Adeels Palace Pty Ltd v Moubarak - [2009] HCA 48

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

Matter No S191/2009

ADEELS PALACE PTY LTD APPELLANT

AND

ANTHONY MOUBARAK RESPONDENT

Matter No S192/2009

ADEELS PALACE PTY LTD APPELLANT

AND

ANTOIN FAYEZ BOU NAJEM RESPONDENT

Adeels Palace Pty Ltd v Moubarak
Adeels Palace Pty Ltd v Bou Najem
[2009] HCA 48
10 November 2009
S191/2009 & S192/2009

ORDER

Matter No S191/2009

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales entered on 24 March 2009, and in lieu thereof order that:*

   (a) *the appeal to that Court be allowed with costs;*

   (b) *the orders of the District Court of New South Wales made on 25 January 2008, as amended by order 1 of the orders of that Court made on 14 February 2008, be set aside, and in lieu thereof there be judgment for the defendant with costs.*

Matter No S192/2009

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales entered on 24 March 2009, and in lieu thereof order that:*

(a) the appeal to that Court be allowed with costs;

(b) the orders of the District Court of New South Wales made on 25 January 2008 be set aside, and in lieu thereof there be judgment for the defendant with costs.

On appeal from the Supreme Court of New South Wales

Representation

J E Sexton SC with M J Gollan for the appellant (instructed by Lee & Lyons Lawyers)

B M Toomey QC with D R Campbell SC and D C Morgan for the respondent in S191 /2009 (instructed by Leitch Hasson Dent Solicitors)

S G Campbell SC with J W Catsanos for the respondent in S192/2009 (instructed by Sanford Legal)

CATCHWORDS

Adeels Palace Pty Ltd v Moubarak
Adeels Palace Pty Ltd v Bou Najem

Torts – Negligence – Duty of care – Where gunman shot two men at New Year's Eve function – Where shootings occurred on licensed premises – Whether defendant owed duty of care to prevent injury from conduct of other patrons – Relevance of statutory requirements under *Liquor Act* 1982 (NSW) .

Torts – Negligence – Breach of duty – Where no licensed security personnel on premises – Whether licensed security personnel ought to have been provided – Relevance of size and type of function – Relevance of past incidents at premises.

Torts – Negligence – Causation – Whether absence of licensed security personnel necessary condition for shootings taking place – Whether "but for" test of causation satisfied – Relevance of nature of damage sustained – Whether an exceptional case.

Words and phrases – "necessary condition of the occurrence of the harm", "factual causation", "scope of liability", "an exceptional case".

Civil Liability Act 2002 (NSW), ss 5B, 5C, 5D, 5E .
Liquor Act 1982 (NSW), ss 2A, 103, 125 .

1. FRENCH CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. The appellant in each appeal (Adeels Palace Pty Ltd – "Adeels Palace") carried on a reception and restaurant business at premises in Punchbowl, New South Wales. The premises were licensed under the *Liquor Act* 1982 (NSW) ("the Liquor Act"[1]). An "OnLicence (Restaurant)" licence permitted the service of alcohol on the premises on any day, between midday and 4.00 am on the day following. A condition of the licence limited the seating capacity of the premises to restaurant seating for 295 persons. The local council authorised the use of the premises as a

place of public entertainment between midday and 4.00 am on the next day but limited the capacity of the premises to 283 persons. At the times relevant to these matters, a director of Adeels Palace was the licensee.

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[1] The *Liquor Act* 1982 (NSW) has since been repealed and replaced by the *Liquor Act* 2007 (NSW) . In relevant respects the 2007 Act contains generally similar provisions to those of the 1982 Act that are mentioned later in these reasons.

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2. On 31 December 2002, Adeels Palace was open for business and many came to celebrate the New Year. The restaurant was full. Exactly how many were there was never proved. Admission to the premises, collected at the door, cost $60 per person which included food but not alcoholic drinks. There was a band; there were singers and entertainers; patrons could dance. Seating was at long tables. The bar was open. Waiters brought drinks to the tables.

3. At about 2.30 am on 1 January 2003, there was a dispute between some women dancing on the dance floor. One accused another of brushing her hand with a lighted cigarette. Words were exchanged. Relatives and friends intervened. Fighting erupted and onlookers joined in. Punches were thrown. Chairs, plates and bottles were thrown. One witness was later to agree that the disruption "got bigger and more ferocious very quickly". As he said, there were "[a] lot of egos out there".

4. One man involved in the fight was hit in the face, drawing blood. He left the restaurant and returned soon after with a gun. Someone called out "Gun, gun, run away" and Mr Bou Najem (the respondent in the second appeal in this Court) did just that. He ran into the restaurant's kitchen but slipped over. The gunman came in. As Mr Bou Najem tried to get up, the gunman pointed the gun at him. Mr Bou Najem pleaded with him not to shoot, but shoot he did, wounding Mr Bou Najem in the leg.

5. The gunman left the kitchen and went back into the restaurant itself. There he found the man who had struck him in the face – Mr Moubarak (the respondent in the first appeal). The gunman shot Mr Moubarak in the stomach and then left the premises.

6. The two men who were shot, Mr Bou Najem and Mr Moubarak, each brought proceedings in the District Court of New South Wales against Adeels Palace claiming damages for personal injury. Each alleged that they had suffered injury as a result of Adeels Palace's negligence in not providing any or any sufficient security during the function on New Year's Eve.

7. In the District Court, the two actions were heard together, and each plaintiff obtained judgment for damages. Adeels Palace appealed to the Court of Appeal of New South Wales and that Court (Beazley, Giles and Campbell JJA) dismissed[2] each appeal. By special leave, Adeels Palace appeals to this Court. Each appeal should be allowed. Consequential orders should be made entering judgment in each proceeding for Adeels Palace.

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[2] *Adeels Palace Pty Ltd v Moubarak* (2009) Aust Torts Reports ¶81997.

The issues

8. There was no dispute in these matters that both Mr Bou Najem and Mr Moubarak had suffered serious personal injury. The live issues in the case of each, at trial, on appeal to the Court of Appeal, and in this Court, were, however, whether Adeels Palace owed each a duty of care to prevent harm of the kind suffered, whether that duty had been breached, and whether the breach was a cause of the damage suffered. In Mr Moubarak's case, quantum of damages was a live issue at trial but not on appeal.

9. In this Court, Adeels Palace submitted that it owed no duty to those attending its premises to prevent criminal conduct by third parties. It submitted that so much is established by this Court's decision in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [3] . It submitted further that, if it did owe some relevant duty of care to its patrons, it was not shown that the reasonable response to the risk of violent behaviour at the function would have been to employ licensed security personnel. Finally, it submitted that it was not shown that the want of licensed security personnel was a cause of the shooting of either plaintiff.

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[3] (2000) 205 CLR 254; [2000] HCA 61 .

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10. Each plaintiff raised further issues in this Court, by notice of contention. Each submitted that he had entered the restaurant under a contract, and that accordingly, by operation of s 74 of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act"), Adeels Palace impliedly warranted that the services it provided would be provided with due care and skill (including, in this case, by provision of suitable security services). As these reasons will later demonstrate, it will not be necessary to consider this contention in any detail. Mr Moubarak further sought to contend (by an amendment of his notice of contention first proposed at the hearing of the appeal to this Court) that causation was established in this case by demonstrating no more than that the failure of Adeels Palace to engage competent security staff "resulted in a material increase in an existing risk of injury to [him] from violent acts of other patrons and so materially contributed to the injuries suffered by him".

11. **Following paragraph cited by:**

Austen v Tran (29 November 2023) (McCallum CJ; Wheelahan J; Crowe AJ)
Cornwall v Jenkins as Trustee for the iSpin Family Trust (19 February 2020) (Burns and Loukas-Karlsson JJ; Crowe AJ)
Fairall v Hobbs (18 April 2017) (McColl A, P, Leeming and Payne JJA)
Nepean Blue Mountains Local Health District v Starkey (25 July 2016) (McColl and Payne JJA, Garling J)

1. Cf Adeels Palace Pty Ltd v Moubarak [2009] HCA 48 ; (2009) 239 CLR 420 (Adeels Palace) (at [11]).

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; Miller v Lithgow City Council (15 October 2015) (Basten, Leeming and Simpson JJA)
Lorrimar v Serco Sodexo Defence Services Pty Ltd (30 October 2014) (McColl and Macfarlan JJA, Tobias AJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)
Lym International Pty Ltd v Marcolongo (22 September 2011) (Basten and Campbell JJA, Sackar J)
Council of the City of Greater Taree v Wells (01 July 2010) (Beazley, McColl and Basten JJA)

35 In *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48 the High Court, at [11] , warned that if attention was not directed to the *Civil Liability Act* first, there was a serious risk that "*inquiries about duty, breach and causation would miscarry*".

Did the appellant owe the respondent a duty of care?

In considering each of the issues of duty, breach and causation, it is of the first importance to identify the proper starting point for the relevant inquiry. In this case there are two statutes which require particular consideration: the *Civil Liability Act* 2002 (NSW) ("the Civil Liability Act") and the Liquor Act. If attention is not directed first to the Civil Liability Act , and then to the Liquor Act, there is serious risk that the inquiries about duty, breach and causation will miscarry.

The Civil Liability Act

12. The Civil Liability Act is taken to have commenced on 20 March 2002[4]. At the relevant times, s 5A of the Act provided that Pt 1A [5] "applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise". Part 1A of the Act included Div 2, entitled "Duty of care" (ss 5B and 5C), and Div 3, entitled "Causation" (ss 5D and 5E).

[4] s 2.

[5] As inserted in the *Civil Liability Act* 2002 (NSW) by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) .

13. **Following paragraph cited by:**

Commissioner of Taxation v Patrix Prestige Pty Ltd (14 November 2024) (Thawley, Wheelahan and Kennett JJ)
Austen v Tran (29 November 2023) (McCallum CJ; Wheelahan J; Crowe AJ)
Eddy v Goulburn Mulwaree Council (07 June 2022) (Bell CJ, Gleeson and Kirk JJA)
Liprini v Hale (03 July 2020) (Macfarlan and McCallum JJA, Emmett AJA)
Mal Owen Consulting Pty Ltd v Ashcroft (20 June 2018) (Basten and Macfarlan JJA, Barrett AJA)

> 37. (2009) 239 CLR 420; [2009] HCA 48 at [13] ; see also the exercise undertaken at [23]-[26].

Bitupave Ltd t/as Boral Asphalt v Pillinger (30 September 2015) (Ward, Emmett and Gleeson JJA)
Rankin v Gosford City Council (25 August 2015) (Basten, Macfarlan and Simpson JJA)

18. As has been noted on more than one occasion, the elements relevant to identification of the scope of a duty, a breach of duty and causation with respect to harm are not to be found in self-contained compartments, but tend to overlap. [6] Thus, although the focus of s 5B of the *Civil Liability Act* is breach of duty, [7] the matters identified are also relevant to the existence of a duty of care. The section provides:

> **5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
>
> (a) the probability that the harm would occur if care were not taken,
>
> (b) the likely seriousness of the harm,
>
> (c) the burden of taking precautions to avoid the risk of harm,
>
> (d) the social utility of the activity that creates the risk of harm.

via

7. Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48 at [13] .

Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

28. The existence of a duty of care is to be determined in accordance with the general law. Although the *Civil Liability Act* has a division headed "Duty of care", [8] it is accepted that the provisions relate more to breach than to the existence of a duty. [9] Nevertheless, the provision adopts language relevant to both duty and breach [10] . (The heading to a Division in an Act is part of the Act. [11]) The first provision in Div 2 , s 5B , reads as follows:

> **5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
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>
> (c) the burden of taking precautions to avoid the risk of harm,
>
> (d) the social utility of the activity that creates the risk of harm.

via

[9] Adeels Palace Pty Limited v Moubarak [2009]HCA 48; 239 CLR 420 at [13] .

Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)
Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

93. The High Court in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [13] , held that ss 5B and 5C are directed to questions of breach. It is an error to determine the existence and content of a duty of care by serial reference to the provisions of those sections.

Mamo v Surace (13 March 2014) (McColl and Ward JJA, Tobias AJA)
Transpacific Industrial Solutions Pty Ltd v Phelps (26 February 2013) (McColl, Basten and Barrett JJA)
Garzo v Liverpool/Campbelltown Christian School (25 May 2012) (Basten and Meagher JJA, Tobias AJA)

22. My reasons for this conclusion may be stated shortly. As the primary judge notes, the provisions of ss 5B and 5C of the *Civil Liability Act* 2002 are directed to questions of breach of duty: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at [13] ; *Harmer v Hare* [2011] NSWCA 229; (2011) 59 MVR 1 at [194] . Those sections assume an allegation of breach of duty resulting from negligence which is or can be formulated in terms of a failure to take precautions against a risk of harm. The question which s 5B requires be answered favourably to the plaintiff is whether in the face of a risk of harm which was foreseeable and not insignificant, a reasonable person in the defendant's position would have taken those precautions having regard to, among other relevant things, the considerations in s 5B(2) . To address the questions and considerations in s 5B , it is 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.

Harmer v Hare (11 August 2011) (Beazley and Whealy JJA, Sackville AJA)
Adeel's Palace Pty Ltd v Moubarak (2009) 239 CLR 420 at [13]
Imbree v McNeilly

Harmer v Hare (11 August 2011) (Beazley and Whealy JJA, Sackville AJA)

194. The proceedings were governed by the **Civil Liability Act 2002** . Section 5B of the Act has been described as "misleading", in that it is headed "Duty of Care" (see **Adeel's Palace Pty Ltd v Moubarak** (2009) 239 CLR 420 at [13]). Clearly the section deals with breach, rather than duty. The **Ipp Report** [1] did not recommend any alteration to the common law concepts governing questions as to when and in what circumstances a duty of care arose. The Report simply stated:-

7.4 So far as concerns the duty of care in the tort of negligence, the basic principle is that a person owes a duty of care to another if the person can reasonably be expected to have foreseen that if they did not take care, the other

would suffer personal injury or death. Foreseeability is also relevant to standard of care (that is, to the question of whether a duty of care has been breached) and to remoteness of damage.

Reed v Warburton (20 April 2011) (Hodgson and Basten JJA, Handley AJA)
Shaw v Thomas (23 July 2010) (Beazley, Tobias and Macfarlan JJA)

Although ss 5B and 5C appear beneath the heading "Duty of care", that heading is apt to mislead. The sections provided:

"**5B General principles**

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk."

Both provisions are evidently directed to questions of breach of duty.

14. By contrast, Div 3 (ss 5D and 5E) is directed to the subjectmatter described in the heading to the division – Causation. Those sections provided:

"**5D General principles**

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (***factua l causation***), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

15. These provisions of the Civil Liability Act are central to the questions of breach of duty and causation.

The Liquor Act

16. Consideration of provisions of the Liquor Act is central to the question of duty of care. Why that is so is revealed by the nature of the claims that were made.

17. Each plaintiff sued Adeels Palace for damages for injury he had suffered on the premises of Adeels Palace. It was not disputed, in either matter, that "[a]t all material times [Adeels Palace] operated [the] licensed premises known as Adeels Palace"[6]. Nor was there any dispute that on 31 December 2002 the business conducted by Adeels Palace was controlled by two men: Mr Simon Bazouni and Mr Fouad Kouzi. Mr Bazouni was licensee.

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[6] Liquor licensing and corporate records tendered in evidence at trial appear to suggest that a company called Adeel's Restaurant Pty Ltd was the owner of the business at the relevant time but in the light of the way in which the trial was conducted this suggestion need not be examined further. Those records, and a photograph, tendered in evidence at trial, of the sign advertising the business, suggest that the appellant's business was conducted under the name of "Adeel's Palace". It is convenient, however, to adopt the spelling used in the title of the proceedings in this Court.

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18. **Following paragraph cited by:**

Ryan v Dearden (17 February 2023) (Mullins P; McMurdo and Flanagan JJA)

32. The third consideration was an apparent reference to a passage which the judge had quoted from *Adeels Palace Pty Ltd v Moubarak* . [34] Howeve r that was a case which involved the operation of licensed premises and in which the central complaint was that the licensee had not regulated who came onto its premises, who stayed on those premises and how those who were on the premises conducted themselves towards other patrons. [35] As I have explained, that was not the case against the appellants.

via

[35] [2009] HCA 48 at [18] ; (2009) 239 CLR 420 at 434.

The central complaint each plaintiff made was that Adeels Palace had not regulated who came onto its premises, who stayed on those premises, and how those who were on the premises conducted themselves towards other patrons. Adeels Palace, as occupier of the premises, could control who came into and who stayed on the premises. But in conducting licensed premises (of which one of its directors was licensee) Adeels Palace was much affected by the duties which the Liquor Act cast on the licensee.

19. Section 125 of the Liquor Act regulated conduct on licensed premises. Section 125(1)(b) oblig ed a licensee not to permit on his or her licensed premises "any indecent, violent or quarrelsome conduct". Contravention of the provision was an offence. Section 103(1) of the Liquor Act permitted a licensee, or his or her employee, to "refuse to admit to the licensed premises" or to "turn out, or cause to be turned out, of the licensed premises any person ... who is then ... violent, quarrelsome or disorderly" [7] or "whose presence on the licensed premises renders the licensee liable to a penalty" [8] under the Act. Section 103(3A) permitted the use of "such reasonable degree of force as may be necessary ... to turn a person out" of the premises. Section 103(4) obliged a member of the police force, asked by the licensee or an employee to turn out or assist in turning out a person whom the licensee is entitled to turn out, to comply with the request and provided that the member of the police force may, for that purpose, use such reasonable degree of force as may be necessary.

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[7] s 103(1)(a) .

[8] s 103(1)(c) .

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20. **Following paragraph cited by:**

Bondi Beach Foods Pty Ltd v Chadwick (09 November 2023) (Gleeson, Leeming and Payne JJA)
Brighten v Traino (08 July 2019) (Basten, Gleeson and Brereton JJA)
State of New South Wales v Thomlinson (12 July 2018) (Meagher, Leeming and Payne JJA)

It is next important to recognise that the particular provisions made in the Liquor Act for controlling violent, quarrelsome or disorderly conduct on licensed premises take their place in a context set by two considerations. First, sale of liquor is controlled because it is well recognised that misuse and abuse of liquor causes harm, including what the Liquor Act refers to as "violent, quarrelsome or disorderly" conduct. Section 2A of the Liquor Act provided:

"**Liquor harm minimisation is a primary object of this Act**

A primary object of this Act is liquor harm minimisation, that is, the minimisation of harm associated with misuse and abuse of liquor (such as harm arising from violence and other antisocial behaviour). The court, the Board, the Director, the Commissioner of Police and all other persons having functions under this Act are required to have due regard to the need for liquor harm minimisation when exercising functions under this Act. In particular, due regard is to be had to the need for liquor harm minimisation when considering for the purposes of this Act what is or is not in the public interest."

The second and related point to make is that the duties cast upon those responsible for the service of liquor on licensed premises can be understood as a part of the price that is exacted for the statutory permission granted under the Liquor Act. The permission granted is to do what otherwise the Act forbids[9] – sell liquor – and to do that on premises to which members of the public may resort only in accordance with the conditions on which the licence is granted.

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[9] s 122.

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21. In considering whether a common law duty of care should be held to exist in these cases, it is important to recognise that the provisions of the Liquor Act that have been mentioned have close analogies in other States and Territories. Though variously expressed, all States and Territories make provision for a licensee of licensed premises to remove from, or prevent the entry to, licensed premises of violent or quarrelsome persons [10] . All State and Territory liquor legislation forbids the sale of liquor without a licence. All State and Territory liquor legislation provides for the licensing of premises on which liquor may be sold and consumed, and not only regulates the sale and service of liquor in such places, but also (as already noted) directly or indirectly regulates the conduct of persons who are on the premises.

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[10] *Liquor Control Reform Act* 1998 (Vic), s 114(2) , and see also s 108(4)(b) of that Act; *Liquor Licensing Act* 1997 (SA), s 124(1) ; *Liquor Act* 1992 (Q), ss 165, 165A ; *Liquor Control Act* 1988 (WA), s 115 ; *Liquor Licensing Act* 1990 (Tas), ss 62, 79A ; *Liquor Act* (NT), ss 105, 121; *Liquor Act* 1975 (ACT), s 143 .

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22. It is against this statutory background that the question of duty of care must be considered, not for the purpose of developing the common law by analogy with statute law [11] , but to ensure that the imposition of a common law duty of reasonable care of the kind now in question would not run counter to the statutory requirements imposed on licensees in all Australian jurisdictions.

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[11] cf *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 5963 [18][28]; [1999] HCA 67.

Duty of care?

23. **Following paragraph cited by:**

Lesandu Blacktown Pty Ltd v Gonzalez (08 February 2013) (Basten and Meagher JJA, Davies J)

> 65. The primary judge did not attempt to identify any features or factors which might justify the imposition of a similar duty in the present case. Mr Gonzalez, in his argument to the primary judge and to this Court, points to two matters which are said to require the imposition of a duty of care. The first is that his "complaint" is as to the occupier's failure to exercise reasonable care with regard its activities in dealing with persons on the premises suspected of criminal or other wrongdoing, and in particular their being permitted to leave the premises or being detained on the premises. The latter is said to be something in relation to which Lesandu was able to and did exercise control by locking the entrance door. The fact that the complaint concerns an activity involving the occupier's capacity to exercise control is said to set this case apart from the decision in *Modbury Triangle* for the same reasons as were said in *Adeels Palace* (at [23] , [24]) to distinguish the complaint in that case. The second matter is that if Lesandu sought to detain suspected criminals in the premises by locking the entrance door, it was foreseeable that a person in Mr Gonzalez' position might suffer harm of the kind suffered if the door was opened and those detained sought to escape.

Lesandu Blacktown Pty Ltd v Gonzalez (08 February 2013) (Basten and Meagher JJA, Davies J)

Lesandu Blacktown Pty Ltd v Gonzalez (08 February 2013) (Basten and Meagher JJA, Davies J)

Contrary to the submissions on behalf of Adeels Palace, this Court's decision in *Modbury* does not dictate the conclusion that Adeels Palace owed no relevant duty of care to the plaintiffs in the present cases. Like the claims now under consideration, the claim that was made in *Modbury* was for damages for personal injury suffered as a result of a criminal assault. The injured plaintiff in *Modbury* had been attacked in a shopping centre car park at night when the lights in the car park were off. He alleged that the shopping centre proprietor was negligent in not leaving the car park lights on. A majority of the Court [12] held that the shopping centre did not owe the plaintiff a duty to take reasonable care to prevent injury to the plaintiff resulting from the criminal behaviour of third persons on the shopping centre's land. It is important to recognise, however, that the duty alleged in *Modbury* was said to be founded only on the defendant's position as occupier of the land controlling the physical state of the land (there the

level of its illumination). What is said in *Modbury* must be understood as responding to those arguments. No complaint was made [13] that the defendant should have controlled, but did not control, access by the assailants to the land it occupied.

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[12] (2000) 205 CLR 254 at 266267 [29], 268269 [36] per Gleeson CJ, 270 [42][43] per Gaudron J, 291294 [108][118] per Hayne J, 302 [147] per Callinan J.

[13] (2000) 205 CLR 254 at 290 [106] .

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24. It is, of course, important to recognise that the decision in *Modbury* forms part of a line of cases in which consideration has been given to whether and when one person owes another a duty to take reasonable care to control the conduct of a third person [14] . And the fact that the conduct in question is criminal conduct is of great importance in deciding not only what, if any, duty is owed to prevent its commission, but also questions of breach and causation.

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[14] See, for example, *Smith v Leurs* (1945) 70 CLR 256 at 262 per Dixon J; [1945] HCA 27 ; *Howard v Jarvis* (1958) 98 CLR 177; [1958] HCA 19; *New South Wales v Bujdoso* (2005) 227 CLR 1; [2005] HCA 76; cf *Stuart v KirklandVeenstra* (2009) 237 CLR 215; [2009] HCA 15; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47.

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25. Several considerations set the present case apart from *Modbury* and point to the conclusion that Adeels Palace owed each plaintiff a relevant duty of care. First, the complaint that was made in these cases was that the occupier of premises failed to control access to, or continued presence on, its premises [15] . Secondly, the premises concerned were licensed premises where liquor was sold. They were, therefore, premises where it is and was well recognised that care must be taken lest, through misuse and abuse of liquor, "harm [arise] from violence and other antisocial behaviour" [16] . And thirdly, the particular duty said to have rested on the occupier of the premises (who was the operator of the business that was conducted on the premises) is a duty to take reasonable care to prevent or hinder the occurrence of events which, under the Liquor Act, the licensee was bound to prevent occurring – violent, quarrelsome or disorderly conduct. (And although variously expressed in the legislation of other Australian jurisdictions, the evident scheme of all liquor licensing laws in Australia is to minimise antisocial conduct both on and off licensed premises associated with consumption of alcohol.)

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[15] cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 2932 94 [117] .

[16] *Liquor Act* 1982 (NSW), s 2A .

26. **Following paragraph cited by:**

Tilden v Gregg (16 June 2015) (McColl, Macfarlan and Meagher JJA)
QBE v Orcher (23 December 2013) (McColl and Macfarlan JJA, Tobias AJA)

> 114. The respondent contended that there were three bases on which Bowcliff owed a duty of care to him on the facts and circumstances of the case. The first was that the general duty of care formulated in *Adeels Palace* at [26] (a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons) extended to a duty to take reasonable care in the conduct of activities in the vicinity of the licensed premises. The duty, which arose from the nature of the business being conducted, did not depend on prior actual or constructive knowledge of intoxication or the propensity for violence of a particular individual. What was reasonably required in terms of 'control' in particular circumstances was a matter for consideration on the issue of breach, rather than being determinative of the existence of a duty of care.

McKenna v Hunter & New England Local Health District (23 December 2013) (Beazley P, Macfarlan JA and Garling J)
QBE v Orcher (23 December 2013) (McColl and Macfarlan JJA, Tobias AJA)
QBE v Orcher (23 December 2013) (McColl and Macfarlan JJA, Tobias AJA)
Lesandu Blacktown Pty Ltd v Gonzalez (08 February 2013) (Basten and Meagher JJA, Davies J)
Cregan Hotel Management Pty Ltd v Hadaway (08 November 2011) (Allsop P, Giles and Basten JJA)

In the circumstances reasonably to be contemplated before the restaurant opened for business on 31 December 2002 as likely to prevail on that night, Adeels Palace owed each plaintiff a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons. The duty is consistent with the duty imposed by statute upon the licensee and which was a duty enforceable by criminal processes. No question arises of translating a statutory power given to a statutory body into the common law "ought" [17] . The duty is not absolute; it is a duty to take reasonable care. It is not a duty incapable of performance. It is a duty the performance of which is supported by the provision of statutory power to prevent entry to premises and to remove persons from the premises, if needs be by using reasonable force. Although it is a duty directed to controlling the conduct of others (for the avoidance of injury to other patrons) it is a duty to take reasonable care in the conduct of activities on licensed premises, particularly with regard to allowing persons to enter or remain on those premises.

[17] cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 375 [122]; [1998] HCA 3.

Breach of duty?

27. **Following paragraph cited by:**

Child and Adolescent Health Service v Mabior (27 September 2019) (Quinlan CJ, Murphy JA, Pritchard JA)

328. Again, save for the references to onus of proof, the following remarks of Simpson JA in ***Sparks v Hobson*** are apposite to the position in this State: [316]

> Failure by a defendant to prove the s 5 O [s 5PB(1)] circumstances (however that section is construed) does not conclude the matter. The onus remains on the plaintiff to establish that the defendant failed to provide the professional service in accordance with the standard of the ordinary skilled person practising that profession.
>
> The claim is then to be determined by reference to s 5B of the CLA: see ***Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem*** (2009) 239 CLR 420; [2009] HCA 48 at [27]. The relevant questions are:
>
> - was there a foreseeable risk of harm arising from the conduct the subject of the claim?;
> - was the risk not insignificant?;
> - would a reasonable person in the position of the defendant have taken precautions to safeguard against the risk? (It is necessary for the plaintiff to identify the precautions it is alleged ought to have been taken.)

Bruce v Apex Software Pty Ltd (18 December 2018) (Meagher, Leeming and White JJA)
Sparks v Hobson (01 March 2018) (Basten, Macfarlan and Simpson JJA)

335. The claim is then to be determined by reference to s 5B of the CLA: see *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* (2009) 239 CLR 420; [2009] HCA 48 at [27]. The relevant questions are:

- was there a foreseeable risk of harm arising from the conduct the subject of the claim?;
- was the risk not insignificant?;
- would a reasonable person in the position of the defendant have taken precautions to safeguard against the risk? (It is necessary for the plaintiff to identify the precautions it is alleged ought to have been taken.)

Ratewave Pty Ltd v BJ Illingby (19 May 2017) (Macfarlan and Meagher JJA, Fagan J)

The question of breach of duty must be considered by reference to the relevant provisions of the Civil Liability Act – in particular s 5B .

28. **Following paragraph cited by:**

Council of the City of Greater Taree v Wells (01 July 2010) (Beazley, McColl and Basten JJA)

It may be accepted, for the purposes of argument, that there was a risk, of which Adeels Palace knew or ought to have known [18] , that there would be violent, quarrelsome or disorderly conduct in the restaurant. It may also be accepted that this risk "was not insignificant" [19] . The question then becomes whether a reasonable person in the position of Adeels Palace would have taken the precautions that the plaintiffs alleged should have been taken [20] . Those precautions were the provision of licensed [21] security personnel who would act as crowd controllers or bouncers.

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[18] s 5B(1)(a) .

[19] s 5B(1)(b) .

[20] ss 5B(1)(c) and 5B(2) .

[21] Under the *Security Industry Act* 1997 (NSW) .

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29. Just how many security personnel the plaintiffs alleged should have been provided was not always made clear in argument. The plaintiffs pleaded their cases on the basis that there should have been not only security personnel controlling the entrance to the premises but also sufficient security personnel to intervene in any dispute that broke out within the restaurant. Because the restaurant was on the second floor of a building it seems to have been accepted that to supervise what was happening inside the restaurant would have required personnel who were different from those who controlled access to the premises. Some evidence led at trial suggested that as many as six or eight persons would have been necessary to supervise both the interior of, and the entrance to, the restaurant.

30. **Following paragraph cited by:**

Price v State of New South Wales (10 November 2011) (Allsop P, Beazley and Giles JJA)

Whether any, and how many, security personnel should have been provided to satisfy the duty of Adeels Palace to take reasonable care depended upon the considerations identified in s 5B (2) of the Civil Liability Act : the probability that the harm would occur, the likely seriousness of the harm, the burden of taking precautions to avoid the risk, and the social utility of the activity that created the risk. No doubt the chief focus of those inquiries in these cases would fall upon the first three of those considerations.

31. **Following paragraph cited by:**

Ethicon Sarl v Gill (05 March 2021) (Jagot, Murphy and Lee JJ)
Lim v Cho (09 July 2018) (Leeming JA at [1]; Sackville AJA at [2]; Emmett AJA at [54])
Logar v Ambulance Service of NSW Sydney Region (25 October 2017) (Macfarlan JA, Emmett AJA and Schmidt J)

> 92. What his Honour thus had to determine was both what Ms Riches actually did and whether that departed from what a reasonable person would have done in the circumstances, given the admitted risk which the ambulance crossing the intersection against a red light involved. The duty was to take reasonable care in the circumstances. It was not to avoid any risk of collision with a vehicle in lane 1, at any cost. The question of what the duty required also had to be approached prospectively: *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48 at [31] and [40] .

Logar v Ambulance Service of NSW Sydney Region (25 October 2017) (Macfarlan JA, Emmett AJA and Schmidt J)

> 159. Those conditions also had to be taken into account, as the primary judge did, when assessing whether Ms Riches not taking the precaution of traversing the intersection in some other way, had resulted in a breach of her duty. That assessment had to be made prospectively, not with the benefit of hindsight: *Adeels Palace* at [31] and [40] .

ALDI Foods Pty Ltd v Young (13 May 2016) (Meagher and Simpson JJA, Adamson J)
Murray v Sheldon Commercial Interiors Pty Ltd (15 April 2016) (Leeming and Payne JJA, Schmidt J)
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy (27 August 2015) (McColl, Basten and Leeming JJA)
Jackson v McDonald's Australia Ltd (26 May 2014) (McColl, Barrett and Ward JJA)

> 14. Although the judgment as to what the reasonable person would have done to avoid what is known at trial to have occurred 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: *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 (at [126])

per Hayne J; applied in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [31]).

Port Macquarie Hastings Council v Mooney (20 May 2014) (Emmett JA, Sackville AJA and Simpson J)
Mamo v Surace (13 March 2014) (McColl and Ward JJA, Tobias AJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)
Novakovic v Stekovic (27 March 2012) (McColl and Whealy JJA, Tobias AJA)
Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)

Many different matters were relevant to the questions that thus were posed. They included, but were not limited to, such matters as the number of patrons expected to attend the restaurant, the atmosphere that could reasonably be expected to exist during the function, and whether there had been any suggestion of violence at similar events held in comparable circumstances, either at this restaurant or elsewhere. And all of those questions fell to be answered, and the probability of harm and other considerations mentioned in s 5B(2) assessed, prospectively[22], not with the wisdom of hindsight. That is, they were to be assessed *before* t he function began, not by reference to what occurred that night.

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[22] *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 461463 [126][129]; [2005] HCA 62.

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32. The evidence led in these cases included evidence of the opinions of persons who described themselves as security consultants. The trial judge understood the evidence of the experts called by the plaintiffs and by Adeels Palace as accepting that there had been a "need for 'access control' as the 'front line of defence' ... having the purpose of discouraging at least, if not preventing, the return of unruly or troublesome patrons who [had] left the premises". Whether or to what extent this opinion of the experts was based on their consideration of what had happened on this occasion (an irrelevant inquiry), as opposed to the probability of violence if "access control" were not provided [23] , was not expressly considered by the trial judge.

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[23] *Civil Liability Act* 2002 (NSW), s 5B(2)(a) .

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33. No finding was made below that there should have been security personnel supervising conduct in the restaurant. Both the trial judge and the Court of Appeal proceeded on the footing that it was sufficient to find that the failure to provide security personnel who would control access to the restaurant was a breach of the duty of care owed by Adeels Palace. That is, both the trial judge and the Court of Appeal concluded that the failure of Adeels Palace to provide licensed personnel to act as crowd controllers or bouncers at the door of the premises

(in addition to whomever Adeels Palace used to take the cost of admission from patrons at the door) was a breach of the duty of care owed by Adeels Palace to its patrons.

34. **Following paragraph cited by:**

Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy (27 August 2015) (McColl, Basten and Leeming JJA)

49. "Negligent" in this context means failure to exercise reasonable care and skill: s 5. It was not disputed that the risk of someone slipping, falling and injuring himself or herself while stepping up into the hut was both foreseeable and not insignificant. Even so, s 5B(1)(c) means that a plaintiff must fail in an action for negligence based on a failure to take precautions unless the plaintiff discharges the onus of showing that a reasonable person in the defendant's position would have taken the precautions. The fact that s 5B(1)(c) is a necessary element of a plaintiff's success in litigation to which it applies is plain on the face of the section, and was confirmed by the High Court in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [34] .

Having regard to the Civil Liability Act , this conclusion could be reached only if the probability of "unruly or troublesome patrons who [had] left the premises" returning to do violence to other patrons, or the probability of other persons likely to do violence to patrons seeking to gain entry to the premises, was such that a reasonable person in the position of Adeels Palace would have employed security personnel to control access to the restaurant.

35. But why a reasonable person would have taken that step was never clearly articulated in argument or in the reasoning of the trial judge. Considered in isolation, the numbers attending the restaurant, and the type of customers (spread over a range of ages, with some in family or friendship groups extending over several generations), did not demonstrate a need for provision of security personnel controlling access to the restaurant. And despite the plaintiffs' attempt to prove at trial that the venue had a history of violent incidents, there appears to have been nothing in that history (which went no further than some reports of threatening conduct by passersby *outside* the restaurant premises) which would have warranted the conclusion that there was the probability of violence erupting in or about the restaurant. No argument to that effect was advanced orally in this Court.

36. Reference was made in argument in this Court on behalf of Mr Bou Najem to the possibility that security personnel supervising the floor of the restaurant may have been able to intervene in the dispute on the dance floor and prevent the rapid descent into general violence that followed. To do that would have required several more security personnel than the small number it was suggested should have been controlling access to the restaurant.

37. **Following paragraph cited by:**

Mal Owen Consulting Pty Ltd v Ashcroft (20 June 2018) (Basten and Macfarlan JJA, Barrett AJA)

The argument necessarily asserted that licensed security personnel were the appropriate response to this risk. That is, the argument was that any exchange of words between patrons at this function would require an immediate and decisive response by persons having what might be called the "presence" or "physical authority" of bouncers or crowd controllers.

38. Of course there is always a risk that there will be some altercation between patrons at almost any kind of event. And the risk of that happening is higher if the patrons are consuming alcohol. But unless the risk to be foreseen was a risk of a kind that called for, as a matter of reasonable precaution, the presence or physical authority of bouncers or crowd controllers to deal with it safely, failure to provide security of that kind would not be a breach of the relevant duty of care. As noted earlier, there was no finding at trial or in the Court of Appeal that a risk of that kind should have been foreseen.

39. **Following paragraph cited by:**

Lorrimar v Serco Sodexo Defence Services Pty Ltd (30 October 2014) (McColl and Macfarlan JJA, Tobias AJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

The absence of consideration at trial of the matters prescribed by s 5B of the Civil Liability Act may have been reason enough to conclude that the question of breach of duty was not determined properly by the trial judge. It is, however, not profitable to examine that issue further.

40. It is not profitable to do that because resolution of the issue of breach would necessarily depend only upon the evidence that was led at trial. The points to be made that are of general application are first, that whether a reasonable person would have taken precautions against a risk is to be determined prospectively, and second, that the answer given in any particular case turns on the facts of that case as they are proved in evidence. It follows from the second of these considerations that deciding the question of breach in these cases would not establish any rule about when or whether security personnel should be engaged by the operators of licensed premises. It is not useful [24] in these circumstances for this Court to form a conclusion about whether breach was proved in these cases. In particular, it is not necessary to examine the evidence that was led at trial to determine whether the finding of breach could be supported. Instead, it is desirable to consider the question of causation. Examination of that issue reveals that the negligence found against Adeels Palace was not shown to have been a cause of the injuries suffered by the plaintiffs.

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[24] cf *Pokora v Wabash Railway Co* 292 US 98 at 105106 (1934) per Cardozo J.

Causation

41. **Following paragraph cited by:**

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

101. The parties' detailed written submissions on causation did not refer to s 5D of the *Civil Liability Act 2002* (NSW) (**CL Act**). In oral argument both Mr Hutley and Mr Jackson accepted that the CL Act applies to Hudson's claim for damages by reason of the Solicitors' alleged breach of duty: CL Act, s 5A(1) and definition of "harm" in s 5. Thus the question of causation is to be determined in accordance with the principles stated in Div 3 of Part 1A of the CL Act (ss 5D-5E): *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [41] , [44] (*per curiam*).

Perisher Blue Pty Limited v Harris (27 February 2013) (Beazley JA at [1]; Sackville AJA at [2]; Young AJA at [30])
Department of Housing and Works v Smith [No 2] (19 February 2010) (Pullin JA, Buss JA, Newnes JA)

91. The question of causation in cases where an entrant or lessee claims damages in negligence for personal injury against an occupier or a lessor of residential premises is governed by the CLA. See ***Adeels*** [41] .

The first point to make about the question of causation is that, in these cases, it is governed by the Civil Liability Act .

42. **Following paragraph cited by:**

Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)
Perisher Blue Pty Limited v Harris (27 February 2013) (Beazley JA at [1]; Sackville AJA at [2]; Young AJA at [30])

Section 5D(1) of that Act divides the determination of whether negligence caused particular harm into two elements: factual causation and scope of liability.

43. **Following paragraph cited by:**

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)
Fisher v Nonconformist Pty Ltd (20 February 2024) (Meagher and Kirk JJA, Simpson AJA)
Fairall v Hobbs (18 April 2017) (McColl A, P, Leeming and Payne JJA)
Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd (17 April 2012) (McColl, Basten and Young JJA)

Dividing the issue of causation in this way expresses the relevant questions in a way that may differ from what was said by Mason CJ, in *March v Stramare (E & M H) Pty Ltd* [25] , to be the common law's approach to causation. The references [26] in *March v Stramare* to causation being "ultimately a matter of common sense" were evidently intended to disapprove the proposition "that value judgment has, or should have, no part to play in resolving causation as an issue of fact". By contrast, s 5D(1) treats factual causation and scope of liability as separate and distinct issues.

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[25] (1991) 171 CLR 506 at 515; [1991] HCA 12 .

[26] (1991) 171 CLR 506 at 515 quoting from *Fitzgerald v Penn* (1954) 91 CLR 268 at 277; [1954] HCA 74.

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44. **Following paragraph cited by:**

Turner v Norwalk Precast Burial Systems Pty Ltd (06 May 2025) (Beach and Kennedy JJA; J Forrest AJA)
Gratrax Pty Ltd v T D & C Pty Ltd (17 December 2013) (Fraser and Morrison JJA and Margaret Wilson J,)
Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)
Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)
Zanner v Zanner (15 December 2010) (Allsop P, Tobias and Young JJA)

It is not necessary to examine whether or to what extent the approach to causation described in *March v Stramare* might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1) . It is sufficient to observe that, in cases where the Civil Liability Act or equivalent statutes are engaged, it is the applicable statutory provision that must be applied.

45. **Following paragraph cited by:**

Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network (31 May 2017) (Meagher, Gleeson and Payne JJA)
Fairall v Hobbs (18 April 2017) (McColl A, P, Leeming and Payne JJA)
Chu v Russell (12 February 2016) (Blow CJ, Porter and Estcourt JJ)

75. The question of factual causation under the provisions of the *Civil Liability Act* , s 13 , in other than an exceptional case, is to be determined by the "but for" test of causation, that is to say, "but for the negligent act or omission, would the harm have occurred?": *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [45] , confirmed and applied in *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [18] .

Tilden v Gregg (16 June 2015) (McColl, Macfarlan and Meagher JJA)
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville AJA)
Warth v Lafsky (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)
Lucantonio v Stichter (06 February 2014) (McColl, Basten and Barrett JJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)

74. In order to establish that any breach of duty on the respondent's part caused her harm, the appellant had to establish in accordance with s 5D(1)(a) of the *Civil Liability Act* that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a) . That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace* (at [45] , [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

73. The effect of s 5D(1) is that "the 'but for' test [of causation] is now to be ... a necessary test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2) ": *Adeels Palace* (at [45] , [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ. The s 5D(1)(a) element of factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm, that is to say, a condition that must be present for the occurrence of the harm: *Strong v Woolworths Ltd* (at [20]) per French CJ, Gummow, Crennan and Bell JJ; (at [44]) per Heydon J.

Perisher Blue Pty Limited v Harris (27 February 2013) (Beazley JA at [1]; Sackville AJA at [2]; Young AJA at [30])

11. As the High Court explained in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420, at [42] , *per curiam*, s 5D(1) divides the determination of whether negligence caused particular harm into two

elements: factual causation and scope of liability: see also *Strong v Woolworths Ltd* [2012] HCA 5; 285 ALR 420 at [18]-[19], per French CJ, Gummow, Crennan and Bell JJ. Factual causation is to be determined by the "*but for*" test: but for the negligent act or omission, would the harm have occurred? Subject to the "*exceptional case*" provided for in s 5D(2) , factual causation is a necessary element of a determination that negligence caused a particular harm. In other words, unless s 5D(2) applies, a plaintiff must establish, on the balance of probabilities, that but for the defendant's negligence, the harm would not have occurred: *Adeels Palace* , at [45] , [53] .

Lesandu Blacktown Pty Ltd v Gonzalez (08 February 2013) (Basten and Meagher JJA, Davies J)

75. This is also apparent from a consideration of the way in which the primary judge dealt with the question of causation. He concluded that there was a causal link between the breach of duty he had found and Mr Gonzalez' injuries. Although he had earlier stated that he had regard to the provisions of s 5D , nowhere in the reasons is there any consideration of the elements which he was required by s 5D(1) to address. The first of those elements, factual causation, is determined by the "but for" test: *Adeels Palace* at [45] ; *Strong v Woolworths Ltd* [2012] HCA 5; 86 ALJR 267 at [18] . It requires an inquiry as to whether, but for the negligent act or omission, the harm would have occurred. In this case it was necessary for the primary judge to make findings as to what an adequate "security system" would have entailed and then to consider whether more probably than not Mr Gonzalez would have been injured if such a system was in place. The primary judge did not undertake that analysis.

Lederberger v Mediterranean Olives Financial Pty Ltd (17 October 2012) (Nettle, Redlich JJA and Beach AJA)

119. In our view, factual causation was made out. We do not think it was open to his Honour to reject Mrs Lederberger's evidence that if she had been told that she would be personally responsible for debts of the business, she would not have taken out probate. It follows that, but for Mr Granek's breach of duty, [131] Mrs Lederberger's personal assets would not have been put at risk.

via

[131] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, [45] .

Ridolfi v Hammond (23 February 2012) (Beazley and Campbell JJA, Sackville AJA)

85. In *Varga v Galea* [2011] NSWCA 76, McColl JA (with whom Beazley JA and Handley AJA agreed) observed (at [9]) that s 5D(1) requires:

"the application of the 'but for' test of causation: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45]). The statutory

content of s 5D , and the extent of any continuity with the common law, awaits judicial elucidation: *Zanner v Zanner* [2010] NSWCA 343 (at [11]) per Allsop P (Young JA agreeing). At common law, causation is a question of fact, to be approached in a commonsense manner, in which the 'but for' test plays an important role: *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 (at 5 l5 - 546) per Mason CJ (Toohey and Gaudron JJ agreeing)."

Independent Supervening Incapacity

Miskovic v Stryke Corporation Pty Ltd t/as KSS Security (30 November 2011) (Giles and Macfarlan JJA, Handley AJA)
Varga v Galea (04 April 2011) (Beazley and McColl JJA, Handley AJA)
Stojan (No 9) Pty Ltd v Kenway (12 November 2009) (Ipp, McColl and Basten JJA)

Next it is necessary to observe that the first of the two elements identified in s 5D(1) (factual causation) is determined by the "but for" test: but for the negligent act or omission, would the harm have occurred?

46. **Following paragraph cited by:**

Perisher Blue Pty Limited v Harris (27 February 2013) (Beazley JA at [1]; Sackville AJA at [2]; Young AJA at [30])

In the Court of Appeal, Giles JA, who gave the principal reasons, pointed out [27] , correctly, that the reasoning of the trial judge on the question of causation was "not fully articulated". The reasoning was reconstructed [28] by Giles JA in the following terms:

"From the evidence, security staff would have been aware of a significant fracas on the dance floor. Even if [the gunman] had not been identified at the time as the man who had got into a fight with Mr Moubarak, the presence of blood on his face would have caused the security staff at the street entrance, particularly with knowledge of the fracas, to deny him entry, or at least to require that he submit to search as a condition of being permitted to enter. On the balance of probabilities, security staff at the street entrance would have deterred or prevented [the gunman's] reentry, and he therefore would not have shot Mr Moubarak and Mr Bou Najem."

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[27] (2009) Aust Torts Reports ¶81997 at 62,744 [107] .

[28] (2009) Aust Torts Reports ¶81997 at 62,744 [107] .

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47. Security personnel may have been able to deter or prevent reentry by the drunk or the obstreperous wouldbe patron willing to throw a punch. There was, however, no basis in the evidence for concluding that security staff at the entrance to the restaurant would have deterred or prevented the reentry to the premises of a man armed with a gun when later events showed he was ready and willing to use the weapon on persons unconnected with his evident desire for revenge.

48. The evidence at trial did not show that the presence of security personnel would have *deterred* the reentry of the gunman. That conclusion could have been reached only if it was assumed that the gunman would have acted rationally. But, as was pointed out in *Modbury* [29] , "[t]he conduct of criminal assailants is not necessarily dictated by reason or prudential considerations". The gunman's conduct at the restaurant on this night was dictated neither by reason nor by prudential considerations. He shot the man who had struck him during the mêlée that broke out after the confrontation on the dance floor. And before shooting that man, the gunman had shot a man who had done nothing to him and who, defenceless, begged for mercy.

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[29] (2000) 205 CLR 254 at 291 [107] .

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49. Nor did the evidence show that security personnel could or would have *prevented* reentry by the gunman: a determined person armed with a gun and irrationally bent on revenge. The evidence given at trial by the plaintiffs' expert security consultant did not go beyond the assertion that a security person confronting the gunman at the entrance to the restaurant "would have at least altered the chain of events and thereby likely altered the outcome". The security consultant called on behalf of Adeels Palace emphasised that the overriding principle which should govern the conduct of security personnel confronted by a gunman is "safety for all parties" and that "once a determined gunman is targeting a victim or victims there [is] no guaranteed safe or effective option".

50. **Following paragraph cited by:**

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

103. The effect of s 5D(1)(a) is that factual causation is to be determined by the "but for" test: "but for the negligent act or omission, would the harm have occurred?": *Adeels Palace* at [45] ; *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] (*per curiam*). The test requires the Court to determine whether, if the defendant had not breached its duty of care, the harm complained of would have been prevented. The test is not satisfied merely by showing that taking the steps the plaintiff alleges should have been taken might have made a difference: *Adeels Palace* at [50] . The plaintiff must show that it is more probable than not that, if the defendant had taken reasonable care, the harm would have been prevented: *Adeels*

Palace at [53] . However, if the defendant's negligent act or omission is necessary to complete a set of conditions jointly sufficient to account for the occurrence of the harm, the test of factual causation will be satisfied: *S trong v Woolworths Ltd* at [20] .

BGC Residential Pty Ltd v Fairwater Pty Ltd (18 December 2012) (Pullin JA, Newnes JA, Murphy JA)

Recognising that changing any of the circumstances in which the shootings occurred *might* hav e made a difference does not prove factual causation. Providing security at the entrance of the restaurant *might* have delayed the gunman's entry; it might have meant that, if Mr Bou Najem was a random victim, as seemed to be the case, someone else might have been shot and not him. But neither plaintiff proved factual causation by pointing to possibilities that might have eventuated if circumstances had been different.

51. **Following paragraph cited by:**

Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network (31 May 2017) (Meagher, Gleeson and Payne JJA)
Smith v Croote Pty Ltd (07 March 2014) (Meagher, Ward and Emmett JJA)

74. The question of factual causation in a case such as this is not to be answered simply by pointing out that Croote and Dunns owed a duty of care to take reasonable steps to prevent a violent assault, that Mr Smith was the victim of a violent assault and that the damage suffered by him was the very kind of thing that the relevant duty obliged Croote to take reasonable steps to prevent. Describing his injury as the very kind of thing that was the subject of the duty owed by Croote should not obscure the need to prove factual causation. This is not a case in which the evidence demonstrates that the taking of reasonable care would probably have prevented the occurrence of injury to Mr Smith (see *Adeels Palace v Moubarak* [2009] HCA 48; 239 CLR 420 at [51]).

Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales (09 December 2010) (Giles and McColl JJA, Sackville AJA)

Nor was "but for" causation established in these cases by observing that the relevant duty was to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons. That is, the question of factual causation was not answered in these cases by pointing out that the relevant duty of care was to take reasonable steps to prevent violent assault, that each plaintiff was the victim of a violent assault, and that the damage sustained by the plaintiffs was "the very kind of thing" which the relevant duty obliged Adeels Palace to take reasonable steps to prevent [30] . That observation may bear upon questions about scope of liability [31] . Describing the injury as "the very kind of thing" which was the subject of the duty must not be permitted to obscure the need to prove factual causation. Unlike *Home Office v Dorset Yacht Co Ltd* [32] and *Stansbie v Troman* [33] , these

are not cases where the evidence demonstrated that the taking of reasonable care would probably have prevented the occurrence of injury to the plaintiffs.

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[30] cf *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1030 per Lord Reid; *Stansbie v Troman* [1948] 2 KB 48 at 5152 .

[31] cf *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 638639 [26][27], 641642 [40][41]; [2005] HCA 69.

[32] [1970] AC 1004 .

[33] [1948] 2 KB 48 .

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52. Counsel for the plaintiffs, in this Court, relied upon passages in *Chappel v Hart* [34] . But in that case the majority proceeded on the basis that but for the failure to warn the event would not have happened; the question then was whether certain additional factors, combined with the satisfaction of the "but for" test, were sufficient to establish causation [35] .

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[34] (1998) 195 CLR 232; [1998] HCA 55 .

[35] (1998) 195 CLR 232 at 238239 [8], 257 [66][67], 269270 [93] .

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53. **Following paragraph cited by:**

Central Darling Shire Council v Greeney (16 March 2015) (Macfarlan JA, Sackville AJA and Beech-Jones J)
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville 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)
Woolworths Ltd v Strong (02 November 2010) (Campbell JA, Handley AJA and Harrison J)

In the present case, in contrast, the "but for" test of factual causation was not established. It was not shown to be more probable than not that, but for the absence of security personnel (whether at the door or even on the floor of the restaurant), the shootings would not have taken place. That is, the absence of security personnel at Adeels Palace on the night the

plaintiffs were shot was not a necessary condition of their being shot. Because the absence of security personnel was not a necessary condition of the occurrence of the harm to either plaintiff, s 5D(1) was not satisfied. Did s 5D(2) apply?

54. **Following paragraph cited by:**

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)
Smith v Croote Pty Ltd (07 March 2014) (Meagher, Ward and Emmett JJA)

Section 5D(2) makes provision for what it describes as "an exceptional case". But the Act does not expressly give content to the phrase "an exceptional case". All that is plain is that it is a case where negligence cannot be established as a necessary condition of the harm; the "but for" test of causation is *not* met. In such a case the court is commanded "to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party". But beyond the statement that this is to be done "in accordance with established principles", the provision offers no further guidance about how the task is to be performed. Whether, or when, s 5D(2) is engaged must depend, then, upon whether and to what extent "established principles" countenance departure from the "but for" test of causation.

55. **Following paragraph cited by:**

Gomez v Woolworths Group Limited (21 May 2024) (Bell CJ, Gleeson and Adamson JJA)
Leakes Road Property Development Pty Ltd v Brasse (26 March 2024) (Emerton P; Niall and Kennedy JJA)
Leakes Road Property Development Pty Ltd v Brasse (26 March 2024) (Emerton P; Niall and Kennedy JJA)
Leakes Road Property Development Pty Ltd v Brasse (26 March 2024) (Emerton P; Niall and Kennedy JJA)
Gary Nigel Roberts v Westpac Banking Corporation (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)
Bitupave Ltd t/as Boral Asphalt v Pillinger (30 September 2015) (Ward, Emmett and Gleeson JJA)
Nominal Defendant v Bacon (21 August 2014) (McColl, Macfarlan and Ward JJA)

> 39. This passage refers only to a single exception to the "but for" test, being one that is not presently applicable as it relates to cases where there are particular evidentiary gaps. The speech thus overlooks the exception at common law, referred to in the Ipp Report, where harm is attributable to more than one sufficient condition. However, as the High Court noted in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [55], the exceptional cases contemplated by s 5D(2) are undefined. Whilst obedience must be paid to its express limitation to "exceptional" cases

and to its requirement for determinations in accordance with "established principles", the subsection's terms do not justify its limitation to the single instance referred to in the Second Reading Speech, particularly when the further (and presently relevant) exception to the "but for" test was referred to in the Ipp Report to which the Second Reading Speech referred approvingly.

Nominal Defendant v Bacon (21 August 2014) (McColl, Macfarlan and Ward JJA)

16. Neither party suggested that if factual causation was established, it was not appropriate for the scope of the appellant's liability to extend to the harm caused to the respondent (cf s 5D(1)(b), CLA) or that the causation issue fell within "the undefined group of exceptional cases contemplated by s 5D(2) ": *Adeels Palace Pty Ltd v Moubarak* (at [55]).

Nominal Defendant v Bacon (21 August 2014) (McColl, Macfarlan and Ward JJA)
Wilson v Nilepac Pty Ltd (24 March 2011) (Beazley, Tobias and Whealy JJA)
Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales (09 December 2010) (Giles and McColl JJA, Sackville AJA)

110 The "necessary condition" test in s 5D(1)(a) takes up the "but for" test developed in the common law, there operating as a "negative criterion of causation" whereby if it could not be concluded on the balance of probabilities that the harm would not have happened but for the negligence, then it could not be concluded that the harm was caused by the negligence: *March v E & M H Stramare Pty Ltd* at 515-6 ; *CAL (No 14) Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47; (2009) 239 CLR 390 at [14] . As was said in *Adeels Palace Pty Ltd v Moubarak* at [55] -

> " … as s 5D(1) shows, the 'but for' test is now to be (and has hitherto been seen to be) a *necessary* test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2) ."

At once it must be recognised that the legal concept of causation differs from philosophical and scientific notions of causation [36] . It must also be recognised that before the Civil Liability Act and equivalent provisions were enacted, it had been recognised [37] that the "but for" test was not always a *sufficient* test of causation. But as s 5D(1) shows, the "but for" test is now to be (and has hitherto been seen to be) a *necessary* test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2) .

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[36] *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 509 ; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412413, 418419, 428; [1992] HCA 27; *Chappel v Hart* (1998) 195 CLR 232 at 238 [6], 255 [62] .

[37] *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 413 ; *Chappel v Hart* (1998) 195 CLR 232 at 257 [66][67] .

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56. **Following paragraph cited by:**

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

> In ***Adeels Palace*** the Court concluded that the fact that a precaution *might* have prevented the harm did not give rise to an 'exceptional case'. [453] The Court continued: [454]
>
> *via*
> [453] ***Adeels Palace*** [56] (French CJ, Gummow, Hayne, Heydon & Crennan JJ).

Tilden v Gregg (16 June 2015) (McColl, Macfarlan and Meagher JJA)
Smith v Croote Pty Ltd (07 March 2014) (Meagher, Ward and Emmett JJA)

Even if the presence of security personnel at the door of the restaurant *might* have deterred or prevented the person who shot the plaintiffs from returning to the restaurant, and even if security personnel on the floor of the restaurant *might* have been able to intervene in the incident that broke into fighting in time to prevent injury to anyone, neither is reason enough to conclude that this is an "exceptional case" where responsibility for the harm suffered by the plaintiffs should be imposed on Adeels Palace. To impose that responsibility would not accord with established principles.

57. **Following paragraph cited by:**

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)
Reid v Commercial Club (Albury) Ltd (03 April 2014) (Emmett and Gleeson JJA, Tobias AJA)
Smith v Croote Pty Ltd (07 March 2014) (Meagher, Ward and Emmett JJA)
Amaba Pty Ltd v Booth (10 December 2010) (Beazley, Giles and Basten JJA)

It may be that s 5D(2) was enacted to deal with cases exemplified by the House of Lords decision in *Fairchild v Glenhaven Funeral Services Ltd* [38] where plaintiffs suffering from mesothelioma had been exposed to asbestos in successive employments. Whether or how s 5D (2) would be engaged in such a case need not be decided now. The present cases are very different. No analogy can be drawn with cases like *Fairchild* . Rather, it would be contrary to established principles to hold Adeels Palace responsible in negligence if not providing security was *not* a necessary condition of the occurrence of the harm but providing security *might* have deterred or prevented its occurrence, or might have resulted in harm being suffered by someone other than, or in addition to, the plaintiffs. As in *Modbury* [39] , the event which caused the plaintiffs' injuries was deliberate criminal wrongdoing, and the wrongdoing

occurred despite society devoting its resources to deterring and preventing it through the work of police forces and the punishment of those offenders who are caught. That being so, it should not be accepted that negligence which was not a *necessary* condition of the injury that resulted from a third person's criminal wrongdoing was a cause of that injury. Accordingly, the submission that the plaintiffs' injuries in these cases were caused by the failure of Adeels Palace to take steps that *might* have made their occurrence less likely, should be rejected.

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[38] [2003] 1 AC 32 .

[39] (2000) 205 CLR 254 at 292293 [113] .

The Trade Practices Act contention

58. As noted earlier in these reasons, each plaintiff sought to support the orders made in his favour in the Court of Appeal by contending that s 74 of the Trade Practices Act was engaged. Even if that were so, each plaintiff could recover damages for breach of such an implied warranty only if he established at least that breach of the warranty was a cause of (in the sense of materially contributed to) his loss [40] . Whether more than material contribution to loss must be established to make good a claim for breach of an implied warranty need not be considered. For the reasons given earlier, a "but for" causal connection between absence of security and injury to either plaintiff was not established in these cases. It was not shown that absence of security materially contributed to either plaintiff being injured. The contention that the judgment below is to be supported by reference to s 74 of the Trade Practices Act should be rejected.

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[40] See, concerning contraventions of the *Trade Practices Act* 1974 (Cth) , *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 127129 [54][58]; [2002] HCA 41.

Conclusion and orders

59. Each appeal should be allowed with costs. In each case the orders of the Court of Appeal of the Supreme Court of New South Wales entered on 24 March 2009 should be set aside and in their place there should be orders that the appeal to that Court is allowed with costs, the judgment of the District Court of New South Wales set aside and in its place there be judgment for the defendant with costs.

Cited by:

Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

71. In essence, it appeared to be the position of the parties that, in the circumstances of this case, the ultimate result (that is, the determination of the issues of breach of duty and causation) would be the same whether one adopted a traditional common law approach or whether one applied the relevant statutory provisions contained in Part X of the *Wrongs Act* . We note, however, that in *Adeels Palace Pty Ltd v Moubarak* ,[32] a case dealing with a cognate provision, s 5D(1) of the *Civil Liability Act 2002* (NSW) , the High Court said:

> It is not necessary to examine whether or to what extent the approach to causation described in *March v Stramare* might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1) . It is sufficient to observe that, in cases where the *Civil Liability Act* or equivalent statutes are engaged, it is the applicable statutory provision that must be applied. [33]

via

[32] (2009) 239 CLR 420 (French CJ, Gummow, Hayne, Heydon and Crennan JJ) (' *Adeels*').

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 -
Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 -
Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 -
Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 -
Springfree Trampoline Australia Pty Ltd v Forostenko [2024] QCA 255 -
Springfree Trampoline Australia Pty Ltd v Forostenko [2024] QCA 255 -
Springfree Trampoline Australia Pty Ltd v Forostenko [2024] QCA 255 -
Commissioner of Taxation v Patrix Prestige Pty Ltd [2024] FCAFC 148 -
Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 -
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 -
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 -
Gomez v Woolworths Group Limited [2024] NSWCA 121 -
Gomez v Woolworths Group Limited [2024] NSWCA 121 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 -
Austen v Tran [2023] ACTCA 44 -
Austen v Tran [2023] ACTCA 44 -

Bondi Beach Foods Pty Ltd v Chadwick [2023] NSWCA 265 -
Young v Chief Executive Officer (Housing) [2023] HCA 31 -
Ryan v Dearden [2023] QCA 20 (17 February 2023) (Mullins P; McMurdo and Flanagan JJA)

32. The third consideration was an apparent reference to a passage which the judge had quoted from *Adeels Palace Pty Ltd v Moubarak* . [34] However that was a case which involved the operation of licensed premises and in which the central complaint was that the licensee had not regulated who came onto its premises, who stayed on those premises and how those who were on the premises conducted themselves towards other patrons. [35] As I have explained, that was not the case against the appellants.

via

[34] [2009] HCA 48 at [23]-[25] ; (2009) 239 CLR 420 at 436 , quoted in the Judgment at [63] .

Ryan v Dearden [2023] QCA 20 (17 February 2023) (Mullins P; McMurdo and Flanagan JJA)

32. The third consideration was an apparent reference to a passage which the judge had quoted from *Adeels Palace Pty Ltd v Moubarak* . [34] However that was a case which involved the operation of licensed premises and in which the central complaint was that the licensee had not regulated who came onto its premises, who stayed on those premises and how those who were on the premises conducted themselves towards other patrons. [35] As I have explained, that was not the case against the appellants.

via

[35] [2009] HCA 48 at [18] ; (2009) 239 CLR 420 at 434.

Ryan v Dearden [2023] QCA 20 -
Ryan v Dearden [2023] QCA 20 -
Eddy v Goulburn Mulwaree Council [2022] NSWCA 87 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 (06 April 2022) (Kiefel CJ, Keane, Gordon, Edelman and Gleeson JJ)

46. First, this Court has recognised that the Act does not apply a test of "common sense" [78] .

via

[78] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 440 [43] .

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 (06 April 2022) (Kiefel CJ, Keane, Gordon, Edelman and Gleeson JJ)

101. A negligent action will be a "necessary condition" of the occurrence of harm if, "but for" the negligence, the harm would not have occurred. As French CJ, Gummow, Crennan and Bell JJ said in *Strong v Woolworths Ltd* [116] , "[t]he determination of factual causation under s 5D(1)(a) is a statutory statement of the 'but for' test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence". In this assessment, notions of "common sense" have no place [117] . Not only do those notions have no foothold in the text of s 5D , but it has been repeatedly said in this Court that "it is doubtful whether there is any 'common sense' notion of causation which can provide a useful, still less universal, legal norm"[118]. The task of adjudication requires transparent reasoning, not consideration of whether a judge's "sense" of a result might be common with that of others.

via

[117] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 440 [43] .

Bartier Perry Pty Ltd v Paltos [2021] NSWCA 158 -
Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 (28 May 2021) (Macfarlan and Brereton JJA, Simpson AJA)

15. Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420 at 440 [41]-[44] (French CJ, Gummow, Hayne, Heydon and Crennan JJ) ; [2009] HCA 48 ; Wallace v Kam (2013) 250 CLR 375 at 382 [12] (French CJ, Crennan, Kiefel, Gageler and Keane JJ); [2013] HCA 19 .

Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 -
Ethicon Sarl v Gill [2021] FCAFC 29 -
Ethicon Sarl v Gill [2021] FCAFC 29 -
Gors v Tomlinson [2020] WASCA 164 (30 September 2020) (Quinlan CJ, Murphy JA, Vaughan JA)

100. Thirdly, it might also be observed (without wishing to be too critical of the Parliamentary draftsperson) that the heading of Part 1A Division 6, is not the only respect in which the headings in the *Civil Liability Act* (in the various States that it has been enacted) are discordant with the sections themselves. Section 5B, for example, in both the *Civil Liability Act* and its New South Wales equivalent is found under the Division heading 'Duty of Care'. As the High Court observed in ***Adeels Palace Pty Ltd v Mourbarak*** that heading is 'apt to mislead'; s 5B is concerned not with duty of care, but with breach. [60]

via

[60] ***Adeels Palace Pty Ltd v Moubarak*** [2009] HCA 48; (2009) 239 CLR 420 [13] (French CJ, Gummow, Hayne, Heydon & Crennan JJ).

Gors v Tomlinson [2020] WASCA 164 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

In ***Adeels Palace*** the Court concluded that the fact that a precaution *might* have prevented the harm did not give rise to an 'exceptional case'. [453] The Court continued: [454]

via

[453] ***Adeels Palace*** [56] (French CJ, Gummow, Hayne, Heydon & Crennan JJ).

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
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)

169. Factual causation in this case of course involves consideration of s 13(1) of the *Civil Liability Act* . The "but for" test is the relevant inquiry: *Adeels Palace Pty Ltd v Mourbarak* [2009] HCA 48, 239 CLR 420 at [42]-[45] ; *Strong v Woolworths* [2012] HCA 5, 246 CLR 182 at [18] .

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)

Adeels Palace Pty Ltd v Moubarak [2009] HCA 48 ; (2009) 239 CLR 420

J-Corp Pty Ltd v Thompson [2019] WASCA 173 -
Child and Adolescent Health Service v Mabior [2019] WASCA 151 (27 September 2019) (Quinlan CJ, Murphy JA, Pritchard JA)

328. Again, save for the references to onus of proof, the following remarks of Simpson JA in ***Sparks v Hobson*** are apposite to the position in this State: [316]

> Failure by a defendant to prove the s 5 O [s 5PB(1)] circumstances (however that section is construed) does not conclude the matter. The onus remains on the plaintiff to establish that the defendant failed to provide the professional service in accordance with the standard of the ordinary skilled person practising that profession.
>
> The claim is then to be determined by reference to s 5B of the CLA: see ***Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem*** (2009) 239 CLR 420; [2009] HCA 48 at [27] . The relevant questions are:
>
> - was there a foreseeable risk of harm arising from the conduct the subject of the claim?;
> - was the risk not insignificant?;
> - would a reasonable person in the position of the defendant have taken precautions to safeguard against the risk? (It is necessary for the plaintiff to identify the precautions it is alleged ought to have been taken.)

Child and Adolescent Health Service v Mabior [2019] WASCA 151 -
Brighten v Traino [2019] NSWCA 168 -
Brighten v Traino [2019] NSWCA 168 -
Brighten v Traino [2019] NSWCA 168 -
Brighten v Traino [2019] NSWCA 168 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Weber v Greater Hume Shire Council [2019] NSWCA 74 -
Bruce v Apex Software Pty Ltd [2018] NSWCA 330 -
Hunold v Twinn [2018] QCA 308 (09 November 2018) (Gotterson and McMurdo JJA and Jackson J)

22. There are provisions of Schedule 3 Part 2 Division 2 of the *Civil Liability Regulation* 2003 (Qld) as to the methodology for assessing a whole person impairment percentage or as to the weight to be given to assessments made in assessing an ISV as provided under AMA 5. [42] However, the starting point is that the statutory provisions for an award of general damages just described do not apply expressly to an award of damages for economic loss or other heads of damage. Those heads of loss or damage are to be determined at common law, including the usual common law conception of causation, [43] subject to any other applicable legislative provision.

via

[43] *Robinson Helicopter Co Inc v McDermott* (2016) 331 ALR 550, 569 ; *Strong v Woolworths Ltd* (2012) 246 CLR 182, 190-195 ; *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 ; *Roads and Traffic Authority v Royal* (2008) 245 ALR 653, 687 [135], 689 [143]-[144] ; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 642-644 ; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 (21 August 2018) (Murphy JA, Beech JA, Pritchard J)

Adeels Palace Pty Ltd v Moubarak [2009] HCA 48 ; (2009) 239 CLR 420

Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 -
Inghams Enterprises Pty Ltd v Tat [2018] QCA 182 (03 August 2018) (Gotterson and Morrison JJA and Bond J)

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48 , cited
The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 , cited
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66 , cited
Henderson v State of Queensland (2014) 255 CLR 1; [2014] HCA 52, cited
Hewitt v Count Financial Ltd [2017] VSCA 354, cited
Innes v AAL Aviation Limited [2017] FCAFC 202, cited
Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319; [2012] QCA 315 , cited
Re Day (2017) 340 ALR 368; [2017] HCA 2, cited
Robinson Helicopter Company Inc v McDermott (2016) 331 ALR 550; [2016] HCA 22, cited
Shaw v Thomas [2010] NSWCA 169, cited
Southern Colour (Vic) Pty Ltd v Parr [2017] VSCA 301, cited
Stokes v House With No Steps [2016] QSC 79, cited
Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, followed
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, cited

Inghams Enterprises Pty Ltd v Tat [2018] QCA 182 -
Inghams Enterprises Pty Ltd v Tat [2018] QCA 182 -
CGU Insurance Ltd v Coote (by his next friend Stephen Desmond Coote) [2018] WASCA 117 (17 July 2018) (Martin CJ, Mitchell JA, Pritchard J)

77. Section 5B has been construed as setting out preconditions for establishing a breach of duty, rather than the existence of a duty. [92] We agree with the analysis of Buss JA in ***Smith*** for reaching that conclusion. [93]

via

[92] ***Mamo v Surace*** [2014] NSWCA 58; (2014) 86 NSWLR 275 [48]; ***Department of Housing and Works v Smith (No 2)*** [2010] WASCA 25; (2010) 41 WAR 217 [70] - [83]; ***Adeels Palace Pty Ltd v Moubarak*** [2009] HCA 48 (2009) 239 CLR 420 [27].

CGU Insurance Ltd v Coote (by his next friend Stephen Desmond Coote) [2018] WASCA 117 -
State of New South Wales v Thomlinson [2018] NSWCA 151 -
Lim v Cho [2018] NSWCA 145 -
Mal Owen Consulting Pty Ltd v Ashcroft [2018] NSWCA 135 (20 June 2018) (Basten and Macfarlan JJA, Barrett AJA)

37. (2009) 239 CLR 420; [2009] HCA 48 at [13] ; see also the exercise undertaken at [23]-[26].

Mal Owen Consulting Pty Ltd v Ashcroft [2018] NSWCA 135 -

Mal Owen Consulting Pty Ltd v Ashcroft [2018] NSWCA 135 -
Sparks v Hobson [2018] NSWCA 29 (01 March 2018) (Basten, Macfarlan and Simpson JJA)

335. The claim is then to be determined by reference to s 5B of the CLA: see *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* (2009) 239 CLR 420; [2009] HCA 48 at [27] . The relevant questions are:

- was there a foreseeable risk of harm arising from the conduct the subject of the claim?;
- was the risk not insignificant?;
- would a reasonable person in the position of the defendant have taken precautions to safeguard against the risk? (It is necessary for the plaintiff to identify the precautions it is alleged ought to have been taken.)

Logar v Ambulance Service of NSW Sydney Region [2017] NSWCA 274 (25 October 2017) (Macfarlan JA, Emmett AJA and Schmidt J)

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48 ; *Verryt v Schoupp* [2015] NSWCA 128; *Marien v Gardiner; Marien v H J Heinz Company Australia Ltd* (2013) 66 MVR 1; [2013] NSWCA 396; *Thornton v Sweeney* (2011) 59 MVR 155; [2011] NSWCA 244; *Waverley Council v Ferreira* (2005) Aust Torts Reports 81-81; [2005] NSWCA 418 applied.

Logar v Ambulance Service of NSW Sydney Region [2017] NSWCA 274 (25 October 2017) (Macfarlan JA, Emmett AJA and Schmidt J)

92. What his Honour thus had to determine was both what Ms Riches actually did and whether that departed from what a reasonable person would have done in the circumstances, given the admitted risk which the ambulance crossing the intersection against a red light involved. The duty was to take reasonable care in the circumstances. It was not to avoid any risk of collision with a vehicle in lane 1, at any cost. The question of what the duty required also had to be approached prospectively: *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48 at [31] and [40] .

Logar v Ambulance Service of NSW Sydney Region [2017] NSWCA 274 (25 October 2017) (Macfarlan JA, Emmett AJA and Schmidt J)

159. Those conditions also had to be taken into account, as the primary judge did, when assessing whether Ms Riches not taking the precaution of traversing the intersection in some other way, had resulted in a breach of her duty. That assessment had to be made prospectively, not with the benefit of hindsight: *Adeels Palace* at [31] and [40] .

Pere v Central Queensland Hospital and Health Service [2017] QCA 225 (06 October 2017) (Gotterson and Morrison JJA and Applegarth J)

19. His Honour was also not satisfied that the applicant had proved that the circumstances in which the tests were taken had, conformably with the provisions of s 305D , caused the psychiatric condition. He said:[12]

"[85] The medical opinions of Dr de Leacy and Dr Klein diagnosing a psychiatric condition and finding a causal link between the subject event and that conditions are, as each of them conceded, dependent upon an acceptance of the history provided by the plaintiff. Dr Chalk and Dr Flanagan had access to fuller information about the patient's history than did Dr de Leacy and Dr Klein. Dr Chalk concluded that the plaintiff was not suffering from a psychiatric disorder and Dr Flanagan was unsure about the diagnosis, expressing doubts about the genuineness and severity of the plaintiff's psychiatric condition. Both Dr Flanagan and Dr Chalk questioned the subject incident as being the cause of subsequent symptoms. Both commented that the plaintiff was able to continue to work as a security officer for some time after the subject incident.

[86] Assessment of the medical evidence must now occur in light of the findings of fact which I have made. I find the plaintiff knowingly consented to provision of the blood and urine samples and that his claim a nurse viewed his genitals is false, he having no memory soon after the event of having provided a urine sample. I find the sample was taken in circumstances where the plaintiff was intoxicated when he went to work. Other unrelated issues at the time were causing him stress. He had continuing concerns relating to the breakdown of his marriage with his Australian wife and divorce proceedings following from that and issues requiring his return to Papua New Guinea arising from concerns expressed by his traditional Papua New Guinean wife. In light of the plaintiff's choice to take up a security position in Gladstone in March/April 2013 which was terminated not by him but by his employer due to his poor work conduct, I do not accept his claim that he was experiencing a fear of security work. In my view, feelings of anger and resentment towards Queensland Health due to ongoing disciplinary issues did not constitute a psychiatric injury. The opinion of Dr Chalk in this regard should be accepted.

[87] The medical evidence, in my view, does not establish a probable connection between the subject event and the plaintiff's subsequent and ongoing psychological disturbance. Given the view I have formed on the facts, the concessions by Dr de Leacy and Dr Kein that in those circumstances it was less likely than likely the plaintiff's condition was caused by the 2 August incident have application. It has not been shown to be more probable than not that, but for the taking of the samples on 2 August 2012, the psychological condition of the plaintiff would not have existed. Furthermore, this cannot be considered an exceptional case where responsibility for the plaintiff's condition should, in accordance with established principles, be imposed on the defendant. [13]

[88] The plaintiff bears the onus of establishing causation. In my view, bearing in mind the principles in s 305D , he has failed to do so."

via

[13] See *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 .

Circular Head Fencing Pty Ltd v Motor Accidents Insurance Board [2017] TASFC 6 (30 August 2017) (Blow CJ, Pearce and Brett JJ)

77. It is now well established that the effect of s 13(1)(a) of the *Civil Liability Act* is that in order to establish factual causation, the appropriate test is the "but for" test. (See *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48, 239 CLR 420 ; *Strong v Woolworths Ltd* [2012] HCA 5, 246 CLR 182.) In the circumstances of this case, it was therefore necessary for the MAIB to prove against each appellant that, but for the failure of that appellant to take steps to secure the gate against the escape of cattle in a manner consistent with that of a reasonable person in the position of the appellant in question, the cattle would not have escaped on the night in question. Given that her Honour found that the relevant breach on the part of each appellant related to the use of a gudgeon pin with recessed thread, the finding which was necessary was that, had that pin not been used, but some other means used to secure the gate, the cattle would not have escaped.

Circular Head Fencing Pty Ltd v Motor Accidents Insurance Board [2017] TASFC 6 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 (04 August 2017) (McColl, Meagher and Ward JJA)

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48 applied.

Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 (04 August 2017) (McColl, Meagher and Ward JJA)

62. Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48 ; (at [11], [15], [27], [41]), per curiam (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network [2017] NSWCA 123 -
Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network [2017] NSWCA 123 -
The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 (26 May 2017) (Morrison and McMurdo JJA and Bond J,)

53. In *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 the High Court (French CJ, Gummow, Hayne, Heydon and Crennan JJ) observed [24] at [55] (footnotes omitted):

> "At once it must be recognised that the legal concept of causation differs from philosophical and scientific notions of causation. It must also be recognised that before the *Civil Liability Act* and equivalent provisions were enacted it had been recognised that the 'but for' test was not always a *sufficient* test of causation. But as s 5D(1) shows, the 'but for' test is now to be (and has hitherto been seen to be) a *necessary* test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2)."

The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 -
Ratewave Pty Ltd v BJ Illingby [2017] NSWCA 103 -
Ratewave Pty Ltd v BJ Illingby [2017] NSWCA 103 -
Fairall v Hobbs [2017] NSWCA 82 -
Fairall v Hobbs [2017] NSWCA 82 -
Fairall v Hobbs [2017] NSWCA 82 -
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 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)

68. In *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 , it was held that the proprietor of licensed premises owed customers a duty to take reasonable care to prevent

injury to them from the violent, quarrelsome or disorderly conduct of other persons. This conclusion depended particularly upon the liquor harm minimisation provisions of the *Liquor Act 1982* (NSW) . Other provisions of the Act required a licensee to refuse to admit to licensed premises, or to turn out, any person who was then violent, quarrelsome or disorderly. Thus, the statutory obligations upon the licensee informed the content of the duty.

Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
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 (25 July 2016) (McColl and Payne JJA, Garling J)

1. Cf Adeels Palace Pty Ltd v Moubarak [2009] HCA 48 ; (2009) 239 CLR 420 (Adeels Palace) (at [11]).

Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114 -
Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114 -
Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114 -
Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114 -
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 -
Murray v Sheldon Commercial Interiors Pty Ltd [2016] NSWCA 77 -
Rankilor v City of South Perth [2016] WASCA 29 (12 February 2016) (Buss, Newnes and Murphy JJA)
Adeels Palace Pty Ltd v Moubarak [2009] HCA 48 ; (2009) 239 CLR 420
Botany Bay City Council v Latham

Chu v Russell [2016] TASFC 1 (12 February 2016) (Blow CJ, Porter and Estcourt JJ)

75. The question of factual causation under the provisions of the *Civil Liability Act* , s 13 , in other than an exceptional case, is to be determined by the "but for" test of causation, that is to say, "but for the negligent act or omission, would the harm have occurred?": *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [45] , confirmed and applied in *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [18] .

Chu v Russell [2016] TASFC 1 -
Rankilor v City of South Perth [2016] WASCA 29 -
Rankilor v City of South Perth [2016] WASCA 29 -
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 -
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 (27 August 2015) (McColl, Basten and Leeming JJA)

49. "Negligent" in this context means failure to exercise reasonable care and skill: s 5. It was not disputed that the risk of someone slipping, falling and injuring himself or herself while stepping up into the hut was both foreseeable and not insignificant. Even so, s 5B(1)(c) means that a plaintiff must fail in an action for negligence based on a failure to take precautions unless the plaintiff discharges the onus of showing that a reasonable person in the defendant's position would have taken the precautions. The fact that s 5B(1)(c) is a necessary element of a plaintiff's success in litigation to which it applies is plain on the face of the section, and was confirmed by the High Court in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [34] .

18. As has been noted on more than one occasion, the elements relevant to identification of the scope of a duty, a breach of duty and causation with respect to harm are not to be found in self-contained compartments, but tend to overlap. [6] Thus, although the focus of s 5B of the *Civil Liability Act* is breach of duty, [7] the matters identified are also relevant to the existence of a duty of care. The section provides:

> **5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
>
> (a) the probability that the harm would occur if care were not taken,
>
> (b) the likely seriousness of the harm,
>
> (c) the burden of taking precautions to avoid the risk of harm,
>
> (d) the social utility of the activity that creates the risk of harm.

via

7. Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48 at [13] .

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

28. The existence of a duty of care is to be determined in accordance with the general law. Although the *Civil Liability Act* has a division headed "Duty of care", [8] it is accepted that the provisions relate more to breach than to the existence of a duty. [9] Nevertheless, the provision adopts language relevant to both duty and breach [10] . (The heading to a Division in an Act is part of the Act. [11]) The first provision in Div 2 , s 5B , reads as follows:

> **5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

via

[9] Adeels Palace Pty Limited v Moubarak [2009]HCA 48; 239 CLR 420 at [13] .

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

Adeels Palace Pty Limited v Moubarak [2009] HCA 48; 239 CLR 420
Air Link Pty Ltd v Paterson [2005] HCA 39; 223 CLR 283
Andar Transport Pty Ltd v Brambles Ltd [2004] HCA 28; 217 CLR 424
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36; 88 ALJR 911
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258; 75 NSWLR 649
Chappel v Heart [1998] HCA 55; 195 CLR 232
Chapman v Hearse [1961] HCA 46; 106 CLR 112
Coulton v Holcombe [1986] HCA 33; 162 CLR 1
Curtis v Harden Shire Council [2014] NSWCA 314; 203 LGERA 352
Disley v Levine [2001] EWCA Civ 1087; [2002] 1 WLR 785
Fellowes (or Herd) v Clyde Helicopters Ltd [1997] AC 534
Grills v Leighton Contractors Pty Limited [2015] NSWCA 72
Hoffman v Boland [2013] NSWCA 158
Kuru v State of New South Wales [2008] HCA 26; 236 CLR 1
Wallace v Kam [2013] HCA 19; 250 CLR 375
Woolworths Ltd v Ryder [2014] NSWCA 223; 87 NSWLR 593
Wyong Shire Council v Shirt [1980] HCA 12; 146 CLR 40

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

Adeels Palace Pty Limited v Moubarak [2009] HVA 48; 239 CLR 40 ; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36; 88 ALJR 911; *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72; *Woolworths Ltd v Ryder* [2014] NSWCA 223; 87 NSWLR 593 referred to.

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
Packer v Tall Ship Sailing Cruises Australia Pty Ltd [2015] QCA 108 (19 June 2015) (Gotterson JA and Boddice and Flanagan JJ,)

31. The trial judge concluded there was no failure to exercise reasonable care on the part of the respondent, in failing to have specialist "crowd controllers" or other security personnel in addition to the 10 crew members manning the ship on that day. That was particularly so having regard to the nature of the trip, the identities of the two groups involved, their

numbers and composition, and the likely agenda of the day's activities and the time over which the events were planned, all known to the respondent. Whether reasonable care would require a particular precaution to be taken is to be determined prospectively, and turns on the facts of the case proved in evidence. [12] This involves an assessment of the kind of threat in the unfolding circumstances of which the licensee is aware or ought to have been aware and which calls for action. [13]

via

[12] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 [40] .

Packer v Tall Ship Sailing Cruises Australia Pty Ltd [2015] QCA 108 (19 June 2015) (Gotterson JA and Boddice and Flanagan JJ,)

51. The importance of the particular circumstances to the form and content of any such duty was expressly recognised by the High Court in *Adeels Palace Pty Ltd v Moubarak* : [20]

> "In the circumstances reasonably contemplated before the restaurant opened for business on 31 December 2002 as likely to prevail on that night, Adeels Palace owed each plaintiff a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons. The duty is consistent with the duty imposed by statute upon the licensee and which was a duty enforceable by criminal processes. ... it is a duty to take reasonable care in the conduct of activities on licensed premises, particularly with regard to allowing persons to enter or remain on those premises."

Packer v Tall Ship Sailing Cruises Australia Pty Ltd [2015] QCA 108 -
Packer v Tall Ship Sailing Cruises Australia Pty Ltd [2015] QCA 108 -
Packer v Tall Ship Sailing Cruises Australia Pty Ltd [2015] QCA 108 -
Packer v Tall Ship Sailing Cruises Australia Pty Ltd [2015] QCA 108 -
Tilden v Gregg [2015] NSWCA 164 (16 June 2015) (McColl, Macfarlan and Meagher JJA)

Adeels Palace Pty Ltd v Moubarak [2009] HCA 48; 239 CLR 420
Fontin v Katapodis [1962] HCA 63; 108 CLR 177
Gray v Motor Accident Commission [1998] HCA 70; 196 CLR 1
Lamb v Cotogno [1987] HCA 47; 164 CLR 1
Lane v Holloway [1968] 1 QB 379
McGlen-McLeod v Galloway [2012] NSWCA 368
State of New South Wales v Zreika [2012] NSWCA 37

Tilden v Gregg [2015] NSWCA 164 -
Tilden v Gregg [2015] NSWCA 164 -
Tilden v Gregg [2015] NSWCA 164 -
Tilden v Gregg [2015] NSWCA 164 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

93. The High Court in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [13] , held that ss 5B and 5C are directed to questions of breach. It is an error to determine the existence and content of a duty of care by serial reference to the provisions of those sections.

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Central Darling Shire Council v Greeney [2015] NSWCA 51 -
Central Darling Shire Council v Greeney [2015] NSWCA 51 -

Lorrimar v Serco Sodexo Defence Services Pty Ltd [2014] NSWCA 371 -
Lorrimar v Serco Sodexo Defence Services Pty Ltd [2014] NSWCA 371 -
Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

> 70. The High Court examined the cognate provisions of the New South Wales legislation, ss 5D and 5E of the *Civil Liability Act 2002* (NSW) , in *Adeels Palace Pty Ltd v Moubarak,* [30] *Strong v Woolworths Ltd* [31] and *Wallace v Kam* . [32]

via

[30] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 (' *Adeels Palace*')

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

> 70. The High Court examined the cognate provisions of the New South Wales legislation, ss 5D and 5E of the *Civil Liability Act 2002* (NSW) , in *Adeels Palace Pty Ltd v Moubarak,* [30] *Strong v Woolworths Ltd* [31] and *Wallace v Kam* . [32]

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

> 73. In *Wallace,* the High Court said of the factual causation test:
>
> > The determination of factual causation in accordance with s 5D(1)(a) involv es nothing more or less than the application of a 'but for' test of causation. That is to say, a determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence. [35]

via

[35] (2013) 250 CLR 375 , 383 [16] . See also *Strong* (2012) 246 CLR 182, 190 [17] ; *Adeels Palace* (2009) 239 CLR 420, 440 [45] .

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

> 64. Part X is directed to 'the law of negligence', notwithstanding the fact that the Act does not govern questions of duty of care, but rather (as relevant to this case) those of breach and causation. [28] The criteria for establishing breach of duty and causation are found in divs 2 and 3 respectively. Other divisions within this part concern contributory negligence, awareness of risk, negligence of professionals and persons professing particular skills, non-delegable duties, and vicarious liability.

via

[28] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 432-433 [13]-[14] .

Powney v Kerang and District Health [2014] VSCA 221 -

Powney v Kerang and District Health [2014] VSCA 221 -
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Powney v Kerang and District Health [2014] VSCA 221 -
Powney v Kerang and District Health [2014] VSCA 221 -
Powney v Kerang and District Health [2014] VSCA 221 -
Powney v Kerang and District Health [2014] VSCA 221 -
Nominal Defendant v Bacon [2014] NSWCA 275 (21 August 2014) (McColl, Macfarlan and Ward JJA)

39. This passage refers only to a single exception to the "but for" test, being one that is not presently applicable as it relates to cases where there are particular evidentiary gaps. The speech thus overlooks the exception at common law, referred to in the Ipp Report, where harm is attributable to more than one sufficient condition. However, as the High Court noted in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [55] , the exceptional cases contemplated by s 5D(2) are undefined. Whilst obedience must be paid to its express limitation to "exceptional" cases and to its requirement for determinations in accordance with "established principles", the subsection's terms do not justify its limitation to the single instance referred to in the Second Reading Speech, particularly when the further (and presently relevant) exception to the "but for" test was referred to in the Ipp Report to which the Second Reading Speech referred approvingly.

Nominal Defendant v Bacon [2014] NSWCA 275 (21 August 2014) (McColl, Macfarlan and Ward JJA)

16. Neither party suggested that if factual causation was established, it was not appropriate for the scope of the appellant's liability to extend to the harm caused to the respondent (cf s 5D(1)(b), CLA) or that the causation issue fell within "the undefined group of exceptional cases contemplated by s 5D(2) ": *Adeels Palace Pty Ltd v Moubarak* (at [55]).

Nominal Defendant v Bacon [2014] NSWCA 275 -
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

103. The effect of s 5D(1)(a) is that factual causation is to be determined by the "but for" test: "but for the negligent act or omission, would the harm have occurred?": *Adeels Palace* at [45] ; *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] (*per curiam*). The test requires the Court to determine whether, if the defendant had not breached its duty of care, the harm complained of would have been prevented. The test is not satisfied merely by showing that taking the steps the plaintiff alleges should have been taken might have made a difference: *Adeels Palace* at [50] . The plaintiff must show that it is more probable than not that, if the defendant had taken reasonable care, the harm would have been prevented: *Adeels Palace* at [53] . However, if the defendant's negligent act or omission is necessary to complete a set of conditions jointly sufficient to account for the occurrence of the harm, the test of factual causation will be satisfied: *Strong v Woolworths Ltd* at [20] .

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

101. The parties' detailed written submissions on causation did not refer to s 5D of the *Civil Liability Act 2002* (NSW) (**CL Act**). In oral argument both Mr Hutley and Mr Jackson accepted that the CL Act applies to Hudson's claim for damages by reason of the Solicitors' alleged breach of duty: CL Act, s 5A(1) and definition of "harm" in s 5. Thus the question of causation is to be determined in accordance with the principles stated in Div 3 of Part 1A of the CL Act (ss 5D-5E): *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [41] , [44] (*per curiam*).

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 -
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 -
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 -

Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22 (26 June 2014) (Refshauge, Penfold and Rares JJ)

> 25. Whether a reasonable person would have taken precautions against a risk must be determined prospectively based on the facts in the evidence: *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 440 [40] per French CJ, Gummow, Hayne, Heydon and Crennan JJ . We reject ground 1. We do not accept the appellant's criticism of the trial judge as having arrived at his conclusion based on a retrospective assessment. His Honour said that he had not done so. Having reviewed the evidence of Prof Churches and the objective facts as they would have appeared to the appellant at the time it first received the modified mini-bus and subsequently before Ms Hyam's accident, we are satisfied that the appellant ought to have perceived the not insubstantial risk of its passengers suffering physical injury if their clothing became caught on the lever when it took delivery of the modified minibus or within a short time thereafter when viewing it in operation.

Jackson v McDonald's Australia Ltd [2014] NSWCA 162 (26 May 2014) (McColl, Barrett and Ward JJA)

> 14. Although the judgment as to what the reasonable person would have done to avoid what is known at trial to have occurred 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: *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 (at [126]) per Hayne J; applied in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [31]).

Port Macquarie Hastings Council v Mooney [2014] NSWCA 156 (20 May 2014) (Emmett JA, Sackville AJA and Simpson J)

> *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 ; *New South Wales v Fahy* [2007] HCA 20; 232 CLR 486; applied.

Port Macquarie Hastings Council v Mooney [2014] NSWCA 156 -
Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98 -
Warth v Lafsky [2014] NSWCA 94 -
Mamo v Surace [2014] NSWCA 58 -
Mamo v Surace [2014] NSWCA 58 -
Owens v Galvin [2014] VSCA 0 -
Smith v Croote Pty Ltd [2014] NSWCA 35 (07 March 2014) (Meagher, Ward and Emmett JJA)

> 74. The question of factual causation in a case such as this is not to be answered simply by pointing out that Croote and Dunns owed a duty of care to take reasonable steps to prevent a violent assault, that Mr Smith was the victim of a violent assault and that the damage suffered by him was the very kind of thing that the relevant duty obliged Croote to take reasonable steps to prevent. Describing his injury as the very kind of thing that was the subject of the duty owed by Croote should not obscure the need to prove factual causation. This is not a case in which the evidence demonstrates that the taking of reasonable care would probably have prevented the occurrence of injury to Mr Smith (see *Adeels Palace v Moubarak* [2009] HCA 48; 239 CLR 420 at [51]).

Smith v Croote Pty Ltd [2014] NSWCA 35 -
Smith v Croote Pty Ltd [2014] NSWCA 35 -
Smith v Croote Pty Ltd [2014] NSWCA 35 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Lucantonio v Stichter [2014] NSWCA 5 -

QBE v Orcher [2013] NSWCA 478 (23 December 2013) (McColl and Macfarlan JJA, Tobias AJA)

114. The respondent contended that there were three bases on which Bowcliff owed a duty of care to him on the facts and circumstances of the case. The first was that the general duty of care formulated in *Adeels Palace* at [26] (a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons) extended to a duty to take reasonable care in the conduct of activities in the vicinity of the licensed premises. The duty, which arose from the nature of the business being conducted, did not depend on prior actual or constructive knowledge of intoxication or the propensity for violence of a particular individual. What was reasonably required in terms of 'control' in particular circumstances was a matter for consideration on the issue of breach, rather than being determinative of the existence of a duty of care.

QBE v Orcher [2013] NSWCA 478 (23 December 2013) (McColl and Macfarlan JJA, Tobias AJA)

115. It was on a similar basis that the respondent submitted that DSSS owed a duty of care to patrons. The duty was said to be owed on the basis of a "recognised relationship" (see *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361), that is, the relationship of security guard and patron. This duty was said to be "co-extensive with" although not "identical to" that duty formulated in *Adeels Palace* , extended to the vicinity of the licensed premises, and applying to Bowcliff. It extends to taking "reasonable care to prevent injury from the violent, quarrelsome or disorderly conduct of other persons on and in the vicinity of the licensed premises."

QBE v Orcher [2013] NSWCA 478 (23 December 2013) (McColl and Macfarlan JJA, Tobias AJA)

118. The third basis upon which Bowcliff was said to owe a duty of care to the respondent involved a 'salient features' analysis (cf *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; (2009) 75 NSWLR 649 at [103] per Allsop P). The salient features supporting the existence of a duty of care in the instant case included the high degree of probability of a disturbance occurring between patrons and an untrained employee overreacting; the undoubted existence of a duty of care *on* the premises; the nature of the activity undertaken by Bowcliff and Mr Keough, in particular, the undertakings attached to the licence of the premises; their assumption of control in fact in the vicinity of the premises through the actual performance of security functions; their capacity to take precautions against the risk of harm by giving appropriate instructions to employees; and the respondent's vulnerability. There was no question of any potential indeterminacy of liability, even if the duty was owed to anyone in the vicinity of the hotel; but if the duty was only owed to patrons leaving the hotel, the class of persons to which it was owed would be no greater than those to which the duty recognised in *Adeels Palace* was already owed.

McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
QBE v Orcher [2013] NSWCA 478 -
QBE v Orcher [2013] NSWCA 478 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
QBE v Orcher [2013] NSWCA 478 -
QBE v Orcher [2013] NSWCA 478 -
QBE v Orcher [2013] NSWCA 478 -
QBE v Orcher [2013] NSWCA 478 -
Parkview Constructions Pty Ltd v Abrahim [2013] NSWCA 460 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 (17 December 2013) (Maxwell P, Redlich JA and Dixon AJA)

98. Although neither the primary judge, nor counsel in submissions addressed causation in terms of the statutory test, the parties conceded in argument that the court is required to do so. In *Adeels Palace Pty Ltd v Moubarak,* [26] on appeal from the Supreme Court of New South Wales, French CJ, Gummow, Hayne, Heydon and Crennan JJ, stated: [27]

The first point to make about the question of causation is that, in these cases, it is governed by the *Civil Liability Act* . [28]

Section 5D(1) of that Act divides the determination of whether negligence caused particular harm into two elements: factual causation and scope of liability.

Dividing the issue of causation in this way expresses the relevant questions in a way that may differ from what was said by Mason CJ, in *March v Stramare (E&MH) Pty Ltd*, to be the common law's approach to causation. The references in *March v Stramare* to causation being 'ultimately a matter of common sense' were evidently intended to disapprove the proposition 'that value judgment has, or should have, no part to play in resolving causation as an issue of fact'. By contrast, s 5D(1) treats factual causation and scope of liability as separate and distinct issues.

It is not necessary to examine whether or to what extent the approach to causation described in *March v Stramare* might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1) . It is sufficient to observe that, in cases where the *Civil Liability Act* or equivalent statutes are engaged, it is the applicable statutory provision that must be applied.

Next it is necessary to observe that the first of the two elements identified in s 5 D(1) (factual causation) is determined by the 'but for' test: but for the negligent act or omission, would the harm have occurred?

via

[26] (2009) 239 CLR 420 .

Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Takla v Nasr [2013] NSWCA 435 (13 December 2013) (McColl, Basten and Hoeben JJA)

74. In order to establish that any breach of duty on the respondent's part caused her harm, the appellant had to establish in accordance with s 5D(1)(a) of the *Civil Liability Act* that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a) . That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Walla ce v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace* (at [45] , [55]); *S trong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Takla v Nasr [2013] NSWCA 435 -
Takla v Nasr [2013] NSWCA 435 -
Paul v Cooke [2013] NSWCA 311 -
Paul v Cooke [2013] NSWCA 311 -
Paul v Cooke [2013] NSWCA 311 -
Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

73. The effect of s 5D(1) is that "the 'but for' test [of causation] is now to be ... a necessary test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2) ": *Adeels*

Palace (at [45] , [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ. The s 5D(1)(a) element of factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm, that is to say, a condition that must be present for the occurrence of the harm: *Strong v Woolworths Ltd* (at [20]) per French CJ, Gummow, Crennan and Bell JJ; (at [44]) per Heydon J.

Shoalhaven City Council v Pender [2013] NSWCA 210 -
Shoalhaven City Council v Pender [2013] NSWCA 210 -
Shoalhaven City Council v Pender [2013] NSWCA 210 -
Shoalhaven City Council v Pender [2013] NSWCA 210 -
Cox v Fellows [2013] NSWCA 206 (09 July 2013) (Basten, Ward and Gleeson JJA)

89. The first of the two elements identified in s 5D(1) (factual causation) is to be determined by the "but for" test: but for the negligent act or omission, would the harm have occurred? (see *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at 440 [45]).

Cox v Fellows [2013] NSWCA 206 -
Wooby v Australian Postal Corporation [2013] NSWCA 183 -
King v Western Sydney Local Health Network [2013] NSWCA 162 -
King v Western Sydney Local Health Network [2013] NSWCA 162 -
King v Western Sydney Local Health Network [2013] NSWCA 162 -
King v Western Sydney Local Health Network [2013] NSWCA 162 -
King v Western Sydney Local Health Network [2013] NSWCA 162 -
Oyston v St Patrick's College [2013] NSWCA 135 (27 May 2013) (Macfarlan and Barrett JJA, Tobias AJA)

5. As the nature and content of the duty owed to the appellant was not in issue at trial or on the appeal, an appropriate starting point is to record the primary judge's exposition of that duty. It is contained in paragraphs [11]-[15] of her Honour's reasons and, for convenience, I set it out in full.

[11] As discussed in *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48 , ss 5B, 5C, 5D and 5E of the *Civil Liability Act* are central to the questions of breach of duty and causation. Sections 5C and 5D provide:

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk."

[12] Negligence has the meaning given by s 5 of the *Civil Liability Act* , namely 'failure to exercise reasonable care and skill'.

[13] In *Cox v State of New South Wales* [2007] NSWSC 471; (2007) 71 NSWLR 225, another bullying case, Simpson J discussed the nature of the duty which a school owes a pupil:

"72 That the defendant, through the Woodberry School authorities, owed a duty of care to the plaintiff cannot be seriously doubted. The nature of the duty has been considered on more than one occasion but, again, is not controversial. In *Geyer v Downs* [1977] HCA 64; 138 CLR 91, both Stephen J in his individual judgment, and Murphy and Aickin JJ, in their joint judgment, with which Mason and Jacobs JJ agreed, cited, with approval, passages from *Richards v Victoria* [1969] VR 136. Murphy and Aickin JJ excerpted that part of the judgment concerned with the content of the duty of care, as follows:

"The duty of care owed by [the teacher] required only that he take such measures as in all the circumstances were reasonable to prevent physical injury to [the pupil]. This duty not being one to ensure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which ex-hypothesis [the teacher] should reasonably have foreseen."

73 The passage excerpted by Stephen J sought to explain the rationale for the duty, as follows:

"The reason underlying the imposition of the duty would appear to be the need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that, during school hours, the child is beyond the control and protection of his parents and is placed under the control of the schoolmaster who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury."

74 Stephen J said:

"The duty which a schoolmaster owes to his pupil arises from the relationship between them and its temporal ambit will be determined by the circumstances of the relationship on the particular occasion in question. Children stand in need of care and supervision and this their parents cannot effectively provide when their children are attending school; instead it is those then in charge of them, their teachers, who must provide it."

His Honour also said:

"It is for schoolmasters and for those who employ them, whether government or private institutions, to provide facilities whereby the schoolmasterly duty can adequately be discharged during the period for which it is assumed. The schoolmaster's ability or inability to discharge it will determine neither the existence of the duty nor of its temporal ambit but only whether or not the duty has been adequately performed. The temporal ambit of the duty will, therefore, depend not at all upon the schoolmaster's ability, however derived, effectively to perform the duty but, rather, upon whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was not then in existence. If it was, the duty will apply. It will be for the schoolmaster and those standing behind him to cut their coats according to the cloth, not assuming the relationship when unable to perform the duty which goes with it."

75 Murphy and Aickin JJ also cited as "the classic formulation of the duty owed by a schoolmaster to a pupil" that drawn from *Williams v Eady* (1893) 10 TLR 41, in the following terms:

" ... The schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster."

76 This was restated by Kitto J in *Ramsay v Larsen* [1964] HCA 40; 111 CLR 16 in the following terms:

"The breach of duty which the plaintiff alleges is a failure to take such precautions for his safety on the occasion in question as a reasonable parent would have taken in the circumstances.""

[14] Simpson J concluded in the face of the evidence led in that case as to bullying, that the plaintiff had demonstrated that the school authority had failed to discharge its duty of care to the plaintiff.

[15] In this case, that bullying at school may result in harm, including psychiatric injury, was not controversial. Such a risk is not only foreseeable, on the evidence it was foreseen by the College; it being well understood that such a risk was so significant that it required the College to take active steps to protect its students from bullying by other students. That approach appears to have become a common one amongst both Government and non-Government schools in this State. There was no issue that a reasonable person in the College's position, would have taken steps to protect a student such as Ms Oyston, from the risks which bullying posed. Whether the steps taken from time to time were adequate to ensure that the duty was met, was in issue."

Perisher Blue Pty Limited v Harris [2013] NSWCA 38 (27 February 2013) (Beazley JA at [1]; Sackville AJA at [2]; Young AJA at [30])

11. As the High Court explained in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420, at [42] , *per curiam*, s 5D(1) divides the determination of whether negligence caused particular harm into two elements: factual causation and scope of liability: see also *Strong v Woolworths Ltd* [2012] HCA 5; 285 ALR 420 at [18]-[19], per French CJ, Gummow, Crennan and Bell JJ. Factual causation is to be determined by the "*but for*" test: but for the negligent act or omission, would the harm have occurred? Subject to the "*exceptional case*" provided for in s 5D (2) , factual causation is a necessary element of a determination that negligence caused a particular harm. In other words, unless s 5D(2) applies, a plaintiff must establish, on the balance of probabilities, that but for the defendant's negligence, the harm would not have occurred: *Adeels Palace* , at [45] , [53] .

Perisher Blue Pty Limited v Harris [2013] NSWCA 38 -
Perisher Blue Pty Limited v Harris [2013] NSWCA 38 -
Perisher Blue Pty Limited v Harris [2013] NSWCA 38 -
Perisher Blue Pty Limited v Harris [2013] NSWCA 38 -
Perisher Blue Pty Limited v Harris [2013] NSWCA 38 -
Transpacific Industrial Solutions Pty Ltd v Phelps [2013] NSWCA 31 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

69. In *Adeels Palace* the need for the exercise of care in allowing persons to enter or remain on the licensed premises, which was directed to controlling the misuse or abuse of liquor so as to avoid violence and other anti-social behaviour likely to cause harm, was described as "well recognised". In addition, the licensee had a statutory obligation not to permit such conduct and the power to remove persons to assist in the performance of that obligation.

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

55. The primary judge held that the "adequate security system" which should have been in place "was to have security staff immediately available to speak to the alleged suspects. If doors were to be closed, all members of the staff should be aware of it and the security staff could deal with suspects until the arrival of police" (Judgment, p 25). This conclusion was arrived at in the absence of any consideration of the probability that harm of the relevant kind might occur, the likely seriousness of that harm and the burden of taking precautions to avoid the risk of its occurrence; and also in the absence of any evidence directed to a consideration of such matters. There was also no consideration of whether a reasonable person in Lesandu's position would have implemented a security system and, if so, as to what the characteristics of such a system would be or include: cf s 5B of the *Civil Liability Act 2002* and the discussion in *Adeels Palace* at [28]-[35] .

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

29. In the present case, the issue of causation was to be determined in accordance with the principles set out in s 5D of the *Civil Liability Act* . Section 5D imposes a structure on the assessment of causation and may thereby qualify the approach permitted by the common law: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [43]-[44] .

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

75. This is also apparent from a consideration of the way in which the primary judge dealt with the question of causation. He concluded that there was a causal link between the breach of duty he had found and Mr Gonzalez' injuries. Although he had earlier stated that he had regard to the provisions of s 5D , nowhere in the reasons is there any consideration of the elements which he was required by s 5D(1) to address. The first of those elements, factual causation, is determined by the "but for" test: *Adeels Palace* at [45] ; *Strong v Woolworths Ltd* [201 2] HCA 5; 86 ALJR 267 at [18] . It requires an inquiry as to whether, but for the negligent act or omission, the harm would have occurred. In this case it was necessary for the primary judge to make findings as to what an adequate "security system" would have entailed and then to consider whether more probably than not Mr Gonzalez would have been injured if such a system was in place. The primary judge did not undertake that analysis.

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

37. In *Adeels Palace* , the High Court distinguished *Chappel v Hart* : at [52]-[53] . One important point of distinction was the need in *Adeels Palace* (as in the present case) to consider the unpredictable conduct of the third parties. If there had been security staff in the store, it is quite possible that they would have questioned the fraudsters and thus delayed their departure. Whether they would have attempted to stop the fraudsters leaving if they had chosen to "make a break for it", and whether their attempts would have been successful, are matters of speculation. A real possibility remains that by the time the fraudsters ran the respondent would have been in their way. Similarly, if the doors were locked and not reopened, further events must be posited, including the possibility that the respondent waited outside the doors, that they were eventually opened and that the fraudsters then sought to make good their escape. In short, it is quite unclear whether the proposed precautions would have lessened the risk of harm to the respondent. It was, therefore, not demonstrated that the failure to take the proposed precautions caused the harm suffered by the respondent.

Conclusion

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

37. In *Adeels Palace* , the High Court distinguished *Chappel v Hart* : at [52]-[53] . One important point of distinction was the need in *Adeels Palace* (as in the present case) to consider the unpredictable conduct of the third parties. If there had been security staff in the store, it is quite possible that they would have questioned the fraudsters and thus delayed their departure. Whether they would have attempted to stop the fraudsters leaving if they had chosen to "make a break for it", and whether their attempts would have been successful, are matters of speculation. A real possibility remains that by the time the fraudsters ran the respondent would have been in their way. Similarly, if the doors were locked and not reopened, further events must be posited, including the possibility that the respondent waited outside the doors, that they were eventually opened and that the fraudsters then sought to make good their escape. In short, it is quite unclear whether the proposed precautions would have lessened the risk of harm to the respondent. It was, therefore, not demonstrated that the failure to take the proposed precautions caused the harm suffered by the respondent.

Conclusion

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

63. In *Adeels Palace* (at [25]-[26]), several considerations were identified as justifying the conclusion that the occupier of the licensed premises owed a duty to take reasonable care which was directed to preventing injury to patrons from the violent or disorderly conduct of others. Those factors were that the subject matter of the complaint concerned the exercise of control over access to, and the presence of persons on, the premises; that they were licensed premises concerning which it "is and was well recognised that care must be taken" to prevent alcohol abuse otherwise likely to result in harm from violence and other anti-social behaviour; that the licensee had a statutory obligation under the *Liquor Act* 1982 (NSW) not to permit such conduct on the premises; and that the licensee also had a statutory power to prevent entry to the premises and to remove persons from the premises, if needs be by the exercise of reasonable force, to enable discharge of that duty.

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

65. The primary judge did not attempt to identify any features or factors which might justify the imposition of a similar duty in the present case. Mr Gonzalez, in his argument to the primary judge and to this Court, points to two matters which are said to require the imposition of a duty of care. The first is that his "complaint" is as to the occupier's failure to exercise reasonable care with regard its activities in dealing with persons on the premises suspected of criminal or other wrongdoing, and in particular their being permitted to leave the premises or being detained on the premises. The latter is said to be something in relation to which Lesandu was able to and did exercise control by locking the entrance door. The fact that the complaint concerns an activity involving the occupier's capacity to exercise control is said to set this case apart from the decision in *Modbury Triangle* for the same reasons as were said in *Adeels Palace* (at [23] , [24]) to distinguish the complaint in that case. The second matter is that if Lesandu sought to detain suspected criminals in the premises by locking the entrance door, it was foreseeable that a person in Mr Gonzalez' position might suffer harm of the kind suffered if the door was opened and those detained sought to escape.

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Blundell v Leighton [2013] ACTCA 1 (11 January 2013)

54. The references at [43] in *Adeels Palace* , quoted above, to the observations of Mason CJ in *March v Stramare* are to the passage at 515 of the report which we extracted at [51] above. It should also be noted that the present appeal involves no question concerning scope of liability.

Blundell v Leighton [2013] ACTCA 1 -
Blundell v Leighton [2013] ACTCA 1 -
Blundell v Leighton [2013] ACTCA 1 -
Wodonga Regional Health Service v Hopgood [2012] VSCA 326 -
Donnellan v Woodland [2012] NSWCA 433 -
BGC Residential Pty Ltd v Fairwater Pty Ltd [2012] WASCA 268 -
BGC Residential Pty Ltd v Fairwater Pty Ltd [2012] WASCA 268 -
BGC Residential Pty Ltd v Fairwater Pty Ltd [2012] WASCA 268 -
BGC Residential Pty Ltd v Fairwater Pty Ltd [2012] WASCA 268 -
BGC Residential Pty Ltd v Fairwater Pty Ltd [2012] WASCA 268 -
BGC Residential Pty Ltd v Fairwater Pty Ltd [2012] WASCA 268 -
Jones Lang Lasalle (Vic) Pty Ltd v Korlevski [2012] VSCA 305 (14 December 2012) (Warren CJ, Neave JA and Ferguson AJA)

56. Under s 51(1) of the *Wrongs Act 1958* , a determination that negligence had caused particular harm comprises two elements. These are:

(a) that the negligence was a necessary condition of the occurrence of the harm (factual causation); and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

The first element requires the judge to consider whether the accident would have occurred 'but for' the occupier's breach of duty. [23]

via

[23] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 [45] .

Idameneo (No 123) Pty Ltd v Gross [2012] NSWCA 423 -
Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 (16 November 2012) (Fraser and White JJA and Mullins J,)

22. For claims of the present kind, the considerations to which the plurality referred in *Burnie Port Authority v General Jones Pty Ltd* [33] as justifying variations in the degree of care required to meet the standard of reasonable care are now reflected in s 9(1)(c) and, particularly, ss 9(2)(a) and (d), of the Act , but it remains necessary for a plaintiff to demonstrate that the criteria in ss 9(1)(a) and (b) are fulfilled. In *Adeels Palace Pty Ltd v Moubarak* [34] the High Court emphasised the centrality of the provisions of the very similar *Civil Liability Act* 2002 (NSW) to questions of breach of duty (and causation).[35] It was accepted for the purposes of argument in that case that there was a risk of which the defendant knew or ought to have known [36] and that the relevant risk "was not insignificant". The question was whether a reasonable person in the position of the defendant would have taken the precautions that the plaintiffs alleged should have been taken under ss 5B(1)(c) and 5B(2), provisions which are similar to s 9(1)(c) and s 9(2) of the Act . The High Court observed that the relevant questions were to be answered,

> "prospectively, [37] not with the wisdom of hindsight ... they were to be assessed *before* the function [in which the plaintiffs were injured] began, not by reference to what occurred that night."
>
> and that;
>
> "The points to be made that are of general application are first, that whether a reasonable person would have taken precautions against a risk is to be determined prospectively, and secondly, that the answer given in any particular case turns on the facts of that case as they are proved in evidence." [38]

via

[34] (2009) 239 CLR 420 .

Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 (16 November 2012) (Fraser and White JJA and Mullins J,)

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> "The points to be made that are of general application are first, that whether a reasonable person would have taken precautions against a risk is to be determined prospectively, and secondly, that the answer given in any particular case turns on the facts of that case as they are proved in evidence." [38]

Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 -
Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 -
Meandarra Aerial Spraying Pty Ltd v Gej & MA Geldard PTY LTD [2012] QCA 315 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
State of New South Wales v Mikhael [2012] NSWCA 338 (22 October 2012) (Allsop P, Beazley JA and Preston CJ of LEC)

> Cited: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422; *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48; 239 CLR 420 ; *Stephens v Giovenco; Dick v Giovenco* [2011] NSWCA 53

State of New South Wales v Mikhael [2012] NSWCA 338 -
State of New South Wales v Mikhael [2012] NSWCA 338 -
State of Queensland v Nudd [2012] QCA 281 -
State of Queensland v Nudd [2012] QCA 281 -
State of Queensland v Nudd [2012] QCA 281 -
Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 (17 October 2012) (Nettle, Redlich JJA and Beach AJA)

112. In *Adeels Palace Pty Ltd v Moubarak* ,[122] the High Court had to consider the operation of s 5D of the *Civil Liability Act 2002 (NSW)* . Section 5D of the *Civil Liability Act* is the New South Wales equivalent of s 51 of the *Wrongs Act* . [123] The Court said: [124]

> Section 5D(1) of that Act divides the determination of whether negligence caused particular harm into two elements: factual causation and scope of liability.
>
> Dividing the issue of causation in this way expresses the relevant questions in a way that may differ from what was said by Mason CJ, in *March v E & M H Stramare Pty Ltd* ,[125] to be the common law's approach to causation. The references [126] in *March v Stramare* to causation being 'ultimately a matter of common sense' were evidently intended to disapprove the proposition 'that value judgment has, or should have, no part to play in resolving causation as an issue of fact'. By contrast, s 5D(1) treats factual causation and scope of liability as separate and distinct issues.
>
> It is not necessary to examine whether or to what extent the approach to causation described in *March v Stramare* might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1) . It is sufficient to observe that, in cases where the *Civil Liability Act* or equivalent statutes are engaged, it is the applicable statutory provision that must be applied.

Next it is necessary to observe that the first of the two elements identified in s 5 D(1) (factual causation) is determined by the 'but for' test: but for the negligent act or omission, would the harm have occurred?[127]

via

[124] (2009) 239 CLR 420 , 440.

Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 (17 October 2012) (Nettle, Redlich JJA and Beach AJA)

113. In *Adeels Palace* , the Court concluded that factual causation was not made out. While there was a discussion about the operation of s 5D(2) , the Court was not called upon to consider the provisions in s 5D dealing with the scope of liability.

Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 (17 October 2012) (Nettle, Redlich JJA and Beach AJA)

119. In our view, factual causation was made out. We do not think it was open to his Honour to reject Mrs Lederberger's evidence that if she had been told that she would be personally responsible for debts of the business, she would not have taken out probate. It follows that, but for Mr Granek's breach of duty, [131] Mrs Lederberger's personal assets would not have been put at risk.

via

[131] *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, [45] .

Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 (17 October 2012) (Nettle, Redlich JJA and Beach AJA)

111. 'Harm' is defined in s 43 of the *Wrongs Act* to mean 'harm of any kind and includes ... economic loss'. Further, s 44 of the *Wrongs Act* provides for ss 51 and 52 to have application 'to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise'. Section 51 is central to the question of causation in Mrs Lederberger's claim against Sterling & Sheink. [121]

via

[121] Cf *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 433 [15] .

Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 -
Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
Garzo v Liverpool/Campbelltown Christian School [2012] NSWCA 151 (25 May 2012) (Basten and Meagher JJA, Tobias AJA)

22. My reasons for this conclusion may be stated shortly. As the primary judge notes, the provisions of ss 5B and 5C of the *Civil Liability Act 2002* are directed to questions of breach of duty: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at [13] ; *Harmer v Hare* [2011] NSWCA 229; (2011) 59 MVR 1 at [194] . Those sections assume an allegation of breach of duty resulting from negligence which is or can be formulated in terms of a failure to take precautions against a risk of harm. The question which s 5B requires be answered

favourably to the plaintiff is whether in the face of a risk of harm which was foreseeable and not insignificant, a reasonable person in the defendant's position would have taken those precautions having regard to, among other relevant things, the considerations in s 5B(2) . To address the questions and considerations in s 5B , it is 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.

Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94 -
Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94 -
Wallace v Kam [2012] NSWCA 82 (13 April 2012) (Allsop P, Beazley and Basten JJA)
Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem [2009] HCA 48 ; 239 CLR 420

Bennett v Minister of Community Welfare

Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
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 -
Karatjas v Deakin University [2012] VSCA 53 (28 March 2012) (Nettle and Hansen JJA and Kyrou AJA)

52. That does not appear to be the way, however, in which the High Court, including Hayne and Heydon JJ, approached the problem in the later case of *Adeels Palace Pty Ltd v Moubara.* [47] I n *Adeels* , their Honours stressed the importance of recognising that the duty alleged in *Modbu ry Triangle* was said to be founded only on the defendant's position as occupier of the land controlling the physical state of the land, and that what was said in *Modbury Triangle* must be understood as responding to those arguments. As *Adeels* shows, it is different where there are considerations which set a case apart from *Modbury Triangle* . [48]

Karatjas v Deakin University [2012] VSCA 53 (28 March 2012) (Nettle and Hansen JJA and Kyrou AJA)

53. I approach this case accordingly. As it seems to me, there are four important considerations which set this case apart from *Modbury Triangle* . [49] First and foremost, the complaint in this case is not that Deakin as occupier of the campus failed to provide lights adequate to deter an attack on an entrant to the campus. It is that Deakin, as the party who retained Spotless to run the cafeteria on Deakin's campus for the benefit of Deakin, and retained control over that part of the work place encompassed in the pathway to and from the car-park which it encouraged Spotless employees to use, provided an unsafe system of work by requiring or at least encouraging Mrs Karatjas to park her car where she did and then closing off the safe blue path to and from that car-park.

via

[49] Cf *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 436–7 [25] .

Karatjas v Deakin University [2012] VSCA 53 (28 March 2012) (Nettle and Hansen JJA and Kyrou AJA)

56. Finally, unlike *Modbury Triangle* where recognition of the duty contended for would have subjected the occupier to an obligation not previously known to law, for Deakin to comply with a duty to take reasonable care to guard Mrs Karatjas against the risk of attack would have required Deakin to do no more than comply with the obligations to which it was

already subject under s 26 of the *Occupational Health and Safety Act 2004* , to ensure so far as reasonably practicable that Mrs Karatjas's means of entering and leaving her workplace on the campus were safe and without risks to health. [51]

via

[51] Cf *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 436–7 [25] .

Karatjas v Deakin University [2012] VSCA 53 -
Karatjas v Deakin University [2012] VSCA 53 -
Karatjas v Deakin University [2012] VSCA 53 -
Karatjas v Deakin University [2012] VSCA 53 -
Karatjas v Deakin University [2012] VSCA 53 -
Novakovic v Stekovic [2012] NSWCA 54 -
Strong v Woolworths Ltd [2012] HCA 5 -
Strong v Woolworths Ltd [2012] HCA 5 -
Strong v Woolworths Ltd [2012] HCA 5 -
Ridolfi v Hammond [2012] NSWCA 3 (23 February 2012) (Beazley and Campbell JJA, Sackville AJA)

85. In *Varga v Galea* [2011] NSWCA 76, McColl JA (with whom Beazley JA and Handley AJA agreed) observed (at [9]) that s 5D(1) requires:

"the application of the 'but for' test of causation: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45]). The statutory content of s 5D , and the extent of any continuity with the common law, awaits judicial elucidation: *Zanner v Zanner* [2010] NSWCA 343 (at [11]) per Allsop P (Young JA agreeing). At common law, causation is a question of fact, to be approached in a commonsense manner, in which the 'but for' test plays an important role: *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 (at 5 l5 - 546) per Mason CJ (Toohey and Gaudron JJ agreeing)."

Independent Supervening Incapacity

Amaca Pty Ltd v Booth [2011] HCA 53 -
Miskovic v Stryke Corporation Pty Ltd t/as KSS Security [2011] NSWCA 369 -
Miskovic v Stryke Corporation Pty Ltd t/as KSS Security [2011] NSWCA 369 -
Price v State of New South Wales [2011] NSWCA 341 -
Cregan Hotel Management Pty Ltd v Hadaway [2011] NSWCA 338 -
Cregan Hotel Management Pty Ltd v Hadaway [2011] NSWCA 338 -
Lym International Pty Ltd v Marcolongo [2011] NSWCA 303 -
Harmer v Hare [2011] NSWCA 229 (11 August 2011) (Beazley and Whealy JJA, Sackville AJA)
Adeel's Palace Pty Ltd v Moubarak (2009) 239 CLR 420 at [13]
Imbree v McNeilly

Harmer v Hare [2011] NSWCA 229 (11 August 2011) (Beazley and Whealy JJA, Sackville AJA)

194. The proceedings were governed by the **Civil Liability Act 2002** . Section 5B of the Act has been described as "misleading", in that it is headed "Duty of Care" (see **Adeel's Palace Pty Ltd v Moubarak** (2009) 239 CLR 420 at [13]). Clearly the section deals with breach, rather than duty. The **Ipp Report** [1] did not recommend any alteration to the common law concepts governing questions as to when and in what circumstances a duty of care arose. The Report simply stated:-

7.4 So far as concerns the duty of care in the tort of negligence, the basic principle is that a person owes a duty of care to another if the person can reasonably be expected to have foreseen that if they did not take care, the other

would suffer personal injury or death. Foreseeability is also relevant to standard of care (that is, to the question of whether a duty of care has been breached) and to remoteness of damage.

Evans v Queanbeyan City Council [2011] NSWCA 230 -
Jovanovski v Billbergia Pty Ltd [2011] NSWCA 135 (02 June 2011) (Giles, Hodgson and Macfarlan JJA)

15. Causation was to be addressed according to the principles in s 5D of the *Civil Liability Act 2002* . With particular reference to *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420, from which he correctly took that the appellant "does not succeed merely by showing that particular conduct might have deterred or prevented the harm" (at [78]), the nub of his Honour's decision was -

> "82 ... *Adeels* makes clear that where the issue of causation is governed by s 5D br eaches such as those that I have found, cannot be regarded as a necessary condition of the occurrence of the harm for the purposes of s 5D(1) . The matter can be put no higher than that the appropriate warning might have deterred or prevented the occurrence which caused the injury to the Plaintiff.
>
> 83 Further, I cannot be satisfied on the balance of probabilities that a warning coupled with a threat of dismissal would be more likely than not to have deterred the perpetrator from further acts of grease smearing or the like. There is only evidence to infer that truck drivers on the site were likely to have been earning $1400 per week net. There is no evidence of what other persons on the site may have been earning. In any event, the majority of drivers were not direct employees of the Defendant, and dismissal from this site and termination of any sub-contracting arrangement with the Defendant may not have had the same implications for sub-contracting drivers as would have been the position for direct employees. There are simply too many possibilities involved to enable a view to be reached on the balance of probabilities in favour of the causal connection."

Jovanovski v Billbergia Pty Ltd [2011] NSWCA 135 -
Jovanovski v Billbergia Pty Ltd [2011] NSWCA 135 -
Jovanovski v Billbergia Pty Ltd [2011] NSWCA 135 -
Reed v Warburton [2011] NSWCA 98 -
Reed v Warburton [2011] NSWCA 98 -
Varga v Galea [2011] NSWCA 76 -
Varga v Galea [2011] NSWCA 76 -
Wilson v Nilepac Pty Ltd [2011] NSWCA 63 (24 March 2011) (Beazley, Tobias and Whealy JJA)

144. **WHEALY JA:** I have had the advantage of reading the draft decision of Tobias JA. I have ultimately concluded that the primary judge erred in relation to the finding on breach of duty and, for that reason, I agree with the order proposed by Tobias JA. I also agree with Tobias JA in relation to the causation issue argument arising from the decision of the High Court in **Adeels Palace Pty Ltd v Moubarak** (2009) 239 CLR 420 . I would like, however, to make some observations of my own in relation to the evidence on the breach of duty issue.

Wilson v Nilepac Pty Ltd [2011] NSWCA 63 (24 March 2011) (Beazley, Tobias and Whealy JJA)

Adeels Palace Pty Ltd v Mourbarak [2009] HCA 48; (2009) 239 CLR 420 ; *Zanner v Zanner* [2010] NSWCA 343 considered.

Wilson v Nilepac Pty Ltd [2011] NSWCA 63 -
Wilson v Nilepac Pty Ltd [2011] NSWCA 63 -
Zanner v Zanner [2010] NSWCA 343 (15 December 2010) (Allsop P, Tobias and Young JJA)

10 In *Adeels Palace* , the Court (French CJ, Gummow, Hayne, Heydon and Crennan JJ), in joint reasons, said at 440 [44] that it was not necessary to examine whether the approach under s 5D mig ht lead to a different result than that reached by applying *March v Stramare*. There was no further discussion of that question. The appeal turned on questions of fact applying the "but for" test. Nor did the Court discuss s 5D(2) .

Zanner v Zanner [2010] NSWCA 343 (15 December 2010) (Allsop P, Tobias and Young JJA)

9 Many, but not all, of these cases were before *Tambree* and *Adeels Palace* in the High Court.

Zanner v Zanner [2010] NSWCA 343 (15 December 2010) (Allsop P, Tobias and Young JJA)

2 From the terms of the Act , there can be no doubt that s 5D must be followed in resolving questions of causation in cases to which the Act applies: *Travel Compensation Fund v Tambree t/as Tambree and Associates* [2005] HCA 69; 224 CLR 627 at 642-643 [45] (per Gummow and Hayne JJ); and *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48; 239 CLR 420 at 440 [44] (per French CJ, Gummow, Hayne, Heydon and Crennan JJ).

Zanner v Zanner [2010] NSWCA 343 -
Zanner v Zanner [2010] NSWCA 343 -
Zanner v Zanner [2010] NSWCA 343 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 (10 December 2010) (Beazley, Giles and Basten JJA)

Adeels Palace Pty Ltd v Moubarak [2009] HCA 48; 239 CLR 420 ; *Amaca Pty Ltd v Ellis* [2010] HCA 5; 240 CLR 111; *Tabet v Gett* [2010] HCA 12; 240 CLR 537 distinguished.

Amaba Pty Ltd v Booth [2010] NSWCA 344 (10 December 2010) (Beazley, Giles and Basten JJA)
[Adeels Palace Pty Ltd v Moubarak] [2009] HCA 48; 239 CLR 420
[Amaca Pty Ltd v Ellis]

Amaba Pty Ltd v Booth [2010] NSWCA 344 (10 December 2010) (Beazley, Giles and Basten JJA)

93. It is convenient to address next what may be seen as a consequential argument, namely that if all exposure has a cumulative effect, a claimant cannot succeed unless he or she demonstrates that the particular exposure resulting from the tort of the defendant is one without which, the injury would not have occurred. The legal requirement to apply such a test was said to be "reaffirmed" in three recent decisions of the High Court, namely *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 ; *Amaca Pty Ltd v Ellis* [2010] HCA 5; 240 CLR 111 and *Tabet v Gett* [2010] HCA 12; 240 CLR 537.

Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales [2010] NSWCA 328 (09 December 2010) (Giles and McColl JJA, Sackville AJA)

110 The "necessary condition" test in s 5D(1)(a) takes up the "but for" test developed in the common law, there operating as a "negative criterion of causation" whereby if it could not be concluded on the balance of probabilities that the harm would not have happened but for the negligence, then it could not be concluded that the harm was caused by the negligence: *March v E & M H Stramare Pty Ltd* at 515-6 ; *CAL (No 14) Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47; (2009) 239 CLR 390 at [14] . As was said in *Adeels Palace Pty Ltd v Moubarak* at [55] -

> " ... as s 5D(1) shows, the 'but for' test is now to be (and has hitherto been seen to be) a *necessary* test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2) ."

Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales [2010] NSWCA 328 -
Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales [2010] NSWCA 328 -
Woolworths Ltd v Strong [2010] NSWCA 282 (02 November 2010) (Campbell JA, Handley AJA and Harrison J)
Adeels Palace Pty Ltd v Moubarak [2009] HCA 48; (2009) 239 CLR 420
Astley v Austrust Ltd

Woolworths Ltd v Strong [2010] NSWCA 282 -
Laresu Pty Ltd v Clark [2010] NSWCA 180 (04 August 2010) (Tobias and Macfarlan JJA, Handley AJA)

> 42 In cases to which the *Civil Liability Act* applies, it is in my view important that a trial judge refers to its provisions to ensure that he or she adheres to it in his or her reasoning and that such adherence is apparent to an appellate court. Nevertheless I do not consider that the absence of such a reference in a judge's decision is sufficient on its own to establish that such a decision is erroneous. It will suffice in my opinion if it is apparent that the judge has addressed and determined the issues that the *Civil Liability Act* requires be addressed and determined. This view is consistent with the approach of this Court in *Doubleday v Kelly* [2005] NSWCA 151 (at [15]) and *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd* (at [444] – [445]). The observation in *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 that "[t]he absence of consideration at trial of the matters prescribed by s 5B of the *Civil Liability Act* may have been reason enough to conclude that the question of breach of duty was not determined by the trial judge" (at [39]) does not suggest that a contrary conclusion is required, as it was directed to the absence of consideration of the matters prescribed by s 5B , and not to the absence of express reference to that section, as being a potentially vitiating factor in a trial judge's decision.

Laresu Pty Ltd v Clark [2010] NSWCA 180 -
Shaw v Thomas [2010] NSWCA 169 -
Shaw v Thomas [2010] NSWCA 169 -
Council of the City of Greater Taree v Wells [2010] NSWCA 147 (01 July 2010) (Beazley, McColl and Basten JJA)

> 35 In *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48 the High Court, at [11] , warned that if attention was not directed to the *Civil Liability Act* first, there was a serious risk that "*inquiries about duty, breach and causation would miscarry*".

Did the appellant owe the respondent a duty of care?

Council of the City of Greater Taree v Wells [2010] NSWCA 147 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 (19 February 2010) (Pullin JA, Buss JA, Newnes JA)

> 91. The question of causation in cases where an entrant or lessee claims damages in negligence for personal injury against an occupier or a lessor of residential premises is governed by the CLA. See ***Adeels*** [41] .

Department of Housing and Works v Smith [No 2] [2010] WASCA 25 (19 February 2010) (Pullin JA, Buss JA, Newnes JA)

73. In ***Adeels Palace Pty Ltd v Moubarak*** [2009] HCA 48; (2009) 260 ALR 628 , the High Court held, relevantly, that the appellant, who carried on a reception and restaurant business at premises that were licensed under the *Liquor Act 1982* (NSW) , owed each of the respondents, who were patrons of the business, a duty to take reasonable care to prevent injury to them from the violent, quarrelsome or disorderly conduct of other persons on the premises.

Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Department of Housing and Works v Smith [No 2] [2010] WASCA 25 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 (12 November 2009) (Ipp, McColl and Basten JJA)

143. In *Adeels Palace* (at [43] – [44]), the High Court (French CJ, Gummow, Hayne, Heydon and Crennan JJ) observed that dividing the determination of the question whether negligence caused particular harm into the two s 5D(1) questions expressed "the relevant questions in a way that may differ from what was said by Mason CJ, in *March v Stramare* to be the common law's approach to causation". Their Honours found it unnecessary to examine to what extent the *March v Stramare (E & M H) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 approach might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1) , emphasising that where s 5D was engaged, its provisions must be applied.

Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 (12 November 2009) (Ipp, McColl and Basten JJA)
Adeels Palace Pty Ltd v Moubarak [2009] HCA 48

Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 -
Adeels Palace Pty Ltd v Moubarak [2009] NSWCA 29 -