# BREACH OF DUTY

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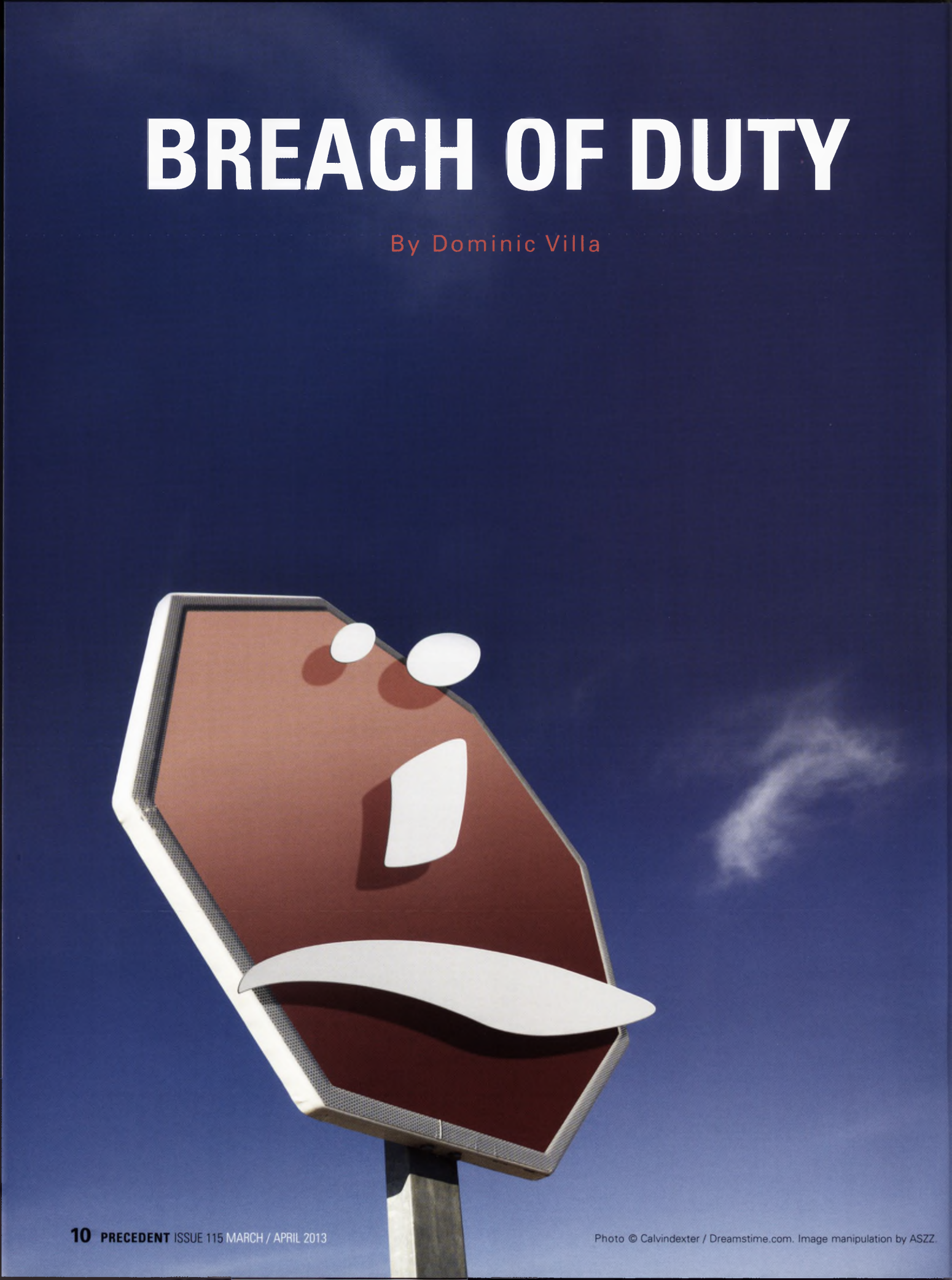

At common law, the determination by a court of whether or not a person (conveniently referred to here as a defendant) is liable to another (a plaintiff) under the rubric of the tort of negligence has traditionally involved an inquiry into:

- whether or not the defendant owed the plaintiff a duty of care, for 'a man is entitled to be as negligent as he pleases towards the whole world if he owes them no duty'[1] (duty of care);
- whether or not the conduct of the defendant (whether by act or omission) fell short of the standard of care required of the defendant (breach of duty); and
- whether or not the defendant's breach of duty (if established) caused the plaintiff loss or damage (damage).

The enactment of the *Civil Liability Act* 2002 (NSW) (the Act), and similar enactments throughout Australia, has brought significant changes to these common law inquiries. The Act provides that, in certain circumstances, no duty of care is owed.[2] It also provides that certain forms of damage did not give rise to a liability on the part of the defendant,[3] or at least that no damages are recoverable in respect of that damage.[4] The Act also alters the common law in relation to breach of duty, narrowing the test for breach of duty at common law, and altering the standard of care required of certain defendants, or in certain categories of relationship. This article seeks to explain how the Act has altered the common law, and how the courts have applied those alterations in practice. While the article focuses on the NSW legislation, similar provisions have been enacted to varying degrees throughout Australia.

## BREACH OF DUTY AT COMMON LAW

Although *Donoghue v Stevenson*[5] was a case determined by reference to the question of duty of care, the classic dictum of Lord Atkin contained within it a statement of the general principle relating to breach of duty of care:

> 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'[6]

That a defendant is required to take precautions against reasonably foreseeable risks of harm resulting from the defendant's conduct invites the question: what risks of harm are reasonably foreseeable?

That question was definitively answered by Mason J in *Wyong Shire Council v Shirt*.[7] By the time this case reached the High Court, the issue raised for determination was whether the defendant was required to foresee only risks that were 'real' or 'not unlikely to occur' (as opposed to being 'mere possibilities'), or whether the defendant was required to foresee any risk, however unlikely, so long as it was not 'far-fetched or fanciful'. Mason J said:

> 'In essence [the correctness of the Privy Council's decision in *Wagon Mound (No 2)*] depends upon a recognition of the general proposition that foreseeability of the risk of injury and the likelihood of that risk occurring are two different things. ...
>
> A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone*,[8] may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it >>

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is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.'[9]

It is worth recording Wilson J's withering critique (in dissent) of this standard:[10]

'...notwithstanding that it depends on the foresight of a reasonable man, [the law] tends to credit such a man with an extraordinary capacity for foresight, extending to "possibilities" which are highly speculative and largely theoretical'.[11]

## BREACH OF DUTY UNDER THE CIVIL LIABILITY ACT: GENERAL PRINCIPLES

Acknowledging the force of a number of criticisms made of the common law test of reasonable foreseeability,[12] the Ipp Committee recommended that there be a statutory statement of the general principles by which the question of breach of duty ought be determined, and recommended that the common law test of 'not far-fetched or fanciful' be replaced with a phrase indicating a risk that carried a higher degree of probability of harm.[13] Those recommendations are reflected in ss5B and 5C of the Act.

As was observed in *Adeels Palace Pty Ltd v Moubarak*,[14] although s5B appears under the heading 'Duty of care', it is self-evidently directed towards questions of breach of duty. It sets out a number of necessary conditions that need to be satisfied before a defendant will be held liable for a failure to exercise reasonable care and skill. Satisfaction of the conditions is a necessary, but not a sufficient, prerequisite for civil liability to arise.[15]

Section 5B does not provide an exhaustive statement of the circumstances in which a defendant will be liable in negligence. Instead, in subsection (1) it sets out three preconditions that must co-exist before a liability in negligence arises.[16] A person is not negligent (in the extended sense of having failed to exercise reasonable care and skill) in failing to take precautions against a risk of harm unless:

- it was a risk of which the person knew or ought to have known;
- the risk was not insignificant; or
- a reasonable person in the circumstances would have taken those precautions.

As with the common law, the inquiry into breach of duty of care is a prospective one.[17] Section 5B is directed towards consideration of whether or not a person is negligent in failing to take precautions against a risk of harm. It is critical, therefore, to accurately identify the relevant risk of harm. It is only by identifying the relevant risk of harm that one can then proceed to ascertain its foreseeability, and the appropriate response of the reasonable person to that risk.[18]

The Ipp Committee was sympathetic to the view that the phrase 'not far-fetched or fanciful' should be replaced with a phrase indicating a risk that carried a higher degree of probability of harm.[19] The difficulty was in determining what an appropriate form of words would be. Ultimately, the Ipp Committee recommended the phrase 'not insignificant'. In doing so, the Committee observed:

'... The phrase "not insignificant" is intended to indicate a risk that is of a higher probability than is indicated by the phrase "not far-fetched or fanciful", but not so high as might be indicated by a phrase such as "a substantial risk". The choice of the double negative is deliberate. We do not intend the phrase to be a synonym for "significant". "Significant" is apt to indicate a higher degree of probability than we intend.'[20]

The meaning of the phrase 'not insignificant' is incapable of any more precise definition, but there are two matters to be emphasised arising out of the Ipp Committee's discussion. *First*, it is clear that the words 'not insignificant' were intended by the Ipp Committee to more narrowly define the category of risks of harm for which a defendant will be liable than the words 'not far-fetched or fanciful'. *Second*, in referring to a 'not insignificant' risk, the Ipp Committee was referring to the *probability* of the risk eventuating, and not to the *magnitude* of the resulting harm.[21]

Despite the assertion in a number of decisions that s5B 'picks up in statutory form the principles stated in *Wyong Shire Council v Shirt*',[22] it is clear that the requirement that the risk of harm be 'not insignificant' imposes a higher threshold than was the position at common law. It has been described as imposing 'a more demanding standard' but 'not by very much': *Shaw v Thomas*.[23]

As with the common law, in assessing what response is called for in the face of a foreseeable risk of injury to another, the inquiry is an objective one. The state of mind of a particular defendant is, therefore, irrelevant.[24] The relevant standard is the legal standard of the reasonable person, 'independent of the idiosyncrasies of the particular person whose conduct is in question'.[25] It is no defence that the person was doing their incompetent best.

It is clear that the position of the defendant includes the 'relationship between the plaintiff and the defendant, and the defendant's knowledge of the circumstances and characteristics of the plaintiff'.[26]

On numerous occasions, the High Court has noted that the failure to eliminate a risk that was foreseeable and preventable is not necessarily negligence,[27] and it is clear that this remains the position under s5B.[28] As Gleeson CJ colourfully expressed it in *Swain v Waverley Municipal Council*:

'The measure of careful behaviour is reasonableness, not elimination of risk. Where people are subject to a duty of care, they are to some extent their neighbours' keepers, but they are not their neighbours' insurers.'[29]

Section 5B(2) provides a non-exhaustive list of factors that must be taken into consideration in determining whether or not a reasonable person would have taken the relevant precautions against the risk of harm.[30] Those considerations are:

- the probability of the harm occurring if care were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk of harm (and other similar risks of harm);[31] and
- the social utility of the activity that creates the risk of harm.

This reflects the common law position enunciated by Mason J in *Wyong Shire Council v Shirt*.[32] However, as has been said on a number of occasions both in relation to *Shirt* and in relation to s5B(2), there is a danger in treating the inquiry as divisible, or as a 'calculus' by which the different factors are weighed in a balance, instead of a single inquiry into whether or not the defendant's response to the risk (if any) was reasonable.[33]

Section 5C sets out further principles relevant to the determination of liability for negligence, which are relevant to the breach inquiry. These are:

- the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible;
- the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done;
- the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

These principles are, again, largely reflective of the common law.

## BREACH OF DUTY BY PROFESSIONALS

Section 5O of the Act makes provision for the standard of care owed by professionals, and sets that standard by reference to peer professional opinion as to competent professional practice. This effects a significant change from the common law.

In *Rogers v Whitaker*,[34] the High Court had described the position at common law in the following terms:

> 'In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade... the

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courts have adopted the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to "the paramount consideration that a person is entitled to make his own decisions about his life".'[35]

The effect of s5O is that a court will no longer be able to make a finding of liability against a defendant professional where there is probative evidence that the professional acted in accordance with a practice widely accepted as being competent by peer professional opinion, unless that peer professional opinion is irrational. In other words, whereas previously expert opinion to the effect that the defendant had acted competently in accordance with widely accepted professional practice was merely *relevant*, now such expert opinion is *conclusive* and a court *must* find that a defendant who has acted in accordance with widely accepted professional practice has satisfied the standard of care. It is only if the court finds that the widely accepted professional practice is irrational that the court may disregard the expert opinion.

A defendant who wishes to rely upon s5O must plead the material facts which, if established, are alleged to engage s5O and thereby negate a finding of liability in negligence that would otherwise be available: *Sydney South West Area Health Service v MD*.[36]

The section operates as a defence, and does not merely define the content of the duty of care. Accordingly, it is for the defendant to prove that the manner in which the defendant acted was widely accepted by peer professional opinion as competent professional practice: the onus is not on the plaintiff to prove that the defendant did not so act: *Dobler v Halverson*.[37]

The operation of the provision is ameliorated by two considerations. Firstly, and perhaps most significantly, it does not apply to a failure to warn, or a failure to give advice or other information, in personal injury proceedings: s5P. Secondly, it does not apply if the plaintiff can establish that the 'peer professional opinion' relied upon by the defendant is 'irrational': s5O(2).

## BREACH OF DUTY BY PUBLIC AUTHORITIES

Part 5 of the Act applies in relation to various broadly defined public authorities.

Section 42 sets out various considerations that apply when determining whether or not a public authority has breached a duty of care, in addition to the general principles set out in s5B and 5C. These are:

- the functions exercised by the authority are limited by the financial and other resources that are available to the authority;
- the general allocation of those resources by the authority is not open to challenge;
- the functions exercised by the authority are to be determined by reference to the broad range of its activities;
- the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions.

The difficulties in applying this provision in any particular case are amply illustrated by the judgment of Campbell JA in in *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd*,[38] and in particular distinguishing between the general allocation and the specific allocation of resources.[39]

Where the proceedings against the public authority are based on a breach of statutory duty, no breach will be established unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions: s43. Despite the clumsiness of the language, it is clear that this section (and the similarly worded s43A dealing with the exercise of a 'special statutory power'[40]) introduce the rather more demanding administrative law standard of *Wednesbury* unreasonableness into the determination of breach of duty by public authorities where those sections apply.[41]

Continuing the importation of administrative law concepts into the law of negligence as it applies to public authorities, s44 provides that a public authority cannot be liable for the failure to exercise a regulatory function unless the authority could have been compelled (presumably by some public law remedy in the nature of *mandamus*) to exercise the function in proceedings instituted by the plaintiff.

Finally, s45 provides that a roads authority is not liable in negligence for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.[42]

## LIABILITY OF OTHER DEFENDANTS

Various other provisions of the Act affect the circumstances in which a defendant may or may not be liable for particular harm caused to a plaintiff by altering the standard of care owed.

Part 8 of the Act addresses the liability of Good Samaritans, with s57 providing that where a person in good faith and without expectation of payment of reward comes to the assistance of a person who is apparently injured or at risk of injury, they will not be liable.[43] This effectively eliminates the standard of care altogether, although in practical terms the

more egregious the breach, the less likely a court would find that the Samaritan was relevantly acting in good faith.

Part 9 provides a similar protection (and elimination of the standard of care) to that of Good Samaritans for volunteers acting in good faith while doing community work: s61.

Part 8A, relating to food donors, prescribes the steps a food donor must take in order to obtain the protection of s58C against liability for death or personal injury resulting from the consumption of donated food. While the section is prescriptive, it is doubtful that a person who followed the prescribed steps would have been liable at common law or under the general principles set out in sections 5B and 5C in any event. ■

**Notes:** **1** *Le Lievre v Gould* [1893] 1 QB 491 at 497 per Lord Esher MR. See also *Grant v Australian Knitting Mills Ltd* (1935) 54 CLR 49 at 63–64 per Lord Wright. **2** For example, there is no duty of care to warn of an obvious risk (s5H); in relation to recreational activities where there is a risk warning (s5M); in relation to mental harm if the plaintiff is not a person of normal fortitude (s32). **3** For example, something less than a recognised psychiatric illness is not sufficient damage in a claim for pure mental harm (s31). **4** For example, damages for the costs of rearing or maintaining a child without a disability (s71). **5** *Donoghue v Stevenson* [1932] AC 562. **6** *Ibid* at 580. **7** *Wyong Shire Council v Shirt* (1980) 146 CLR 40. **8** In *Bolton v Stone* [1951] AC 850, the plaintiff was standing on a road adjoining a cricket ground when she was struck by a ball which had been hit out of the ground. It was held that such an event was foreseeable, an unsurprising finding given that there was evidence to the effect that balls had previously (and to the defendant's knowledge) been hit out of the ground, but that the likelihood of injury to a person in the plaintiff's position was so slight that the cricket club was not negligent in allowing cricket to be played without taking additional precautions such as increasing the height of the fence. **9** *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47. **10** *Ibid* at 56. **11** See also *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [54] per Callinan J. **12** See, for example, Fitzgerald J in *Rasic v Cruz* [2000] NSWCA 66 at [43]; Spigelman JJ, 'Negligence: the last outpost of the welfare state' (2002) 77 *Australian Law Journal* 432 at 443; *Tame v New South Wales* (2002) 211 CLR 317 at [99], [107]-[107] per McHugh J. **13** Ipp Report, paras [7.14]–[7.15]. **14** *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [13]. **15** *Penrith Rugby League Club Ltd v Elliot* [2009] NSWCA 247 at [22] per Sackville JA. **16** *Roads and Traffic Authority of New South Wales v Refrigerator Roadways Pty Ltd* (2009) 77 NSWLR 360 at [173]. **17** *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [126] – [129]; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [31]. **18** *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at [59]. **19** *Ipp Report*, paras [7.14]–[7.15]. **20** *Ibid*, para 7.15. **21** See *Benic v State of New South Wales* [2010] NSWSC 1039 at [101]. **22** *Council of the City of Liverpool v Turano* [2008] NSWCA 270 at [171] per Beazley JA (see also at [204] where her Honour refers to the 'far-fetched and fanciful' formulation rather than the 'not insignificant' formulation required by s5B(1)(b)). Her Honour cites as authority for that proposition *Waverley Council v Ferreira* [2005] NSWCA 418 at [45]. However, that passage specifically refers to s5B(2), and not to s5B generally. Somewhat curiously, at [27] in *Ferreira*, Ipp JA himself suggested that s5B(1) reflects the common law. **23** *Shaw v Thomas* [2010] NSWCA 169. **24** *Waverley Council v Ferreira* [2005] NSWCA 418 at [52] per Ipp JA, Spigelman CJ at [1] and Tobias JA at [109] agreeing. **25** *Glasgow Corp v Muir* [1943] AC 448 at 457 per Lord MacMillan. **26** *Shaw v Thomas* [2010] NSWCA 169 at [40]. **27** McHugh J in *Tame v New South Wales* (2002) 211 CLR 317 at [99]. **28** *Shaw v Thomas* [2010] NSWCA 169 at [45]. **29** *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at [5]. **30** *Roads and Traffic Authority of New South Wales v Refrigerator Roadways Pty Ltd* (2009) 77 NSWLR 360 at [173]. **31** Section 5C(a), *Civil Liability Act* 2002. **32** *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47–8. **33** *Tame v State of New South Wales* (2002) 211 CLR 317 at [99]; *New South Wales v Fahy* (2007) 232 CLR 486 at [57]; *Drinkwater v Howarth* [2006] NSWCA 222 at [22]. **34** *Rogers v Whitaker* (1992) 175 CLR 479. **35** The quotation is from *F v R* (1983) 33 SASR 189 at [193] per King CJ. **36** *Sydney South West Area Health Service v MD* [2009] NSWCA 343 at [23], [51]. **37** *Dobler v Halverson* (2007) 70 NSWLR 151 at [61]. **38** *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360. **39** *Ibid* at [395]-[405]. **40** These include, for example, the power to forcibly detain under the *Mental Health Act* 2007, and certain powers of a road authority to carry out roadworks. **41** *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360; *Allianz Australia Insurance Ltd v Roads and Traffic Authority (NSW)* [2010] NSWCA 328. **42** See, for example, *North Sydney Council v Roman* (2007) 69 NSWLR 240. **43** Exceptions to this provision include where it was the Good Samaritan's breach of duty that caused the injury or the risk of injury in the first place, or where the good Samaritan is intoxicated or impersonating a health care or emergency worker: s58.

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