SUPREME COURT OF QUEENSLAND

CITATION:	*Ryan & Anor v Dearden & Anor* [2023] QCA 20
PARTIES:	**TERRENCE BERNARD RYAN** (first appellant) **NICOLE THERESE RYAN** (second appellant) **v** **CHARLES OSWALD DEARDEN** (first respondent) **ROBERT ANDREW TAYLOR** (second respondent)
FILE NO/S:	Appeal No 7428 of 2022 SC No 366 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton – [2022] QSC 111 (Crow J)
DELIVERED ON:	17 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2022
JUDGES:	Mullins P and McMurdo and Flanagan JJA
ORDERS:	**1. The appeal is allowed.** **2. The judgment for the first respondent against the appellants is set aside.** **3. The first respondent's claim is dismissed.** **4. The order for costs made in the Trial Division against the appellants is set aside.** **5. The first respondent pay to the appellants their costs of the proceeding in the Trial Division and of the appeal.**
CATCHWORDS:	TORTS – NEGLIGENCE – OCCUPIERS' LIABILITY – STANDARD OF CARE AT COMMON LAW GENERALLY AND BREACH THEREOF – OTHER PARTICULAR CASES – where the appellants hosted a party on their property – where the first and second respondent were guests at the party – where the first respondent suffered severe burns when the second respondent deliberately applied a flame from a cigarette lighter to fuel which he had poured on to the first respondent's clothing – where the fuel had been brought to the property by the appellants earlier on the same

night – where the appellants, as occupiers, owed a duty of care to the party guests – where the general rule provides that an occupier is under no duty of controlling another man to prevent his doing damage to a third – where one exception to the general rule arises where the defendant has created a special danger – whether, by bringing the fuel to the property, the appellants created a special danger giving rise to an exception to the general rule – whether the scope of the duty extended so far as to oblige the appellants to take such steps as were necessary to prevent the second respondent deliberately harming another guest by setting fire to his clothing

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420; [2009] HCA 48, cited
Ashrafi Persian Trading Co Pty Ltd v Ashrafinia [2001] NSWCA 243, cited
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479; [1987] HCA 7, cited
D v C [1998] NSWCA 67, cited
Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22; [1998] UKHL 5, applied
Home Office v Dorset Yacht Co Ltd [1970] AC 1004; [1970] UKHL 2, considered
Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254; [2000] HCA 61, applied
Smith v Leurs (1945) 70 CLR 256; [1945] HCA 27, applied
Smith v Littlewoods Organisation Ltd [1987] AC 241, approved

COUNSEL: A P J Collins for the appellants
P J Dunning KC, with R D Green and C Campbell, for the first respondent
No appearance for the second respondent

SOLICITORS: McCabes for the appellants
Grant & Simpson Lawyers for the first respondent
Hall Payne Lawyers for the second respondent

[1] **MULLINS P:** I agree with McMurdo JA.

[2] **McMURDO JA:** The first respondent, Mr Dearden, suffered severe burns to his upper body and limbs when he attended, as an invited guest, a friend's 21st birthday party at a farm outside Jondaryan. He was burnt when another guest deliberately applied a flame from a cigarette lighter to petrol which he had poured on to Mr Dearden's clothing.

[3] The appellants were the owners and occupiers of the farm and were hosting the party for one of their sons, Daniel Ryan. They were sued by Mr Dearden for damages for personal injury, and they joined the young man who set fire to him, Robert Taylor, as a third party. The appellants were found liable in an amount of

$600,797.55 and were given judgment against Taylor for 70 per cent of that sum.[1] The basis of the appellants' liability was that they were the occupiers of the property; the petrol used by Taylor had been found by him in a small jerry can inside a shed near the homestead; Taylor had entered the shed to search for fuel to inflict on Mr Dearden what he intended as a prank; the appellants had created a source of danger by having that jerry can in the shed; there was a foreseeable risk that a guest at the party would use the fuel to start "an uncontrolled fire" and cause someone to be injured; the appellants thereby owed a duty of care to those at the party to avoid that risk by removing the jerry can to a place where it would not be found by someone who was wanting to start a fire at the party; by omitting to do so they were negligent; and their negligence was a cause of the harm suffered.

[4] It was conceded that the appellants, as occupiers, owed a duty of care to the guests. Undoubtedly they owed *a* duty of care.[2] The principal issue in this case concerns the scope of that duty. The injuries here were inflicted by the deliberate, and indeed criminal, conduct of Taylor, over whom they had no control. Any relevant duty of care had to be a duty to protect someone in the position of Mr Dearden from such conduct. For the reasons that follow, that duty of care was not owed and the appellants should not have been held liable.

The facts

[5] The appellants' property included the house block on which were located the homestead and adjacent sheds and water tanks. The sheds were used to store gardening and associated equipment and to provide shelter for motor vehicles. There was another shed a short distance from the homestead which may have been used to store a harvester and other farming equipment.[3] However the majority of the farm's equipment and its fuel store was kept at sheds on an adjacent property, located about five minutes' drive from the homestead.[4] Three or four jerry cans of unleaded petrol were stored there, and ordinarily, fuel was not kept in the shed near the homestead.

[6] A large number of guests were invited to the party; 40 to 50 of them were mature-aged and 100 or so were contemporaries of Daniel. The judge accepted evidence of Mrs Ryan that she carefully planned for the safety of the event by, in particular, taking steps to ensure that no one would drive home while affected by alcohol. To this end she invited guests to stay overnight, arranging for a separate and safe area on the property for them to camp out.[5]

[7] At dusk on the evening in question, the electricity supply to the property failed. Mr Ryan drove a utility from the homestead to the petrol hub at the adjacent property, where he loaded a generator, two 20 litre jerry cans and one five litre jerry can of fuel on the back of the utility before driving back to the homestead. Upon his return, Mr Ryan had one of the guests pour fuel from the small jerry can into the tank of the generator. The larger jerry cans were not used, but they were removed from the back of the utility and placed in a secluded and relatively inaccessible position between the utility and a wall of the homestead. The judge found that

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1 *Dearden v Ryan & Anor* [2022] QSC 111 (Judgment).
2 *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; (1987) 162 CLR 479.
3 Judgment [1].
4 Judgment [2].
5 Judgment [3].

Mr Ryan did so because he was alert to a danger that the fuel in them should not be accessible to guests, particularly those who were intoxicated.[6]

[8] About an hour and a half later, an electrician restored the power supply. The small jerry can was left in the back of the utility.

[9] At around 11 pm, a fire was started by some of the young guests on the lawn between the homestead and the shed. The judge described it as a grassfire.[7] Mr Ryan fetched a fire extinguisher from the homestead and returned to find half a dozen guests stomping on the fire to put it out. He found the small jerry can adjacent to where the fire had been lit. He told his older son, Matthew Ryan, to put it in the shed.

[10] Matthew Ryan's evidence was that when he picked up the jerry can, it felt quite empty.[8] He took it to the shed and placed it inside a terracotta pot, approximately a metre inside the front of the shed. The shed did not have internal lights. Mr Ryan then removed the two large jerry cans and placed them in the rear of the shed, because he was concerned that petrol might be used to start another fire.

[11] Taylor was a friend of Mr Dearden as well as of Daniel Ryan. Taylor was then aged 21. He had travelled to the party with Mr Dearden and two other young men, and they brought several swags with them. Taylor consumed a lot of alcohol at the party. At the trial, Taylor gave evidence that he recalled helping to extinguish the grassfire, he thought, with a shovel.[9]

[12] Some time after midnight, Mr Dearden decided to go to the carpark to find a swag and go to sleep. Some of his friends went looking for him and that group included Taylor. They thought that they would find Mr Dearden and wake him up to "keep him partying".[10] On the way to the carpark, where Mr Dearden was then sleeping, Taylor deviated into the shed to obtain some fuel, having formed the intention "to wake [Mr Dearden] up via lighting his swag on fire". Inside the shed he found the small jerry can. In his evidence he explained that he went into the shed in the expectation that there would be fuel stored there because, as he put it, "I grew up on a farm so there's always fuel in a shed like that".[11]

[13] According to Mr Taylor's evidence, what then happened was that he and the other members of the group found Mr Dearden sleeping when Taylor "kind of dribbled the fuel on [Mr Dearden's] lower shirt, high jeans area and his – say his hip area" before Taylor "then ignited it … with the lighter".

[14] At another point there was this evidence from him:

> "Okay. Somehow you got a lighter from somewhere?---Yes.
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> Right. And again, if we work on an assumption that none of the guys with you had lighters, somehow you've got that lighter from somewhere?---Correct.

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6 Judgment [9].
7 Judgment [11].
8 Judgment [19].
9 Judgment [18].
10 Judgment [21].
11 T2-71 lines18-19, Judgment [24].

> Okay. Now, there's a bit of a three or four-stage process here as you approach Charlie – sorry, yeah, Charlie Dearden. You firstly had to decide, you personally, to dribble the petrol on him, correct?---Yes.
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> And you had to decide whereabouts you were going to dribble the petrol on him?---Yes.
>
> And then after having done that, to your recollection, he didn't wake up from the petrol being poured on him?---Yes.
>
> Alone before the fire?---Correct.
>
> Yep. And it's then that you've made a conscious choice to get a lighter from someone?---Correct.
>
> And then having got that lighter you made the conscious choice to apply it to his shirt or was it to his – what's your recollection?---Lower shirt, upper – like upper jeans area.
>
> Okay?---On his hip.
>
> Okay. As we sit here now is that something you can remember or you just - - -?---Yes".

[15] In the words of the trial judge, Mr Dearden was then on fire.[12] He had jumped up and was running away, with his shirt on fire and stuck under his armpit, and there was fire on his body and hands. He was taken to the homestead and attended by sisters of Mrs Ryan, before an ambulance took him to the Toowoomba Base Hospital.[13]

[16] Taylor was charged with, and pleaded guilty to, an offence of causing grievous bodily harm to Mr Dearden.

The duty

[17] In *Smith v Leurs*,[14] Dixon J discussed the general rule that "one man is under no duty of controlling another man to prevent his doing damage to a third". However, he said, there are "special relations" which can be the source of such a duty, instancing the duty of "a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger".[15]

[18] In *Modbury Triangle Shopping Centre Pty Ltd v Anzil*,[16] Gleeson CJ, referring to that judgment of Dixon J, observed that the element of control had been the basis of liability in *Home Office v Dorset Yacht Co Ltd*,[17] where Lord Morris of Borth-y-Gest said that the case was one of a special relationship involving a duty to control another's actions.[18]

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12 Judgment [29].
13 Judgment [29].
14 [1945] HCA 27; (1945) 70 CLR 256 at 261-2.
15 Ibid.
16 [2000] HCA 61; (2000) 205 CLR 254 (*Modbury*).
17 [1970] AC 1004.
18 *Modbury* at [21] citing [1970] AC 1004 at 1038-9.

[19] In this case, however, it was no part of the duty of care pleaded against the appellants that they controlled, or were bound to control, the conduct of their guests, or at least to take reasonable steps to do so. Nor was it pleaded that they had been negligent by not doing so. Similarly, in the final submissions to the trial judge, counsel for Mr Dearden submitted that the appellants had the capacity to control the use of petrol at their property by what the appellants did with their petrol rather than by any personal control of Taylor.

[20] Amongst the particulars of the alleged negligence was an allegation to the effect that the appellants failed to manage or supervise that part of the carpark where guests were sleeping. At one point in the Judgment, that particular was rejected by the trial judge as being itself devoid of particularity.[19] Yet in another part of the Judgment, the same allegation was treated as a fact and was said to have been one of the foundations for the imposition of a duty of care which distinguished the case from *Modbury*.[20] The judge there said that "in the further amended statement of claim, complaint is made that the defendants … failed to control the continued presence upon the property of the expected irrational and intoxicated guests by supervising those guests that were acting in an unacceptable or unruly manner". That was not an accurate description of the pleaded case and no finding was made or sought to the effect that the appellants had the capacity to control the behaviour of unruly guests.

[21] Consequently, it cannot be said that a capacity to control their guests was the basis of liability in this case.

[22] Apart from cases involving that element of control, there are other exceptions to the general rule as stated by Dixon J in *Smith v Leurs*. Dixon J also said:[21]

> "[A]part from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger".

[23] The last point in that passage – a duty in reference to things involving special danger – is the principal way in which the trial judge in this case saw an exception to the general rule that there is no duty to prevent a third party from harming another. The judge said that the appellants had "introduced fuel from a remote location to the party area where there was always a prospect that an intoxicated irrational person may start a fire".[22]

[24] In *Smith v Littlewoods Organisation Ltd*,[23] Lord Goff of Chieveley discussed that exception:

> "But there is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate

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19 Judgment [80].
20 Judgment [66].
21 [1945] HCA 27; (1945) 70 CLR 256 at 261-262.
22 Judgment [68].
23 [1987] AC 241 at 272-274.

> cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer. The classic example of such a case is, perhaps, *Haynes v. Harwood* [1935] 1 K.B. 146, where the defendant's carter left a horse-drawn van unattended in a crowded street, and the horses bolted when a boy threw a stone at them. A police officer who suffered injury in stopping the horses before they injured a woman and children was held to be entitled to recover damages from the defendant. There, of course, the defendant's servant had created a source of danger by leaving his horses unattended in a busy street. Many different things might have caused them to bolt - a sudden noise or movement, for example, or, as happened, the deliberate action of a mischievous boy. But all such events were examples of the very sort of thing which the defendant's servant ought reasonably to have foreseen and to have guarded against by taking appropriate precautions. In such a case, Lord Sumner's dictum (*Weld-Blundell v. Stephens* [1920] AC 956, 986) can have no application to exclude liability.
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> …
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> Suppose that a person is deputed to buy a substantial quantity of fireworks for a village fireworks display on Guy Fawkes night. He stores them, as usual, in an unlocked garden shed abutting onto a neighbouring house. It is well known that he does this. Mischievous boys from the village enter as trespassers and, playing with the fireworks, cause a serious fire which spreads to and burns down the neighbouring house. Liability might well be imposed in such a case; for, having regard to the dangerous and tempting nature of fireworks, interference by naughty children was the very thing which, in the circumstances, the purchaser of the fireworks ought to have guarded against."

[25] Importantly, Lord Goff then stated this qualification:[24]

> "Moreover, it is not to be forgotten that, in ordinary households in this country, there are nowadays many things which might be described as possible sources of fire if interfered with by third parties, ranging from matches and firelighters to electric irons and gas cookers and even oil-fired central heating systems. These are commonplaces of modern life; and it would be quite wrong if householders were to be held liable in negligence for acting in a socially acceptable manner. No doubt the question whether liability should be imposed on defenders in a case where a source of danger on his land has been sparked off by the deliberate wrongdoing of a third party is a question to be decided on the facts of each case, and it would, I think, be wrong for your Lordships' House to anticipate the manner in which the law may develop: but I cannot help thinking

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24 [1987] AC 241 at 274.

> that cases where liability will be so imposed are likely to be very rare."

[26] In *Modbury*, Gleeson CJ said that the general rule is based upon a fundamental principle, which is that the common law does not ordinarily impose liability for omissions.[25] He added that it is "a principle which is based upon considerations of practicality and fairness".[26]

[27] The rule is not displaced simply by what Lord Goff in *Smith v Littlewoods Organisation Ltd* described as the mechanism of foreseeability.[27] Similarly, in *Modbury*, Gleeson CJ said that in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.[28] In this respect, in *Smith v Littlewoods Organisation Ltd*, Lord Goff said:[29]

> "I wish to emphasise that I do not think that the problem in these cases can be solved simply through the mechanism of foreseeability. When a duty of care *is* cast on a person to take precautions against the wrongdoing of third parties, the ordinary standard of foreseeability applies; and so the possibility of such wrongdoing does not have to be very great before liability is imposed. I do not subscribe to the opinion that liability for the wrongdoing of others is limited because of the unpredictability of human conduct. So, for example, in *Haynes v Harwood* [1935] 1 K.B. 146, liability was imposed although it cannot have been at all likely that a small boy would throw a stone at the horses left unattended in the public road; and in *Stansbie v Troman* [1948] 2 K.B. 48, liability was imposed although it cannot have been at all likely that a thief would take advantage of the fact that the defendant left the door on the latch while he was out. Per contra, *there is at present no general duty at common law to prevent persons from harming others by their deliberate wrongdoing, however foreseeable such harm may be if the defender does not take steps to prevent it*."
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> (Emphasis added.)

[28] Further, in this context it is relevant to consider the nature of the conduct of the third party which is the immediate cause of the relevant injury or damage. Thus, in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*,[30] Lord Hoffmann said that an employer owes a duty not to leave a drum filled with highly inflammable vapour in a place where it could be accidentally ignited, but not a duty to take precautions against an arsonist workman igniting it *deliberately*.[31]

[29] The trial judge reasoned in this way:

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25 *Modbury* [2000] HCA 61 at [26]; (2000) 205 CLR 254 at 265, 266.
26 *Modbury* [2000] HCA 61 at [35]; (2000) 205 CLR 254 at 268.
27 [1987] AC 241 at 279.
28 *Modbury* [2000] HCA 61 at [29]; (2000) 205 CLR 254 at 267.
29 [1987] AC 241 at 279.
30 [1999] 2 AC 22.
31 [1999] 2 AC 22 at 31-32; see also *Ashrafi Persian Trading Co Pty Ltd v Ashrafinia* [2001] NSWCA 243 at [61] per Heydon JA (Mason P and Handley JA agreeing).

> "[51] In the present case, it was not suggested that it is part of the plaintiff's case that the defendants, as social hosts, owe a duty of supervision to social guests. I respectfully accept the analysis of Priestley JA in *S v S*[32] that, in general, social hosts do not owe duties to social guests. However, in the present case, I do consider that the provision of the source of fuel, being the small jerry can, then placing it in a position that made it available to social guests, who were expected to be highly intoxicated, combined with the fact that there had been an earlier grassfire, does place upon the defendants a duty to take reasonable care to prevent harm from an uncontrolled fire lit by an intoxicated guest from petrol made available by the defendants."

[30] The judge continued by saying that there were several considerations that distinguished the present case from *Modbury*, namely:

(a) the duty of care in this case was not founded solely upon the appellants' position as occupiers of the property;

(b) a complaint was made in the pleading that the appellants failed to control the continued presence upon the property of the irrational and intoxicated guests by supervising those guests;

(c) the guests were supplied with "essentially an unlimited amount of alcohol", and it was expected that many would become intoxicated and might act irrationally;

(d) the appellants introduced the fuel source from a remote location to the party area where there was always prospect that an intoxicated irrational person might start a fire;

(e) the grassfire having been lit, combined with the consumption of alcohol and young guests becoming intoxicated and irrational, "called for prudent steps to deal with that high level of risk by removal of the fuel source", a risk which was actually foreseen by the appellants.[33]

[31] The first of those considerations seems to be simply an introductory statement of the effect of the others. I have discussed already the second of those considerations.

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

[33] It is convenient to discuss now the fifth consideration. The foreseeability of a risk of a fire such as this one was not the determinant of whether the general rule had been displaced. And however foreseeable it may have been that someone would

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32 *D v C* [1998] NSWCA 67.
33 Judgment [64]-[69].
34 [2009] HCA 48 at [23]-[25]; (2009) 239 CLR 420 at 436, quoted in the Judgment at [63].
35 [2009] HCA 48 at [18]; (2009) 239 CLR 420 at 434.

again use the fuel to start a fire like that which was started on the lawn, it was another thing to say that a risk of the deliberate ignition of the clothing of a guest as he slept was reasonably foreseeable, such that the appellants owed a duty to take precautions against it.[36]

[34] I return to the fourth consideration, namely the suggested creation of a source of danger by leaving the fuel in the shed. Outside cases of a special relationship, in a case in which a defendant is rendered liable for facilitating a third party harming another, the defendant's liability is for more than mere inaction.[37] The judge reasoned that the appellants' breach involved more than omitting to remove the petrol from the reach of guests. He considered that they had created a source of danger by bringing the fuel to the property from a remote location. As the judge reasoned, the appellants had thereby created what Dixon J described as a "special danger". It is at that point where, in my respectful opinion, the judge made a critical error.

[35] As it happened, the appellants did not usually keep fuel on this property. Still, to have done so would have been an ordinary and unremarkable practice. Indeed that is why Taylor entered the shed, because having grown up on a farm, that is where he expected to find fuel. As discussed earlier, Lord Goff cautioned that there are many things which might be described as possible sources of fire if interfered with by third parties which are commonplace in ordinary households. This may be said of small quantities of petrol which are commonly kept, not only in sheds on farms, but in suburban sheds and garages. As Gleeson CJ said in *Modbury*, the general rule is founded upon considerations of practicality and fairness. If occupiers were under a legal duty to take steps to prevent harm being caused to another by a third party from the misuse of things kept in an ordinary way on their properties, the burden would be intolerable.[38]

[36] In summary, the general rule was not displaced in this case. The appellants were not liable, because they were not obliged to take such steps as were necessary to prevent Taylor from harming another guest by deliberately setting fire to his clothing. Questions of breach and causation under sections 9 to 11 of the *Civil Liability Act 2003* (Qld) did not arise.

Apportionment

[37] The appellants argued that the trial judge erred in apportioning responsibility for the injuries between them and Taylor in the respective percentages of 30 and 70 per cent. They argued that if they were liable to Mr Dearden, their responsibility should have been assessed as no higher than five per cent.

[38] On my analysis, the question does not arise.

The assessment of damages

[39] Three arguments were advanced for the appellants which challenged aspects of the assessment of damages. Should it matter, I will address them. Unlike the

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36 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22.

37 *Ashrafi Persian Trading Co Pty Ltd v Ashrafinia* [2001] NSWCA 243 at [66].

38 *Modbury* [2000] HCA 61 at [28]; (2000) 205 CLR 254 at 266.

apportionment question, they can be considered without having to adopt a view of the facts and the law which is contrary to my reasoning on the principal issue.

[40] The first was that, it was said, the amount of $95,670 which was allowed for general damages was excessive. The judge said that this was a case of multiple injuries where the dominant injury was the right shoulder injury, which had a maximum ISV of 30, as a serious shoulder injury, meaning that it was an injury which would involve serious trauma to the shoulder causing serious permanent impairment. The appellants' submission is that although the injury was severe in some respects, by the time of the trial Mr Dearden had returned to his employment which involved physical labour such that the dominant injury could only have been a "moderate upper limb" equating to item 123 with an ISV range of 6-20. The judge then applied an uplift of 25 per cent to reach an ISV of 38. The appellants' submission is that an uplift of that order was not open.

[41] The critical findings within the Judgment are set out at paragraphs [136] – [143]. Those findings were open, and it was therefore open to the judge to quantify the general damages as he did.

[42] Next there was a challenge to the component of the award which was for past economic loss, in the sum of $18,500. Mr Dearden was off work for eight weeks but still received full wages from his parents, on whose properties he had worked. Mr Dearden's case was that had he been able to work, his remuneration would have been higher by doing some additional work at other properties. At paragraph [150] of the Judgment, the evidentiary basis for this component was explained. In essence, the judge accepted that it was plain from Mr Dearden's evidence that he would have earnt double his normal remuneration doing that other work. The argument that there was no proof of this component was unpersuasive.

[43] Finally, there is a ground which complained of the assessment of the future economic loss and the future loss of superannuation benefits. Mr Dearden was employed in his parents' farming business, in which most of his family were also employed. It is said that he would remain employed in the family business and on the same level of pay, and that only a small amount should have been allowed for the contingency that he might leave that employment. Further, it was said that the findings did not accord with the requirements of s 55(3) of the *Civil Liability Act*. That last submission cannot be accepted. In this case the loss was able to be assessed by reference to a defined weekly loss, as the judge did. He assessed that Mr Dearden had a loss of earning capacity of the order of 40 per cent of his pre-existing earning capacity of $1,000 net per week, and he quantified the loss by a factor of 43 years, resulting in the sum of $375,200. On the findings made by the judge that assessment was open.

Conclusion

[44] I would order that the appeal be allowed, the judgment for the first respondent against the appellants be set aside, the first respondent's claim be dismissed, the order for costs made in the Trial Division against the appellants be set aside, and that the first respondent pay to the appellants their costs of the proceeding in the Trial Division and of the appeal. There should be no order for the costs in this Court between the appellants and the second respondent.

[45] **FLANAGAN JA:** I agree with McMurdo JA.