result of that case is that a road authority is obliged to exercise reasonable care so that the road is safe "for users exercising reasonable care for their own safety". The expression of the scope of the RTA's duty of care in those terms has long antecedents in the law relating to occupiers ' liability. In *Indermaur v Dames*, giving the judgment of the Court of Common Pleas, Willes J held that:

> we consider it settled law, that [a visitor], using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger.

The modern form of that principle has been frequently affirmed in recent times, *both with regard to occupiers and roads authorities*. Of course, the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case, but in the present case it was also a specific element contained, as a matter of law, in the scope of the RTA's duty of care.

A road authority such as the RTA is not obliged to exercise reasonable care in the abstract; still less is it obliged to ensure that a road be safe in all the circumstances. So much was recently reaffirmed in *Leichhardt Municipal Council v Montgomery*. Such an expression of the duty's scope has an obvious and direct consequence when assessing breach. As Gaudron, McHugh and Gummow JJ stated in *Brodie* :

> "In dealing with questions of breach of duty, whilst there is to be taken into account as a 'variable factor' the results of 'inadvertence' and 'thoughtlessness', a proper starting point may be the proposition that the persons using the road will themselves take ordinary care." (citations omitted and emphasis added)

via

[49] (2007) 234 CLR 330 .

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 (24 June 2009) (Neave and Redlich JJA and Pagone AJA)

3. In the passage from *Roads and Traffic Authority of NSW v Dederer* [2] which is cited by Redlich JA at [50], Gummow J seems to have considered that the specialised duty in *Brodie* applies to public bodies, whether they are acting in their capacity as occupiers or road authorities. [3] *Dederer* was an appeal from a decision of the New South Wales Court of Appeal. Accordingly, it did not require consideration of the effect of s 14B of the *Wrongs Act 1958* on the scope of an occupier's duty.

via

[2] (2007) 234 CLR 330 (' *Dederer*').

Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
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Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Wynn Tresidder Management v Barkho [2009] NSWCA 149 (16 June 2009) (Tobias JA at 1; McColl JA at 2; Young JA at 114)

60. Determining whether the duty had been breached turned upon the probability of the risk occurring, the magnitude of the consequences and the expense or inconvenience of eliminating the risk: *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40 (at 47) per Mason J. In the assessment of breach, weight had to be given to the expectation that the respondent would exercise reasonable care for her own safety and also to the possibility of "inadvertence" and "thoughtlessness". However it must also be accepted that while persons exercising reasonable care will be able to avoid injury in some situations, other situations present "a foreseeable risk of harm" even to persons taking such care: *Brodie v Singleton Shire Council* [2001] HCA 29; (2001) 206 CLR 512 (at [160], [163]) per Gaudron, McHugh and Gummow JJ; *Dederer* (at [45] – [46]) per Gummow J.

Wynn Tresidder Management v Barkho [2009] NSWCA 149 -
Wynn Tresidder Management v Barkho [2009] NSWCA 149 -
Shire of Gingin v Coombe [2009] WASCA 92 (25 May 2009) (Martin CJ)

47. More recently, Gummow J reiterated the proposition in ***Roads and Traffic Authority of New South Wales v Dederer*** [2007] HCA 42; (2007) 234 CLR 330 at [65] (see also Callinan J [264]).

Reasonable care, not prevention

Shire of Gingin v Coombe [2009] WASCA 92 (25 May 2009) (Martin CJ)

62. The character of the activity undertaken by the person claiming to be owed a duty of care is also relevant to the assessment of its scope or content. Many recreational activities are inherently dangerous, and the activities undertaken by the class of persons entering the ORVA amply illustrate that point. In ***Agar v Hyde*** [2000] HCA 41; (2000) 201 CLR 552 [127], it was observed that adults voluntarily participating in a sport may be assumed to have an appreciation of the risks involved in that sport, just as those diving from a rock platform into the sea might be taken to have some knowledge of the risk of submerged objects. Similarly, those resorting to large sand dunes in order to use offroad vehicles may be assumed to have a knowledge and appreciation of the general risks associated with that activity. This does not, of course, mean that those persons are not owed a duty of care, but it is relevant to the ascertainment of the scope and content of that duty. Further, the fact that such persons undertake such hazardous recreational activities voluntarily, places them in a different category to those such as road users and employees, who have little or no practical choice in relation to the risks to which they are subjected - see Callinan and Heydon JJ in *Vairy* at [216] [217] , Callinan J in ***Dederer*** at [264] .

The significance of prior injuries

Shire of Gingin v Coombe [2009] WASCA 92 (25 May 2009) (Martin CJ)

65. As Gummow J pointed out in ***Dederer*** :

> It is only through the correct identification of the risk that one can assess what a reasonable response to that risk would be. [59]

In that case, Gummow J concluded that mischaracterisation of the relevant risk by the Court of Appeal was one of its sources of error [60].

Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
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Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Portelli v Tabriska Pty Ltd [2009] NSWCA 17 (17 February 2009) (Allsop P ; Hodgson JA; Macfarlan JA)

Roads and Traffic Authroity of New South Wales v Dederer [2007] HCA 42 ; 234 CLR 330
Rooty Hill RSL Club Ltd v Karimi

Portelli v Tabriska Pty Ltd [2009] NSWCA 17 -
Hamshere v Favelle [2009] NSWCA 4 (12 February 2009) (Hodgson JA at 1; Campbell JA at 2; Macfarlan JA at 3)

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 ; 234 CLR 330
Romeo v Conservation Commission of the Northern Territory

Hamshere v Favelle [2009] NSWCA 4 -
Rooty Hill RSL Club Ltd v Karimi [2009] NSWCA 2 -
Rooty Hill RSL Club Ltd v Karimi [2009] NSWCA 2 -
Seage v State of New South Wales [2008] NSWCA 328 -
Seage v State of New South Wales [2008] NSWCA 328 -
Jandson Pty Ltd v Welsh [2008] NSWCA 317 -
Council of the City of Liverpool v Turano [2008] NSWCA 270 (31 October 2008) (Beazley JA ; Hodgson JA; McColl JA)

117 The question of the content of the duty of care arose again recently in *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 238 ALR 761. Gummow J, with whose reasons Callinan and Heydon JJ agreed, stated at [43] :

> "First, duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."

Council of the City of Liverpool v Turano [2008] NSWCA 270 (31 October 2008) (Beazley JA ; Hodgson JA; McColl JA)

Vairy v Wyong Shire Council [2005] HCA 62; (2005) 223 CLR 422; *Graham Barclay Oysters Pty Limited v Ryan* [2002] HCA 54; (2002) 211 CLR 540; *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5; (1998) 192 CLR 431; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; 205 CLR 254; *Nagle v Rottnest Island Authority* [1993] HCA 76; (1993) 177 CLR 423; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 238 ALR 761 (all considered); *Mulligan v Coffs Harbour City Council* [2005] HCA 63; (2005) 223 CLR 486 (referred to).

Council of the City of Liverpool v Turano [2008] NSWCA 270 -
Talbot-Price v Jacobs [2008] NSWCA 189 -
Talbot-Price v Jacobs [2008] NSWCA 189 -
Roads and Traffic Authority v Royal [2008] HCA 19 (14 May 2008) (Gummow, Kirby, Hayne, Heydon and Kiefel JJ)

114. *Correct approach: correct conclusion*: There are additional considerations of a general kind that support this conclusion. They include:

. the undesirability of giving encouragement to the sophistry of single causes where evidence shows that more than one cause has materially contributed to the damage complained of [109] ; and

. the fulfilment of an important objective of the law of torts. The law of actionable civil wrongs exists not only to provide monetary compensation (and contribution) where that is justified, but also to encourage appropriate conduct (including on the part of public officials) by the imposition of appropriate monetary sanctions [110] . I realise, of course, the imperfections, inefficiencies and paradoxes involved in treating the law of torts as a guardian of communal fairness and as a stimulus to accident prevention [111]. Doubtless, there are other, usually legislative, means of attaining these ends. However, so long as the law of torts survives, its role in distributive justice and in promoting safety should be maintained rather than denied.

via

[110] Fleming, *The Law of Torts*, 9th ed (1998) at 13-14. See also Linden, "Tort Law as Ombudsman", (1973) 51 *Canadian Bar Review* 155; Linden, "Reconsidering Tort Law as Ombudsman", in Steel and Rodgers-Magnet (eds), *Issues in Tort Law*, (1983) at 1; Schuck, *Suing Government: Citizen Remedies for Official Wrongs*, (1983) at 184; cf *Neindorf v Junkovic* (2005) 80 ALJR 341 at 359-360 [84]-[85] ; 222 ALR 631 at 653 ; *Fahy* (2007) 81 ALJR 1021 at 1055 [169]; 236 ALR 406 at 449 ; *Dederer* (2007) 81 ALJR 1773 at 1805 [166] ; 238 ALR 761 at 801.

Roads and Traffic Authority v Royal [2008] HCA 19 -
Roads and Traffic Authority v Royal [2008] HCA 19 -
Collins v Tabart [2008] HCA 23 -
Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 (11 April 2008) (Mason P at 1; Basten JA at 5; Bell JA at 65)

42 As positive evidence that no such accidents had occurred, the weight to be given to Mr Dunlop's statement may have been limited in the absence of any express evidence of the existence of appropriate files and the searching of such files. On the other hand, the plaintiff did not cross-examine Mr Dunlop about this evidence, nor seek to call evidence suggesting there was a known history of accidents. Rejecting Mr Dunlop's evidence out of hand as having no weight was an error. Evidence that a particular risk has apparently not eventuated in the past may give rise to doubt as to whether the supposed risk is significant: see, eg, *University of Wollongong v Mitchell* [2003] NSWCA 94; Aust Torts Rep ¶81-708 at [14] (Meagher JA), [34]-[35] (Giles JA); *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705 at [5] (Priestley JA). Further, as explained by Handley JA in *Great Lakes Shire Council v Dederer* [2006] NSWCA 101; Aust Torts Rep ¶81-860 at [63], evidence of an extensive accident-free history may well demonstrate that the perceived risk gave rise to no reasonable claim on the attention or resources of the RTA: see also *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 81 ALJR 1773 at [61] (Gummow J); *Romeo v Conservation Commission of the NT* [1998] HCA 5; 192 CLR 431 at [132] (Kirby J) and [274] (Callinan J); *In the Estate of MT Mutton v Howard Haulage Pty Ltd* [2007] NSWCA 340 at [169]-[172] (Ipp JA).

Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 (11 April 2008) (Mason P at 1; Basten JA at 5; Bell JA at 65)

Romeo v Conservation Commission of the NT [1998] HCA 5; (1998) 192 CLR 431; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 81 ALJR 1773 ; *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; 52 NSWLR 705; *University of Wollongong v Mitchell* [2003] NSWCA 94; *Great Lakes Shire Council v Dederer* [2006] NSWCA 101; Aust Torts Rep ¶81,860; *In the Estate of MT Mutton v Howard Haulage Pty Ltd* [2007] NSWCA 340, referred to.

Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
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Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
Roads and Traffic Authority of NSW v Chandler [2008] NSWCA 64 -
Preti v Sahara Tours Pty Ltd [2008] NTCA 2 (07 April 2008) (Mildren, Thomas & Riley JJ)

> *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448; *Horton v Byrne* (1956) 30 ALJ 583; *Nance v British Colombia Electric R y Co Ltd* [1951] AC 601; *Nguyen v Nguyen* (1990) 169 CLR 245; *Pennington v Norris* (1956) 96 CLR 10; *Roads and Traffic Authority (NSW) v Dederer* (2007) 81 ALJR 1773 , followed

Preti v Sahara Tours Pty Ltd [2008] NTCA 2 -
Preti v Sahara Tours Pty Ltd [2008] NTCA 2 -
Preti v Sahara Tours Pty Ltd [2008] NTCA 2 -
MW v Director-General, Department of Community Services [2008] HCA 12 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

> Roads and Traffic Authority of New South Wales v Dederer [2007] HCA 42 ; (2007) 81 ALJR 1773 Sargent v ASL Developments Ltd

Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Commonwealth of Australia v Griffiths [2007] NSWCA 370 -
Commonwealth of Australia v Griffiths [2007] NSWCA 370 -
Estate of the late M T Mutton v Howard Haulage Pty Ltd [2007] NSWCA 340 (07 December 2007) (Spigelman CJ at 1; Hodgson JA at 52; Ipp JA at 65)

> 171 In *Roads and Traffic Authority of New South Wales v Dederer* (2007) 81 ALJR 1773, Gummow J (with whom Callinan J (at 1822 , [270] and 1823 , [282]) and Heydon J (at 1823 , [283] agreed) had regard (at 1788 , [61]) to the fact that no injury had been caused despite the fact that over some 40 years large numbers of people had jumped and dived from the bridge in question in that case. He considered that the absence of any injury being caused until the plaintiff was rendered paraplegic demonstrated that "the probability [of the risk materialising] was in truth very low". See also at 1790, [71] where Gummow J said:
>
> > "The probability of that injury occurring was, however, low. Despite the frequency of jumping and diving from the bridge, no-one was injured until Mr Dederer's unfortunate dive."

Reardon v State of Queensland [2007] QCA 436 -
Estate of the late M T Mutton v Howard Haulage Pty Ltd [2007] NSWCA 340 -
Estate of the late M T Mutton v Howard Haulage Pty Ltd [2007] NSWCA 340 -
Brighton le Sands Amateur Fishermen's Association Ltd v Vasilios Koromvokis [2007] NSWCA 331 -
Brighton le Sands Amateur Fishermen's Association Ltd v Vasilios Koromvokis [2007] NSWCA 331 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -
North Sydney Council v Binks [2007] NSWCA 245 -