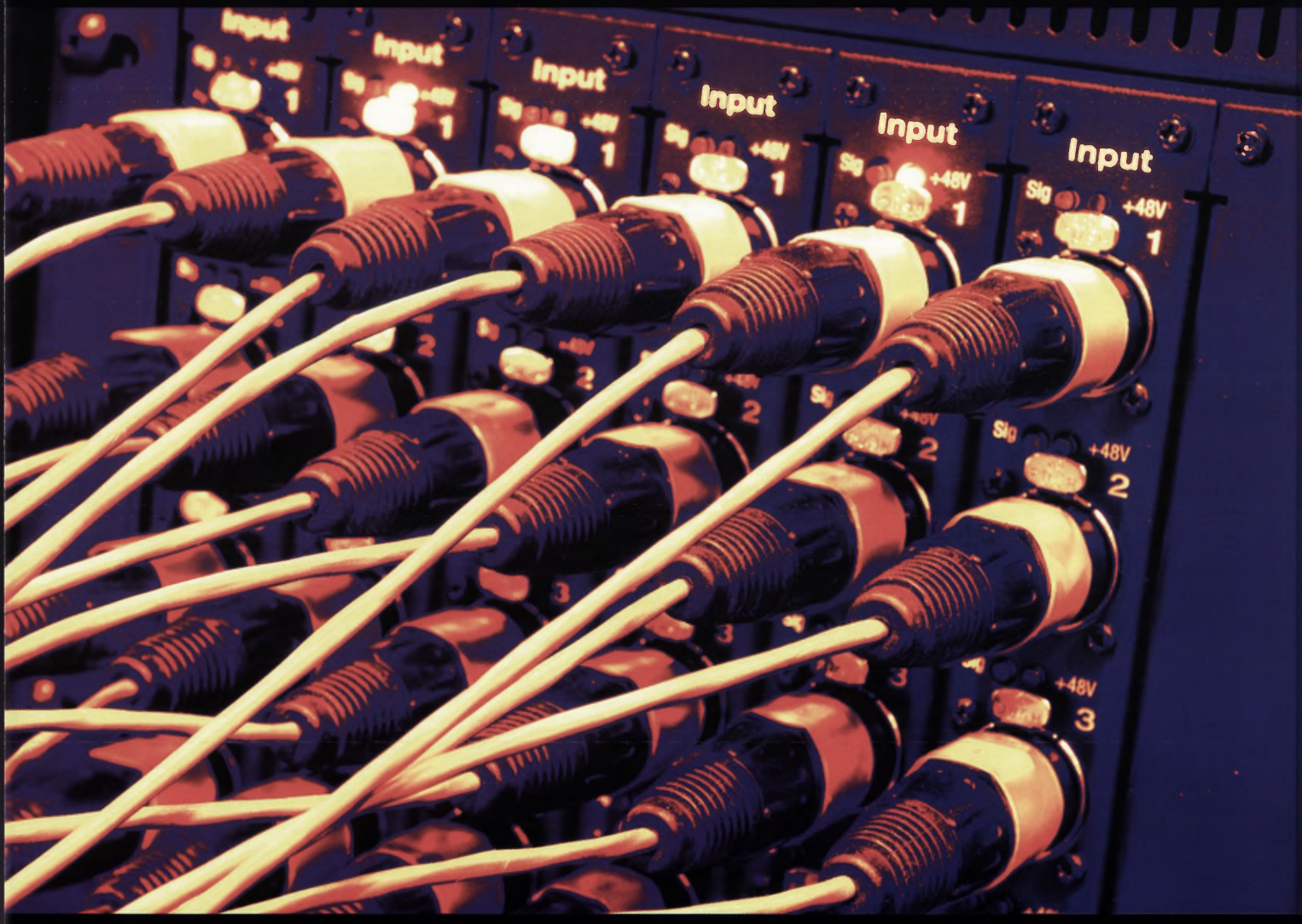
From *Brodie* to *Dederer*
Elements of negligence

By Dr Keith Rewell SC



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Statements by members of the High Court in *Brodie* and *Ghantous*[1] posed a dangerous conundrum: where an occupier of land, or a road authority, creates, or knowingly acquiesces in, a risk of injury obvious to (and avoidable by) a person taking reasonable care for his or her safety, is the occupier or road authority relieved of any obligation to remedy the risk?

Practitioners (and judges) were thrown into confusion. Inconsistent judicial decisions based on tangled logic served only to deepen the problem.

But why were we wrong-footed by such a straightforward question? The answer lies in our failure to recall the basic elements of negligence:

- whether a duty of care exists, and why;
- the scope and content of that duty;
- whether, as a question of fact, the duty of care has been breached; and
- whether, if a breach has occurred, that breach caused the plaintiff's injury.

Had each case been argued and analysed according to these tenets, it may not have been necessary to return to the High Court in *Vairy*,[2] *Mulligan*,[3] *Thompson*[4] and *Dederer*.[5] Errors, appeals and injustices at state level could have been avoided.

The High Court has gone some distance towards cleaning up the mess. But the frustrating (and interesting) thing about the common law is that it is fact-dependent; clear statements of principle are quickly blurred by hard cases.

A rough and ready knowledge of the law of negligence is no longer enough; in reality, it never was. It is time for lawyers to go back to basics, and to re-educate themselves about the building blocks on which the common law still stands. Only then can 'tort reform' and the constraints imposed by the *Civil Liability Act* 2002 (NSW) (CLA) and similar civil liability legislation in other states, be properly understood, and dealt with.

DUTY OF CARE

The suggestion that an occupier, or a road authority, may owe no duty to take reasonable care for a person lawfully using the premises, or road, for the purpose for which it was intended, is intellectually troublesome.

In particular, to assert in simplistic terms that a duty of care is owed only to those who take reasonable care is repugnant to the concept of apportionment of liability and contributory negligence.

The argument is advanced with surprising regularity. Yet it is, in all but the most extreme factual circumstances, fundamentally misconceived, as recent cases demonstrate.

The proposition that a road authority does not owe a duty of care to any road user who fails to exercise reasonable care for his or her own safety, derives from two passages in judgments of the High Court in *Brodie* and *Ghantous*.

In *Brodie*, Gaudron, McHugh and Gummow JJ said [163]:

> 'The formulation of the duty in terms which require that a road be safe, not in all circumstances, but for users exercising reasonable care for their safety, is even more important where … the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface … As Callinan J points out in his reasons in *Ghantous*, persons ordinarily will be expected to exercise sufficient care by looking where they are going, and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. … some allowance must be made for inadvertence. Certain dangers may not be readily perceived … Each case will, of course, turn on its own facts.'

The remarks of Callinan J to which their Honours referred, included [355]:

> 'The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them, in the ordinary course as they walk along. No special vigilance is required for this.'

There are at least six bases for arguing that these statements *did not* create a 'principle' that an occupier or road authority owes a duty of care only to those taking reasonable care for their own safety.

First, this argument tends to 'merge' the legally distinct elements of negligence: duty of care, standard of care, breach of duty, and causation. These separate elements cannot be 'rolled up' into one.

Second, contributory negligence is usually expressed in terms of a claimant's failure *'to take reasonable care for his or her own safety'*. The argument negating the duty of care has the effect of elevating contributory negligence to a complete defence, which is prohibited by s10(1) *Law Reform (Miscellaneous Provisions) Act* 1965.

Third, to negate the duty of care so as to exclude any consideration of the conduct of the occupier precludes the undertaking of the 'balancing exercise' prescribed by Mason J in *Wyong Shire Council v Shirt*,[6] yet the '*Shirt* calculus' was expressly approved in *Brodie*.[7]

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Fourth, if the High Court had intended to establish a 'principle' of the kind suggested, one would expect that it would have said so in unambiguous terms. Such an approach would represent a significant shift in the law of negligence; reasons for such a shift would ordinarily be clearly stated.

Fifth, *Ghantous* was ultimately determined on the basis that there was no *breach*, not that there was no *duty*. This was clearly the basis of the leading judgment,[8] and the judgments of Callinan J[9] and Hayne J.[10] Gleeson CJ agreed that no case in negligence had been made out.[11]

Kirby J agreed that there was no breach of duty of care. His honour made plain that the existence of the duty of care was not affected by the injured person's duty to take reasonable care for his or her own safety.[12]

Sixth, to have created such a 'principle' would conflict with the majority in *Webb v State of South Australia*.[13] But there was no adverse comment in *Brodie* on the reasons of Mason, Brennan and Deane JJ, who said:

> 'Of course a pedestrian could avoid the possibility of injury by taking due care. However, the reasonable man does not assume that others will always take due care; he must recognise that there will be occasions when others are distracted by emergency or some other cause from giving sufficient attention to their own safety.
>
> It seems to us that the courts below gave undue emphasis to the circumstance that injury could be avoided by a pedestrian who took reasonable care for his own safety.'

There are, no doubt, other, equally persuasive arguments to the same end.

These and other arguments were considered by Bryson JA in *Sutherland Shire Council v Henshaw*.[14] His honour said:

> '[61] ... the decision of the High Court in *Brodie* is not an authorative source for a legal rule that, whatever result might otherwise be produced by applying the *Shirt* calculus to the facts, no duty of care is owed by a highway authority to a pedestrian who does not take reasonable care for his or her own safety. Judgments in *Brodie* do not make any such rule its *ratio decidendi*.
>
> [89] ... the question whether a pedestrian who was making reasonable use of a road, such as by walking on a footpath, took reasonable care for his or her own safety, *does not determine the existence of a duty of care*, but is relevant to the standard of care or scope of duty and to whether there was a breach of duty by the highway authority. In relation to those questions, inadvertence and momentary inattention of a pedestrian are within the range of risks, foresight of which may move a highway authority to take such action as regularly inspecting footpaths and carrying out repairs, subject to... reasonableness.'

This resonates with the leading judgment in *Brodie*:[15]

> 'In dealing with questions of *breach of duty* ... a proper starting point may be the proposition that the persons using the road will themselves take ordinary care ...'

Taken in context, the guiding principle so far as to the duty of care of road authorities is unambiguously stated in *Brodie*:[16]

> 'Authorities having statutory powers to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of, or failure to exercise, those powers, does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time, to address the risk.'

The approach best supported by recent authority, is that a failure by the injured person to take reasonable care is but one matter for consideration, with others, in the '*Shirt* calculus', in determining whether there has been a *breach of duty* of care; it does not negate the existence of the duty itself: see for example, *Leichhardt Municipal Council v Montgomery*,[17] *Chotiputhsilpa v Waterhouse*,[18] *Edson v RTA*,[19] *North Sydney Council v Binks*;[20] and *RTA v Dederer*.

SCOPE OF THE DUTY OF CARE

A duty of care is not owed in the abstract. The duty has a defined scope, according to the circumstances giving rise to the existence of that duty.

An occupier, or road authority, is not required to ensure that its premises, or road, will be safe in all possible circumstances. Whether an injured person took reasonable care for his or her own safety *is* relevant in considering the scope or content of the duty of care.

This may be illustrated by reference to the facts in *RTA v Dederer*.

Philip Dederer was 14 years old when he dived from a bridge near Forster, NSW. The height of the bridge was eight or nine metres above water level. Unfortunately, the water channel below was tidal, and the tide was receding. The water was too shallow. Philip struck his head on the bottom, and suffered severe spinal injuries.

Jumping and diving from the bridge was common from the time the bridge was constructed. However, no previous injuries had occurred.

The RTA was aware of the local culture involving the use of the bridge as a diving platform. The RTA was also aware of the depth, and variation in depth, of the channel below.

Some years before Philip's injury, pictogram signs were placed at each end of the bridge, indicating that diving was prohibited. Philip had seen and understood the signs. The signs, and verbal instructions by council officers, were simply ignored by the many young people inclined to jump or dive from the bridge.

It was Philip's case that the RTA, which was responsible for the construction of the bridge, should have taken further action, in the knowledge of its use as a diving platform, by installing barriers of one kind or another, which would have made the practice impossible.

All courts hearing the matter found that Philip failed to take reasonable care for his own safety.

In explaining the scope of the RTA's duty of care, Gummow J said:[21]

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

It is, at least, possible to formulate a definitive statement of the scope of the duty owed by occupiers, and road authorities, in personal injury cases. As McHugh J explained in *Vairy*:[22]

'The duty is always the same – to conform to the legal standard of reasonable conduct in the light of the apparent risk.'

The first step in establishing the '*reasonable conduct*' required is to identify correctly the risk that gives rise to the duty.

Generally speaking, the 'risk' that is relevant to the scope of the duty of care is the probability that an injury will occur.

In *Dederer*, Gummow J explained[23] that the relevant 'risk' was not the risk that young people would continue to jump or dive from the bridge unless physically prevented from doing so; it was the risk that someone might suffer serious injury if the practice continued.

The fact that no one had been injured in the years during which the local youth had carried on this practice was relevant to the probability of the risk occurring, and therefore to the '*reasonable conduct*' required of the RTA, which defined the scope of the duty of care.

One cannot determine whether breach has occurred unless one first clearly establishes the risk that gives rise to the duty of care, and the extent of the action required in response to that probability (or improbability) of injury, governed always by the test of reasonableness.

While the assumption that persons using an occupier's premises, or a road, will take reasonable care for their own safety, is relevant to the assessment of the risk, and therefore to the scope of the duty of care, it is wrong to suggest that the scope or content of the duty can never extend to circumstances in which the injured person fails to take reasonable care.

If the circumstances are such that a reasonable assessment of the likelihood of injury occurring requires some responsive action on the part of the occupier or road authority, then the duty of care is enlivened, and the occupier or road authority is liable if it fails to take that action.

The CLA probably adds little to this issue – the heading 'Duty of care' above s5B is misleading,[24] because the section relates to breach of duty, not the existence or scope of the duty itself.

BREACH OF DUTY OF CARE

'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.'[25]

Breach of duty of care cannot be determined simply by asking '*Could the injury have been prevented?*' The issue must be approached without the benefit of hindsight.

Even if, with hindsight, a serious injury could have been avoided easily and cheaply, there will be no breach of duty of care *unless* the action required to avoid the injury was *reasonable*, when looked at prospectively, not retrospectively, having regard to the [then] known risk that an injury could occur.[26]

As Hayne J stated in *Vairy*:[27]

'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.'

The point is again illustrated by the facts in *Dederer*. >>

If, as the majority found, signage alone was a reasonable response to the apparently low risk of injury involved in jumping or diving from the bridge, then the RTA discharged its duty, even if the signage was ineffective.

If, however, signage was an inadequate response to the risk of injury (as Gleeson CJ and Kirby J found), then the RTA would be liable, notwithstanding that Philip ignored signs prohibiting the exact conduct which led to his injury.

How, then, is the question of breach of duty of care to be approached? The High Court has recently affirmed[28] the statements of Mason J in *Shirt*:[29]

> '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.'

In any particular case, opinions may well differ as to the reasonableness of a suggested or actual response to a foreseeable risk. Such differences of opinion cannot be avoided, without emasculating the flexibility of the common law, which is its greatest virtue. Ultimately, provided that the correct approach to breach of duty is followed, injustices will be rare.

CAUSATION

Before s5D of the CLA came into play, the issue of causation in negligence cases was determined by applying commonsense to the facts of the particular case.[30] The 'but for' test was not always the determinative approach to causation.

There may be more than one cause of a claimant's injury. It is not necessary that the negligence of the defendant be the *sole* cause. It is sufficient at common law if the defendant's breach of duty of care caused or *materially contributed to* the injury.[31]

These common law principles of causation do not appear particularly complex. It is surprising that causation has given rise to more appeals and contradictory findings than the other elements.

In cases to which the CLA applies, which will include most, if not all, cases against road authorities, s5D must now be considered: the section overrides the common law approach to causation.

Section 5D introduces concepts of 'factual causation' and 'scope of liability'.The requirement *that the negligence was a necessary condition of the occurrence of the harm* (factual causation), reinstates the 'but for' test as a necessary condition for causation in all but unspecified, and presumably rare, 'exceptional' cases.

THE *CIVIL LIABILITY ACT* 2002

It is beyond the scope of this article to examine the current judicial interpretation of the provisions of the CLA and, in particular, the statutory principles and defences relevant to occupiers and road authorities. However, some brief observations may be useful.

In NSW, the CLA imports statutory 'principles' as to breach of duty (s5B and s5C) and causation (s5D).

The principles relating to breach of duty of care in s5B(1), appear consistent with the analysis of the common law by Gummow J in *Dederer*. (Philip's injury preceded the commencement of the CLA.)

The matters relevant to the 'reasonable conduct' required of a defendant to which s5B(2) refers, mirror the 'balancing exercise' in *Shirt*, and the principle that the response required to a particular risk is not to be based on hindsight.

These matters are also reflected in s5C, as is the maxim that the duty is to take *reasonable* care, not a duty to ensure that injury is prevented.

As to causation, s5D now prevails where there is any inconsistency with common law principles. The High Court has given notice[32] that *March v Stramare* may have to be reconsidered.

CONCLUSION

When the CLA (and similar legislation in other states), and particularly the 'personal responsibility' provisions, were introduced, the profession may have been distracted by the urgent need to decipher statutory 'principles' of negligence, and new concepts such as 'obvious risk' and 'dangerous recreational activities'. In such exciting times, it was easy to lose sight of the basic elements of negligence, which continue to be the cornerstone of personal injury cases.

For a time, the common law lost its way. Several visits to the High Court have been required to remind us that long-established common law principles of negligence are largely intact in the era of tort reform.

While the CLA, and similar legislation, are intended to, and do, restrict rights to compensation for injured persons, nowhere in the legislation is an occupier, or public authority, relieved of its duty of care merely because the injured person failed to take reasonable care for his or her own safety. That is one more reason to lay to rest the aberration in common law doctrine with which this article has been mainly concerned. ■

Notes: **1** *Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire* Council (2001) 206 CLR 512. **2** *Vairy v Wyong Shire Council* (2005) 223 CLR 422. **3** *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486. **4** *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 221CLR 234. **5** *RTA v Dederer* (2007) 234 CLR 330. **6** *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47–8. **7** At [151]. **8** At [167]. **9** At [355]. **10** At [339]. **11** At [5] – [8]. **12** At [247]. **13** (1982) 56 ALJR 912. **14** [2004] NSWCA 386. **15** At [160]. **16** At [150]. **17** (2007) 81 ALJR 686. **18** [2005] NSWCA 295. **19** [2006] NSWCA 68. **20** [2007] NSWCA 245. **21** At [47]. **22** At [25], quoting Prosser and Keeton on the *Law of Torts*, 5th ed (1984) at 356. **23** At [60]. **24** *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48 at [13]. **25** *Dederer*, per Gummow J at [49]. **26** See *Rosenberg v Percival* (2001) 205 CLR 434. **27** At [126]. **28** In *New South Wales v Fahy* (2007) 81 ALJR 1021. **29** (1980) 146 CLR 40 at 47–8. **30** *March v Stramare* (E & MH) Pty Ltd (1991) 171 CLR 506 at 515. **31** *Chappel v Hart* (1998) 195 CLR 232 at 244, per McHugh J. **32** *Adeels Palace v Moubarak* at [43–4].

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