

## CASE NOTE

### ROADS AND TRAFFIC AUTHORITY OF NEW SOUTH WALES v DEDERER\*

#### NEGLIGENCE AND THE EXUBERANCE OF YOUTH

PAM STEWART<sup>†</sup> AND GEOFF MONAHAN<sup>‡</sup>

*[This case note examines the decision of the High Court of Australia in Roads and Traffic Authority of New South Wales v Dederer, which marks the common law's continued departure from shared liability for tragic accidents into the realm of personal liability. The decision has particular significance for children and young people who may be held accountable for their reckless actions, notwithstanding the 'exuberance of youth'. In particular, the case note analyses the High Court's emphasis on obvious risks and personal responsibility and the Court's attempt to limit liability through a consideration of the plaintiff's conduct on questions of the scope of the duty of care and at the breach of duty enquiry, rather than confining it to the issue of the plaintiff's contributory negligence.]*

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\* (2007) 238 ALR 761 ('Dederer').

<sup>†</sup> LLB, LLM (Syd); Solicitor of the Supreme Court of New South Wales and the High Court of Australia; Lecturer, Faculty of Law, University of Technology Sydney.

<sup>‡</sup> BA (Macq), LLB (Syd), LLM (UNSW), GradCertHEd (UTS); Solicitor of the Supreme Court of New South Wales and the High Court of Australia; Notary Public (NSW); Associate Professor, Faculty of Law, University of Technology Sydney.

## I INTRODUCTION

The case of *Roads and Traffic Authority of New South Wales v Dederer* ('*Dederer*')<sup>1</sup> involved a tragic event that regrettably occurs all too often in our society. It resonates not only with lawyers, but also with every parent, particularly those of adolescent boys. The decision in *Dederer* illustrates the common law's steady departure from shared liability for tragic accidents and its firm entrance into the realm of personal liability. In particular, *Dederer* emphasises a requirement for young people to be held accountable for their reckless actions, despite the effects of the 'exuberance of youth'.

The case concerned Phillip Dederer, the plaintiff, who was rendered partially paraplegic when he dived off the Forster-Tuncurry Bridge into a river in northern New South Wales.<sup>2</sup> The accident occurred at about midday on New Year's Eve, 1998, during the school holidays when the plaintiff was 14 and a half years' old.<sup>3</sup> The evidence established that the Roads and Traffic Authority of New South Wales ('RTA') was well aware of the dangerous behaviour that many young people engaged in, which was jumping from the bridge into the river below.<sup>4</sup> Despite this common practice having continued for many years, there had apparently been no record of injury in the 39 years since the bridge was built until the plaintiff's fateful dive.<sup>5</sup>

The decision of the majority of the High Court in *Dederer* that a minor should bear full responsibility for the consequences of this tragic accident represents a discernible shift in common law attitudes towards personal responsibility and liability in respect of accidents involving children and young people. In the past, the common law has demonstrated great flexibility in its willingness to accommodate the exuberance of youth through applying contributory negligence against a youthfully careless plaintiff.<sup>6</sup> The common law has typically used such a finding of contributory negligence to apportion liability instead of using the plaintiff's ignorance of a risk, which might be obvious to others, as a crucial determinant of the defendant's liability.

Certainly, there has been a general shift in recent years in the High Court's attitude in favour of asserting personal responsibility and being more conservative in its approach to the question of liability in respect of risks which should be obvious to all plaintiffs.<sup>7</sup> However, the cases that constitute this shift do not

<sup>1</sup> (2007) 238 ALR 761.

<sup>2</sup> *Ibid* 767–8 (Gummow J).

<sup>3</sup> *Ibid* 783 (Kirby J).

<sup>4</sup> *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81–792, 67 529 (Dunford J).

<sup>5</sup> *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81–860, 68 876 (Handley JA).

<sup>6</sup> For cases involving the issue of contributory negligence and youthful plaintiffs, see, eg, *Kelly v Bega Valley County Council* (Unreported, New South Wales Court of Appeal, Glass, Hope and Samuels JJA, 13 September 1982) ('*Kelly*'); *Commonwealth v Introvigne* (1982) 150 CLR 258; *Gunning v Fellows* (1997) 25 MVR 97; *Ryan v State Rail Authority of New South Wales* [1999] NSWSC 1236 (Unreported, Dunford J, 16 December 1999); *Sainsbury v Great Southern Energy Pty Ltd* [2000] NSWSC 479 (Unreported, Barr J, 26 May 2000) ('*Sainsbury*'); *Traynor v Australian Capital Territory* (2007) 214 FLR 416.

<sup>7</sup> This 'shift' can be seen in the decisions of *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 ('*Romeo*'); *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 ('*Woods*'); *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 ('*Vairy*'); *Mulligan v Coffs Har-*

focus on the age of the plaintiffs concerned.<sup>8</sup> Furthermore, these High Court decisions have consistently failed to define how, and to what extent, obviousness of risk relates to the question of breach of duty on the one hand and contributory negligence on the other.

There is also a growing tendency within the Court to use considerations of obviousness of risk and failure by plaintiffs to take care for their own safety in limiting the *scope* of a given duty of care, at least in respect of defendants who are statutory or road authorities or occupiers.<sup>9</sup> This trend, if expanded to include all classes of defendants, would have a profound narrowing effect on the class of persons entitled to recover.

Unfortunately, the majority's decision in *Dederer* does not definitively resolve any of these issues. Instead, the majority of the High Court employed a technical dissection of the decisions below and almost overlooks the mitigating factor of age in its attempt to define more reasonable duties owed by defendants.

## II THE FACTS AND CASE HISTORY

### A *The Plaintiff's Claim*

The plaintiff claimed that the RTA had breached its duty of care to him by failing to warn him of the danger of the variable depth of the water below the bridge and by failing to install a redesigned railing along the side of the pedestrian walkway on the bridge.<sup>10</sup> The RTA, being the statutory successor to the NSW Department of Main Roads (which initially constructed the bridge), maintained the bridge as part of a NSW main road.<sup>11</sup>

The plaintiff argued that the bridge, as constructed and maintained, constituted a danger because the railings were horizontal (as opposed to vertical) with a flat top railing, making it relatively easy for persons to climb onto the railing and then to jump or dive into the river. Nevertheless, there were pictograph signs at either end of the bridge prohibiting diving which the plaintiff acknowledged having seen.<sup>12</sup> The plaintiff claimed, however, that the signs were inadequate as they should have warned him of the dangers of the variable depth of the water below the bridge.<sup>13</sup>

After commencing the original proceedings only against the RTA, the plaintiff subsequently joined the Great Lakes Shire Council to the proceedings on the basis that it was a roads authority, meaning that it had partial responsibility for

*bour City Council* (2005) 223 CLR 486 ('Mulligan'); *Neindorf v Junkovic* (2005) 222 ALR 631 ('Neindorf').

<sup>8</sup> The plaintiff in *Romeo* (1998) 192 CLR 431, 434 (Brennan CJ) was not quite 16 years' old, though the plaintiffs in *Woods* (2002) 208 CLR 460, 467 (Gleeson CJ) and *Vairy* (2005) 223 CLR 422, 473 (Callinan and Heydon JJ) were 32 and 33 years' old respectively.

<sup>9</sup> See, eg, *Brodie v Singleton Shire Council* (2001) 206 CLR 512 ('Brodie'); *Romeo* (1998) 192 CLR 431. Cf Kirby J's comments regarding 'obviousness' as directed towards breach of duty rather than scope of duty in *Neindorf* (2005) 222 ALR 631, 649–51.

<sup>10</sup> *Dederer* (2007) 238 ALR 761, 789 (Kirby J), 814–15 (Callinan J).

<sup>11</sup> *Ibid* 767–8 (Gummow J), 784 (Kirby J).

<sup>12</sup> *Ibid* 768 (Gummow J), 786 (Kirby J), 808 (Callinan J).

<sup>13</sup> *Ibid* 789 (Kirby J), 814 (Callinan J).

the bridge. In fact, some years prior to the plaintiff's accident, the Council had erected the pictograph 'no diving' signs at either end of the bridge with the aid of funding from the RTA. Furthermore, Council rangers patrolled the area on and around the bridge from time to time.<sup>14</sup> The Council was also aware of the widespread practice of young persons jumping and diving from the bridge, notwithstanding the presence of the signs and the activities of its rangers.<sup>15</sup>

### B Tort Law Reform Legislation

Interestingly, the recent tort law reform legislation — the *Civil Liability Act 2002* (NSW) — applied only to the case against the Council because the Council was joined to the proceedings after the Act had commenced. On the other hand, the proceedings against the RTA were brought before the commencement of the legislation. Consequently, the claim against the RTA was decided entirely on common law principles. In contrast, the case against the Council was determined on the basis of the legislation. On appeal, the case was ultimately decided in the Council's favour.

### C At Trial

At first instance, the case was heard before Dunford J in the NSW Supreme Court.<sup>16</sup> Although the plaintiff's claim against both defendants was successful at this stage, his damages were reduced by 25 per cent for contributory negligence.<sup>17</sup> His Honour found that both the Council and the RTA knew of the frequency with which young persons jumped and dived off the bridge and that the bridge was an 'allurement' to young persons.<sup>18</sup> His Honour also held that the RTA and the Council were negligent in their failure to warn the plaintiff of the danger of shallow water beneath the bridge.<sup>19</sup> Furthermore, Dunford J held that the RTA's failure to modify the bridge railings to make climbing onto and jumping off the bridge more difficult was also negligent.<sup>20</sup> The RTA and the Council appealed the decision.

### D NSW Court of Appeal

The appeal by the Council was allowed on the basis that s 5L of the *Civil Liability Act 2002* (NSW) afforded the Council a complete defence against the claim<sup>21</sup> because the plaintiff was injured by 'the materialisation of an obvious risk of a dangerous recreational activity'.<sup>22</sup>

<sup>14</sup> Ibid 785 (Kirby J), 811–12 (Callinan J).

<sup>15</sup> Ibid 769 (Gummow J).

<sup>16</sup> *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81–792.

<sup>17</sup> Ibid 67 534.

<sup>18</sup> Ibid 67 530.

<sup>19</sup> Ibid 67 531.

<sup>20</sup> Ibid.

<sup>21</sup> *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81–860, 68 894–5 (Ipp JA). Tobias JA agreed: at 68 923.

<sup>22</sup> Ibid 68 891 (Ipp JA).

Meanwhile, although the RTA's appeal failed on the issue of liability, the Court of Appeal increased the reduction to the plaintiff's damages for his contributory negligence to 50 per cent.<sup>23</sup>

Ipp JA, with whom Tobias JA agreed (Handley JA dissenting), held that the RTA owed the plaintiff a general duty of care because it had 'constructed the bridge and created the danger. The danger being the allurements to people, particularly children, to jump or dive off the railings'.<sup>24</sup>

Ipp JA further found that the RTA exercised control over the bridge, was responsible for its maintenance, promoted pedestrian safety, erected signs on the bridge and knew that the pedestrian walkway attracted large numbers of people. Moreover, his Honour held that the RTA knew of the widespread practice of young people jumping and diving off the bridge:

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.<sup>25</sup>

The majority in the NSW Court of Appeal held that the RTA's reliance on the 'no diving' signs was, in all the circumstances of the case, an insufficient and unreasonable response to the risk of injury, particularly as the RTA knew that the signs were ignored by persons jumping off the bridge.<sup>26</sup> A further response was required for the RTA to satisfy the reasonableness criterion, namely, signage which specifically referred to the possibility of shallow water<sup>27</sup> as well as modification of the bridge railings to make climbing and diving more difficult.<sup>28</sup>

In his dissenting judgment, Handley JA held that having regard to the state-wide road responsibilities of the RTA and the conflicting demands on allocation of resources, combined with the fact that the plaintiff was engaged in a risky activity, the RTA's response to a risk which had not eventuated even once in 39 years was reasonable.<sup>29</sup> The RTA then appealed to the High Court.

### *E The High Court*

The appeal by the RTA to the High Court was successful by a bare majority of three (Gummow, Callinan and Heydon JJ) to two (Gleeson CJ and Kirby J). In reaching their decision, the Court considered the nature and scope of the duty of care owed by a highway authority to pedestrian users of the roadway, as well as the appropriate standard of care owed to persons who fail to take care for their own safety. The Court also considered the question of when concurrent findings

<sup>23</sup> Ibid 68 915. Tobias JA agreed: at 68 923. Handley JA similarly agreed on contributory negligence despite dissenting on other points: at 68 874.

<sup>24</sup> Ibid 68 896 (Ipp JA).

<sup>25</sup> Ibid 68 900.

<sup>26</sup> Ibid 68 902.

<sup>27</sup> Ibid 68 904–5 (Ipp JA).

<sup>28</sup> Ibid 68 905–6 (Ipp JA).

<sup>29</sup> Ibid 68 881–2.

of fact by trial and intermediate appellate courts should be reviewed by the High Court.

### 1 *The Majority View on the Issue of Liability of the RTA*

#### (a) *Scope of Duty*

Gummow J held that the RTA's appeal should be allowed on the basis that both the trial judge and the NSW Court of Appeal had engaged in a 'misapplication of basic and settled matters of legal principle.'<sup>30</sup> Those principles were:

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*.<sup>31</sup>

Gummow J held that while the RTA owed the plaintiff a duty of care, that duty involved a particular and defined legal obligation arising out of a relationship between the parties.<sup>32</sup> After referring to the reasons in *Sullivan v Moody*,<sup>33</sup> Gummow J pointed out that '[t]he law now recognises certain types of loss and kinds of relationships which are different from those of earlier days.'<sup>34</sup> Moreover, his Honour held that the effect of the decision in *Brodie v Singleton Shire Council* ('*Brodie*')<sup>35</sup> was that a roads authority is obliged to exercise reasonable care so that the road is safe 'for users exercising reasonable care for their own safety'.<sup>36</sup>

His Honour noted that this expression of the limitation of the scope of the duty owed to those exercising care for their own safety 'has long antecedents in the law relating to occupiers' liability.'<sup>37</sup> Gummow J also cited the more recent authorities of *Romeo v Conservation Commission of the Northern Territory* ('*Romeo*')<sup>38</sup> and *Neindorf v Junkovic* ('*Neindorf*')<sup>39</sup> for the principle as it applies to occupiers' liability.

In his judgment, his Honour appeared careful not to expand this limited scope of duty beyond those defendants to whom he specifically referred. However, it is tempting to conclude that this kind of duty-limiting approach might represent a

<sup>30</sup> *Dederer* (2007) 238 ALR 761, 767.

<sup>31</sup> *Ibid* (citations omitted).

<sup>32</sup> *Ibid* 773.

<sup>33</sup> (2001) 207 CLR 562.

<sup>34</sup> *Dederer* (2007) 238 ALR 761, 773.

<sup>35</sup> (2001) 206 CLR 512.

<sup>36</sup> *Dederer* (2007) 238 ALR 761, 773 referring to *Brodie* (2001) 206 CLR 512, 581 (Gaudron, McHugh and Gummow JJ).

<sup>37</sup> *Dederer* (2007) 238 ALR 761, 773 referring to *Indermaur v Dames* (1866) LR 1 CP 274, 288 (Willes J).

<sup>38</sup> (1998) 192 CLR 431.

<sup>39</sup> (2005) 222 ALR 631.

further progression of the common law's tendency to impose 'personal responsibility', in line with much of Australian's recent tort law reform legislation.<sup>40</sup>

There are, of course, authorities which stand for the opposite proposition — that defendants must, in some circumstances, specifically take account of the possibility that others might themselves be negligent.<sup>41</sup> This would place the possibility of a plaintiff behaving negligently within the class of reasonably foreseeable risks that some defendants must be concerned about, and therefore such risks fall *within* the scope of the duty of care. This principle was applied in the case of an employer in *McLean v Tedman*.<sup>42</sup> The High Court then extended this principle in *Bus v Sydney County Council*, stating that a duty to a person who might 'inadvertently or negligently injure himself if the duty is breached is not unique to employment situations.'<sup>43</sup> The Court pointed out that '[c]ases of occupiers' liability frequently concern injury involving the inadvertence of the person present on the land concerned'.<sup>44</sup>

Whilst Gummow J did not advert to these authorities, he nevertheless qualified his statement as to the limited scope of the RTA's duty in *Dederer* by stating:

Of course, the weight to be given to an expectation that potential plaintiffs will exercise reasonable care for their own safety is a general matter in the assessment of breach in every case, but in the present case it was also a specific element contained, as a matter of law, in the scope of the RTA's duty of care.<sup>45</sup>

His Honour clarified this issue of the scope of the RTA's duty of care by saying that

[t]he RTA's duty of care was owed to all users of the bridge, whether or not they took ordinary care for their own safety; the RTA did not cease to owe Mr Dederer a duty of care merely because of his own voluntary and obviously dangerous conduct in diving from the bridge. However, the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road is safe 'for users exercising reasonable care for their own safety'. The essential point is that the RTA did not owe a more stringent obligation towards careless road users as compared with careful ones. In each case, the same obligation of reasonable care was owed, and the extent of that obligation was to be measured against a duty whose scope took into account the exercise of reasonable care by road users themselves.<sup>46</sup>

<sup>40</sup> See *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

<sup>41</sup> *McLean v Tedman* (1984) 155 CLR 306, 311–12 (Mason, Wilson, Brennan and Dawson JJ); *Bus v Sydney County Council* (1989) 167 CLR 78, 90 (Mason CJ, Deane, Dawson and Toohey JJ); *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 519–20 (Deane J), 536–7 (McHugh J); *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, 431 (Mason CJ, Deane, Dawson and Gaudron JJ).

<sup>42</sup> (1984) 155 CLR 306, 312–13 (Mason, Wilson, Brennan and Dawson JJ). Gibbs CJ agreed with the judgment (at 307) despite disagreeing on the point of contributory negligence.

<sup>43</sup> (1989) 167 CLR 78, 90 (Mason CJ, Deane, Dawson and Toohey JJ).

<sup>44</sup> *Ibid.* See also *Cooper v Southern Portland Cement Ltd* (1972) 128 CLR 427, 449 (Barwick CJ).

<sup>45</sup> *Dederer* (2007) 238 ALR 761, 773 (citations omitted).

<sup>46</sup> *Ibid.* 774 (citations omitted).

One interpretation of his Honour's comments is that there is a telescoping of the notion of a plaintiff's obligation to take care for their own safety into *both* the scope of duty and the breach enquiries. This raises some important questions. If such an obligation to take care is a defining matter on the issue of the *scope* of the duty of care, why is it not open to a defendant to argue that it owes no duty at all to a plaintiff who has not exercised reasonable care? Is negligence on the part of the plaintiff then capable of taking the plaintiff outside the class of persons to whom a duty of care is owed? If this were the case, contributory negligence could serve to disqualify a plaintiff altogether from recovery<sup>47</sup> and render apportionment legislation<sup>48</sup> effectively worthless.

Gummow J plainly states in the extract above that this is not the case — that the plaintiff's own negligence will not negate the duty of care. Yet if, *as a matter of law*, the *scope* of the duty is defined by reference only to those plaintiffs who take reasonable care for their own safety, it is conceivable that there may be cases where a negligent plaintiff will fail on the duty of care issue, before the breach question is even considered. For Gummow J, the issue of the plaintiff's failure to take care for his own safety was a crucial consideration in determining the *scope of the duty of care*. Is there then a possibility that the scope of the duty might be so limited as to preclude a finding of a duty at all?

(b) *Obvious Risks*

In several Australian jurisdictions, tort law reform legislation precludes liability being owed to plaintiffs who are injured by the materialisation of obvious risks while engaging in dangerous recreational activities.<sup>49</sup> Indeed, a provision to that effect<sup>50</sup> defeated Dederer's claim against the Great Lakes Shire Council,<sup>51</sup> which had been joined as a defendant in the plaintiff's original proceedings. By limiting the scope of any duty of care owed to persons who take such risks, is it possible that the common law is developing towards the same legislative end in respect of obvious risks?

In *Dederer*, Gummow J did not specifically deal with the issue of 'obvious risk' and its relevance to the *breach of duty* enquiry at common law. Instead, he explicitly considered obviousness of risk on the *scope of duty* question in relation

<sup>47</sup> This is the case under tort law reform legislation in several states where provisions have been enacted to the effect that courts may reduce damages by 100 per cent for contributory negligence: *Civil Law (Wrongs) Act 2002* (ACT) s 47; *Civil Liability Act 2002* (NSW) s 5S; *Civil Liability Act 2003* (Qld) s 24; *Wrongs Act 1958* (Vic) s 63.

<sup>48</sup> See *Civil Law (Wrongs) Act 2002* (ACT); *Law Reform (Miscellaneous Provisions) Act 1965* (NSW); *Law Reform (Miscellaneous Provisions) Act 1956* (NT); *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act 1953* (Qld); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); *Tortfeasors and Contributory Negligence Act 1954* (Tas); *Wrongs (Contributory Negligence) Act 1951* (Vic); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) s 4. In Queensland, the legislation on the apportionment of liability in contributory negligence is now contained in pt III of the *Law Reform Act 1995* (Qld); in Victoria it is now pt IVAA of the *Wrongs Act 1958* (Vic); and in Tasmania it is now s 4 of the *Wrongs Act 1954* (Tas).

<sup>49</sup> *Civil Liability Act 2002* (NSW) s 5L; *Civil Liability Act 2003* (Qld) s 19; *Recreational Services (Limitation of Liability) Act 2002* (SA) s 7; *Civil Liability Act 2002* (Tas) s 20; *Civil Liability Act 2002* (WA) s 5H.

<sup>50</sup> *Civil Liability Act 2002* (NSW) s 5L.

<sup>51</sup> *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81–860, 68 884 (Ipp JA).

to the plaintiff's failure to take care for his own safety. Gummow J refers to the plaintiff's 'own voluntary and obviously dangerous conduct in diving from the bridge'<sup>52</sup> and it was this conduct which his Honour held limited the *scope* of the duty owed.

There has been significant debate within the High Court in recent years as to whether the obviousness of risk should be a factor specifically limiting the *scope* of a duty of care, or whether it should be considered simply as one of the factors going to *breach* of duty or, alternatively, whether it should be confined to considerations of contributory negligence on the plaintiff's part.<sup>53</sup>

In *Romeo*, a majority of the High Court considered the 'obviousness of the risk' as one factor going to the breach of duty question.<sup>54</sup> They held that the public authority concerned was not negligent in failing to warn of the danger of a cliff edge or to take steps to avoid it because the danger would have been obvious to users of the reserve, making it reasonable to expect that entrants would exercise reasonable care for their own safety.<sup>55</sup> Kirby J held:

While account must be taken of the possibility of inadvertence or negligent conduct on the part of entrants, the occupier is generally entitled to assume that most entrants will take reasonable care for their own safety ... Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about the risk is neither reasonable nor just.<sup>56</sup>

Similarly, in *Woods v Multi-Sport Holdings Pty Ltd* ('*Woods*'), the majority of the High Court regarded the 'obviousness of the risk' of injury from a cricket ball to the eye as but one factor to be taken into account as part of the wider breach of duty enquiry.<sup>57</sup>

The cases of *Vairy v Wyong Shire Council* ('*Vairy*')<sup>58</sup> and *Mulligan v Coffs Harbour City Council* ('*Mulligan*')<sup>59</sup> both concerned a plaintiff who had suffered serious spinal injury after diving into water of unknown depth. In each case the statutory authority, having control of the relevant swimming spot, was held not to have breached its duty of care by failing to warn of the danger or to otherwise avoid it. In *Vairy*, Gleeson CJ, Kirby, McHugh, Gummow and Hayne JJ all held that the obviousness of risk was one factor to be considered on the issue of breach of duty. They were not of the opinion that the obviousness of risk alone could ever be 'necessarily determinative of questions of breach of duty'.<sup>60</sup> However, Callinan and Heydon JJ took a much narrower view in

<sup>52</sup> *Dederer* (2007) 238 ALR 761, 774.

<sup>53</sup> See, eg. *Romeo* (1998) 192 CLR 431; *Woods* (2002) 208 CLR 460; *Brodie* (2001) 206 CLR 512; *Thompson v Woolworths (Q'Land) Pty Ltd* (2005) 221 CLR 234; *Vairy* (2005) 223 CLR 422; *Mulligan* (2005) 223 CLR 486.

<sup>54</sup> (1998) 192 CLR 431, 447 (Brennan CJ), 455–6 (Toohey and Gummow JJ), 491 (Hayne J).

<sup>55</sup> *Ibid* 481 (Kirby J).

<sup>56</sup> *Ibid* 478 (citations omitted).

<sup>57</sup> (2002) 208 CLR 460, 474 (Gleeson CJ), 504 (Hayne J), 509–10 (Callinan J).

<sup>58</sup> (2005) 223 CLR 422.

<sup>59</sup> (2005) 223 CLR 486.

<sup>60</sup> *Vairy* (2005) 223 CLR 422, 441 (Gummow J). See also at 427 (Gleeson CJ and Kirby J), 438–9 (McHugh J), 479 (Hayne J).

*Mulligan* and held that ‘obviousness may be of such significance and importance, indeed of such a very high degree of importance as to be overwhelmingly so, and effectively conclusive in some cases.’<sup>61</sup>

In contrast, McHugh J sounded a note of caution in *Vairy* and adverted to a more traditional approach when he stated that ‘[t]he obviousness of the risk goes to the issue of the plaintiff’s contributory negligence, rarely to the discharge of the defendant’s duty.’<sup>62</sup> Similarly, Hayne J stated that ‘the focus of inquiry [at the breach of duty stage] must remain upon the putative tortfeasor, not upon the person who has been injured’.<sup>63</sup>

Kirby J’s judgment in *Neindorf*, a case concerning the liability of a private occupier of a dwelling house to entrants, contains some telling comments concerning the recent developments in the High Court’s attitude to obvious risks. In particular, his Honour refers to the fact that ‘passages appear in many judicial reasons to the effect that, in defining the standard of care in a particular case, it is appropriate to take into account whether the suggested risk is “obvious”.’<sup>64</sup> His Honour specifically refers to his own judgment in *Romeo* and points out that the

danger of placing so much emphasis on suggested obviousness is that, in a given case, it will distort proper consideration of a defence of contributory negligence. It will take that factor of alleged carelessness on the part of the plaintiff up into the negation of a breach of duty, instead of reaching it at the conclusion of conventional negligence analysis.

The mischief of this approach, which is spreading like wildfire through the courts of this land and must be arrested if proper negligence doctrine is to be restored, is that it can effectively revive the ancient common law position so that effectively, contributory negligence, of whatever proportion, becomes again a complete defence to an action framed in negligence ...

If I could expunge the quoted passage from my reasons in *Romeo*, I would gladly do so. I would take it out, not because it was incorrect as a factual observation in the context of that case but because it has been repeatedly deployed by courts as an excuse to exempt those with greater power, knowledge, control and responsibility over risks from a duty of care to those who are vulnerable, inattentive, distracted and more dependent.<sup>65</sup>

So the approach of the High Court to obviousness of risk is by no means settled. Certainly in the case of *Dederer*, obviousness of risk can be identified clearly as the decisive issue defining the *scope* of the duty of care owed to the plaintiff by the RTA, and subsequently affecting the *breach of duty* question.

(c) *Breach of Duty*

Having dealt with the complex issue of the scope of the duty of care, Gummow J then considered the question of the relevant standard of care expected of the RTA. He emphasised that the standard required of a defendant is to take

<sup>61</sup> *Mulligan* (2005) 223 CLR 486, 509.

<sup>62</sup> *Vairy* (2005) 223 CLR 422, 438.

<sup>63</sup> *Ibid* 470.

<sup>64</sup> *Ibid* 649 (citations omitted).

<sup>65</sup> *Ibid* 650–1 (citations omitted).

*reasonable care*, rather than to *prevent* injury.<sup>66</sup> His Honour held that this ‘orthodox approach’ was not adopted at trial or in the Court of Appeal.<sup>67</sup> He noted that the trial judge and the majority in the Court of Appeal concentrated on the failure of the signs on the bridge to *prevent* people from diving and jumping from it.<sup>68</sup> The majority in the Court of Appeal concluded that it was unreasonable for the RTA to do nothing in response to the ‘well-known practice of children jumping from the bridge in defiance of “No Diving” signs’.<sup>69</sup> Gummow J held that this approach was erroneous, and that as long as the RTA had exercised reasonable care it would not be liable even if the risky behaviour were to continue.<sup>70</sup> His Honour stated that ‘[e]ven reasonable warnings can “fail”’<sup>71</sup> and held that the majority of the Court of Appeal had

impermissibly reasoned that if a warning is given, and if the conduct against which that warning is directed continues ... then the party who gave the warning is shown to have been negligent by reason of the warning having failed.<sup>72</sup>

This reasoning, his Honour held, ‘short-circuits the inquiry into breach of duty that is required by *Shirt*’.<sup>73</sup>

Gummow J further held that the trial judge and the Court of Appeal had incorrectly characterised the risk to the plaintiff as being a risk of serious spinal injury caused by diving from the bridge.<sup>74</sup> His Honour held that this view of the risk obscured the real source of the injury, which was not the state of the bridge but instead the plaintiff’s own conduct in jumping into potentially shallow water and risking impact. This distracted the majority from a proper assessment of the probability of the risk eventuating and also led to attributing to the RTA a greater control over the situation than it actually had. Gummow J held that the risk of injury had a low probability of occurring and that the RTA had no control over the plaintiff’s activity or the variations in depth of the river.<sup>75</sup>

Gummow J also found that the trial judge and the majority in the Court of Appeal did not engage in an assessment of breach of duty on the part of the RTA prospectively, but rather from a position of hindsight, that is, by ‘retrospectively asking whether the defendant’s actions could have prevented the plaintiff’s injury.’<sup>76</sup> His Honour held that the lower courts had focused in retrospect on the defendant’s failure to prevent the plaintiff’s dive, rather than asking what the exercise of reasonable care would have required prospectively in response to the foreseeable risk of injury.

Ultimately on the issue of breach, Gummow J held that the risk was plainly foreseeable, but that the RTA had acted reasonably in doing nothing more than it

<sup>66</sup> *Dederer* (2007) 238 ALR 761, 775.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* 776–7.

<sup>69</sup> *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81–860, 68 920 (Tobias JA).

<sup>70</sup> *Dederer* (2007) 238 ALR 761, 776.

<sup>71</sup> *Ibid* 777.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid* (referring to *Wyong Shire Council v Shirt* (1979) 146 CLR 40 (*‘Shirt’*)).

<sup>74</sup> *Dederer* (2007) 238 ALR 761, 778.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid* 779.

had already done in response to the risk. His Honour held that the risk, though of grave injury, had a low probability of occurring. Furthermore, the plaintiff had provided little evidence that he would have complied with further signs; moreover, modification of the railings was of doubtful utility and would have involved significant expense.<sup>77</sup> Accordingly, his Honour concluded that the RTA had not breached its duty of care to the plaintiff.<sup>78</sup>

Using the ‘*Shirt calculus*’, Callinan J, like Gummow J, considered that the RTA had discharged its duty of care to the plaintiff. In the opinion of Callinan J, both the trial judge and the majority in the Court of Appeal had ‘erred, by failing to undertake this balancing exercise in a sufficient and proper way’.<sup>79</sup> Notwithstanding that it was a risk of grave injury, his Honour specifically drew attention to the very low probability of the realisation of the risk of injury, the community interests to be balanced against redesign of the bridge, and the improbability that a differently worded sign would have deterred the plaintiff’s behaviour. Callinan J also held that a defendant is not an insurer, in the sense that a duty of care is not an absolute duty to prevent injury; rather, a defendant must respond to a risk reasonably.<sup>80</sup> His Honour considered that:

A proper balancing exercise which takes all of the relevant circumstances into account leads inescapably to the conclusion that the appellant, in responding to a risk that had not been realised for 40 years, by erecting the pictograph signs, acted reasonably and adequately.<sup>81</sup>

Heydon J expressly agreed with the reasons of Gummow J on the question of the liability of the RTA.<sup>82</sup>

## 2 *The Dissident View on the Issue of Liability of the RTA*

Kirby J, with whose reasons Gleeson CJ agreed, held in dissent that the decision of the trial judge and the majority of the Court of Appeal on the issues of the defendant’s negligence and causation should stand.<sup>83</sup> Kirby J held that those conclusions contained no error of fact or law on the part of the Court of Appeal that would justify disturbance by the High Court.<sup>84</sup>

As to the evidence, Kirby J held that it was open to the trial judge to find that the RTA knew of the dangerous practice of diving from the bridge and to accept the plaintiff’s own evidence at trial as to the deterrent effect upon him of a sign warning of the danger of shallow water.<sup>85</sup> Kirby J noted that these findings of fact presented a serious obstacle to the defendant obtaining a different conclusion

<sup>77</sup> Ibid 781–2.

<sup>78</sup> Ibid 782.

<sup>79</sup> Ibid 825.

<sup>80</sup> Ibid 826.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid 798 (Kirby J), 766 (Gleeson CJ).

<sup>84</sup> Ibid 794, 798, 800, 802–3 (Kirby J).

<sup>85</sup> Such a statement by a plaintiff after the event as to what the plaintiff would have done had the defendant not been negligent would now be inadmissible in NSW: *Civil Liability Act 2002* (NSW) s 5D(3).

from an appellate court, where the appellate court did not have the benefit of hearing directly from the plaintiff.<sup>86</sup>

On the issue of breach of duty of care, Kirby J referred to the High Court's recent decision in *New South Wales v Fahy*,<sup>87</sup> where the 'Shirt calculus' was reaffirmed. He stressed that there is

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.<sup>88</sup>

Kirby J concluded that the Court of Appeal's application of the 'Shirt calculus' was correct and that there was no indication in the majority reasons that 'any of the strictures against mechanistic reasoning or hindsight analysis' had been overlooked.<sup>89</sup> His Honour considered in detail the leading judgment of Ipp JA in the Court of Appeal and all the evidence upon which Ipp JA had concluded that the RTA's response to the risk was unreasonable. Kirby J concluded that it was well open to the majority in the Court of Appeal to agree with the primary judge, concluding that the RTA was in breach of its duty.<sup>90</sup>

On the issue of causation, Kirby J held that the findings of the primary judge, who had the advantage of the plaintiff's own oral evidence, should stand. His Honour clearly stated that appellate courts should have no 'exaggerated deference to trial assessments which reasonably appear to defy appellate common-sense.'<sup>91</sup> Nevertheless, he found that in the present case there was no error in the approach of the Court of Appeal, which had carefully considered both the factual findings of the trial judge and the circumstances surrounding the plaintiff's dive.<sup>92</sup> Accordingly, Kirby J held that the plaintiff's judgment against the RTA should stand.

### III THE ALLUREMENT FACTOR

The question of whether the way in which the bridge was constructed constituted an 'allurement' to young people was a relevant consideration to both the issues of duty and breach of duty, at trial and also in the Court of Appeal.

At trial, Dunford J held:

The bridge, being a launching pad for jumping or diving into generally clear water at a holiday resort, particularly in summer was, I believe, a very strong

<sup>86</sup> *Dederer* (2007) 238 ALR 761, 799.

<sup>87</sup> (2007) 232 CLR 486.

<sup>88</sup> *Dederer* (2007) 238 ALR 761, 794–5 (citations omitted).

<sup>89</sup> *Ibid* 795.

<sup>90</sup> *Ibid* 798.

<sup>91</sup> *Ibid* 799.

<sup>92</sup> *Ibid* 800.

allurement to youths of the plaintiff's age group, particularly as in a colloquial, though not accurate, sense, 'everybody else' was doing it.<sup>93</sup>

In the Court of Appeal, Ipp JA considered 'allurement' on the question of duty of care whilst looking at many factors: for example, the construction of the bridge so as to create the danger; the 'allurement' presented by the bridge; the RTA's maintenance and regular inspections of the bridge; and, most influentially, the RTA's control of the bridge.<sup>94</sup> His Honour regarded all these factors as influential on the duty of care question, but also held that the fact that the bridge was an allurement to young people was a relevant consideration on the issue of breach of duty.<sup>95</sup> His Honour referred to his own judgment in *Edson v Roads and Traffic Authority of New South Wales*,<sup>96</sup> with which Beazley JA and Hunt AJA agreed:

Where the exigencies of life and human nature combine to cause large numbers of persons to take grave risks in utilising areas under the control of a statutory authority, the community expects that the authority itself will take reasonable steps to limit the harm likely to result. It was the very function of the RTA, after all, to promote traffic safety.<sup>97</sup>

The issue of 'allurement' has been a significant consideration in a number of cases over the last four decades,<sup>98</sup> particularly on the question of the comparative culpability between plaintiff and defendant for the purpose of determining the extent of the reduction in damages for contributory negligence.<sup>99</sup> For example, in *Commonwealth v Introvigne*,<sup>100</sup> Murphy J held that a school authority was not only negligent in failing to supervise the 15-year-old plaintiff who was swinging on a school flagpole,<sup>101</sup> but that the flagpole itself was a 'lure'.<sup>102</sup>

In *Sainsbury v Great Southern Energy Pty Ltd* ('*Sainsbury*'),<sup>103</sup> Barr J discussed the different ways of measuring the comparative negligence of parties as identified by Glass JA in *Kelly v Bega Valley County Council* ('*Kelly*').<sup>104</sup> 'The first three factors were the intrinsic danger of the activity under examination, its

<sup>93</sup> *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81-792, 67 530.

<sup>94</sup> *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860, 68 896.

<sup>95</sup> *Ibid* 68 901.

<sup>96</sup> (2006) 65 NSWLR 453.

<sup>97</sup> *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81-860, 68 901, citing his own judgment in *Edson v Roads and Traffic Authority of New South Wales* (2006) 65 NSWLR 453, 469-70.

<sup>98</sup> See, eg, *Munnings v Hydro-Electric Commission* (1971) 125 CLR 1; *Commonwealth v Introvigne* (1982) 150 CLR 258; *Kelly* (Unreported, New South Wales Court of Appeal, Glass, Hope and Samuels JJA, 13 September 1982); *Sainsbury* [2000] NSWSC 479 (Unreported, Barr J, 26 May 2000).

<sup>99</sup> Interestingly, Dunford J, the trial judge in *Dederer*, also presided in the earlier case of *Ryan v State Rail Authority of New South Wales* [1999] NSWSC 1236 (Unreported, Dunford J, 16 December 1999) [17], where the 'allurement' factor was held to be a relevant consideration in the determination of contributory negligence involving a 13-year-old boy.

<sup>100</sup> (1982) 150 CLR 258.

<sup>101</sup> *Ibid* 275.

<sup>102</sup> *Ibid* 276.

<sup>103</sup> [2000] NSWSC 479 (Unreported, Barr J, 26 May 2000).

<sup>104</sup> (Unreported, New South Wales Court of Appeal, Glass, Hope and Samuels JJA, 13 September 1982) 10 (Glass JA).

duration and the maturity of the actor.<sup>105</sup> The fourth factor was whether the ‘defendant’s default constituted an allurement which in a real sense provoked and facilitated the default of the plaintiff.’<sup>106</sup>

In *Sainsbury*, a 12-year-old boy suffered injuries by electrocution after he climbed an electricity pole in a park reserve and touched an electricity wire.<sup>107</sup> The boy had unfortunately believed that he needed to touch two electricity wires to get hurt. In finding the energy company liable for the accident and setting the boy’s contribution at 10 per cent,<sup>108</sup> Barr J referred to the four factors identified by Glass JA in *Kelly*. In relation to the first factor, his Honour noted that the defendant’s act ‘was a special undertaking which transmitted electricity at lethal voltages through a public park provided for the recreation of members of the public, including children.’<sup>109</sup> His Honour found that the defendant ‘owed a responsibility to all those who used the reserve to carry electricity safely’ and that it had failed ‘in its duty to do so.’<sup>110</sup> By contrast, Barr J reasoned that the ‘plaintiff’s default endangered only himself.’<sup>111</sup> In relation to the second factor, his Honour noted that while the defendant’s default was longstanding, the ‘plaintiff’s default was short-lived and impulsive.’<sup>112</sup> As to the third factor, his Honour stated that while the ‘defendant’s default was that of a mature man knowing all the dangers of the carriage of lethal voltages of electricity in the circumstances’, the plaintiff was an ‘immature’ 12-year-old boy.<sup>113</sup> In relation to the fourth factor, ‘allurement’, Barr J held that the ‘defendant’s default constituted an allurement which actually provoked and facilitated the plaintiff’s default.’<sup>114</sup> Indeed, his Honour went further and described the power pole, and the lack of guard rails preventing access, as promoting a ‘positive encouragement to climb.’<sup>115</sup>

In contrast to these earlier authorities, Gummow J’s judgment in *Dederer* is particularly dismissive of the ‘allurement’ factor, describing the continued use of the term ‘as a factual epithet [that] 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

<sup>105</sup> *Sainsbury* [2000] NSWSC 479 (Unreported, Barr J, 26 May 2000) [12]–[15].

<sup>106</sup> *Ibid* [16].

<sup>107</sup> *Ibid* [2]–[6].

<sup>108</sup> *Ibid* [18].

<sup>109</sup> *Ibid* [13].

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid* [14].

<sup>113</sup> *Ibid* [15].

<sup>114</sup> *Ibid* [16].

<sup>115</sup> *Ibid*.

activity was attractive to certain kinds of people. Such an observation is of no legal consequence.<sup>116</sup>

Callinan J was also dismissive of the bridge being cast as an ‘allurement’ that the defendant should have rectified:

The [plaintiff] was engaged in an activity of a purely recreational kind. The thrill of making, as he did, a high dive which he knew to be banned must have been an attraction for him. To say, as if it were an answer, that the bridge was therefore an allurement which the defendants should, on that account, have rectified is to cease the inquiry at, or to treat as effectively decisive, the state of affairs antecedent to the first respondent’s entirely voluntary, and premeditated, prohibited act of diving. But even so, it is something of an exaggeration to describe a perfectly orthodox bridge constructed to endure for many years, and in accordance with the standards of the time, as an allurement, as if, because youths were accustomed to misuse it, it should be modified to put beyond all chance that they would do so in the future.<sup>117</sup>

In contrast, Kirby J agreed with Ipp JA’s assessment in the Court of Appeal that the design of the bridge’s railing ‘afforded an allurement to children tempted to use that railing as a platform for entry into the water.’<sup>118</sup> He found that although the proposed relatively inexpensive modification to the railing would not have prevented access to the water from the bridge, it would have assisted in diminishing or removing any encouragement to use the rail as a diving platform.<sup>119</sup> Additionally, Kirby J referred to Ipp JA’s endorsement of the suggestion that the horizontal railings on the bridge ‘should have been removed and replaced with vertical pool-type railings’, at least in the area known to have been an allurement.<sup>120</sup>

In dismissing the appeal, Kirby J found that:

With respect, I do not agree that an allurement to children is a defendant’s responsibility only if that party encourages the alluring feature. 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.<sup>121</sup>

Consequently, as far as the majority of the current High Court is concerned, the ‘allurement factor’ may have reached its ‘use-by date’ as an independent factor for consideration.

#### IV CONTRIBUTORY NEGLIGENCE

While the High Court majority in *Dederer* did not need to consider the question of the plaintiff’s contributory negligence, Kirby J, having decided to allow

<sup>116</sup> *Dederer* (2007) 238 ALR 761, 779.

<sup>117</sup> *Ibid* 826 (citations omitted).

<sup>118</sup> *Ibid* 797 (citations omitted), referring to *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81–860, 68 905.

<sup>119</sup> *Dederer* (2007) 238 ALR 761, 797.

<sup>120</sup> *Ibid* 798.

<sup>121</sup> *Ibid* (citations omitted).

the defendant's appeal, did consider the role of an appellate court in reviewing apportionment ordered for contributory negligence at trial.<sup>122</sup>

The discount for contributory negligence in *Dederer* was assessed by the trial judge as 25 per cent.<sup>123</sup> The Court of Appeal increased the apportionment to 50 per cent.<sup>124</sup> Kirby J observed that it is generally accepted that a trial judge, having heard all the evidence, will be in a better position than an appellate court to make an 'evaluative and multi-factorial' decision on apportionment.<sup>125</sup> Nevertheless, his Honour held that an intermediate appellate court must discharge its own functions of appellate review and so is obliged to substitute its own decision for that of the lower court where error is shown in the apportionment.<sup>126</sup> Kirby J concluded that the Court of Appeal had engaged in a 'painstaking examination of the facts'<sup>127</sup> and all the judges considered that the trial judge had erred. His Honour stated:

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. While the standard of care that could be expected of him was only that of an ordinary person of his age, 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.<sup>128</sup>

This view of the High Court and the Court of Appeal represents a relatively high standard of care to be expected of an adolescent boy and a departure from traditional notions of a minor's contributory negligence which have allowed for the exuberance of youth.

In the past, the courts have tended to take a fairly lenient view of the culpability of negligent children and adolescents when applying apportionment legislation. They appear to have developed some fine calibrations along the 'gauge' of contributory negligence in order to accommodate the inattention or foolishness of children and young persons. Commonly, the bar has appeared to be set relatively low in recognition of youthful exuberance, with findings of more than 25 per cent contributory negligence against a child plaintiff relatively rare.<sup>129</sup>

<sup>122</sup> Ibid 801–3.

<sup>123</sup> *Dederer v Roads and Traffic Authority* (2005) Aust Torts Reports ¶81–792, 67 534 (Dunford J).

<sup>124</sup> *Great Lakes Shire Council v Dederer* (2006) Aust Torts Reports ¶81–860, 68 915 (Ipp JA). Tobias JA agreed: at 68 923. Handley JA similarly agreed on contributory negligence despite dissenting on other points: at 68 874.

<sup>125</sup> *Dederer* (2007) 238 ALR 761, 802.

<sup>126</sup> Ibid referring to *Fox v Percy* (2003) 214 CLR 118, 127–8 (Gleeson, Gummow and Kirby JJ).

<sup>127</sup> *Dederer* (2007) 238 ALR 761, 802.

<sup>128</sup> Ibid 803.

<sup>129</sup> Consideration of a selection of cases illustrates this point: *Kelly* (Unreported, New South Wales Court of Appeal, Glass, Hope and Samuels JJA, 13 September 1982) 1, 10 (Glass JA) involved an 11-year-old boy who was electrocuted upon entering a council sub-station, the result being a 25 per cent reduction for contributory negligence; *Gunning v Fellows* (1997) 25 MVR 97, 97–8, 100 (Beazley JA) involved a 12-year-old boy who was injured in a collision with a car while riding his bike down a driveway, the result being a 25 per cent reduction for contributory negli-

In cases such as *Kelly* and *Sainsbury*, the courts have been at pains to consider the impulsiveness, immaturity, inexperience and lack of foresight of children when making a comparison between the culpability of an adult or corporate defendant, and that of a child plaintiff. These matters have been addressed overtly by the courts, resulting in accommodations for children that would not and clearly should not, be applicable to adults. However, *Dederer's* case represents an apparently higher expectation of youthful responsibility than that which has been applied in the past.

The same general notions of personal responsibility that are embodied in the tort law reform legislation in Australian jurisdictions have undoubtedly had some influence on the courts in applying the common law. Several of those deal with contributory negligence and, in particular, some tort law reforms reverse the previous common law position<sup>130</sup> by providing that contributory negligence may result in a 100 per cent reduction in the plaintiff's damages.<sup>131</sup> Such radical alterations to the common law position must reflect a widespread change in community values. Perhaps we are already seeing that change in attitude reflected in increased findings of contributory negligence against young persons at common law.

The finding by the High Court majority in *Dederer* (and one dissenting justice in the NSW Court of Appeal) that this minor should shoulder full responsibility for the tragic accident in this case appears somewhat harsh. The plaintiff's actions were certainly foolish, but they were the actions of a boy not yet old enough to vote, obtain a driver's licence or even leave school. While there have been examples of children as young as 12 being held fully responsible for their own actions,<sup>132</sup> this is generally due to a finding of a lack of 'foreseeability of risk' by a defendant. Given the evidence that the RTA had known for many years

gence; *Ryan v State Rail Authority of New South Wales* [1999] NSWSC 1236 (Unreported, Dunford J, 16 December 1999) [1], [41] involved a 13-year-old boy who was injured jumping onto a moving train, the result being a 33 per cent reduction for contributory negligence; *Sainsbury* [2000] NSWSC 479 (Unreported, Barr J, 26 May 2000) [1], [2], [18] involved a 12-year-old boy who was electrocuted after climbing upon an electricity pole, the result being a 10 per cent reduction for contributory negligence; *Goode v Thompson* (2001) Aust Torts Reports ¶81-617, 67 153, 67 160 (Ambrose J) involved a 12-year-old boy who was hit by a car while crossing a road, the result being a 20 per cent reduction for contributory negligence; *Chotiputhsilpa v Waterhouse* [2005] NSWCA 295 (Unreported, Beazley, Giles and Ipp JJA, 2 September 2005) [1], [4], [94] involved a 16-year-old boy who was hit by a car crossing Sydney's Anzac Bridge, the result being a 60 per cent reduction for contributory negligence; *Edson v Roads and Traffic Authority of New South Wales* (2006) 65 NSWLR 453, 454, 477 (Ipp JA) involved a 13-year-old girl who was hit by two cars crossing Sydney's F5 freeway, the result being a 40 per cent reduction for contributory negligence; and *Traynor v Australian Capital Territory* [2007] ACTSC 38 (Unreported, Connolly J, 18 June 2007) [1], [115] involved an 11-year-old boy who was injured in a collision with a car when riding his bicycle onto a road from a cycle path, the result being a 10 per cent reduction for contributory negligence.

<sup>130</sup> See, eg, *Wynbergen v Hoyts Corporation Pty Ltd* (1997) 149 ALR 25, 28-30 (Hayne J), in which it was held that s 10 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) does not permit the apportionment of 100 per cent responsibility to one party to the exclusion of responsibility of another party whose fault was a cause of the claimant's damage. Gaudron, McHugh, Gummow and Kirby JJ agreed with Hayne J: at 26.

<sup>131</sup> See *Civil Law (Wrongs) Act 2002* (ACT) s 47; *Civil Liability Act 2002* (NSW) s 5S; *Civil Liability Act 2003* (Qld) s 24; *Wrongs Act 1958* (Vic) s 63.

<sup>132</sup> See, eg, *McLellan v Queensland Rail* [2001] QCA 487 (Unreported, McMurdo P, McPherson JA and Cullinane J, 9 November 2001) [16] (McMurdo P), [27] (Cullinane J). McPherson JA agreed with McMurdo P: at [20].

that both adults and children were using a particular part of the bridge as a diving platform, one would have thought that foresight, rather than hindsight, should have led to modification of the bridge structure to prevent improper or dangerous use. Although the view of the majority would have merit with respect to the actions of competent adults, it is of concern that children and young people may be expected, in such situations, to show ‘a degree of sense and circumspection which nature ordinarily withholds till life has become less rosy.’<sup>133</sup>

#### V CONCURRENT FINDINGS OF FACT AND THE ROLE OF AN APPELLATE COURT

A separate but important issue addressed by the High Court in *Dederer* was that of the circumstances in which a final or second appellate court might disturb concurrent findings of fact by two lower courts.

There are various High Court authorities which recognise a ‘rule’ concerning the approach of second appellate courts to concurrent findings of fact.<sup>134</sup> The issue was considered definitively by the High Court for the first time in 1928 in *Major v Bretherton*, where Isaacs J used the word ‘rule’ to describe the approach to be taken, stating:

I do not mean that as soon as I see there are concurrent findings I abstain from forming my own opinion. I am bound to consider the evidence and to form my own opinion consistently with judicial obligation and precedent. But when I have done so, the rule comes into play, and, unless I reach the point of clear conviction predicated by the House of Lords in the *P Caland Case*, the appeal should, in my opinion, fail.<sup>135</sup>

Gleeson CJ agreed with Kirby J’s dissenting judgment in *Dederer* that the findings of the Court of Appeal on issues of negligence and causation should not be overturned.<sup>136</sup> In his judgment, the Chief Justice focused on the crucial issue of whether a final appellate court should overturn findings on negligence and causation made by the trial judge, as well as by the Court of Appeal. The Chief Justice was adamant that the function of the High Court ‘as a second appellate court and a court of final resort, is not simply to give a well-resourced litigant a third opportunity to persuade a tribunal to take a view of the facts favourable to that litigant.’<sup>137</sup>

Gleeson CJ relied on the principle that an appellate court should not disturb concurrent findings of two lower courts except where there are special reasons for doing so, such as injustice or clear error. He referred to the many authorities

<sup>133</sup> *McHale v Watson* (1966) 115 CLR 199, 216 (Kitto J).

<sup>134</sup> See *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, 568 (Gleeson CJ); *Major v Bretherton* (1928) 41 CLR 62, 68 (Isaacs J); *Baffsky v Brewis* (1976) 12 ALR 435, 438 (Barwick CJ) (Stephen, Mason, Jacobs and Aickin JJ agreed with Barwick J: at 438); *Commonwealth v Introvigne* (1982) 150 CLR 258, 274 (Mason J); *Louth v Diprose* (1992) 175 CLR 621, 633–4 (Deane J); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 434–5 (Deane J); *Bridgewater v Leahy* (1998) 194 CLR 457, 471 (Gleeson CJ and Callinan J).

<sup>135</sup> (1928) 41 CLR 62, 70–1 (citations omitted).

<sup>136</sup> (2007) 238 ALR 761, 766.

<sup>137</sup> *Ibid* 764.

that underpin this longstanding principle,<sup>138</sup> pointing out that, in most Australian jurisdictions a decision on the issue of negligence in a claim for personal injury would historically have been made by a civil jury as the tribunal of fact.<sup>139</sup> Such a finding would, of course, not easily be reviewed by an appellate court.<sup>140</sup> Today, issues of negligence are decided by the trial judge, who delivers a judgment setting out reasons, which makes appellate review possible. Appellate courts in turn set out full reasons. The Chief Justice argued that, in the interests of finality, a second appellate court, while not abdicating its own responsibilities, must be clearly convinced of error before it should disturb concurrent findings of fact.<sup>141</sup>

In contrast, Gummow J was of the opinion that the errors in the lower courts in *Dederer* did not turn on issues of fact about which reasonable minds might differ.<sup>142</sup> Rather, his Honour characterised the errors in the courts below as errors in the application of settled law. Accordingly, his Honour was not concerned about the matters on which Gleeson CJ based his judgment.

On the question of the appropriate role of an appellate court, Callinan J considered both s 73 of the *Australian Constitution* and s 35AA of the *Judiciary Act 1908* (Cth), which imposed ‘at least as heavy an obligation to dispose of appeals to it on their legal and factual merits as an intermediate appellate court.’<sup>143</sup> His Honour emphasised that in all the cases cited by the Chief Justice as authority for the ‘concurrent findings principle’, there is no reference to the enactments under which the various appeals were brought. Nor has any distinction been made in those authorities between appeals on questions of law, and appeals on questions of fact.<sup>144</sup> Callinan J further observed that in the present case there were no primary factual matters of substance in dispute between the parties, either at first instance or on appeal. His Honour noted ironically that the ‘key inferential matter of fact’ — being the issue of what an adequate warning sign should have said — was not a matter on which there had been concurrent findings.<sup>145</sup>

While Heydon J agreed with the judgment of Gummow J in relation to the substance of the appeal,<sup>146</sup> he cast doubt on the applicability of the ‘concurrent findings principle’ to the High Court. Heydon J held that in the present case, the courts below had not made ‘concurrent findings of fact’ in such a way as to inhibit the High Court from allowing the appeal.<sup>147</sup> Moreover, his Honour listed six non-concurrent or ‘discordant’ findings of the lower courts in *Dederer* which were in relation to measures that the RTA should have taken to discharge its duty of care.<sup>148</sup> His Honour also pointed out that the non-concurrent findings in

<sup>138</sup> See above n 134.

<sup>139</sup> *Dederer* (2007) 238 ALR 761, 764–5.

<sup>140</sup> *Ibid* 766.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid* 772.

<sup>143</sup> *Ibid* 822.

<sup>144</sup> *Ibid*.

<sup>145</sup> *Ibid* 824.

<sup>146</sup> *Ibid* 826.

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid* 826–7.

*Dederer* consisted of ‘discordance on issues not directly material to the question ... [of] breach ... but factually closely related to that question’.<sup>149</sup>

Referring to the judgment of Deane J in *Louth v Diprose*,<sup>150</sup> Heydon J opined that

it is understandable that a third court might feel trepidation in disagreeing with factual findings on which all the judges of two other courts have already agreed: but it is difficult to understand the trepidation in cases like the present, where the courts below not only did not agree, but were at odds on almost every crucial issue except the ultimate issue of whether there had been a breach of duty.<sup>151</sup>

Heydon J recognised the importance of minimising the costs of administration of justice as well as the need to ensure practical equality before the law, but nonetheless held that such considerations should not stand in the way of appellate correction of erroneous conclusions.<sup>152</sup> Heydon J referred to two propositions advocated by Deane J in *Louth v Diprose*, namely, that ‘the concurrent findings principle applies even if the courts below differ in their reasoning, and even if there is a dissent in the first appellate court.’<sup>153</sup> Heydon J referred to *Devi v Roy*,<sup>154</sup> the Privy Council authority for those propositions, and stated:

It must be seriously doubted whether it is right for this court to adopt for itself a rule of conduct which the board laid down without reference to any statutory provision, at least without counsel appearing before this court, and the court itself, conducting a close analysis of the constitutional and statutory provisions concerning appeals to this court in a case in which the existence or non-existence of the supposed concurrent findings principle is crucial to the outcome.<sup>155</sup>

Heydon J concluded by deciding that even if the ‘concurrent findings principle’ was to be treated as a rule of law until it is examined more closely in the future, the exception to the rule — that it does not apply if there is a clear conviction that the findings are erroneous — would apply in the present case.<sup>156</sup>

Although Kirby J would have dismissed the appeal, he agreed with the approach adopted by Heydon J on the question of concurrent findings of fact.<sup>157</sup> Kirby J held that neither a principle of law nor judicial practice stands in the way of the High Court’s jurisdiction and power ‘to reach, and give effect to, contrary factual conclusions.’<sup>158</sup> His Honour was of the opinion, however, that ‘more than a passing nod is required to a sense of “trepidation” against interfering in

<sup>149</sup> *Ibid* 827.

<sup>150</sup> (1992) 175 CLR 621, 634.

<sup>151</sup> *Dederer* (2007) 238 ALR 761, 828.

<sup>152</sup> *Ibid* 828–9.

<sup>153</sup> *Ibid* 829.

<sup>154</sup> [1946] AC 508.

<sup>155</sup> *Dederer* (2007) 238 ALR 761, 830.

<sup>156</sup> *Ibid* 831–2.

<sup>157</sup> *Ibid* 800.

<sup>158</sup> *Ibid*. Kirby J agreed with Heydon J’s judgment at 831–2 (Heydon J).

concurrent findings of fact',<sup>159</sup> and that 'a clear case of error is needed for interference in concurrent findings of fact made below.'<sup>160</sup>

#### VI A TREND IDENTIFIED

*Dederer* represents another example in the High Court's trend towards a more restrictive attitude to the finding of liability in the tort of negligence. Kirby J made several telling observations regarding the decision of the majority of the High Court to allow the appeal by the RTA on the issue of liability:

All that has occurred is the substitution of different factual opinions, in harmony with a trend that I have earlier called to notice. 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.<sup>161</sup>

His Honour had previously referred to such a trend in the recent cases of *Cole v South Tweed Heads Rugby League Football Club Ltd*<sup>162</sup> and *New South Wales v Fahy*.<sup>163</sup> In *Neindorf*, Kirby J opined:

Changing attitudes in this court to the content of the common law of negligence have resulted in a discernible shift in the outcomes of negligence cases. According to Professors Skene and Luntz, '[t]he common law, as emanating from the High Court of Australia, was already moving to a much more restrictive attitude towards the tort of negligence'. Now the shift has been accelerated by statute.<sup>164</sup>

This trend shows no signs of abating and, given the emphasis on individual responsibility evident in tort law reforms in all Australian jurisdictions in recent years, it seems likely to continue.

#### VII CONCLUSION

*Dederer* is certainly a case which brings these restrictive changes to the common law into stark relief. The emphasis on obvious risks and personal responsibility is necessitated by the High Court's attempt to limit liability through a consideration of the plaintiff's conduct on the question of scope of duty at the breach enquiry, rather than on the question of contributory negligence. Confining these issues to the question of scope of duty may result in a severe limitation of recourse to damages for those plaintiffs most in need. The approach of the majority in the High Court to ensure that a defendant's liability is limited in terms of reasonable prospective foresight by having regard to obvious risks is laudable. However, there is a wider policy issue of balancing the liability of public authorities in negligence against plaintiffs who require care after a tragic accident caused by youthful exuberance. The High Court's move away from a

<sup>159</sup> *Ibid* 801. Kirby J agreed with Heydon J's judgment: at 828 (Heydon J).

<sup>160</sup> *Ibid* 801.

<sup>161</sup> *Ibid* (citations omitted).

<sup>162</sup> (2004) 217 CLR 469, 499–500.

<sup>163</sup> (2007) 236 ALR 406, 539–40.

<sup>164</sup> (2005) 222 ALR 631, 636 (citations omitted).

focus on public and community responsibility for negligently caused harm and toward renewed emphasis on the same notion of individual responsibility made explicit by recent tort law reform legislation is not only discernible, but palpable.

In every respect, the decision in *Dederer* represents an acceptance of a far more qualified view of negligence law than has been evident in the past. The combination of the narrow definition of the scope of the duty of care, the application of the '*Shirt* calculus' so as to include considerations of the plaintiff's conduct at the breach of duty enquiry, and the disregard for the plaintiff's youth and inexperience all point to an expectation of individual responsibility which diminishes the value and role of the law of negligence.