CASE EXTRACT

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

ROADS AND TRAFFIC AUTHORITY
OF NSW APPELLANT

AND

PHILIP JAMES DEDERER & ANOR RESPONDENTS

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

ORDER

1. Appeal allowed.

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

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

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

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

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

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

On appeal from the Supreme Court of New South Wales

Representation

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

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

Submitting appearance for the second respondent

CATCHWORDS

Roads and Traffic Authority of NSW v Dederer

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

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

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

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

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

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

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

17 GUMMOW J. In *Berrigan Shire Council v Ballerini*[1], Callaway JA remarked that "[t]he relationship between duty and breach in the law of negligence is causing more perplexity than it used to do". This appeal bears out the force of that statement.

18 The errors of which the appellant rightly complains, regarding both the reasons of the trial judge and those of the New South Wales Court of Appeal, did not turn on factual matters upon which reasonable minds might differ. Rather, they concerned the misapplication of basic and settled matters of legal principle. These principles may be restated shortly. First, the proper resolution of an action in negligence depends on the existence and scope of the relevant duty of care. Secondly, whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct. Thirdly, the assessment of breach depends on the correct identification of the relevant risk of injury. Fourthly, breach must be assessed prospectively and not retrospectively. Fifthly, such an assessment of breach must be made in the manner described by Mason J in *Wyong Shire Council v Shirt*[2].

The facts

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

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

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

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1 (2005) 13 VR 111 at 115.

2 (1980) 146 CLR 40 at 47-48.

22 The bridge was built in 1959 by the Department of Main Roads, the predecessor of the RTA. The RTA became the universal successor of that Department and the Commissioner for Main Roads pursuant to the *Transport Administration Act* 1988 (NSW), Sched 7 Div 5, and now exercises the powers and functions set out in Pt 6 of that Act. Pursuant to s 7(4) of the *Roads Act* 1993 (NSW), the Council was the relevant "roads authority" within the meaning of that statute. The extent of the obligations of such a "roads authority" was recently considered by this Court in *Leichhardt Municipal Council v Montgomery*[3].

23 The interplay between the statutory functions of the Council and the RTA with respect to the bridge was not fully considered at trial or in the Court of Appeal. It was concluded, however, that the RTA was responsible for the erection and maintenance of the bridge and that the Council was responsible for the day to day management of the bridge including, among other things, the enforcement of the prohibition contained in the various pictograms and signs. Each entity thus answered the common law description of a roads authority, namely, as Dixon J put it, "an authority exercising powers for the construction, maintenance, repair and control of highways"[4].

24 There was ample evidence that diving and jumping from the Forster-Tuncurry bridge was a widespread and longstanding practice among young people, although the precise frequency and extent of this practice was disputed in this Court. Be that as it may, there was no dispute that until the accident that befell the first respondent, Mr Dederer, there were no reported injuries to those who jumped or dived from the bridge.

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

26 On 31 December 1998, Mr Dederer was rendered partially paraplegic after he dived from the bridge into shallow water and struck his head on the estuary bed. Mr Dederer was then aged 14. He climbed onto the railing of the bridge and although he originally intended to jump into the water he changed his mind

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3 (2007) 81 ALJR 686; 233 ALR 200.

4 *Buckle v Bayswater Road Board* (1936) 57 CLR 259 at 286.

and dived head first instead. Mr Dederer and his family were familiar with the area, and he had seen many other young people jump or dive from the bridge. He had done so himself on the previous day without any harm. He admitted that he saw and understood the signs forbidding diving and climbing, and that he knew that the sandbar moved and that the channels were of variable depth.

The decision at trial

27 At trial in the Supreme Court of New South Wales (Dunford J sitting without a jury) Mr Dederer succeeded against both the RTA and the Council. His Honour found that Mr Dederer saw, understood, and deliberately disregarded the "no diving" pictograms, and that he knew that the water was of variable depth and that jumping from heights could cause injury. Nonetheless, Dunford J placed great emphasis on the fact that many people jumped or dived from the bridge both before and after the then current signs prohibiting diving were erected in 1995. He said[5]:

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

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5 (2005) Aust Torts Reports ¶81-792 at 67,528-67,529.

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

> "not sufficient to ignore the fact that the signs were being disregarded and it is necessary to consider what, if any, further steps should reasonably have been taken by way of further warning signs, modification of the bridge or otherwise, to prevent injury to persons such as the plaintiff; or to put it another way, the content of the duty of care"[6].

29 His Honour held that the RTA breached its duty of care and was negligent in failing to erect a "warning sign containing words similar to 'Danger, shifting sands, variable depth'"; in failing to replace the existing handrail with one composed of vertical (not horizontal) members like "a 'pool' type fence"; and in failing to modify the flat top of the handrail by attaching to it a triangular strip "making it difficult and uncomfortable to stand on, and almost impossible to balance on before jumping or diving"[7]. The evidence upon which the trial judge came to his conclusions respecting breach will require some explanation later in these reasons.

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

The decision of the Court of Appeal

31 An appeal by the Council was allowed on the basis that it was not liable to Mr Dederer because his injuries were "a result of the materialisation of an obvious risk of a dangerous recreational activity" within the meaning of s 5L of the *Civil Liability Act* 2002 (NSW)[8]. That Act did not apply to Mr Dederer's action against the RTA. The Council was joined as second respondent in this Court but played no active part in the appeal.

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

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6 (2005) Aust Torts Reports ¶81-792 at 67,529.

7 (2005) Aust Torts Reports ¶81-792 at 67,531.

8 (2006) Aust Torts Reports ¶81-860 at 68,891-68,895.

33 The Court of Appeal rejected the RTA's ground of appeal relating to the trial judge's finding that it knew of the continued jumping and diving from the bridge[9]. In any event, Ipp JA held that:

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

34 Tobias JA, who agreed with Ipp JA's disposition of the appeal, endorsed these remarks and added that[11]:

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

35 For the majority in the Court of Appeal, it was of central importance that the risk was one "created" by the RTA itself through its statutory predecessor. Ipp JA stated that[12]:

> "In the present case the RTA is to be regarded as having created the danger by erecting the bridge and by constructing it in a position and configuration that, since its construction, attracted young people to jump and dive from it into the water some nine to ten metres below. In a

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9 (2006) Aust Torts Reports ¶81-860 at 68,899.

10 (2006) Aust Torts Reports ¶81-860 at 68,900.

11 (2006) Aust Torts Reports ¶81-860 at 68,918.

12 (2006) Aust Torts Reports ¶81-860 at 68,908-68,909. See also at 68,896, 68,901, 68,903.

material sense, in the present context, *creating* the risk of harm is at least equivalent to *increasing* the risk." (emphasis in original)

Tobias JA agreed, saying that[13]:

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

36 Their Honours then fixed upon the fact that the "no diving" signs had not in fact prevented young people from diving from the bridge. Ipp JA stated[14]:

"There have been many decisions, including decisions of the High Court, holding that the erection of prohibitory signs is sufficient to discharge the duty of care owed by an entity in control of land on which dangerous activities may be undertaken by members of the public. But, breach of a duty of care is a question of fact, and each case depends on its own circumstances. In the present case, the signs that were erected (and that includes the signs prohibiting climbing on the bridge as well as the pictographs) were not serving the purpose for which they had been erected. They were being ignored and the practice was continuing unabated. This was common knowledge. Mr Alexander referred to it as a 'well known event' and Mr [Pevitt] and the police had found enforcement of the prohibitions displayed on the sign impossible.

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

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

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13 (2006) Aust Torts Reports ¶81-860 at 68,920-68,921.

14 (2006) Aust Torts Reports ¶81-860 at 68,900.

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

His Honour amplified this conclusion under the heading "The reasonableness of the RTA's response to the risk"[15]:

> "The obvious risks involved in jumping and diving off the bridge were not a deterrent. Many of the visitors to the bridge were children and young people. The RTA could not assume that these persons would take reasonable care for their own safety. Experience over many years had shown that, in large numbers, this was not what they were doing.
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> …
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> In my opinion, the RTA was not entitled to rely solely on the signs once it became apparent that they were not serving their purpose and were not having any noticeable effect on persons jumping or diving off the bridge."

37 The result in the Court of Appeal was that the trial judge was correct to hold that "by the time Mr Dederer was injured … the erection of the signs was no longer a reasonable response to the risk that the RTA had created"[16].

38 Tobias JA held that it was not reasonable for the RTA "to simply ignore what it clearly knew to be a dangerous activity in which children were partaking and who could be expected to be oblivious to the risks involved"[17]. This statement sits rather oddly with the Court of Appeal's finding that the risk was of such obviousness even to a 14 year old that the Council was absolved of all liability.

39 The majority thus upheld the trial judge's ruling that the RTA was negligent in failing to attach a triangular top to the handrail and in failing to install vertical pool-type fencing[18]. Although the Court of Appeal correctly considered, contrary to the trial judge, that a sign of prohibition did constitute a "warning", the majority regarded a "mere" sign of prohibition to be unreasonable

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15 (2006) Aust Torts Reports ¶81-860 at 68,900, 68,902.

16 (2006) Aust Torts Reports ¶81-860 at 68,903.

17 (2006) Aust Torts Reports ¶81-860 at 68,921.

18 (2006) Aust Torts Reports ¶81-860 at 68,905-68,906.

in the circumstances. However, their Honours considered the trial judge's proposed sign would have been similarly ineffective because "Mr Dederer in fact knew that there were shifting sands and variable depths and this did not prevent him from diving"[19]. Instead, their Honours found that a "composite sign" conveying the danger of "shallow water" would have been a reasonable response[20]. This conclusion was at odds with the trial judge's undisturbed finding that it was "probable that [such a] sign would also have been ignored, just as the 'diving prohibited' sign was ignored"[21].

40 Handley JA dissented. His Honour found that the trial judge had been in error in attributing to the RTA knowledge of continued *diving* from the bridge, as distinct from jumping therefrom, and that "[t]he absence of any recorded injury over the 39 years before the plaintiff's accident is eloquent testimony to the fact that the common practice of jumping off the bridge was not unsafe"[22]. His Honour added that "[i]f this was an accident waiting to happen it had been waiting for a very long time"[23]. So far as the exercise of reasonable care was concerned, his Honour summarised his views as follows[24]:

> "The signs proposed would not have told the plaintiff anything he did not already know, a triangular section on the handrail would not have discouraged the plaintiff from diving off the ledge, and a pool type handrail would not have stopped him getting onto the ledge."

As his Honour pointed out, Mr Dederer did not give direct evidence about whether any of these matters would have caused him not to dive. A finding of causation in his favour was, at best, a matter of inference[25].

41 Handley JA concluded that, in light of the State-wide obligations of the RTA and in light of Mr Dederer's voluntary participation in a recreational activity involving inherent risk, "the foreseeable risk of a diving accident from

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19 (2006) Aust Torts Reports ¶81-860 at 68,904.

20 (2006) Aust Torts Reports ¶81-860 at 68,905.

21 (2005) Aust Torts Reports ¶81-792 at 67,530.

22 (2006) Aust Torts Reports ¶81-860 at 68,876.

23 (2006) Aust Torts Reports ¶81-860 at 68,876.

24 (2006) Aust Torts Reports ¶81-860 at 68,880.

25 (2006) Aust Torts Reports ¶81-860 at 68,880.

this bridge with a 39 year accident free history had no reasonable claim on [the RTA's] further attention or resources"[26].

The appeal to this Court

42 The appeal by the RTA to this Court should be allowed. Unlike many recent appeals to this Court in negligence cases, the resolution of this appeal does not require consideration of factual matters regarding breach, upon which reasonable minds may differ[27]. Nor, despite submissions by the RTA, was the error of the Court of Appeal to be found in discrete and perhaps peripheral disputes of fact. Rather, the errors on the part of the majority of the Court of Appeal lay in fundamental matters of law: matters against which concurrent findings of fact are no insulation.

The scope of the RTA's duty of care

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

44 Regarding the first point, a duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs). Sometimes, the determination of that legal obligation is more complicated than it was at the time Lord Atkin announced his "neighbour" principle in 1932[28]. The law now recognises types of loss and kinds of relationships which are different from those of earlier days. Five members of this Court observed in their joint judgment in *Sullivan v Moody*[29]:

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26 (2006) Aust Torts Reports ¶81-860 at 68,881-68,882.

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

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

29 (2001) 207 CLR 562 at 579-580 [50] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

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

45 Many of those matters were canvassed in *Brodie v Singleton Shire Council*[30]. The result of that case is that a road authority is obliged to exercise reasonable care so that the road is safe "for users exercising reasonable care for their own safety"[31]. The expression of the scope of the RTA's duty of care in those terms has long antecedents in the law relating to occupiers' liability. In *Indermaur v Dames*, giving the judgment of the Court of Common Pleas[32], Willes J held that[33]:

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

The modern form of that principle has been frequently affirmed in recent times, both with regard to occupiers and roads authorities[34]. Of course, the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every

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30 (2001) 206 CLR 512.

31 (2001) 206 CLR 512 at 581 [163].

32 Erle CJ, Willes, Keating and Montague Smith JJ.

33 (1866) LR 1 CP 274 at 288.

34 Examples include *Phillis v Daly* (1988) 15 NSWLR 65 at 74; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 478 [123]; *Neindorf v Junkovic* (2005) 80 ALJR 341 at 362 [99]; 222 ALR 631 at 656-657.

case[35], but in the present case it was also a specific element contained, as a matter of law, in the scope of the RTA's duty of care.

46 A road authority such as the RTA is not obliged to exercise reasonable care in the abstract; still less is it obliged to ensure that a road be safe in all the circumstances. So much was recently reaffirmed in *Leichhardt Municipal Council v Montgomery*[36]. Such an expression of the duty's scope has an obvious and direct consequence when assessing breach. As Gaudron, McHugh and Gummow JJ stated in *Brodie*[37]:

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

Their Honours went on to observe that persons exercising reasonable care will be able to avoid injury in some situations, whereas others will present "a foreseeable risk of harm even to persons taking reasonable care for their own safety"[38].

47 The RTA's duty of care was owed to all users of the bridge, whether or not they took ordinary care for their own safety; the RTA did not cease to owe Mr Dederer a duty of care merely because of his own voluntary and obviously dangerous conduct in diving from the bridge. However, the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road is safe "for users exercising reasonable care for their own safety"[39]. The essential point is that the RTA did not owe a more stringent obligation towards careless road users as compared with careful ones. In each case, the same obligation of reasonable care was owed, and the extent of that obligation was to be measured against a duty whose scope took into account the exercise of reasonable care by road users themselves.

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

36 (2007) 81 ALJR 686; 233 ALR 200.

37 (2001) 206 CLR 512 at 580 [160].

38 (2001) 206 CLR 512 at 581 [163].

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

48 In the Court of Appeal[40], Ipp JA referred to and adopted remarks he made in the earlier case of *Edson v Roads and Traffic Authority*[41], in which the plaintiff and many others exercised an obvious disregard for their own safety when they crossed a busy highway on foot. After referring to the passage from *Brodie* set out above, his Honour remarked that[42]:

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

In the present case, his Honour concluded that "the 'factual underpinning' was also absent"[43]. This was in error, as the expectation of reasonable care was not merely a "factual underpinning", but rather a legal aspect of the scope of the duty owed by the RTA.

Reasonable care, not prevention

49 In simple and complicated cases alike, one thing is fundamental: while duties of care may vary in content or scope, they are all to be discharged by the exercise of *reasonable* care. In *Vairy v Wyong Shire Council*, McHugh J explained[44]:

> "[T]he duty in negligence is generally described as a duty to take reasonable care. In some areas of the law of negligence, however, the duty is expressed in more limited and specific terms. Until the decision of this Court in *Zaluzna*[45], for example, the duty owed to entrants upon privately owned land varied according to the category of the entrants. They were classified as invitees, licensees and trespassers. Similarly, the duty in respect of negligent statements is more specific and limited than a

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40 (2006) Aust Torts Reports ¶81-860 at 68,901.

41 (2006) 65 NSWLR 453.

42 (2006) 65 NSWLR 453 at 468.

43 (2006) Aust Torts Reports ¶81-860 at 68,901.

44 (2005) 223 CLR 422 at 432 [25].

45 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

> simple duty to take reasonable care in all the circumstances of the case. In negligence cases involving physical injury, however, the duty is always expressed in terms of reasonable care. As Prosser and Keeton have pointed out, 'the duty is always the same – to conform to the legal standard of reasonable conduct in the light of the apparent risk'[46]."

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

50 Leaving aside matters such as vicarious liability and the potential existence of non-delegable duties of care – neither of which are presently relevant – the exercise of reasonable care is always sufficient to exculpate a defendant in an action in negligence. In *Blyth v Birmingham Waterworks*, Alderson B laid down the nature of the action as long ago as 1856[47]:

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

Blyth was a case in which the exercise of reasonable care was sufficient to exonerate the defendants notwithstanding the plaintiff's injuries. However, the standard of reasonable care also results in the inculpation, rather than exoneration, of defendants. In the earlier case of *Vaughan v Menlove*, Tindal CJ was able to say that[48]:

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

It was therefore insufficient, in the judgment of his Lordship, that the defendant had acted "honestly and bonâ fide to the best of his own judgment"[49].

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

47 (1856) 11 Exch 781 at 784 [156 ER 1047 at 1049].

48 (1837) 3 Bing (NC) 468 at 475 [132 ER 490 at 493].

49 (1837) 3 Bing (NC) 468 at 474 [132 ER 490 at 493].

51 Such an obligation to exercise reasonable care must be contrasted with an obligation to prevent harm occurring to others. The former, not the latter, is the requirement of the law. In *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[50], Gleeson CJ pointed to the remarks of Brennan J in *Sutherland Shire Council v Heyman*[51] and observed that "the common law distinguishes between an act affecting another person, and an omission to prevent harm to another. If people were under a legal duty to prevent foreseeable harm to others, the burden imposed would be intolerable." In *Heyman*[52], Brennan J had emphasised that the common law recognises "a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to another by that other, by a third person, or by circumstances for which nobody is responsible".

52 That recognition can be seen in the recent rejection by this Court in *Montgomery*[53] of the existence of a non-delegable duty of care owed by roads authorities to road users. Whatever its content, the existence of such a non-delegable duty was inconsistent with the general obligation of reasonable care owed by roads authorities to the users of roads, including pedestrians. Gleeson CJ observed in *Montgomery*[54]:

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

Likewise, as Hayne J succinctly put it, "the test for determining a highway authority's liability … [is] the ordinary test of liability in negligence"[55].

53 The RTA correctly complains that this orthodox approach was not applied at trial or in the Court of Appeal. The trial judge and the majority in the Court of Appeal each fixed on the failure of the "no diving" pictograms and "no climbing" signs to *prevent* diving or jumping from the bridge. The trial judge was

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50 (2000) 205 CLR 254 at 266 [28].

51 (1985) 157 CLR 424.

52 (1985) 157 CLR 424 at 478.

53 (2007) 81 ALJR 686; 233 ALR 200.

54 (2007) 81 ALJR 686 at 695 [26]; 233 ALR 200 at 209.

55 (2007) 81 ALJR 686 at 719 [148]; 233 ALR 200 at 241.

"satisfied" that the signs "were *not effective* in the sense that large numbers of young people continued to jump, dive, do somersaults, etc from the bridge into the water", and his Honour found it "not sufficient to ignore the fact that the signs were being disregarded"[56]. In the Court of Appeal, Ipp JA reasoned that the signs "were not serving the purpose for which they had been erected"; that is, they "were not *preventing* children and young adults from endangering themselves in relatively large numbers on what seems to have been a daily basis over the summer months" and they were being "ignored and the practice was continuing unabated"[57]. Tobias JA asked whether the "known fact" of continued jumping called "for different measures to be adopted by the RTA to *prevent* the practice at least of jumping off the bridge". His Honour concluded that it was unreasonable "to ignore the well-known practice of children jumping from the bridge in defiance of 'No Diving' signs"[58].

54 The error in that approach lies in confusing the question of whether the RTA failed to prevent the risk-taking conduct with the separate question of whether it exercised reasonable care. If the RTA exercised reasonable care, it would not be liable even if the risk-taking conduct continued. If the contrary were true, then defendants would be liable in any case in which a plaintiff ignored a warning or prohibition sign and engaged in the conduct the subject of the warning. Whether or not other persons engaged in that conduct, such a defendant would *ipso facto* have failed to prevent at least the plaintiff from engaging in it. If this quasi-automatic form of liability represented the true state of the law, it would be startlingly at odds with the general proposition that liability in tort depends upon proof of fault through the intentional or negligent infliction of harm[59]. More particularly, it would also be at odds with the decision in *Montgomery* that roads authorities owe only a duty to take reasonable care, and do not owe a more stringent or non-delegable duty.

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

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56 (2005) Aust Torts Reports ¶81-792 at 67,527, 67,529 (emphasis added).

57 (2006) Aust Torts Reports ¶81-860 at 68,900 (emphasis added).

58 (2006) Aust Torts Reports ¶81-860 at 68,919, 68,920 (emphasis added).

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

56 Even reasonable warnings can "fail", but the question is always the reasonableness of the warning, not its failure. Ipp JA's statement, based on a reference to another case[60], to the effect that a warning sign is "not an automatic, absolute and permanent panacea"[61] was no substitute for a proper assessment of reasonableness. Whether or not the passage referred to by his Honour did in fact bear the meaning attributed to it by him, the words of Windeyer J in *Teubner v Humble* are apposite[62]:

> "[D]ecisions on the facts of one case do not really aid the determination of another case. Observations made by judges in the course of deciding issues of fact ought not to be treated as laying down rules of law. Reports should not be ransacked and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application … That would lead to the substitution of a number of rigid and particular criteria for the essentially flexible and general concept of negligence."

57 What is demonstrated here is a by-product of the common law technique which looks to precedent and operates analogically as a means of accommodating certainty and flexibility in the law. Equity, by contrast, involves the application of doctrines themselves sufficiently comprehensive to meet novel cases. The question of a plaintiff "what is your equity?"[63] thus has no common law counterpart.

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

The proper identification of the risk

59 Even if the trial judge and the Court of Appeal had properly ascertained the scope of the RTA's duty of care, and had accurately discerned that its obligation extended only to the exercise of reasonable care, their Honours would still have been led into error if they did not accurately identify the actual risk of injury faced by Mr Dederer. It is only through the correct identification of the

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60 *Waverley Council v Lodge* (2001) 117 LGERA 447 at 459.

61 (2006) Aust Torts Reports ¶81-860 at 68,903.

62 (1963) 108 CLR 491 at 503.

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

risk that one can assess what a reasonable response to that risk would be. In this, too, the majority in the Court of Appeal erred.

60 In the Court of Appeal, the risk faced by Mr Dederer was characterised by the majority as being "serious spinal injury flowing from the act of diving off the bridge"[64]. That risk, it was said, was one created by the RTA through the erection of the bridge by its predecessor. However, such a characterisation of the risk obscured the true source of potential injury. This arose not from the state of the bridge itself, but rather from the risk of impact upon jumping into the potentially shallow water and shifting sands of the estuary. This mischaracterisation of the risk led to two consequent errors. First, the majority were distracted from a proper evaluation of the probability of that risk occurring. Secondly, they erroneously attributed to the RTA a greater control over the risk than it possessed.

61 The first error can be seen in Ipp JA's characterisation of the "startling frequency" of "large numbers" of people jumping and diving from the bridge; a practice that was "continuing unabated" notwithstanding the pictograms[65]. Such a characterisation incorrectly focused attention on the frequency of an antecedent course of conduct, namely jumping and diving, and not on the probability of the risk of injury occurring as a result of that conduct, namely impact in shallow water. As Lord Porter observed in *Bolton v Stone*, "in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of *injury being caused*" (emphasis added)[66]. In the present case, the frequency of jumping and diving was only startling if one ignored the fact that no-one was injured until Mr Dederer's unfortunate accident. Far from being a risk with a high probability of occurrence, the probability was in truth very low, and this fact was masked by the Court of Appeal's characterisation of the relevant risk.

62 Regarding the second error, by focusing on the RTA's role in constructing the bridge from which Mr Dederer dived, the majority in the Court of Appeal overlooked the limited nature of the RTA's control over the actual risk of injury faced by Mr Dederer. Ipp JA concluded that[67]:

> "The fact that a defendant actually created the structure that gave rise to the risk that materialised, and maintained the structure in a form that

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64 (2006) Aust Torts Reports ¶81-860 at 68,892.

65 (2006) Aust Torts Reports ¶81-860 at 68,900.

66 [1951] AC 850 at 858.

67 (2006) Aust Torts Reports ¶81-860 at 68,912.

> maintained the risk, has always been regarded as a matter of great importance in determining liability for negligence."

Perhaps that is so, but whatever its role in creating the bridge the RTA did not control Mr Dederer's voluntary action in diving, and nor did it create or control the natural variations in the depth of the estuary beneath the bridge. The present was not a case, for example, in which the plaintiff's injury arose because the bridge collapsed, or because the footpath was defective, or because the side handrail gave way. Nor was it a case in which the "incentives" discerned by Ipp JA were ones created by the RTA[68]. Rather, the risk arose because of the conjunction of the bridge's location and two factors outside the RTA's control: one human and the other environmental, namely Mr Dederer diving from the bridge and the natural variations of the estuary bed[69].

63 Both the RTA and Mr Dederer in this Court addressed the concept of "allurement" in their submissions. But this is a concept that is more likely to mislead than to assist. Even when the term had determinative legal significance, Barrowclough CJ was able to say in *Napier v Ryan* that the word "has been given a sanctity which I think it scarcely deserves"[70]. One can well agree with that sentiment today, especially as the former technical use of that term in occupiers' liability cases has long since been superseded by the decision in *Australian Safeway Stores Pty Ltd v Zaluzna*[71].

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

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

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

70 [1954] NZLR 1234 at 1240.

71 (1987) 162 CLR 479.

The proper assessment of breach

65 Having dealt with the relevant risk, it is appropriate to return to the inquiry into the assessment of breach. Whether reasonable care was exercised in the particular case is a question of fact going to the breach of any duty owed, not to the existence of that duty. In each case, the question of whether reasonable care was exercised is to be adjudged prospectively, and not by retrospectively asking whether the defendant's actions could have prevented the plaintiff's injury. As Hayne J stated in *Vairy*[72]:

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

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

67 What, then, was the correct approach towards assessing breach? The particular trap into which the majority of the Court of Appeal fell was that warned against by Hayne J in *Vairy*[73]:

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

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72 (2005) 223 CLR 422 at 461 [126].

73 (2005) 223 CLR 422 at 462 [128].

68 The relevant passage from the judgment of Mason J in *Shirt* should be set out yet again[74]:

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

69 The continuing authority of this passage has recently been reaffirmed by this Court in *New South Wales v Fahy*[75]. In that case, Gummow and Hayne JJ observed that[76]:

> "There may be cases when the principles stated in *Shirt* have not been applied accurately. In particular, arguments of the kind made, and rejected, in *Vairy* and in *Mulligan v Coffs Harbour City Council*[77] may suggest a misunderstanding of the so-called 'calculus' that would seek to determine questions of breach in some cases by balancing the cost of a single warning sign against the catastrophic consequences of a particular accident. But the fact, if it be so, that *Shirt* has not always been applied properly does not provide any persuasive reason to reconsider its correctness."

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74 (1980) 146 CLR 40 at 47-48.

75 (2007) 81 ALJR 1021.

76 (2007) 81 ALJR 1021 at 1038 [78].

77 (2005) 223 CLR 486.

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

70 Here, the risk of injury consequent upon jumping or diving from the bridge into water of variable depth was reasonably foreseeable. Indeed, the Court of Appeal correctly found, contrary to the trial judge, that the risk was one that was obvious even to a 14 year old boy[78], and it beggars belief that the RTA could not foresee the very conduct against which its signage warned. The RTA's evidentiary dispute about whether it did in fact know of the continued practice of diving is beside the point: reasonable foreseeability is to be determined objectively, and the present risk was plainly foreseeable on any objective standard.

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

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

The course of the evidence

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

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

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78 Mr Dederer challenged that conclusion by way of a Notice of Contention dated 14 May 2007. That challenge should be rejected for the reasons given by the Court of Appeal: (2006) Aust Torts Reports ¶81-860 at 68,892-68,895.

otherwise undermine the force of his evidence about what a reasonable response to the risk would have been.

75 The sign proposed by the trial judge was devised solely by his Honour and there was no evidence that such a sign would have been a reasonable response. The sign adopted by the Court of Appeal, a pictogram indicating "no diving, shallow water", scarcely seems reasonable in light of the trial judge's explicit finding that it would probably have been ignored as well, particularly as the large number of young persons jumping and diving without incident indicated that the water under the bridge was not generally shallow. In any event, Mr Dederer admitted that he knew about the variable depth of the estuary and the moving sandbar. A warning sign would not have told him anything he did not already know.

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

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

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

79 This was not a case in which the defendant had done nothing in response to a foreseeable risk. To the contrary, the RTA had erected signs warning of, and prohibiting, the very conduct engaged in by Mr Dederer. As this Court stated in

Nagle v Rottnest Island Authority, a prohibition is "one form of notice – perhaps the most effective form of notice – warning of the danger of diving"[79]. In the circumstances, that was a reasonable response, and the law demands no more and no less.

Conclusion

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

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

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

Orders

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

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79 (1993) 177 CLR 423 at 432. The suggestion to the contrary by the trial judge, supported by Mr Dederer in his Notice of Contention, should thus be rejected.

80 (2006) Aust Torts Reports ¶81-860 at 68,881-68,882.

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

84 Mr Dederer sued the Roads and Traffic Authority of NSW ("the RTA") and the Great Lakes Shire Council ("the Council"), claiming damages for negligence. The damages to which Mr Dederer was entitled if he succeeded in his action were agreed between the parties before trial. In the event, he succeeded against both defendants in the Supreme Court of New South Wales before Dunford J ("the primary judge"). On appeal to the Court of Appeal of New South Wales, his judgment against the Council was unanimously set aside. That Court held that the *Civil Liability Act* 2002 (NSW) relieved the Council of legal responsibility for Mr Dederer's injuries[81]. However, a majority[82] upheld Mr Dederer's entitlement to recover against the RTA in negligence. Unanimously, the Court of Appeal set aside the primary judge's conclusion that contributory negligence should be assessed at 25% and increased that figure to 50%[83]. Moreover, in a supplementary decision on costs[84], the Court of Appeal dismissed Mr Dederer's application for an order requiring the RTA to pay the Council's costs[85].

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

86 As Tobias JA acknowledged at the end of his reasons in the Court of Appeal, the competing views expressed in that Court (and now urged upon this) "contain powerful arguments in favour and against the RTA's appeal being

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

82 Ipp and Tobias JJA; Handley JA dissenting.

83 (2006) Aust Torts Reports ¶81-860 at 68,874 [1], 68,915 [323], 68,916 [325].

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

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

upheld"[86]. However, alike with his Honour, I have reached the same conclusions on the issues of negligence and contributory negligence as Ipp JA expressed in the Court of Appeal. The concurrent findings of fact relating to the negligence decision should stand. Those conclusions of the Court of Appeal contain no error of fact or law to justify disturbance by this Court. The costs order sought by Mr Dederer in the Court of Appeal should, however, be made. Otherwise, all of the orders of the Court of Appeal should be confirmed.

The facts

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

88 The bridge from which Mr Dederer dived is 632 metres long[88]. Along its northern side is a concrete walkway for pedestrians, which is about 1.5 metres wide and is bounded by a railing on the outer edge. The bridge rests on reinforced concrete piles and 47 piers. It contains two elevated curves over channels respectively at the Forster and Tuncurry ends. These channels are used by "big trawler boats, fishing boats, ski boats and jet skis" passing up and down the estuary[89]. The channel on the Forster side of the estuary flows between piers 43 and 44. However, boats also used the water passage between piers 44 and 45, closer to the Forster shore.

89 On the water side of the railing, a ledge protruded northwards near the point where Mr Dederer dived. According to the evidence, this ledge and the more elevated upper railing on the northern side of the bridge (together with a water pipe on the southern side) constituted popular platforms for children and young people to dive or jump from the bridge into the water below. As Ipp JA found[90]:

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86 (2006) Aust Torts Reports ¶81-860 at 68,923 [375].

87 (2006) Aust Torts Reports ¶81-860 at 68,884 [90].

88 (2006) Aust Torts Reports ¶81-860 at 68,883 [79].

89 (2006) Aust Torts Reports ¶81-860 at 68,883 [81].

90 (2006) Aust Torts Reports ¶81-860 at 68,884 [85].

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

90 Construction of the bridge was completed in 1959 by the then Department of Main Roads ("the DMR") of the State. The bridge was (and remains) part of New South Wales Main Road No 111. In September 1959, in accordance with the *Main Roads Act* 1924 (NSW), the Governor of the State directed the DMR to carry out maintenance of the bridge. This was done with the consent of the two Councils then concerned[91].

91 When the RTA was established, it became the statutory successor to the DMR[92]. The direction to maintain the bridge continues to apply to the RTA by virtue of later legislation[93]. By that legislation, the RTA is authorised to carry out road work, defined to include work upon any building or structure, including a bridge, constructed for the purpose of facilitating the use of the road as a road[94]. Work as a "roads authority" in relation to the bridge is shared with the Council; but work of a capital nature is the responsibility of the RTA, where necessary acting through the Council pursuant to capital grants provided to the Council by the RTA[95].

92 Mr Dederer gave evidence that, over the years of holidaying in the vicinity of Forster, he had frequently observed children and adults jumping and diving off the bridge, a sight that led him to assume that the water beneath "must be deep". He had been under the bridge from time to time in a boat. From that vantage point, he said, "the bridge looked fairly high but the water also looked very deep"[96].

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

92 *Transport Administration Act* 1988 (NSW), Sched 7, Div 5.

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

94 *Roads Act* 1993 (NSW), s 71.

95 (2006) Aust Torts Reports ¶81-860 at 68,874 [5].

96 (2006) Aust Torts Reports ¶81-860 at 68,884-68,885 [92].

93 There was no suggestion that the bridge had been built other than in accordance with the standards applicable to such constructions in 1959. Two factors, however, were advanced to support the proposition that the RTA was aware of the particular dangers involved in the manner in which the bridge, as constructed, came to be used, especially by children and young people. The first was its knowledge of the practice of such people to use the bridge (and especially the ledge and the upper railing) as a departure point from which to enter the water below (to use a neutral expression). The second was its regular testing of the depth of the water channels below the bridge (and hence in the vicinity of the point of entry into the water from the bridge). Inferentially, this was done essentially for the purpose of ensuring the safety of the boating traffic beneath the bridge. In answers to interrogatories, the RTA conceded that from 1 December 1993 it was aware that the river bed levels under the bridge were continually altering and that thereafter soundings were carried out at approximately three-monthly intervals[97].

94 *Children diving and jumping*: Whereas the Council admitted, for the purposes of the proceedings, that it was "aware of the fact persons had jumped and/or dived from the Bridge" before Mr Dederer's injury, the RTA steadfastly maintained that, although it was aware of *jumping* from the bridge, it had no notice that *diving* was also occurring. This point of distinction featured prominently in the RTA's submissions to the Court of Appeal. It was accepted by Handley JA and became an important feature of his dissenting reasons[98]. The same distinction was also pressed upon this Court. However, for reasons similar to those advanced by Ipp JA[99] and Tobias JA[100] in the Court of Appeal, the differentiation between "jumping" and "diving" is not ultimately material to, and certainly not determinative of, the RTA's liability to Mr Dederer.

95 Discovery prior to suit, and evidence otherwise given during the trial, established that for a long time, probably from soon after the bridge was opened in 1959, it came to be used by young people as a *de facto* point of entry into the water channels. Mr John Pevitt had been a ranger for the Council since 1988. He gave evidence that over the years he had seen many people jumping off the bridge, some of them doing somersaults, although he said that he had never seen anyone dive. Mr Pevitt stated that in about 1990, he had on three separate

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

98 (2006) Aust Torts Reports ¶81-860 at 68,875-68,876 [18]-[20].

99 (2006) Aust Torts Reports ¶81-860 at 68,897-68,899 [185]-[204].

100 (2006) Aust Torts Reports ¶81-860 at 68,916-68,918 [327]-[339].

occasions spoken to people preparing to jump from the bridge. He had endeavoured to dissuade them from doing so and had, on at least one occasion, drawn to their attention signs forbidding such activities. Each time he had been wearing his official Council uniform. However, they had ignored him and jumped all the same[101]. Once, Mr Pevitt tried to pursue the offenders, but they swam to a sandbank some 20 metres out, waved to him and refused to come ashore.

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

97 The signs referred to by Mr Pevitt were the subject of more detailed evidence by Mr Michael Keegan, an officer of the Council. Mr Keegan was an asset manager responsible for roads, bridges and stormwater infrastructure within the Council area. He indicated that since the earlier part of the 1990s, the RTA had provided funding to the Council under an annual "Block Grant Agreement" for activities that included the construction, maintenance and improvement of certain roads, including Main Road 111.

98 At some point prior to Mr Dederer's dive, there had been put in place at each end of the bridge a large sign containing words to the effect of "fishing and climbing prohibited". In addition, Mr Keegan stated that he had been aware of "no diving" pictograms (featuring a representation of a diver with arms outstretched superimposed by a prohibitory bar) positioned on the bridge from at least the late 1980s. In 1995 the Council, using funds derived from the Block Grant Agreement, replaced these pictograms, although it seems that the new signs had themselves deteriorated. The signs were certainly in place on the day of Mr Dederer's dive from the bridge. He acknowledged that he had seen and understood the pictogram[102]. His candour in this respect was an important reason why the trial judge was generally willing to accept his evidence as truthful[103]. Mr Dederer had been prepared to make admissions against his own interest.

99 Mr Keegan, like Mr Pevitt, was a resident of the Forster area. He too was well aware of the culture that had developed of children and young people

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101 (2006) Aust Torts Reports ¶81-860 at 68,886 [110].

102 (2006) Aust Torts Reports ¶81-860 at 68,882 [71].

103 (2005) Aust Torts Reports ¶81-792 at 67,524 [18].

jumping from the bridge into the water. In fact, he knew that it had been happening for years. He gave evidence that he had "actually remonstrated with his own children for jumping from the bridge"[104]. He accepted that, from an engineering point of view, it would have been comparatively simple and cheap to install a triangular attachment to the top railing of the bridge such as existed on the railing of the balustrade on the approach to the bridge from the town of Forster. This could have been added to deter the use of the top railing as a launching platform for entry into the water. However, Mr Keegan said that no request had been made for such a modification. He had no budget from the Council for such work. And anyway, he regarded the bridge structure as the responsibility of the RTA[105].

100 *Council's complaint to the RTA*: The RTA, as a State-wide statutory authority, had no officer resident in the Forster-Tuncurry district. There were two officers identified as being conversant with signage issues within the area, but the RTA did not call them to give evidence. Instead, the RTA called Mr John Alexander, planning and analysis officer for the Hunter Region. He had only joined the RTA in 1998. It was by that stage clear that the RTA had been expressly put on notice of the dangerous practice of young people jumping from the bridge to the water below.

101 On 28 January 1993, a committee of the Council resolved to express its concern to the RTA about this practice. On 11 February 1993, the Council sent a facsimile message to the works engineer of the RTA stating[106]:

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

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

103 In 1995, the Council replaced the pictogram signs on the bridge, as noted above. However, the new signs contained no information as to the special danger occasioned by the tidal character of the estuary and the shifting sands underneath the bridge. The RTA was, inferentially, aware of this danger by reason of its regular soundings of water depths. By 1995, alternative pictograms were

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104 (2005) Aust Torts Reports ¶81-792 at 67,526 [34].

105 (2005) Aust Torts Reports ¶81-792 at 67,526 [35].

106 (2006) Aust Torts Reports ¶81-860 at 68,875 [12], 68,887 [113].

available to symbolise the dangers of shallow water. Moreover, pictograms could be accompanied by verbal warnings where these were specially called for. Indeed, the relevant Australian Standard stipulated that signage indicating the fact of "shallow water" should be used in conjunction with the "diving prohibited" pictogram where it posed a risk of serious injury to divers[107].

104 *Changes to the bridge*: In 1992, a new Austroads Standard had come into force. This incorporated the Austroads Bridge Design Code. Under the Code, vertical and not horizontal members were made the norm for new bridge railings[108]. Evidence was adduced for Mr Dederer that other bridges in the area such as that at Bulahdelah (and others further afield, including the Anzac Bridge in Sydney) featured vertical bars compliant with the new prescription.

105 In the same year, wires attached to the northern bridge railings were found to be rusted. In mid-1993, the RTA released funds to allow the Council to replace the wires without any modification to the horizontal bars supporting them, even in the immediate area of the jumping platform. This was notwithstanding the introduction of the new Bridge Design Code, and the fact that the RTA had been put on express notice of the "problem" of people jumping from the bridge some three months earlier[109].

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

107 In the outcome, nothing was done about the structure of the walkway or the railing fence. Mr Alexander, although aware of the alarm expressed about the practice of youths jumping off the bridge in 1993, and the erection of (new) signs in 1995, was seemingly diverted into other concerns. When officers of the RTA inspected the bridge in April 1998, they too reported that people were still jumping off, and fishing from, the bridge notwithstanding the signs. By

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

108 (2005) Aust Torts Reports ¶81-792 at 67,531 [71].

109 (2005) Aust Torts Reports ¶81-792 at 67,531 [71].

inference, the RTA working parties that engaged in maintenance of the bridge over the years[110] would also have observed the practice. Although no specific written reports had been made to it of people diving from the bridge, the RTA was certainly aware of the ongoing problem (contrary to the law)[111] of use of the bridge contrary to the pictogram signs it had paid for as the "least" response to the Council committee's expression of concern.

108 The primary judge found that "the RTA has no policy or programme for dealing with this type of issue, and there is no funding allocated for such an issue"[112]. Even six years after the injury to Mr Dederer, an internal memo of the RTA, in relation to the "latest proposal", stated[113]:

> "It is our intention to remove the handrail and to construct with a new handrail. The new handrail will have a top and bottom RHS 100 x 50 x 5. The balustrades will be made from flat bar and will be centred at least 154 mm. The reason RTA have adopted a new design is to help prevent people jumping off the bridge. The existing handrail can easily be climbed over due to the middle rail. The proposed fence is more like a pool fence and is harder to climb over. RTA have taken this course of action as the authority is being sued by a man who jumped off the bridge and broke his neck when his head hit a sand bar".

109 *The fateful dive*: Mr Dederer's fateful dive was not the first time he had entered the water from the bridge. On 30 December 1998, the day before his injury, he had spent time with his friend Mr Grant Cunial and others swimming at Forster beach adjacent to the Forster end of the bridge. On two occasions that day, he had jumped into the estuary. He first entered the water from the ledge at the base of the bridge platform. He then jumped from the flat top of the bridge handrail[114], which he accessed by using the two horizontal railings in the fence below the upper railing. Effectively, these provided helpful steps to the point of departure from the bridge. On both occasions, Mr Dederer's body became totally submerged in the water below. His feet did not touch the bottom. He gave evidence that he saw other people jumping and diving from the bridge that day, including, he believed, an adult who dived. Nothing untoward happened to any of them.

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110 (2006) Aust Torts Reports ¶81-860 at 68,888 [119] per Ipp JA.

111 Roads (General) Regulation 1994 (NSW), reg 17.

112 (2005) Aust Torts Reports ¶81-792 at 67,527 [39].

113 (2005) Aust Torts Reports ¶81-792 at 67,527 [40].

114 (2005) Aust Torts Reports ¶81-792 at 67,523 [10].

110 On the last day of 1998, Mr Dederer returned to the bridge with Mr Cunial. They crossed the bridge from the Forster side with the initial intention of jumping from the bridge later in the day. However, spontaneously, Mr Dederer made the easy climb again to the flat top of the rail, assisted by an adjacent light pole. He had previously had experience in elevated diving in a swimming pool. Initially, on this day, he had intended simply to jump from the bridge. However, as he described it[115]:

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

111 Mr Dederer said that he listened for any boats that might be approaching under the bridge. He stood on the platform for perhaps two or three minutes. He then proceeded into the water "almost straight, but at an angle". He said that this was similar to the angle at which he had seen other people dive from the bridge. He did not remember striking the water or hitting the bottom. However, he immediately became aware that he had lost feeling in the lower part of his body[116]. He was assisted from the water by Mr Cunial, who confirmed the description of the way the injury had occurred. Mr Cunial also confirmed that he "had seen persons (ranging from about 10 to 30 years old) jumping off the bridge at the channel near the Forster shore including diving, doing back flips, somersaults, 'peg-legs' and bombs"[117]. Mr Cunial had also been going to the area for holidays for years, in his case since 1992.

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

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115 (2005) Aust Torts Reports ¶81-792 at 67,523 [12].

116 (2005) Aust Torts Reports ¶81-792 at 67,523 [14].

117 (2005) Aust Torts Reports ¶81-792 at 67,524 [20].

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

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

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

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

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

The issues

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

(1) *Breach of duty issue*: The first is whether the Court of Appeal erred in failing to reverse the conclusion of the primary judge that Mr Dederer had

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

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

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

(3) *Special costs order issue*: In the event that the first issue is resolved in favour of Mr Dederer, the third issue is whether he should be granted special leave to cross-appeal against the refusal of a special costs order obliging the RTA, as the defendant liable to him, to pay the costs of the Council, whose joinder was reasonable in the circumstances of the case.

Negligence: the factual findings

116 *The RTA knew of diving*: In its pleadings, the RTA made no admission that it knew, before Mr Dederer's injury, that children and other young persons habitually dived off the bridge. In argument in this Court, it conceded that the evidence sustained the conclusion below that jumping and diving had been occurring, but it maintained its claim that it was unaware of the diving. It is true that the documentary evidence produced by the RTA (and the Council) referred only to persons "jumping" from the bridge. Mr Keegan, who knew that children

jumped from the bridge, was not aware of diving[118]. Mr Pevitt had never seen anyone dive[119].

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

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

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

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

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

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

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118 (2006) Aust Torts Reports ¶81-860 at 68,875 [18], referring to (2005) Aust Torts Reports ¶81-792 at 67,526 [34].

119 (2006) Aust Torts Reports ¶81-860 at 68,876 [19].

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

119 On this issue, in my opinion, Tobias JA was correct to say[120]:

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

120 *The signage was incomplete*: The RTA also complained about what it suggested was the invention of the signage that it should have put in place by the primary judge and the majority of the Court of Appeal. With Handley JA[121], the RTA asked, in effect: if Mr Dederer read and understood the two signs (verbal and pictorial) put in place to prevent the type of action that he then took, how could it reasonably be inferred that any other or different sign or notice would have restrained him from diving from the bridge to the water below?

121 The specific complaint of Mr Dederer was that the pictogram sign actually used by the RTA did not (as it might have done) signal the specific danger of shallow water arising from tides and sand movements. The expert called in Mr Dederer's case, Mr Robert Fogg, acknowledged that either the "no diving" or "shallow water" pictogram would have been appropriate, whilst expressing a preference for the latter. Inferentially, this preference was attributable to the additional relevant information which a warning about shallow water gave to those potentially inclined to use the bridge for the purpose of entering the water.

122 One possible interpretation of the prohibition of climbing on, and diving from, the bridge was that, like the prohibition of fishing, it was directed (as the facsimile message that the Council sent to the RTA itself suggested) to protecting

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120 (2006) Aust Torts Reports ¶81-860 at 68,918 [340]. See also at 68,900 [212]-[214] per Ipp JA.

121 (2006) Aust Torts Reports ¶81-860 at 68,879 [43].

boats using the channels beneath. Neither the verbal sign nor the pictogram communicated the essential fact of greatest importance for self-protection to those tempted to jump or dive.

123 Mr Dederer answered questions on this issue:

"Q: Now you'd agree wouldn't you Mr Dederer, if a sign told you that you were not permitted to dive, another sign which told you that warned you against diving would be of no purpose?

A: No I disagree.

Q: Well once you're told not to dive that's the end of it isn't it?

A: Well, 14 year olds you're always curious. If you [see] one sign that says yeah you shouldn't and then you see another sign that shows you the danger why you shouldn't, the one that shows you the danger is most likely going to affect you the most.

Q: I see, you're saying that now with the benefit of hindsight, aren't you?

A: Yes.

…

Q: Is what you're saying that you agree with me that this sign would tell you that if you dive from this location there was a risk that before your full body entered the water half of it would enter and your head would hit the bottom?

A: I don't believe I would have looked at it in that degree. I believe I would have looked at it and seen that it was just shallow water. I don't think I would've started looking at where the water is at the person on the sign … I would have just looked at it as in it's shallow water, I wouldn't have judged saying alright well it must be just half a body length.

…

Q: This sign [the 'shallow water' pictogram] would've meant nothing to you, wouldn't you agree at this location?

A: It would've told me danger yes."

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

"Q: … I'll just have you look at this [the 'shallow water' pictogram]. Are you able to tell us what message that sign would send to you?

A: That's shallow water and if you dive you will hit bottom.

Q: And if such a sign had been erected on the bridge on the day that you were there, the day of your accident, what would your attitude have been to diving from the bridge?

A: I wouldn't have dived because I would have – it would show me that it was shallow water."

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

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

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

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

Court of Appeal. This was a pictogram with the symbol for prohibited diving and the addition of the verbal warning "shallow water". As Ipp JA said[122]:

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

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

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

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

Negligence: breach of the duty of care

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

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

134 *The principle in Shirt*: It was common ground between the parties that the critical legal analysis to be applied to the circumstances was that stated by this

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122 (2006) Aust Torts Reports ¶81-860 at 68,904 [246].

Court in *Wyong Shire Council v Shirt*[123]. The principles expressed by Mason J in that decision[124] have been applied in countless cases in this and other Australian courts since they were expressed. The attempt in *New South Wales v Fahy*[125] to have this Court reconsider its authority in *Shirt* was rejected.

135 An important aspect of the Court's reasoning in *Fahy*, both amongst those who were part of the majority and those who dissented, was an emphasis on the nuanced character of the approach explained in *Shirt*; the fact that the formula there stated is not mathematical in its application; and the fact that it permits a decision-maker, considering what a reasonable person would do by way of response to a foreseeable risk, to reach a conclusion that, in the particular circumstances of the case, it might indeed be that "nothing" or nothing more is required[126]. Like many decisions before it, *Fahy* emphasised that the formula in *Shirt* "does not focus only upon how the particular injury happened. It requires looking forward to identify what a reasonable person *would* have done, not backward to identify what would have avoided the injury"[127].

136 With these freshly restated principles in mind, it is relevant once again to remember the passage in *Shirt* explaining how a problem such as that now before this Court should be approached[128]:

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

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123 (1980) 146 CLR 40.

124 (1980) 146 CLR 40 at 47-48.

125 (2007) 81 ALJR 1021 at 1026 [7], 1038 [78], 1046-1049 [119]-[133], 1065 [241]; cf at 1064 [225].

126 (2007) 81 ALJR 1021 at 1034-1035 [57]-[58], 1046 [123]; cf *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221 CLR 234 at 246-247 [36].

127 (2007) 81 ALJR 1021 at 1034 [57].

128 (1980) 146 CLR 40 at 47-48.

> the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

137 *Correct application of Shirt*: The Court of Appeal majority considered the challenge to the primary judge's decision in favour of Mr Dederer, giving proper attention to the foregoing instruction. As well, the majority gave due consideration to later decisions of this Court concerning warning signs in the context of diving injuries[129]. There is no indication that the majority overlooked the holdings of this Court on the approach to be taken to problems of the present kind. To the contrary, the relevant authorities were cited and accurately applied.

138 Nevertheless, as Gleeson CJ pointed out in *Fahy*, citing what Alderson B said in *Blyth v Birmingham Waterworks Co*[130] as long ago as 1856[131]:

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

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

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

141 Having identified the ambit of the RTA's duty of care[132] and affirmed the primary judge's conclusion that the RTA knew of the continuing practice of

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

130 (1856) 11 Ex 781 at 784 [156 ER 1047 at 1049].

131 (2007) 81 ALJR 1021 at 1026 [7].

132 (2006) Aust Torts Reports ¶81-860 at 68,896 [183]-[184].

children and young people jumping or diving off the bridge (a finding sustained for the reasons already stated)[133], Ipp JA analysed, prospectively, what, armed with such knowledge, the RTA ought reasonably to have done.

142 Into the equation, Ipp JA added the knowledge that the RTA had gathered over the years about the sand movements and variable depth of the river bed beneath the bridge[134]. He also considered its inferred knowledge of the changeable drop from the bridge to both the water surface and the river bed, dependent upon tides[135]. Further, he noted that "[t]he RTA knew or ought to have known that particularly in the summer months, jumping and diving was occurring with startling frequency, involving at times, groups of young people every five or ten minutes, with a group capable of comprising 10 to 15 children aged 10 years to 16 years"[136].

143 *The signs were useless*: Added to this factual matrix was the realisation, which Ipp JA reasonably attributed to the RTA, that the prohibitory signs that were in place "were, in a word, useless"[137]. He concluded that, having been alerted to the dangers of children jumping from the bridge structure, the RTA should "have ascertained whether the pictograph signs were proving effective. On that basis, the RTA ought to have known that they were not"[138].

144 It is against this backdrop that Ipp JA addressed the reasonableness of the RTA's response to the clearly established risk to persons such as Mr Dederer[139]. Correctly, his Honour rejected the suggestion that the RTA was excused from action simply because no significant injury had previously occurred[140]. Handley JA's suggestion that the absence of prior injuries might demonstrate the effectiveness of the existing signs[141] was contradicted by the obvious fact that the

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133 (2006) Aust Torts Reports ¶81-860 at 68,897-68,899 [185]-[204].

134 (2006) Aust Torts Reports ¶81-860 at 68,899 [205]-[210].

135 (2006) Aust Torts Reports ¶81-860 at 68,900 [211].

136 (2006) Aust Torts Reports ¶81-860 at 68,900 [214].

137 (2006) Aust Torts Reports ¶81-860 at 68,900 [219].

138 (2006) Aust Torts Reports ¶81-860 at 68,900 [220] citing *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 585 [180].

139 (2006) Aust Torts Reports ¶81-860 at 68,900 [221].

140 (2006) Aust Torts Reports ¶81-860 at 68,902 [231].

141 (2006) Aust Torts Reports ¶81-860 at 68,878 [35]-[36].

signs were repeatedly and frequently ignored by a class of persons such as Mr Dederer, children and youths, who were amongst those most at risk.

145 The foregoing made it important that the RTA should respond to its demonstrated knowledge of the sources of the risk of which it was aware by taking accident prevention measures beyond mere reliance on signs, which can never be an "automatic, absolute and permanent panacea" for that purpose[142]. Both Ipp JA (with whom Tobias JA agreed) and the primary judge concluded that reasonable steps involved the installation of a sign with a combination of symbols and words[143]. The RTA's reliance alone on a sign of unexplained prohibition was inadequate. Although he rejected the primary judge's conclusion that the pictogram should have addressed the specific problem and contained the warning "Danger, shifting sands, variable depth" (which was described in argument as a product of "judicial engineering"), Ipp JA upheld Mr Dederer's contention in the Court of Appeal that a specific warning of "shallow water" should have been added to the pictogram to make "the nature of the danger even clearer"[144].

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

147 Ipp JA dealt in a convincing way with the lack of cogency of the excuse about the "availability of resources", with the justiciability of Mr Dederer's contentions and with the RTA's passing concentration on the need to upgrade the

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142 (2006) Aust Torts Reports ¶81-860 at 68,903 [233] per Ipp JA, citing *Waverley Council v Lodge* (2001) 117 LGERA 447 at 459 [35] per Bryson J (Meagher and Heydon JJA concurring).

143 (2006) Aust Torts Reports ¶81-860 at 68,903-68,905 [236]-[251]; (2005) Aust Torts Reports ¶81-792 at 67,530-67,531 [69]-[70].

144 (2006) Aust Torts Reports ¶81-860 at 68,904 [246].

walkway and the suggested lack of resources available to it for that purpose[145]. The fact that there was community concern over other aspects of the safety of the bridge did not relieve the RTA of its obligation to address reasonably the notice it had received about the particular risks to young persons jumping from its structure.

148 *More than signs needed*: Given the fact that the existing signs were ineffective to deter or prevent children diving from the bridge, Ipp JA supported, apart from improved signage, the two further initiatives which the primary judge had held that the RTA should have taken. In doing so, he gave effect to the observation of the Privy Council in *Southern Portland Cement Ltd v Cooper* that[146]:

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

149 First, Ipp JA favoured the modification of the flat top of the upper railing of the bridge, which afforded an allurement to children tempted to use that railing as a platform for entry into the water[147]. The installation of a triangular surface would have been inexpensive. A similar surface is shown in a photograph in evidence of the balustrade leading to the bridge. Ipp JA acknowledged that such a modification would not, of itself, prevent access to the water from the bridge[148]. However, for a relatively insignificant amount of money, it would have diminished or removed what, unaltered, both facilitated and encouraged the kind of activities drawn to the RTA's attention in February 1993.

150 Secondly, Ipp JA accepted the opinion of the primary judge that the horizontal railings should have been removed and replaced with vertical pool-type railings[149]. At the least, this should have been done in the section of the bridge which was obviously presenting an allurement to the children and young

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145 (2006) Aust Torts Reports ¶81-860 at 68,907 [266], 68,907-68,910 [268]-[279], 68,913-68,914 [304]-[306].

146 (1973) 129 CLR 295 at 308 per Lord Reid; [1974] AC 623 at 643.

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

148 (2006) Aust Torts Reports ¶81-860 at 68,905 [257].

149 (2006) Aust Torts Reports ¶81-860 at 68,906 [260]-[261].

people who were using it as a platform for jumping and diving. Specifically, Ipp JA endorsed the comment of the primary judge[150]:

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

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

152 *Conclusion: no error on breach*: It follows that the majority in the Court of Appeal did not err in holding that the RTA did not apply its mind to the question of whether it should remedy the dangers which its bridge presented to children and young persons who were attracted to use it as a platform for jumping and diving. The RTA did not give any, or any reasonable, consideration to the fact that because of its position, construction and configuration in relation to the water below, the bridge presented special dangers, particularly to children and young persons[151]. With respect, I do not agree that an allurement to children is a defendant's responsibility only if that party encourages the alluring feature[152]. This is not how allurement has been dealt with in the past. Allurements often arise in run-down, abandoned or disused premises. The question is not one of encouragement. It is one of foresight and responsibility.

153 This was not a case, as the RTA suggested, of wisdom after the event. Instead, it was well open to the majority in the Court of Appeal to conclude, with the primary judge, that it was an instance of an "accident waiting to happen"[153].

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150 (2006) Aust Torts Reports ¶81-860 at 68,906 [260], quoting (2005) Aust Torts Reports ¶81-792 at 67,531 [73].

151 (2006) Aust Torts Reports ¶81-860 at 68,913 [300].

152 cf reasons of Gummow J at [64].

153 (2006) Aust Torts Reports ¶81-860 at 68,912 [293], 68,919 [342].

Moreover, the RTA was put on specific notice of the accident risk, if in no other way, by reason of the communication to it on behalf of the Council committee in February 1993.

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

Negligence: causation

155 *The RTA's case on causation*: This leaves the alternative basis upon which the RTA challenged the conclusion of the majority of the Court of Appeal. Essentially, the RTA supported, in this respect also, the dissenting reasons of Handley JA. Those reasons sought to take apart the elements of the preventive measures urged for Mr Dederer and to suggest that, even if they had been taken, they would not have avoided the injury that occurred[154].

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

157 *The primary judge's conclusions*: As Ipp JA correctly pointed out, conclusions on questions of causation demand the drawing of sensible inferences, including on the basis of hypothetical facts that, by definition, have not occurred. Responding to such questions depends very much on the assessment of the character and personality of the plaintiff and what he or she would have done had other and different precautions been taken by the defendant[155]. Trial judges' assessments of such matters are conventionally given considerable respect by appellate courts, called upon to reconsider conclusions reached at trial on nothing

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154 (2006) Aust Torts Reports ¶81-860 at 68,880 [50].

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

more than a transcript and their own assessment of how individuals, whom they have never seen or heard, would react to changed circumstances[156].

158 These observations do not deny the right and duty of an appellate court to discharge its own functions, as statute envisages. Nor do they revive an exaggerated deference to trial assessments which reasonably appear to defy appellate commonsense. However, for reasons given, the primary judge formed a good opinion of Mr Dederer's truthfulness as a witness. It was open to him, on the basis of Mr Dederer's oral evidence concerning the effect of a more informative sign alone, to conclude that causation was established. That conclusion is reinforced by the fact that the RTA failed, over an extended period and although on notice, to take the other measures that the primary judge and the Court of Appeal concluded it should have. In these circumstances, no error is demonstrated in the conclusion of Ipp JA (Tobias JA concurring) that[157]:

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

159 The reference in this passage to the momentary indecision and to the last-minute initiative of Mr Dederer to dive, rather than jump, is an answer to Handley JA's statement that the injury was the result of a "deliberate" act on Mr Dederer's part[158]. That characterisation of Mr Dederer's actions seriously overstates the will that is to be attributed to him in the circumstances disclosed by the uncontested evidence.

160 Further, as Tobias JA pointed out in his reasons, in matters of causation "we are dealing with probabilities and not certainties" and "[t]here was no suggestion that [Mr Dederer] was of reckless or unthinking disposition"[159]. To picture Mr Dederer as a person blindly fixed upon a course of defying the signs on the bridge is not fairly to reflect his conduct which, according to the evidence, was not so different from that of many other young people, acting with holiday enthusiasm. The RTA's response to the risk that such conduct presented was minimal, ineffective and apparently lacking in proper consideration. More was required of a public authority. In particular this was so because the RTA had

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

157 (2006) Aust Torts Reports ¶81-860 at 68,915 [315].

158 (2006) Aust Torts Reports ¶81-860 at 68,879 [43].

159 (2006) Aust Torts Reports ¶81-860 at 68,923 [370], [372].

been specifically warned of substantial and ongoing danger to many children in a popular holiday resort in connection with a bridge under its control.

161 *Conclusion: no error on causation*: It follows that I cannot, with respect, agree with the opinion[160] that the preventive measures suggested for Mr Dederer would not have been effective. That opinion is contrary to findings of the primary judge, who had advantages on this issue that this Court lacks. It disregards Mr Dederer's own evidence without warrant to do so. And it effectively condones the attitude of neglect and inactivity by the RTA which was inconsistent with the principles and purposes of the law of negligence.

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

Negligence: reversing concurrent findings of fact

163 I accept that, in a final court such as this, no legal principle bars the court from reversing a conclusion based on concurrent findings of fact made by the primary judge and confirmed by the intermediate court. Whatever might have been the opinion of the Privy Council or the earlier practice of this Court, it cannot prevail against the statutory and constitutional functions that we possess[161]. To this extent I agree in the approach of Heydon J as to the jurisdiction and power of this Court to reach, and give effect to, contrary factual conclusions[162]. No principle of law or judicial practice stands in the way[163].

164 Nevertheless, more than a passing nod is required to a sense of "trepidation" against interfering in concurrent findings of fact[164]. Reasons in this Court in recent times have repeatedly explained why this is so[165]. It is not

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

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

162 See reasons of Heydon J at [293].

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

164 Reasons of Heydon J at [287].

165 cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 274 [58]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 634 [262]; *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 212 CLR 411 at 447-448 [95];

(Footnote continues on next page)

ordinarily the function of this Court to perform the tasks of fact-finding and factual review. The Court lacks advantages that other courts possess in this respect. Under the Constitution, the "appeal" we hear has been held to be a strict "appeal", concerned with error. It is not an appeal by way of rehearing, still less a trial[166].

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

166 It is for these reasons that a clear case of error is needed for interference in concurrent findings of fact made below. The present appeal is far from such a case. All that has occurred is the substitution of different factual opinions, in harmony with a trend that I have earlier called to notice[167]. That trend reflects a retreat from communitarian concepts of mutual legal responsibility and from concern with accident prevention. It evidences an attitude to the claims of plaintiffs and to the law of negligence that I cannot share.

Contributory negligence

167 *The Court of Appeal's intervention*: Two subsidiary questions arise. The first concerns the issue of contributory negligence and the unanimous decision of the Court of Appeal to double the discount on this basis to 50% of the verdict otherwise recoverable from the RTA[168]. In the Court of Appeal, the RTA raised the quantification of the reduction for contributory negligence, on the assumption that Mr Dederer was entitled to recover against it. In this Court, Mr Dederer sought special leave to cross-appeal so as to have the apportionment ordered by the primary judge restored.

Nominal Defendant v GLG Australia Pty Ltd (2006) 80 ALJR 688 at 702 [74]; 225 ALR 643 at 660; *Fahy* (2007) 81 ALJR 1021 at 1052 [153].

166 *Mickelberg v The Queen* (1989) 167 CLR 259 at 267.

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

168 (2006) Aust Torts Reports ¶81-860 at 68,874 [1], 68,915 [320]-[321], 68,916 [325].

168 This Court has said many times that appellate courts must show restraint in disturbing the apportionment ordered for contributory negligence as between a plaintiff and a defendant, having regard to their respective shares of responsibility for the damage[169]. The point is self-evident. Involved in such an apportionment is a comparative examination of the whole conduct of each negligent party in relation to the circumstances of the accident and an evaluation of the comparative importance of the respective acts and omissions of the parties in causing the damage. Such decisions are evaluative and multi-factorial. Generally speaking, a trial judge, who has full knowledge of all of the evidence, will be in a better position to make such an apportionment correctly. An appellate court, even if it would have reached a different conclusion, will usually be hard pressed to identify an error that warrants disturbance of the primary judge's conclusion on such an issue. Tinkering with apportionments is to be discouraged.

169 On the other hand, an intermediate appellate court is required by its statute to discharge its own functions of appellate review. If error is shown in the apportionment, it is not only entitled but obliged to set the apportionment aside and to substitute its own decision[170]. In a proper case, this Court will uphold the intermediate court's determination in that regard[171], although sometimes it will be divided over where the correct line is to be drawn.

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

171 Secondly, Mr Dederer pointed to the specific advantages which the trial judge had enjoyed in his case, including the conduct of a view of the bridge and estuary which was not undertaken by the Court of Appeal. As against this, the primary judge accepted that it was impossible, on a view conducted many years

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

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

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

after the event, to re-create exactly the circumstances of the moment of Mr Dederer's injury[172].

172 Thirdly, Mr Dederer pointed to an element of tension in the majority reasoning in the Court of Appeal. For the purpose of determining the issue of negligence and meeting, in that context, the assertion that the danger of diving was obvious, the Court of Appeal emphasised Mr Dederer's age and the spontaneous, unconsidered character of his last-minute decision to effect a dive. On the other hand, when it came to the determination of the application of the *Civil Liability Act* to the claim against the Council and the apportionment for contributory negligence, emphasis was placed on the obviousness of the risk of a dangerous recreational activity engaged in by him[173].

173 *The conclusion was open*: As against these criticisms, the treatment of contributory negligence by Ipp JA (with whom on this issue Handley JA and Tobias JA agreed) followed immediately a most detailed examination of all of the facts of the case essential to a decision on the negligence issues. This was an appeal which could not have been decided, either in the Court of Appeal or in this Court, without the most painstaking examination of the facts. That was clearly undertaken by all of the members of the Court of Appeal. A separate statement or repetition of the facts to determine that part of the RTA's appeal which challenged the apportionment of contributory negligence was not essential. The alteration ordered by the Court of Appeal was certainly not subject to the criticism of tinkering. Obviously, all of the judges considered that the primary judge had erred, if only in the innominate way of reaching a conclusion which, in their view, was plainly wrong.

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

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172 (2005) Aust Torts Reports ¶81-792 at 67,524 [19].

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

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

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

Orders

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

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

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

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

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

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