HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

MICHAEL BRETT WOODS APPELLANT

AND

MULTI-SPORT HOLDINGS PTY LTD RESPONDENT

Woods v Multi-Sport Holdings Pty Ltd [2002] HCA 9
7 March 2002
P93/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation:

B S Spinks for the appellant (instructed by Marks & Sands)

R J L McCormack for the respondent (instructed by Srdarov Richards Burton)

CATCHWORDS

Woods v Multi-Sport Holdings Pty Ltd

Negligence – Occupier's liability – Duty of care – Eye injury suffered by player of indoor cricket – Failure to provide protective helmet – Failure to warn of specific risk of eye injury – Whether conduct of occupier reasonable in the circumstances – Relevance of industry practice and rules of game – Relevance of obviousness of risk – Voluntary assumption of risk – Causation of damage.

1 GLEESON CJ. The appellant suffered serious injury to an eye while playing indoor cricket. The game was being played at a facility, owned and operated, as a business, by the respondent. The respondent organised the game in which the appellant was playing, and provided the equipment used by the players. The equipment included bats, balls, thin hand gloves, and groin protectors, but not helmets or pads. The appellant sued for damages in the District Court of Western Australia. Although various causes of action were pleaded, the claim was ultimately treated as founded in negligence. The trial judge, French DCJ accepted that the respondent owed a duty of care to the appellant. Indeed, the existence of a duty was not in dispute; it was the content of the duty and, in particular, whether there had been a breach of duty, that was the principal area of contention. French DCJ considered that, because the respondent organised and controlled the games that were played at its facility, its responsibility to players went beyond the state of the premises. It had a duty under the *Occupiers' Liability Act* 1985 (WA) but it also had a wider duty to "take reasonable steps to avoid the risk of injury to players arising from the dangers involved in playing indoor cricket". That formulation of the duty was not challenged in argument in this Court. The argument was about the steps the respondent ought reasonably to have taken. If the trial had been before a judge and jury, that would have been a question for the jury to decide as the tribunal of fact. There was no jury, and the issue was one for the trial judge. But it was one for her factual judgment, in the light of the circumstances of the case.

2 There were two respects in which it was ultimately contended that the respondent had failed to take reasonable steps to avoid the risk of injury to players, including the appellant. The trial judge concluded that in neither respect had there been any such failure, because reasonableness did not require those steps to be taken. In brief, she accepted the appellant's case as to the duty of care, but rejected the allegation that there had been a breach of duty. That conclusion was upheld by the Full Court of the Supreme Court of Western Australia[1].

3 In order to explain the basis of the trial judge's reasoning it is convenient to begin by referring to some of the evidence about the sport of indoor cricket.

Indoor cricket

4 Indoor cricket was introduced to Western Australia in 1979. There are about 250 indoor cricket centres in Australia. It is played by about 120,000 people in Australia, and by about 12,500 in Western Australia.

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1 *Woods v Multi-Sport Holdings Pty Ltd* [2000] WASCA 45.

5 Although, as its name suggests, the sport is derived from, and has similarities to, cricket, there are also differences, and it would be wrong to assume that it is played in a manner that resembles what takes place in a suburban or country park on a Saturday or Sunday afternoon in summer.

6 Mr Lewis, the vice-president of the Australian Indoor Cricket Federation (AICF), and former coach of the Australian team which competes for the World Cup, gave evidence. The game is played as a contest between two teams, ordinarily composed of eight persons each. It is played in what is called a court; the average size of a court being 28 to 30 metres long and 10.5 to 12 metres wide. At any given time there are 10 players on the court; two from the batting team and eight (including a bowler) from the fielding team. The court is separated into two sections. In one half, there are the wicket-keeper and three other fielders. In the other half there are the bowler and three other fielders. This is a body contact sport, involving what Mr Lewis called "clashing". There is a good deal of diving by both fielders and batters, who throw themselves onto, and slide along, a synthetic carpet, as they seek to field the ball, or make runs, as the case may be. The prevalence of diving and sliding is significant in considering a suggestion that players should wear helmets with metal grills protruding some distance from their faces. So frequent are collisions, that there are rules which prescribe who has right of way. Because the game is played at a fast pace, in a confined space, there is not only a high risk of collision between players, there is also a danger of players being struck by the ball. As in any game of cricket, a batsman will sometimes seek to hit the ball as hard as possible, and, if a fielder gets in the way, injury is a possible consequence.

7 One of the medical witnesses called for the appellant gave evidence of a report he had prepared about eye injuries, and the possibility of protective measures, in indoor cricket. The trial judge summarised part of the report as follows:

> "The fact that … indoor cricket is played in such a confined space makes proximity a major factor with little time to react to avoid impact with the ball. The report also notes that tests have indicated that eye protection where available for rac[qu]et sports is not able to withstand the impact of an indoor cricket ball. It is therefore considered that only full face cricket helmets would be adequate for eye protection in playing indoor cricket. It also notes that because of the proximity of players *every player* in an indoor cricket field would need to wear a full face batting helmet." (emphasis added)

8 The ball with which indoor cricket is played is similar in size and weight to an outdoor cricket ball, but not as hard. In some respects it is less likely to cause injury, but because it is softer than an ordinary cricket ball, it can mould into the shape of the eye socket when it strikes the socket at speed. The medical evidence was that, in this way, more force is directly transmitted to the eye

causing ocular injury as compared with the standard cricket ball which causes more damage to the bone surrounding the orbit. Being struck in the eye by any cricket ball can result in serious injury, but the particular kind of injury likely to result from being struck by an ordinary cricket ball is in some respects different from the kind of injury likely to result from being struck by an indoor cricket ball.

9 Dr McAllister, an ophthalmologist who treated the appellant, said:

> "Most of the force with a hard ball is transmitted to the bony rim surrounding the orbit and whilst it might cause fractures to the orbit itself, the eye itself would be more protected. A ball like [the indoor cricket ball], when it hits the bony orbit, part of the piece that strikes the orbit will deform and that will extend into the orbit and compress the eye more than a hard ball would. So I guess the softer a ball of this size gets, given that it still weighs the same, it would probably be likely to cause *a little more damage*." (emphasis added)

10 There was no medical evidence that the harm which the appellant suffered would have been materially different had he been struck by an outdoor cricket ball rather than an indoor cricket ball.

11 Dr McAllister, who is head of the Ophthalmology Department of Royal Perth Hospital, said that most of the major eye injuries suffered in Western Australia as a result of trauma were referred to him. He estimated that over 10 years he would have seen approximately 20 significant eye injuries arising from accidents in indoor cricket. He did not attempt to distinguish between batsmen and fielders. The trial judge recorded that the witness "conceded that on the basis that there are approximately 12,500 people playing indoor cricket in Western Australia … this was not a high percentage but … his concern was that in his opinion the injuries were preventable". The significance of a figure of an average of two serious eye injuries per year in a population of 12,500 players was a matter for the trial judge to weigh.

12 The appellant, in his evidence, agreed that he was aware that in playing cricket, outdoors or indoors, either as a batsman or as a fielder, there was a risk of being struck in the head by a ball. French DCJ found that "he was well aware at the time that there was a risk of being hit with the ball". The same, of course, would have applied to the officers and employees of the respondent.

13 The evidence did not go into detail concerning the risks of injury, other than eye injury, involved in playing indoor cricket. It is, however, plain that there are many such risks. A player, whether a batsman or a fielder, could be struck, very hard, by a ball, on any part of the body. The risk is substantially increased by the confined space in which, and the speed at which, the game is played, and the way in which players dive, slide and collide. And, of course, as

in many other sports, players can injure themselves, perhaps severely, by reason of the physical effort they put into the activity and the strain it imposes on their bodies. There was no evidence as to the number or severity of back injuries suffered by indoor cricket players, but the possibility of serious back injury also seems plain.

The injury to the appellant

14 At the time of his injury, the appellant was aged 32. He was an experienced cricketer, who played outdoor club cricket weekly. He had played indoor cricket only once before the day on which he was injured. On that day, he had agreed to participate in a game at the respondent's facility. While he was batting, he received a full toss, and attempted a pull shot. He failed to connect properly, and this caused the ball to ricochet off his bat and hit him in the right eye. As a result, he lost the sight of that eye.

15 The respondent met the allegation of negligence made against it by contending, amongst other things, that the appellant was guilty of contributory negligence in the manner in which he played the unsuccessful stroke. The particulars included the claims that he:

> "(ii) failed to play the shot with due skill, including mis-timing his shot …
>
> (iii) used [an] unsuitable kind of shot without first ascertaining that it was safe so to do".

16 French DCJ rejected the claim of contributory negligence, and it is not pursued in this Court. We are relieved of the necessity of deciding what the law requires of a batsman, by way of reasonable care for his own safety, when he plays a pull shot, or whether an error in timing may constitute contributory negligence. It may be remarked, however, that mis-timing a cricket shot sounds like a text-book example of the difference between an error of judgment and a failure to take reasonable care.

The particulars of negligence

17 A number of other issues that were decided by the trial judge were not pursued on appeal. These included a contention that there was a sign displayed at the respondent's facility warning players that they played at their own risk. French DCJ accepted that such a sign was ordinarily displayed. But there was evidence that, from time to time, it was displaced, and the judge was not satisfied that the sign was present on the day of the appellant's injury or on the earlier occasion when he played indoor cricket.

18 The particulars of negligence relied upon by the appellant came down to two:

> 1. [The respondent] failed to provide any warning or install any warning signs to warn the plaintiff of the dangers of indoor cricket; in particular the risk of serious eye injury.
>
> 2. [The respondent] failed to provide the plaintiff with any or any proper eye protection or guarding while playing indoor cricket.

19 The trial judge dealt with those contentions in reverse order.

Eye protection

20 The case for the appellant was that, as well as providing the players with gloves and groin protectors, (although not with pads), the respondent should have provided them (and, for the reasons set out above, that would have included fielders as well as batsmen) with helmets with face guards similar to, although not necessarily the same as, those commonly used in outdoor cricket. The helmet used by goalkeepers in ice hockey or field hockey was also suggested as a possibility.

21 Counsel for the appellant did not argue at trial, and in this Court specifically disclaimed any suggestion, that it was part of the duty of the respondent, as a provider of sporting facilities, and an organiser of contests, to design a suitable form of helmet, assuming none to be available on the market. The question was whether, in all the circumstances, it was negligent of the respondent not to provide helmets to players; and the general availability, or unavailability, of a suitable kind of helmet was a relevant factor. The argument centred on helmets because the evidence showed that protective goggles, of the kind worn by some squash players, would not be useful for indoor cricket. They would not withstand the force of the ball.

22 As was noted above, there was medical evidence that the risks of eye injury could only be prevented by a full helmet with a face guard or grid, such as helmets used for outdoor cricket. Such a guard or grid protrudes from the face. Dr Bremner was not aware of any helmets that had been designed for indoor cricket. Dr Anderson, another medical witness, said that only full face cricket helmets, or hockey helmets of the kind worn by goalkeepers, would be effective. The visor on the outdoor cricket helmet, which was unnecessary for indoor cricket, could be removed.

23 The evidence showed, not only that there were no helmets designed for indoor cricket, and that they are not usually worn in playing the sport, but that the rules of the game actually discourage the use of helmets, requiring a player who

wants to wear a helmet (for example, because of a special medical condition) to obtain permission to do so.

24 The game is played according to rules set by the AICF. One of the reasons why helmets are not part of the ordinary protective equipment used in the sport appears from the evidence of Mr Lewis summarised above. If eye protection is needed, it is needed just as much by fielders as by batsmen. But the confined space, and the diving, sliding, and frequent collisions between players, were regarded by witnesses involved in administering and playing the sport as reasons why wearing helmets was not only undesirable but would increase some of the hazards. That was why, if a player had a reason for wanting to wear a helmet, permission was required.

25 French DCJ said:

> "I am satisfied after considering all of the evidence of the witnesses who have been involved in the game of indoor cricket either as players, centre operators or administrators, that the rules and practice of indoor cricket does not contemplate that outdoor cricket helmets or any helmet would be worn as part of the usual playing equipment …
>
> It is apparent that the reason for helmets not being part of the standard equipment or uniform for indoor cricket players is a combination of concerns regarding safety if conventional outdoor cricket helmets are used, and the questions of comfort and convenience, taking into account the nature of the game."

26 French DCJ pointed out that it was not a question of uncritical conformity to a bad example set by others who provided similar facilities. She said:

> "It may well be that the time has now come in the light of the medical evidence of the potential for serious eye injury for a helmet of a more lightweight material with no visor and no protuberances to be designed and manufactured. It may be that the AICF should be actively pursuing that course. But that does not mean that it is reasonable to expect an individual operator of a suburban cricket venue to take steps to investigate and research this proposal. It also does not mean that it is reasonable to expect an individual operator to arrange for hire of outdoor cricket helmets as they are presently available on the retail market when as the rules of indoor cricket presently stand that would not be allowed as a matter of standard player equipment."

27 The trial judge's conclusion was:

> "On the basis of my findings in relation to the status of the wearing of a helmet in the game of indoor cricket I find that it was not reasonable

> for the [respondent] to be required to provide a helmet for players when the wearing of helmets had never been a form of protection worn by players in the game and was in fact against the rules of the game of indoor cricket as it is played in Australia."

28 The fact that players at the respondent's facility were not provided with helmets was in accordance with general practice, and with the rules according to which the sport was played. French DCJ did not suggest that the rules of the game, or the practice of indoor cricket players, or other operators of indoor cricket facilities, concluded the question she had to decide, but she saw them as factors to be taken into account in assessing what was required by the standard of reasonableness. There were reasons, which she regarded as substantial reasons, for the practice and the rules. The fact that helmets had not been accepted as part of the protective equipment for indoor cricket, as they had for outdoor cricket, was not the result of indifference to considerations of safety. It resulted from aspects of the game which people might reasonably regard as making helmets unsuitable, and in some circumstances, dangerous.

29 Neither French DCJ, nor the Full Court, found that the practice of playing indoor cricket without a helmet involved an unreasonable disregard for safety on anybody's part.

Absence of warning

30 The appellant's complaint, as particularised, was of a failure to provide a sign to warn of the dangers of indoor cricket, and, in particular, the risk of serious eye injury.

31 Indoor cricket has dangers, in the sense that there are many different ways in which a person batting, bowling, or fielding might suffer injuries of varying degrees of severity. A batsman, or a fielder, might be struck hard on the front, or side, or back of the head, or on any part of the body. Diving, sliding or colliding players might cause or suffer damage. Players might over-exert themselves, or fall awkwardly. It is possible that someone who turned up for a game of indoor cricket for the first time, imagining that it was like a game of ordinary cricket played under shelter, might be surprised at some of the hazards involved, or that someone who had never played a game of cricket of any kind might not realise how easy it is for a mis-hit by a batsman, or a misjudgment by a fielder, to result in unintended harm. But the appellant was not in that position.

32 French DCJ, in her reasons, used the expression "inherent risks" to describe risks which are "by their nature obvious to persons participating in the sport". Whether that is the only, or the proper, meaning of that expression, the judge made clear what she meant by it. She described the risk of being hit by a cricket ball during the course of play as a risk of that kind.

33 Having rejected a conclusion that reasonableness required the compilation of a list warning of all the risks associated with indoor cricket, and having decided that it was so obvious that a player might be hit by a ball during the course of play that there was no requirement to warn of that danger, French DCJ then turned to an argument that there was something about the risk of serious eye injury that required a warning. She posed the question for herself as follows:

> "The question to be determined in relation to this matter is whether the risk of serious eye injury is included in the inherent risks accepted by the plaintiff" – by which, as she had earlier explained, she meant risks by their nature obvious to participants – "or whether it constituted an unusual or hidden danger that necessitated a specific warning to be brought to the attention of the participants including the plaintiff."

34 In contending that reasonableness required a warning, the appellant pointed to one aspect of the risk of serious eye injury which would not have been obvious to participants in the game, and which has already been mentioned. It is the heightened risk of a particular type of eye injury because of the more malleable quality of the ball which would allow it to impact on the eye surface rather than injure the bones around the socket. French DCJ addressed this argument, but concluded that, bearing in mind that the risk of being hit in any part of the body, including the head (and the eye), was so plain, and bearing in mind that the increased risk related to one only of a number of possible dangers to the eye, and the head, reasonableness did not require a warning. She said:

> "I do not consider that in these circumstances, where being hit in any part of the body including the head, is an obvious risk, that there is any duty to warn of the specific risk of serious eye injury."

35 She gave as an additional reason for her conclusion the fact that there was no evidence that the respondent knew or understood the mechanics that gave rise to the particular risk in question. She did not address the question whether the respondent ought to have known that and, in that respect, her findings on that additional reason were incomplete. But it is the adequacy of her primary reason that must be addressed.

36 The Full Court held that the conclusion of fact, that no warning was required because of the obviousness of the "quite high" risk of being struck on the head by a ball, was clearly open on the evidence.

The principles to be applied

37 As Kitto J pointed out in *Rootes v Shelton*[2], people have taken pleasure in engaging in risky games since long before the law of negligence was formulated, and there is nothing new or mysterious about the application of the law to such conduct. But the sporting context may be of special significance in relation to a factual judgment that must be made. Depending upon the manner in which a plaintiff seeks to make out a case of negligence, the risky nature of a sporting activity in which an adult participant has chosen to engage may be of factual importance in a decision as to whether such a case has been established.

38 In *Rootes v Shelton*, the defendant sought to meet a case of negligence in the manner in which he controlled a speed-boat towing a water-skier by arguing that the plaintiff had voluntarily assumed the risk which eventuated. That argument failed. In the course of discussing the argument, Barwick CJ referred to risks that are inherent in a sport or pastime which may be regarded as accepted by participants[3]. There was an argument as to voluntary assumption of risk in the present case, but it was not the basis upon which the matter was decided at trial, and it was not pursued in the Full Court or in this Court. Nevertheless, French DCJ, and the Full Court, referred to the concept of inherent risks in the context of obvious risks, for the purpose of dealing with the appellant's case of failure to warn.

39 Because the concept of foreseeability in the law of negligence has been taken to embrace risks which are quite unlikely to occur, and to mean only that a risk is not one that is far-fetched or fanciful, many of the cases which discuss the approach to be taken by a tribunal of fact in deciding whether there has been a breach of a duty of care speak in terms of balancing the magnitude of the risk with the cost or inconvenience of preventing it. But, as Mason J pointed out in *Wyong Shire Council v Shirt*[4], ultimately the question of fact is what a reasonable person, in the position of the defendant, would do by way of response to the risk.

40 In some cases, of which the present is an example, a court is not confronted with a risk that is quite unlikely to occur; it is dealing with an activity which carries with it the possibility of injury, including serious injury, in a number of different forms. The appellant was not a child, and he was not being compelled to play the game. He was an adult who chose, for his personal enjoyment, to play. That the activity is risky is plain to anyone who understands

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2 (1967) 116 CLR 383 at 387.

3 (1967) 116 CLR 383 at 386.

4 (1980) 146 CLR 40 at 47.

what it involves, including the respondent. The respondent carried on the business of providing facilities for persons such as the appellant to play the game. The question for the tribunal of fact was what reasonableness required by way of response from the respondent, having regard to the respects in which the respondent was alleged to have been negligent.

41 Where it is claimed that reasonableness requires one person to provide protection, or warning, to another, the relationship between the parties, and the context in which they entered into that relationship, may be significant. The relationship of control that exists between an employer and an employee, or of wardship that exists between a school authority and a pupil, may have practical consequences, as to what it is reasonable to expect by way of protection or warning, different from those which flow from the relationship between the proprietor of a sporting facility and an adult who voluntarily uses the facility for recreational purposes. I say "may", because it is ultimately a question of factual judgment, to be made in the light of all the circumstances of a particular case.

42 It was argued for the appellant that French DCJ, and the Full Court, failed to give sufficient weight to the commercial nature of the respondent's activities. It was carrying on a business of providing facilities and organising games, and it was reasonable to expect more of it than might be expected of someone who was assisting a sport in the capacity of a volunteer. That proposition may be accepted, but there is no reason to conclude that it was overlooked. French DCJ was well aware that the respondent was carrying on a business, for profit. However, she was not prepared to conclude that it was reasonable to expect the respondent to provide players such as the appellant with a form of protective headgear in circumstances where none had been designed for the game, none was worn by players elsewhere, the rules of the game did not provide for such headgear, and the manner in which the game was played meant that there were considerations of convenience and safety that provided good reasons why such headgear was not worn. The respondent did not fail to provide the appellant with some item of protective equipment which was available on the market, and commonly used by indoor cricketers. The incidence of serious eye injuries, in the trial judge's view, was not such as to dictate that the respondent should have provided other than the standard equipment normally used by adult players of the sport. That was an assessment that was open as a matter of judgment. Decision-makers might respond differently to that part of the evidence, but French DCJ was the tribunal of fact, and the Full Court agreed with her. No sufficient reason has been shown for this Court to disagree with her assessment.

43 As to the matter of the warning, the trial judge dealt with the appellant's case as it was put to her. The case was that there should have been a warning of the dangers associated with indoor cricket and, in particular, the danger of serious eye injury. It is useful to reflect upon what exactly might have been the content of the warning. There was no reason to limit it to the risk of head injury, much less eye injury. There was one particular respect in which the type of eye injury

suffered at indoor cricket can be different from the type suffered at outdoor cricket, but there were probably also a number of respects in which the risk of back injury, or concussion from collisions, might be different from the risks associated with outdoor cricket. The risk that, in the confined space in which the game was played, any player, batsman or fielder, might receive a severe blow to any part of the head, including the eye, was, the trial judge found, obvious, and well known to the appellant. It was argued that the appellant was not aware of the precise nature, and full extent, of the risk. But warnings of the kind here in question are not intended to address matters of precision. French DCJ concluded that the risk of a player being struck in the face by a cricket ball was so obvious that reasonableness did not require the respondent to warn players about it.

44 French DCJ, and the Full Court, were criticised in argument for their reliance on what French DCJ described as the comment of Kirby J in *Romeo v Conservation Commission (NT)*[5] that:

> "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 that risk is neither reasonable nor just."

45 It is right to describe that observation as a comment. It is not a proposition of law. What reasonableness requires by way of warning from an occupier to an entrant is a question of fact, not law, and depends on all the circumstances, of which the obviousness of a risk may be only one. And, as a proposition of fact, it is not of universal validity. Furthermore, the description of a risk as obvious may require closer analysis in a given case. Reasonableness would not ordinarily require the proprietor of an ice skating rink to warn adults that there is a danger of falling; but there may be some skaters to whom such a warning ought to be given. Nevertheless, as a generalisation, what Kirby J said is, with respect, fair comment. That is how French DCJ and the Full Court understood it, and they did no more than indicate that they regarded it as apposite to the present case. There is no error in that.

Conclusion

46 The judgment on the issue of negligence made by the trial judge has not been shown to be in error.

47 The appeal should be dismissed with costs.

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5 (1998) 192 CLR 431 at 478 [123].

48 McHUGH J. The issue in this appeal is whether Multi-Sport Holdings Pty Ltd ("Multi-Sport"), the respondent, breached the duty of care that it owed to the appellant by failing to provide a protective helmet or by failing to warn him of the danger of sustaining an eye injury while he was playing indoor cricket. The appeal is brought against an order of the Full Court of the Supreme Court of Western Australia[6]. That Court unanimously dismissed an appeal against a judgment in favour of Multi-Sport given in the District Court of Western Australia (French DCJ).

49 In my opinion, Multi-Sport breached its duty in two respects: first, in not providing the appellant – Mr Michael Woods – with a protective helmet and second, in not warning him of the special risks of eye injury while playing indoor cricket. Accordingly, the appeal should be allowed and judgment entered in favour of Mr Woods.

The material facts

50 Multi-Sport has premises in Perth fitted out with two courts suitable for playing the game of indoor cricket. The courts were available for hire by teams wishing to play indoor cricket. Almost all games played at the premises were organised by Multi-Sport which also provided equipment for the players including bats, balls, thin batting gloves and plastic groin protectors. No protective helmets or eye protection were provided. Nor was there any sign that would alert a player to the dangers of serious eye injury from playing indoor cricket or to other dangers involved in playing the game.

51 The two indoor cricket courts were separated by means of meshing. Entrance to a court was by means of a flexible net "door". When the case was tried in the District Court, a sign above the net door declared that "Players play at own risk". However, the trial judge was not satisfied that the sign was affixed to the net on 12 March 1996 when Mr Woods was injured or on an earlier occasion when he had visited the premises.

52 On 12 March 1996, Mr Woods was a member of a team playing in a match at the premises of Multi-Sport. Each player had paid Multi-Sport six or seven dollars to play the game. Shortly after Mr Woods commenced batting, he attempted to pull a "full toss" to the side, but the ball ricocheted off his bat and hit him in the right eye. As a result, he has effectively lost the sight of his right eye. He has no central vision although he does have certain peripheral vision. His loss of sight has been assessed at 99%.

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6 *Woods v Multi-Sport Holdings Pty Ltd* [2000] WASCA 45.

53 In Western Australia, 17 centres offer facilities for the playing of indoor cricket; 13 of them are members of the West Australian Indoor Cricket Federation, itself a member of the Australian Indoor Cricket Federation. The Australian Indoor Cricket Federation is the regulating body for indoor cricket. From time to time, it publishes a set of official rules that govern the playing of indoor cricket. Those rules are binding on the West Australian Indoor Cricket Federation and its members. Multi-Sport is a member of that Federation.

54 The game, in which Mr Woods was injured, was being played under the rules prescribed by the Australian Indoor Cricket Federation. Under the rules, two sets of stumps are pitched opposite and parallel to each other at a distance of 20 metres. The court on which the game is played must be no less than 28 metres and no more than 30 metres in length. It must be no less than 10.5 metres and no more than 12 metres in width. Each team has eight players. At any time during an innings ten players are on the court – two batsmen and eight fielders. An umpire controls the game, applies the rules and keeps the scores of the respective teams.

55 As at March 1996, r 5D provided that players "may wear suitable protective equipment". The sub-rule made no reference to providing a helmet. New rules that were to become operative in 1998 provided:

> "Players may wear suitable protective equipment when fielding. This includes: elbow and knee pads, sporting helmets, face guards, gloves, groin protectors and safety glasses. The decision to allow protective equipment in the field rests with the duty manager or tournament organiser. Their decision must take into account the safety of all players and relevant medical reasons."

56 However, the evidence established that, under the old and the new rules, a player was able to wear a helmet only if there were "specific medical reasons". As a matter of practice, helmets were worn "in exceptional circumstances which will involve a special 'dispensation' made by the manager or centre organiser based on special requirements of the particular player". The trial judge found that, if Multi-Sport had adopted the practice of supplying and encouraging players to wear helmets as standard equipment, it would have permitted the game to be played contrary to the rules of the Australian Indoor Cricket Federation.

57 Evidence established that eye injuries sustained in indoor cricket "are more severe than in the outdoor game because of the confined space in which the game is played" and the velocity of the ball when it strikes a player. In addition, the ball used in indoor cricket is "more malleable than the outdoor ball" with the result "that the ball is able to impinge onto the eyeball in the bony socket". The risk of a player being hit is "quite high". There is a greater risk of injury in playing indoor cricket than in playing outdoor cricket.

58 Expert evidence established that squash and indoor cricket were responsible for the highest number of eye injuries in all sports in Western Australia. In a six month period in 1988-1989, ophthalmologists in Western Australia reported 38 injuries to a register of sport-related injury set up by a Save Sight Foundation. A test had also shown that any helmet that would protect against eye injury in outdoor cricket would provide sufficient protection for the playing of indoor cricket. Evidence also showed that the wearing of protective helmets and face guards in sports such as ice hockey and lacrosse had dramatically reduced the incidence of eye injury. The learned trial judge found that the cost of providing and maintaining outdoor helmets was not high enough to deter an indoor cricket centre from providing them.

59 According to the evidence of a witness, who was the owner of an indoor cricket centre and an experienced indoor cricket player, however, the protruding visor on the outdoor helmet posed an injury risk to other players. This evidence was effectively contradicted by Dr Anderson, an ophthalmologist expert in sport-related eye injuries. He had examined studies on the effect of wearing helmets. They had not shown any case anywhere in the world of another player being injured by the wearing of a helmet. He thought that the risk of injury to another player from the wearing of a helmet must be very small.

60 Upon these facts and this evidence, I am of the opinion that the respondent was in breach of the duty of care that it admittedly owed to Mr Woods. If a jury had tried the case, Multi-Sport could not have obtained a verdict as a matter of law. Multi-Sport knew or ought to have known of the risk of an eye injury. On the expert evidence, it was reasonably foreseeable that such an injury could occur. Those who organise activities for reward to themselves must keep abreast of publicly available or expert knowledge concerning the risks of injury in such activities. The duty of reasonable care demands nothing less. If Multi-Sport did not know of the risk of eye injury from indoor cricket, it ought to have known of it. There was also evidence that could support a finding that a protective helmet was available as a reasonably practicable means of avoiding the risk. The trial judge held that, if a helmet had been available, Mr Woods would have worn it.

61 As a matter of law, therefore, it was open to the trial judge to find as a fact that Multi-Sport had breached the duty of care that it admittedly owed to Mr Woods. And as a matter of fact, the trial judge, sitting as a juror, ought to have found that Multi-Sport had breached its duty. The gravity of the risk, the degree of probability of it occurring and the small cost of avoiding it combined to make it unreasonable for Multi-Sport to fail to eliminate the risk[7].

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7 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

Accident prevention and the cost of injuries

62 Accident prevention is a major concern of Australian society. Injuries not only harm individuals – often permanently – they also place enormous demands on our health services, and this was the position in March 1996 when Mr Woods was injured. According to a report on the costs of the health system for the years 1993-1994, "the direct health system costs of injury and poisoning amounted to $2,601 million"[8]. Given the number of injuries, the enormity of this figure is not surprising. According to a national health survey[9]:

> "In 1995, 2.8 million Australians (16% of the population) had a current injury or injury-related condition. This represented 18% of all people with a medical condition."

The same survey[10] showed that in 1995 228,800 people "with a current injury or injury-related condition had been injured most recently due to a sport or recreation-related activity in the month prior to interview".

63 In my view, it is legitimate and in accordance with long-standing authority and practice to refer to these statistics. They fall into the class of "legislative" facts that a court may judicially notice and use to define the scope or validity of a principle or rule of law. They are matters that "are not particular to the parties"[11] and assist in defining the content of the principles that govern this case and others like it.

(a) The doctrine of judicial notice: general

64 As a general rule, facts in issue or relevant to a fact in issue must be proved by admissible evidence. The doctrine of judicial notice is an exception to this rule. A court may judicially notice a fact whenever it "is so generally known that every ordinary person may be reasonably presumed to be aware of it"[12]. The

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8 Mathers and Penm, *Health System Costs of Injury, Poisoning and Musculoskeletal Disorders in Australia 1993-94*, (Australian Institute of Health and Welfare, Health and Welfare Expenditure Series no 6), (1999) at xii. Available at http://www.aihw.gov.au/publications/health/hscipmda93-4/.

9 Australian Bureau of Statistics, *National Health Survey: Injuries, Australia*, (1998) at 3.

10 Australian Bureau of Statistics, *National Health Survey: Injuries, Australia*, (1998) at 10.

11 *Saul v Menon* [1980] 2 NSWLR 314 at 324.

12 *Holland v Jones* (1917) 23 CLR 149 at 153.

information which the court acquires by taking judicial notice of facts is not "evidence strictly so called"[13]. Facts that may be judicially noticed fall into two categories: facts that can be judicially noticed *without* inquiry and facts that can be judicially noticed *after* inquiry. Facts that can be judicially noticed also fall into two other categories: (1) adjudicative facts and (2) legislative facts.

65 An adjudicative fact is a fact in issue or a fact relevant to a fact in issue. A legislative fact is "a fact which helps the court determine the content of law and policy and to exercise its discretion or judgment in determining what course of action to take"[14]. In contrast with adjudicative facts, which always relate to the issues between the parties, legislative facts generally relate to the law-making function of the judicial process. As Brennan J pointed out in *Gerhardy v Brown*[15], a court that is considering the validity or scope of a law "is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties". Whether the law is a Constitution, a legislative enactment or a principle or rule of the common law or equity, the "validity and scope of a law cannot be made to depend on the course of private litigation"[16]. In *R v Henry*[17], Spigelman CJ said that the means of acquiring information "for the purposes of policy development should not be confined by the rules of evidence developed for fact finding with respect to matters that only concern the parties to a particular case". As a result, as the learned author of *Cross on Evidence* has pointed out, "[i]t is clear from the cases that judges have felt themselves relatively free to apply their own views and to make their own enquiries of social ethics, psychology, politics and history where relevant without requiring evidence or other proof"[18]. And in *Rendell v Paul*[19], King CJ, with the approval of the other members of the Full Court of the Supreme Court of South Australia, said that judicial notice can be taken of "general economic trends, the effects of inflation, prevailing rates of interest and returns on investments". Similarly, the

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13 *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 at 691; *Saul v Menon* [1980] 2 NSWLR 314 at 325; *R v Henry* (1999) 46 NSWLR 346 at 364 [76].

14 Heydon, *Cross on Evidence*, 6th Aust ed (2000) at 122 [3010].

15 (1985) 159 CLR 70 at 141.

16 (1985) 159 CLR 70 at 141-142.

17 (1999) 46 NSWLR 346 at 362.

18 Heydon, *Cross on Evidence*, 6th Aust ed (2000) at 122 [3010].

19 (1979) 22 SASR 459 at 465-466 cited with approval by Moffitt ACJ in *Saul v Menon* [1980] 2 NSWLR 314 at 325.

Supreme Court of Victoria has taken judicial notice of prevailing economic conditions[20].

(b) Notorious facts judicially noticed without inquiry

66 Facts that have been judicially noticed *without* inquiry include:

- that cancer is a major health problem in the community and, despite research, little progress has been made in controlling it[21];
- that HIV is a life-endangering disease[22];
- that a child victim of sexual assault may be reluctant to resist, protest or complain about the sexual assault, due to fear of punishment or rejection[23]; and
- that many lawyers now charge hundreds of dollars an hour for their services, that legal aid is often unavailable to litigants in tort cases and that the cost of those services is substantially increased when lawyers cannot give advice to their clients because the law is unpredictable[24].

(c) Notorious facts judicially noticed after *inquiry*

67 On countless occasions, Justices of this Court have used material, extraneous to the record, in determining the validity and scope of legal rules and principles. They have frequently relied on reports, studies, articles and books resulting from their own research after the case has been reserved and parties have made their submissions. In *Australian Communist Party v The Commonwealth*[25], Dixon J said:

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20 *National Trustees Executors & Agency Co of Australasia Ltd v Attorney-General (Vic)* [1973] VR 610. See also *Bryant v Foot* (1867) LR 2 QB 161; *Hawkins v Lindsley* (1974) 4 ALR 697; *Rendell v Paul* (1979) 22 SASR 459 at 465-466; *Saul v Menon* [1980] 2 NSWLR 314 at 325.

21 *Re E M Murray (deceased); Permanent Trustee Co of NSW v Salwey* [1964-5] NSWR 121 at 122.

22 *Mutemeri v Cheesman* [1998] 4 VR 484 at 492.

23 *M v The Queen* (1994) 181 CLR 487 at 515 per Gaudron J.

24 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 215 [89] per McHugh J.

25 (1951) 83 CLR 1 at 196.

> "Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians … and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like … so we may rely upon a knowledge of the general nature and development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, not from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And, with respect to our own country, matters of common knowledge and experience are open to us …"

68 In *Timbury v Coffee*[26], Dixon J, in the absence of any medical evidence, consulted a medical text on the extent to which acute alcoholism could affect the mental processes of the testator. In *Alexander v The Queen*[27], Stephen J relied on published works of psychology in reaching conclusions as to the reliability of identification evidence. In *Jaensch v Coffey*[28], Deane J referred to legal articles and medical journals, reports, bulletins and textbooks in explaining the causes of psychiatric injury. In *Jones v The Queen*[29], Kirby J referred to extraneous material to explain why children may delay in complaining about sexual assault. Similarly, in *Ryan v The Queen*[30], I referred to psychiatry journals and reports in discussing sentencing approaches for paedophiles. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[31], Callinan J referred extensively to newspapers, books, lectures, academic papers, the journalists' *Codes of Ethics* and a Senate Committee Report to show "the realities of the modern publishing, entertainment and media industries, as well as the activities of members of the Executive branch of government in this country"[32].

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26 (1941) 66 CLR 277 at 283-284.

27 (1981) 145 CLR 395 at 409.

28 (1984) 155 CLR 549 at 600-601.

29 (1997) 191 CLR 439 at 463.

30 (2001) 75 ALJR 815 at 823-824 [42]-[44]; 179 ALR 193 at 203-204.

31 (2001) 76 ALJR 1; 185 ALR 1.

32 (2001) 76 ALJR 1 at 53 [253]; 185 ALR 1 at 72.

(d) Use of statistics in judgments

69 Courts have also used published statistics to resolve issues vital to the resolution of litigation and to inform themselves on policy issues. In *Aqua Max Pty Ltd v M T Associates Pty Ltd*[33], Gillard J found that one party was entitled to recover a bonus by taking judicial notice of movements in the Consumer Price Index for Melbourne. In *R v Henry*[34], the New South Wales Court of Criminal Appeal used sentencing statistics to give a guideline sentencing judgment. In *Wong v The Queen*, this Court has recently queried the utility of statistics in sentencing[35]. But *Wong* has nothing to say concerning the right of a court to take judicial notice of statistics in an appropriate case.

(e) Judicial notice and legislation

70 In three Australian States[36], legislative provisions enable the court to refer to certain published works considered to be of authority in matters of public history, literature, science or art. Section 72 of the *Evidence Act* 1906 (WA), for example, provides:

> "All courts and persons acting judicially may, in matters of public history, literature, science, or art, refer, for the purposes of evidence, to such published books, maps, or charts as such courts or persons consider to be of authority on the subjects to which they respectively relate."

The rise in the standard of care

71 The cost of injuries to society and the effects on the individuals who suffer them have undoubtedly played a significant role in raising the standard of care required of those who owe duties of care. This is particularly so when the duties owed arise in the course of conducting activities organised for the financial benefit of those who owe the duties. Commenting on the rise in the standard of

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33 Unreported, Supreme Court of Victoria, 19 June 1998.

34 (1999) 46 NSWLR 346.

35 (2001) 76 ALJR 70; 185 ALR 233. See also discussion in *R v Downie and Dandy* [1998] 2 VR 517 (about judicial notice of local prevalence of an offence being taken into account for deterrence effect in sentence).

36 *Evidence Act* 1929 (SA), s 64; *Evidence Act* 1910 (Tas), s 67; *Evidence Act* 1906 (WA), s 72. See also *Evidence Act* 1995 (NSW), s 144 and *Evidence Act* 1995 (Cth), s 144.

care required of employers in the previous twenty or thirty years, Brennan and Deane JJ, writing in 1986, said[37]:

> "While it is true that that has, in part, been the consequence of the elucidation and development of legal principle, it has, to a greater extent, reflected the impact, upon decisions of fact, of increased appreciation of the likely causes of injury to the human body, of the more general availability of the means and methods of avoiding such injury and of the contemporary tendency to reject the discounting of any real risk of injury to an employee in the assessment of what is reasonable in the pursuit by an employer of pecuniary profit."

These words are equally applicable to persons, such as Multi-Sport, who organise sporting activities for profit.

72 The learned trial judge found, however, "that it was not reasonable for [Multi-Sport] to be required to provide a helmet for players when the wearing of helmets had never been a form of protection worn by players in the game and was in fact against the rules of the game of indoor cricket as it is played in Australia". But given the gravity of the reasonably foreseeable injury, the probability of its occurrence and the reasonably practicable alternative means of eliminating it, it is no answer that helmets were not usually worn when playing indoor cricket[38].

73 Industry custom and practice can guide but cannot determine whether a person is in breach of a common law duty of care. They are often a good indication of what is reasonable in the conduct of a particular trade, business, profession or activity. But when the risk of injury is high, the effect of injury likely to be serious and the cost of eliminating the risk of the injury small, it is unlikely that industry custom or practice will negate a finding of negligence. Indeed in *Turner v The State of South Australia*[39], Gibbs CJ said:

> "Where it is possible to guard against a foreseeable risk which, although perhaps not great, nevertheless cannot be called remote or fanciful, by adopting a means which involves little difficulty or expense, the failure to adopt such means will in general be negligent."

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37 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 314.

38 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

39 (1982) 56 ALJR 839 at 840; 42 ALR 669 at 670-671.

The first breach: failure to provide helmets

74 In the present case, the risk and gravity of injury were high and the cost of obtaining and servicing helmets disproportionately small to that risk and gravity[40]. Multi-Sport contended that the helmet used in outdoor cricket was unsuitable for indoor cricket because it had a visor that was a potential risk of injury to other players. Why the visor would be a risk to indoor cricket fielders when it was not a risk to outdoor cricket fielders is not obvious. It is true that the indoor game is played in a much more confined space. But outdoor fielders often stand close to the pitch. However, her Honour found that, although a standard outdoor cricket helmet would provide sufficient protection against eye injury, it could provide a risk to other players. Nevertheless, accepting this finding, other helmets including a hockey helmet were suitable for playing indoor cricket.

75 After being shown a hockey helmet, Dr Anderson was asked:

> "What do you say about the suitability or otherwise of that helmet for indoor cricket?---I think with the visor removed, and it has a removable visor, then it would probably be more than adequate. The one query we had about the visor – the potential for injury can be eliminated by removing that."

76 Earlier, the learned trial judge had said "it's possible to get a helmet without a visor, we know that".

77 It is also a near certainty that using helmets with a metal-grille-face mask would eliminate the risk of eye injury. Dr Anderson gave evidence that before the introduction of helmets with masks in ice hockey – a body contact sport – 97% of professional players had suffered eye injuries. After the introduction of face masks, the "rate has dropped to virtually zero". Dr Anderson also gave evidence that after the introduction of masks in ice hockey, no case had been reported of *other* players sustaining injuries from the face mask.

78 Accordingly, the fact that "the wearing of helmets had never been a form of protection" in indoor cricket is no answer to Mr Woods' claim that Multi-Sport was guilty of actionable negligence in failing to provide helmets with masks for players who wished to use them.

79 Nor is it an answer to Mr Woods' claim that it "was in fact against the rules of the game of indoor cricket as it is played in Australia" to wear a helmet.

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40 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

Sporting arenas are not Alsatias[41] where the common law does not run. The law of negligence applies in the sporting arena with the same force and effect as it does in the factory and on the roadway. Those who are under a duty of care in organising sporting activities cannot defeat the operation of the common law of negligence by promulgating rules that prohibit the taking of steps that the law of negligence requires to be taken. There are of course various devices – such as exemption clauses – that may be used to defeat the law of negligence. But those devices have the force of overriding law only because of common law rules and doctrines – such as the law of contract or the doctrine of *volenti non fit injuria.* If the law of negligence applies to a sporting activity, the rules governing the activity cannot exempt the defendant from taking precautions that the exercise of reasonable care requires.

The second breach: failure to warn

80 If, contrary to my view, Multi-Sport did not breach its duty by failing to provide helmets with face shields, it breached it by failing to warn players including Mr Woods of the risk of eye injury. By reason of the composition of the cricket ball used in indoor cricket and the confined area of the court, players are exposed to a risk of injury to the eye to a much greater extent than players in outdoor cricket. The nature of the particular risk is not one that would readily occur to the mind of the uninformed player. Because that is so, Multi-Sport breached its duty by failing to warn of the risk. It would have been a simple matter to display a sign in prominent positions warning of the risk. A sign in the following form would have been sufficient:

WARNING – INJURIES

Indoor cricket exposes players to a much higher risk of severe head and eye injury than outdoor cricket because

- the game is played in a confined space
- without protective headgear or a face shield and
- with a softer ball that can enter the eye-socket.

You play at your own risk.

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41 cf *R v Bamford* (1901) 1 SR (NSW) (L) 337 at 350, 358; *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 59. Alsatia was in the Whitefriars district of London. Until 1697, it was a haven for debtors and criminals. See Cowen, "Alsatias for Jack Sheppards?: The Law in Federal Enclaves in Australia", in *Sir John Latham and Other Papers*, (1965) 171 at 172.

81 If such a sign had been exhibited, an issue would have arisen as to whether it would have prevented Mr Woods' injury – perhaps by deterring him from playing the game. If I had not been in favour of allowing the appeal on the ground that inadequate equipment was provided, I would have ordered a new trial on this issue. But given my finding on the equipment issue, it is not necessary to do so.

82 In my opinion, the learned trial judge, sitting as a juror, should have held that Multi-Sport breached the duty of care that it owed to Mr Woods. The Full Court of the Supreme Court erred in rejecting his appeal.

Order

83 The appeal should be allowed. The orders of the Full Court should be set aside. In lieu thereof, judgment should be entered for the plaintiff in the sum provisionally assessed by the learned trial judge.

84 KIRBY J. In *Miller v Jackson*[42], Lord Denning MR began his reasons with the memorable sentence: "In summertime village cricket is the delight of everyone." The plaintiffs in that case, who had won at trial because cricket balls repeatedly damaged adjoining property, lost their verdict in the Court of Appeal. Earlier, in *Bolton v Stone*[43], the House of Lords exonerated the members of a cricket club from liability to a person on the adjoining highway hit by a cricket ball. Such decisions have prompted a judicial suggestion that they represent "a concession to cricket as a national sport of England" rather than a principled application of the law[44].

85 Many Australians are as dedicated to cricket as the English. As this appeal discloses, indoor cricket is, like outdoor cricket, now very popular. However, unlike outdoor cricket, helmets with eye guards against injury by cricket balls are not provided to indoor cricketers. In the present case, a grave injury to the eye of a batsman occurred, resulting in the virtual loss of vision in that eye. The issue is whether, in the circumstances, the company that provided the venue and equipment for the game is liable in negligence. The primary judge held that it was not[45]. Her conclusion was affirmed by the Full Court of the Supreme Court of Western Australia[46]. The majority in this Court would dismiss the appeal. I disagree.

The facts and issues

86 *The background facts:* A general description of the facts appears in other reasons[47]. Mr Michael Woods (the appellant) had paid the entrance fee to the respondent's facility to participate in a match with friends. He was provided with equipment with which to play the game. Such equipment included bats, balls,

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42 [1977] QB 966 at 976.

43 [1951] AC 850.

44 *Wilkinson v Joyceman* [1985] 1 Qd R 567 at 590 per McPherson J. His Honour contrasted the Scottish case of *Lamond v Glasgow Corporation* [1968] SLT 291 where, he said, in relation to liability for damage caused by a golf ball, "similar considerations [did] not prevail".

45 *Woods v Multi-Sport Holdings Pty Ltd* unreported, District Court of Western Australia (French DCJ), 24 February 1999 ("reasons of the primary judge").

46 *Woods v Multi-Sport Holdings Pty Ltd* [2000] WASCA 45 per Murray J, Malcolm CJ and Pidgeon J concurring.

47 Reasons of Gleeson CJ at [1]-[2]; reasons of McHugh J at [50]-[61]; reasons of Callinan J at [147]-[149].

thin hand batting gloves and plastic groin protectors. Upon these premises, the primary judge (French DCJ) found that the respondent owed the appellant a duty of care. That finding was not challenged in this appeal. Nor before this Court was the general formulation of the duty, as propounded by the trial judge, contested[48]. The defence of contributory negligence was not pursued in this Court. Nor was it suggested before us that the appellant's case could be separately supported by the liability imposed on the respondent by statute[49].

87 *Three issues:* As argued, therefore, three issues were presented by the appeal:

(1) Whether the primary judge and the Full Court had erred in rejecting the appellant's case of breach of the common law duty of care (a) in failing to make available to the appellant suitable protective equipment, namely a helmet with eye guard; and (b) in failing to display a suitable warning to alert the appellant, and players like him, of the particular dangers involved in playing indoor cricket. Such dangers were said to be: (i) the danger of eye injury involved in playing such a game in the confined space without an appropriate helmet with eye guard; and (ii) the particular danger of eye injury resulting from the size and composition of the ball used in an indoor cricket match (the breach of duty issue);

(2) Whether, in the event that the respondent was liable for failure to provide a helmet with eye guard for use by the appellant or a warning sign, any such failure was irrelevant to the cause of the appellant's damage (the causation of damage issue); and

(3) Whether the respondent was exempted from liability because the appellant had voluntarily assumed the risk of the injury that had occurred to him (the voluntary assumption of risk issue).

88 *The appellant's case:* The appellant did not submit that negligence was established by a failure on the part of the respondent itself to design and manufacture an appropriate helmet. The primary judge's finding that this would have been an unreasonable burden to impose on a suburban operation such as the respondent was accepted. However, pointing to other fast-moving contact and potentially dangerous sports where helmets and eye guards are worn, the appellant's case was that suitable protective equipment already existed and could have been secured and adapted for use in indoor cricket. In the circumstances disclosed by the evidence, he contended that the respondent, acting reasonably,

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48 Set out in the reasons of Gleeson CJ at [1].

49 *Occupiers' Liability Act* 1985 (WA). See reasons of Callinan J at [155], fn 119.

should have provided such a helmet to players of indoor cricket, such as himself. Had it done so, he argued, the serious damage to his eye and vision would have been avoided. Alternatively, it should have provided a warning sign.

A sport with special dangers of ocular injury

89 Indoor cricket was introduced to Perth as a form of commercial leisure activity between 1984 and 1988. In the latter year, a finance corporation funded the development of the indoor cricket centre at Belmont near Perth, now owned by the respondent. In the same year, Dr Ian Anderson, a specialist ophthalmologist practising in Perth, began to notice, and to call to attention, the large number of eye injuries that were occurring as a result of games of indoor cricket and squash.

90 Subsequently, eye goggles were introduced as a protective measure for the game of squash, where a smaller ball is used. However, it was uncontested that similar goggles would provide no effective protection from injury caused by the modified cricket ball used in the game of indoor cricket. That ball was too large. Its structure and composition made it apt to penetrate and mould into the eye socket causing profound injuries against which such goggles were useless. From 1988, Dr Anderson began testing various forms of eye protection. He concluded that the only appropriate and effective equipment would be "full face protection and temple protection and lack of protrusions".

91 Dr Anderson was familiar with ophthalmic literature concerning protective equipment introduced into other sports. In his evidence, he described how helmets had been introduced in North America in the games of lacrosse and ice hockey. Eventually such use became compulsory in those games. According to Dr Anderson, in lacrosse, also a game played with a ball, fast movement and much body contact, the introduction of helmets with eye guards led to a dramatic fall in the rate of eye injuries. The same was the experience with ice hockey. As Dr Anderson put it:

> "Ice hockey introduced helmets many years ago and following the introduction of the helmets the rate of eye injuries dropped dramatically. Prior to the introduction of helmets the risk of a player suffering an eye injury in a year was said to be 3 per cent. If they looked at professional ice hockey players over the course of their life, 97 per cent of them suffered a serious eye or periocular – around the eye – injury over the course of their professional career prior to the introduction of helmets. Following the introduction of helmets, that rate has dropped to virtually zero."

92 Dr Anderson rejected, as unsupported by the evidence, the contention that wearing of helmets was liable to cause injuries to other players in the case of collision. He said:

> "As far as eye and head injuries are concerned, there's no question that the helmet would make it very much safer … [T]here's much greater protection by wearing a helmet than not."

93 Similar evidence was given by Dr Mary Bremner, also an ophthalmologist. She was a member of the Injury Control Council of Western Australia. She had conducted visits to indoor cricket centres (although not necessarily to the respondent's facility) trying to raise awareness about eye injuries to their players. The Council resolved to investigate improved eye protection. Dr Bremner said that a register of sports-related eye injuries had been established. In a six month period in 1988 to 1989 there had been 38 reported eye injuries recorded by 15 ophthalmologists in Perth. According to the Council's report, squash and indoor cricket were responsible for the highest number of such injuries. Although attempts had been made to secure legislation, the government had preferred to leave protective measures to the individual sports organisations themselves.

94 Unfortunately, far from introducing protection in the form of helmets with eye guards, the national body responsible for the rules of indoor cricket, the Australian Indoor Cricket Federation ("the Federation"), focussed its attention on other matters. Its rules were tendered in evidence. At the relevant time, they contained detailed provisions for uniforms obliging the use of matching colours and forbidding the wearing of jeans[50]. The umpire was normally to be the judge of correctness of uniform. Provision was made for appeal against penalties "particularly with regard to colour"[51]. "Unacceptable items of apparel" resulted in deduction of points from the offending player's score. The "playing equipment" permitted in the game was specified[52]. On the subject of "fielding protection", as at 1996 when the appellant was injured, the rules provided that players could only wear suitable protective equipment if there were medical reasons. The decision to allow such protective equipment in the field rested with the duty manager or centre organiser. No express provision was made in respect of protective equipment for a batsman (called "batter") such as the appellant when injured. The only equipment expressly provided for in respect of that player was a pair of batting gloves[53].

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50 Australian Indoor Cricket Federation, *Official Rules of Indoor Cricket*, r 3 ("the rules").

51 Rules, r 3.

52 Rules, r 5. The rules were amended in 1998. The amended rule is set out in the reasons of McHugh J at [55].

53 Rules, r 5.

95 The evidence showed that the concerns of Drs Anderson and Bremner had been reflected in a number of media and other publications in which the specialists had drawn attention to the dangers of eye injuries happening in the game of indoor cricket. It is impossible to accept that the respondent, providing its indoor cricket facility for profit, would have been ignorant about the general incidence of ocular injury and about the effort of ophthalmologists to do something about it. Had the respondent made even the most rudimentary enquiries into aspects of safety for its customers, it would soon have come upon the energetic efforts of Drs Anderson and Bremner, their publications and letter writing campaigns to secure better eye protection for the players of indoor cricket.

96 One other ophthalmologist, Dr Ian McAllister, gave evidence. He was head of the Ophthalmology Department of the Royal Perth Hospital. He said that most of the major eye injuries suffered in Western Australia as a result of trauma were referred to him. He estimated that in the ten years prior to the appellant's proceedings he would have seen about twenty significant eye injuries arising from accidents occurring in indoor cricket. It was suggested to Dr McAllister that this – twenty partly blinded persons – was not a large number when compared with the thousands who played indoor cricket in the State. However, he stated that his concern was that "the injuries were preventable".

The failure to provide protective equipment

97 *Rejection of protective gear:* A great deal of attention in the trial was paid to the suitability of the use of outdoor cricket helmets with eye guards to the game of indoor cricket. However, the primary judge concluded against their use. Although, as she correctly noted, the rules of the Federation did not in terms forbid outright the provision and use of "protective equipment" by "batters", her Honour accepted the evidence of witnesses called for the respondent that, in practice, those rules had been interpreted as excluding helmets unless there were "specific medical reasons". As she put it:

> "[T]he rules of practice of indoor cricket does not contemplate that outdoor cricket helmets or any helmet would be worn as part of the usual playing equipment. Helmets may be worn in exceptional circumstances which will involve a special 'dispensation' made by the manager or centre organiser based on special requirements of the particular player."

98 Much of the primary judge's attention was then addressed to the Federation's rules and her concern that, if the respondent had supplied and encouraged players to wear helmets as standard equipment, "it will be organising the playing of games contrary to the [Federation's] rules of play". As I read her Honour's reasons, it was on that basis that she made the finding that it was not reasonable for the respondent to be required to provide a helmet with protective

eye guard for players. This approach by the primary judge to this central plank in the case for the appellant was accepted by the Full Court[54]. That Court quoted with approval the following passage in her Honour's reasons:

> "The helmets now available in Australia are not ideal because of the presence of the hard visor and the protrusions on the outside of the helmet itself. The game of indoor cricket is played in a small area with a high risk of collision between players. While the injuries sustained in a collision may not generally be as serious as an eye injury the frequency is certainly likely to be much higher. Although the evidence establishes that eye injury is most common in games of indoor cricket and squash, compared to other sports it is still not a high risk in terms of frequency of occurrence in relation to the number of persons involved in the sport in Australia."

99 *Important findings at trial:* The first issue in this appeal is, therefore, whether the foregoing reasoning reveals error that this Court should correct. In order to answer that question, it is essential to note a number of other findings made by the primary judge that could not be contested in this Court. They are:

(1) That whenever the appellant played outdoor cricket, as he did commonly, he wore a helmet with a full face grid because, as he described it, it gave him greater confidence by reason of the protection doing so afforded him against possible injury;

(2) That if there had been some kind of protective equipment available, the appellant would have worn it;

(3) That although there were dangers in wearing a helmet with a visor, it was possible to obtain a helmet without a visor and that fact had been established by the evidence. The visor is provided as a protection against the sun. No such protection is required in an indoor game. A helmet was tendered in evidence from which (as might be expected) the visor could be detached;

(4) That if it were otherwise appropriate for suitable helmets to be used, the additional cost associated with their provision and maintenance would not alone have excused the respondent from making them available to its customers;

(5) That if the additional cost of providing clean helmets as standard equipment was not commercially viable, there was no reason why such

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54 [2000] WASCA 45 at [16] per Murray J.

helmets could not have been made available to players for a small hiring fee to cover the cost of their purchase and maintenance; and

(6) That the risk of injury to the appellant's eye was reasonably foreseeable to the respondent. It was a risk that was neither far-fetched nor fanciful but real[55].

Protective equipment: the applicable principles

100 A number of principles govern the determination of whether, in a case like the present and on the foregoing evidence and findings, a breach of the duty of care sounding in negligence is established.

101 First, sporting activities do not occur in a law-free zone. Simply because people participate in sporting events[56], or watch them as spectators[57], they are not cast beyond the pale of the law's protection. It would be a serious mistake to derive any such principle from what this Court held in *Agar v Hyde*[58]. That case concerned the question whether a reasonably arguable foundation had been established for the issue of Australian process against members of the International Rugby Football Board for failing to alter or amend the rules of the game so as to avoid or minimise the risk of injury to players of that sport. The injured players lost their case because it was held by this Court that it was not arguable that the members of the Board owed the players a duty of care[59]. In the present case, the existence of a duty of care was not contested. Accordingly, no legal principle for which *Agar* stands presents an impediment to the appellant's success.

102 Secondly, when, in respect of a game of sport, a question arises as to the scope of the duty owed to participants or spectators, the answer necessarily depends, in each case, upon all of the circumstances. Relevant circumstances include such matters as the age and experience of the claimant, the nature of the sporting activity, the formal or informal character of the game on the occasion in question, whether there was any commercial element in its conduct and in the

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55 *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

56 *Rootes v Shelton* (1967) 116 CLR 383; *Smoldon v Whitworth* [1996] TLR 249.

57 *Green v Perry* (1955) 94 CLR 606 at 611; *Australian Racing Drivers Club Ltd v Metcalf* (1961) 106 CLR 177; *Wilkinson v Joyceman* [1985] 1 Qd R 567.

58 (2000) 201 CLR 552.

59 *Agar* (2000) 201 CLR 552 at 564 [23], 578 [65].

participation of the claimant, the rules and recognised practices of the sport and whether those rules were observed or breached in the particular case[60].

103 Thirdly, reference to the rules of the particular game makes it necessary to clarify the significance of such rules for the law of tort. Ordinarily, a participant in a sporting match will be taken to agree that it will be conducted in accordance with any rules governing such activities that are either universally accepted or accepted by the particular players. A boxer who departs from the standard rules of boxing, and ignores the instructions of a referee, will have no immunity from liability for damage simply because of participation in a sporting match. The implied consent to what would otherwise be an assault and battery will be revoked in consequence of any such excess[61].

104 To talk of sporting activities as if they inevitably import physical harm to which the law is indifferent is to ignore the contemporary attempts to reduce unnecessary and excessive damage to players. The wearing of helmets and other protectors in boxing, outdoor cricket, lacrosse, ice hockey, baseball, softball and other popular games bears witness to the limits of imputed consent to physical harm in the name of sport[62]. There will remain some inescapable risks in sport, as in most human activity. But the law does not necessarily accept the rules or practices of sporting bodies as setting the law's standard of reasonable care. This Court has rejected an analogous proposition advanced by members of the medical profession in support of a professional exception from liability in negligence[63]. It would be inconsistent with that approach now to accept a "sporting exception".

105 Although some older cases in England suggest that the sporting relationship is special and that, within it, liability is confined to deliberate or reckless harm[64], this is neither the standard recently observed in sporting cases in

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60 cf *Rootes* (1967) 116 CLR 383.

61 cf *Cleghorn v Oldham* (1927) 43 TLR 465; *Quire v Coates* [1964] SASR 294; *McNamara v Duncan* (1971) 26 ALR 584 at 587; *Condon v Basi* [1985] 1 WLR 866; [1985] 2 All ER 453.

62 cf *Agar* (2000) 201 CLR 552 at 561-562 [15]; 600-601 [127].

63 *Rogers v Whitaker* (1992) 175 CLR 479 at 487-489, 493-494; *Rosenberg v Percival* (2001) 75 ALJR 734 at 735-736 [6], 757-758 [140]-[142]; 178 ALR 577 at 579, 609-610.

64 See eg *Wooldridge v Sumner* [1963] 2 QB 43 at 57.

England[65] nor that upheld by this Court[66]. The law, and specifically the law of negligence, promotes a greater consciousness of the need for safety, accident prevention and the avoidance of needless or excessive injury in sport. In doing so, it promotes the true values of sport rather than the brutal and excessive features that debase sport, leaving victims and their families to pick up the pieces over many years, long after the watching crowd's cheering has subsided.

106 Fourthly, the appellant paid a fee to enter the respondent's premises and participate in the game in which he was injured. He was therefore an entrant upon the premises as of contractual right. In the traditional formulation[67], he was entitled to enter and use the premises for the mutually contemplated purpose in accordance with an implied warranty that the premises were as safe for that purpose as reasonable care and skill could make them. In *Calin v Greater Union Organisation Pty Ltd*[68], this Court explained that the reformulation of the common law in respect of the liability of occupiers to entrants, expressed in *Australian Safeway Stores Pty Ltd v Zaluzna*[69] and the decisions that preceded it[70], had not overruled the principle governing the liability to contractual entrants stated in *Watson v George*[71]. In the present case, legislation had been enacted in Western Australia to govern occupier's liability[72]. In the way the case was fought, any higher obligations owed because the appellant entered by contractual right were not explored. However, it is self-evident that a commercial enterprise, conducting a leisure business for profit involving specific dangers, is not, in relation to a fee-paying entrant, in the same position as the voluntary organiser of an informal group of amateurs playing an occasional game of cricket on the village green. Nor, for that matter, is it in the same position as a national corporation conducting a major sporting fixture before a stadium audience of thousands, perhaps broadcast to millions, with wide media coverage sold for high fees. By the common law, the duty owed to players adapts to the circumstances. An important consideration in expressing the content of the duty of care, and in

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65 *Smoldon v Whitworth* [1996] TLR 249.

66 *Rootes* (1967) 116 CLR 383.

67 *Maclenan v Segar* [1917] 2 KB 325 at 332-333.

68 (1991) 173 CLR 33 at 38.

69 (1987) 162 CLR 479.

70 *Hackshaw v Shaw* (1984) 155 CLR 614; *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7.

71 (1953) 89 CLR 409.

72 *Occupiers' Liability Act* 1985 (WA), s 5.

determining whether there has been a breach in the particular case, is whether the participants have paid, or been paid, for the sporting activity in question.

107 Fifthly, a purpose of the law of negligence is, by sanctioning breaches, to promote accident prevention. In turn, this has encouraged the expansion of insurance coverage, particularly in commercial activities where premiums for such coverage are part of normal business costs[73].

108 In the field of employment law, this Court has upheld the principle that employers are liable to employees if protective measures reasonably open to them are not considered and, where appropriate, implemented[74]. The increased concern on the part of Australian courts about observance of safety standards has been explained both in this[75] and other courts[76]. Whilst the duty owed by employers to employees is a very high one, so, by the common law, is the duty owed by an occupier to an entrant as of contractual right. The principles of accident prevention expounded in the employment context in *Bankstown Foundry Pty Ltd v Braistina*[77] also apply to the conduct as a business of sporting activities having significant and reasonably avoidable risks of injury. In both such cases, it is not acceptable for the profit-making organisation to shrug off serious injuries as a cost involved in its business, tolerable because it will be borne by others. For those who suffer, there is damage. As a stimulus to accident prevention, and for recompense for those who are the victims of neglect, the law affords remedies.

109 Sixthly, to impose on an individual a duty to take positive initiatives to guard another against a risk of harm, various attempts have been made to express the governing and limiting factors[78]. The risk must, for example, be "foreseeable". However, that test is an "undemanding" one. All that it requires is that the risk be "real", ie such that a reasonable person would not "brush [it] aside

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73 *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 at 518.

74 *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25; *McLean v Tedman* (1984) 155 CLR 306 at 313; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301.

75 *Braistina* (1986) 160 CLR 301 at 306-307.

76 *Bankstown Foundry Pty Ltd v Braistina* (1995) Aust Torts Reports ¶80-713 per Priestley JA and McHugh JA quoted (1986) 160 CLR 301 at 304, 307.

77 (1986) 160 CLR 301.

78 Fleming, *The Law of Torts*, 9th ed (1998) at 128.

as far-fetched" or fanciful[79]. Because virtually all human activity involves some dangers and because foreseeability of harm has "lost its dominance as a limiting factor"[80], other language has been adopted by the courts to differentiate cases where action is required from those where it is not. Thus the risk must be unreasonable before the law will impose duties of action upon the putative tortfeasor. When must the tortfeasor act to protect another from an unreasonable risk of harm? To that question the answer is given: when a reasonable person would have recognised that action was required. In *Turner v The State of South Australia*[81], Gibbs CJ explained:

> "Where it is possible to guard against a foreseeable risk which, although perhaps not great, nevertheless cannot be called remote or fanciful, by adopting a means which involves little difficulty or expense, the failure to adopt such means will in general be negligent."

110 Whilst such judicial formulae are subject to criticism as tautological, they direct the attention of the decision-maker in the particular case to the considerations that have been regarded as sufficient to propel the reasonable person into action. Such considerations include: (1) the likelihood of harm[82];

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79 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617 at 643; see also *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44-45.

80 Fleming, *The Law of Torts*, 9th ed (1998) at 128.

81 (1982) 56 ALJR 839 at 840; 42 ALR 669 at 670-671; see also *Gorman v Williams* (1985) 2 NSWLR 662 at 680-681 per McHugh JA; *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 at 516.

82 *Swinton v The China Mutual Steam Navigation Co Ltd* (1951) 83 CLR 553 at 566-567 where this Court said: "[T]he measure of care increases in proportion with the danger involved".

(2) the seriousness of the risk and the risk of serious injury[83]; (3) the utility of the propounded act of the defendant[84]; and (4) the costs of avoiding the harm[85].

111 Seventhly, some risks are deemed "inherent" in particular activities. In some sports, for example, an element of risk is a feature of the game that may add to its essential enjoyment[86]. Spectators observing at close range fast-moving people or engines inescapably expose themselves to some risks. Participants in games of rugby football, ice hockey, lacrosse and cricket do likewise[87]. However, recent decisions of the courts have moved away from the older line of cases which "tended to a more expansive view of the accepted risk"[88]. In part, this may be the result of a recognition that the only risks that are truly "inherent" in any activity are those that cannot be eliminated by the exercise of reasonable foresight and care. In part, as Professor Fleming suggests[89], the introduction of apportionment legislation for contributory negligence may have discouraged the earlier "unnecessarily broad" approach to the presumed assumption that a sporting participant voluntarily accepted the "inherent risks" of every dangerous activity in a game[90]. If that was ever the common law, it is not now.

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83 *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580 at 601 per Dixon J: "In considering the extent and nature of the measures that due care demands, the first question must be the gravity, frequency and imminence of the danger to be provided against."

84 *Watt v Hertfordshire County Council* [1954] 1 WLR 835 at 838; [1954] 2 All ER 368 at 371: the want of care towards an employee in a commercial enterprise is not equal to that for a firefighter for the "commercial end to make profit is very different from the human end to save life or limb".

85 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617 at 643-644; cf Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 257-262.

86 *Wilks v Cheltenham Cycle Club* [1971] 1 WLR 668; [1971] 2 All ER 369; *Agar* (2000) 201 CLR 552 at 561 [15].

87 *Agar* (2000) 201 CLR 552 at 561 [15], 600-601 [127].

88 Fleming, *The Law of Torts*, 9th ed (1998) at 336.

89 Fleming, *The Law of Torts*, 9th ed (1998) at 336.

90 *Rootes* (1967) 116 CLR 383; *Bondarenko v Sommers* (1968) 69 SR (NSW) 269; *Johnston v Frazer* (1990) 21 NSWLR 89.

112 Eighthly, the part of appellate courts in considering cases such as the present has inevitably changed as fewer cases have been tried before juries and more decided by judges sitting alone. In the case of an appeal against a judgment entered following a verdict of a properly instructed jury, the circumstances in which an appellate court could intervene to give effect to a contrary conclusion on the facts were severely limited[91]. In such trials the judge's role was confined both by the common law and by court rules[92]. In a trial of a common law cause by judge alone, the role and functions of the judge were radically changed. Unlike the jury, the judge was obliged to give reasons for his or her decision. Appellate courts were afforded jurisdiction and power to decide appeals from the judgments of trial judges, including on matters of fact[93].

113 The attempts in this Court thirty years ago to impose on appeals from judgments of trial judges strictures similar to those observed in appellate consideration of jury verdicts[94] were well and truly stopped in their tracks by *Warren v Coombes*[95]. Leaving aside cases of witness assessment that present particular difficulties for appellate courts[96], "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge"[97].

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91 *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 271-272 [1]-[5], 283-284 [43], 289-290 [58], 309 [117].

92 *Naxakis* (1999) 197 CLR 269 at 289-290 [58].

93 The history is explained in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 325 [81]-[82]; 160 ALR 588 at 613.

94 In *Whiteley Muir and Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 199, 207-208; *Edwards v Noble* (1971) 125 CLR 296 at 307.

95 (1979) 142 CLR 531.

96 See *Jones v Hyde* (1989) 63 ALJR 349 at 351; 85 ALR 23 at 27; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 482-483; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 326-327 [83]-[86]; 160 ALR 588 at 614-615; Bell, "Judgments revisited: Abalos – A High Court low", (2001) 33 *Australian Journal of Forensic Sciences* 61 at 70.

97 *Warren v Coombes* (1979) 142 CLR 531 at 551; see also *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 326 [82]; 160 ALR 588 at 613.

114 It is still necessary, if the appeal is to succeed, to demonstrate that the trial judge erred. Respect is paid to the conclusions of the trial judge, who generally has the advantage over the appellate court of more time for reflection, as the trial unfolds[98]. Particular care is taken in disturbing concurrent findings of fact, made by the trial judge and accepted by the intermediate court. However, I would resist any suggestion, even by a hint, that the law should be restored to the position that existed before *Warren v Coombes*. Judge alone trials are different from jury trials. The present was a trial by judge. The question is not whether the conclusion on the facts was "open to the courts below"[99]. It is whether, within the constraints that govern appellate review of fact-finding, especially in this Court, the conclusion reached by the trial judge has been shown to be erroneous, so that the appellate court should intervene, correct the error and substitute its own findings of fact, drawing its own inferences from the facts so found. Many an injustice has been caused by erroneous fact-finding – probably more than by error of law. With jury trials they were very difficult to correct. With judge alone trials there are still difficulties – but they are fewer. They should not be increased.

Protective equipment: correcting the primary judge's error

115 Although the respondent made much of the inhibitions upon appellate intervention in matters involving the assessment of the credibility of witnesses[100], I do not regard that consideration as having significance in this appeal. There was no suggestion that the medical witnesses did other than give truthful evidence. The primary judge also accepted the testimony of the appellant, so far as it went. The real inhibition on appellate disturbance was, as the Full Court recognised, the need for the appellant to show error in the reasons of the primary judge. That inhibition is inherent in the nature of an appeal[101].

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98 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 330 [89]-[92]; 160 ALR 588 at 619-620.

99 Reasons of Hayne J at [141].

100 Citing *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 56-57; *Jones v Hyde* (1989) 63 ALJR 349 at 351; 85 ALR 23 at 27; cf *Warren v Coombes* (1979) 142 CLR 531 at 537; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 327-331 [87]-[92]; 160 ALR 588 at 615-620.

101 *CDJ v VAJ* (1998) 197 CLR 172 at 230-231 [186]; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 330 [89]-[92]; 160 ALR 588 at 619-620.

116 The primary judge's error lay in attaching excessive importance to the rules of the Federation. Her Honour acknowledged that the Federation should perhaps be actively pursuing the design and manufacture of a helmet of more lightweight material. But she thought it sufficient excuse to the respondent, for not having pursued the provision of a helmet, that it was operating a centre complying to "[Federation] rules and as part of a state and national sporting organisation". Whilst most of the competition at the respondent's premises was between teams organised (as the appellant's had been) on a purely local basis by the respondent or by its customers, the respondent had to organise its activities to operate in competitions held under the Federation rules. This, the judge felt, constrained what a suburban business such as the respondent's could reasonably be expected to do on its own initiative.

117 The error in this reasoning is that, effectively, it surrendered the standard of care required by the law to the rules made by the Federation. As it happened, those rules did not absolutely forbid the use of headgear and protections by indoor cricket players. But it is on that flimsy footing that an inhibition was erected against imposing on the respondent a legal duty to take reasonable care to people such as the appellant. The decision in *Rootes v Shelton*[102] denies the proposition that sporting rules expel the law from the respondent's operation. True, such rules may be taken into consideration. But they are not definitive of the existence and extent of the common law duty; nor could they be[103]. Were it otherwise, the law would, in this case, surrender its protection to rules that concentrate on issues such as colour co-ordination of clothing rather than the serious question of player safety. That is not the law of Australia.

118 Because the consideration of the Federation rules, as practised, played a crucial part in the primary judge's decision about the action that it was reasonable to expect the respondent to take, an error occurred that inhibited a more accurate assessment of what it was reasonable to expect the respondent to do. That error, uncorrected by the Full Court, authorises the intervention of this Court.

119 Freed from that error, the relevant considerations in judging what reasonable care required in this case include (1) the commercial nature of the respondent's business and hence the high standard of attention to safety and accident prevention that might reasonably be expected of it; (2) the repeated reports of serious and permanent injury to the eyes of players of indoor cricket in the Perth region alone that ought to have been known and to have stimulated the respondent into proper action; (3) the availability of a helmet without a visor (or with the visor removed) which the judge accepted could be obtained; (4) the

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102 (1967) 116 CLR 383.

103 *Rootes* (1967) 116 CLR 383 at 385 per Barwick CJ.

comparatively low cost of such equipment and the manageable costs of providing such protective gear at least to those who elected to use it and also of providing for its maintenance and hygiene; (5) the contemporary introduction of such protections in other sports and (6) the special need for them in indoor cricket having regard to the confined space of the field, the high pace of the game and the particularly dangerous features of the ball used.

120 When the foregoing considerations are taken into account, the answer to what a reasonable commercial business providing a facility for indoor cricket would have done in 1996 to prevent unnecessary harm to a person such as the appellant is clear. It would have provided at least "batters" and wicket keepers with a helmet without a visor and with an eye guard. Conducting the business at the cost of an average of two players blinded in one eye each year in the State of Western Australia, and doing nothing, does not, in my view, amount to reasonable conduct. The law of negligence intervenes to require that attention be addressed to customer safety and not just to matters such as garment colours and that protective equipment be supplied to players.

121 The primary judge in her reasons twice suggested that "the time has now come in the light of the medical evidence" for a helmet to be designed and manufactured. But in saying this her Honour appears to have overlooked the evidence which, during the trial, she had expressly accepted. That evidence showed that it was "possible to get a helmet without a visor, we know that". The most effective way to respond to the concern that the trial judge properly voiced – Parliament, the relevant sporting organisation and the respondent having done nothing – is for the common law to hold that the unreasonable neglect of attention to protective equipment amounted to negligence. Once that happened, the respondent, and commercial organisations like it, would be obliged to recognise indeed that "the time [had] now come" for them to do something about it. The game of indoor cricket would continue. So would the respondent's business. Like outdoor cricket, ice hockey and many other sports, it would be played with reasonable protection against preventable injuries of a grave kind, such as the appellant suffered to his eye. Parliament, the Federation and the respondent might fail to respond to the unreasonable risk of injury to players. But the common law, especially the community's standards of reasonable care, intervenes to enforce and uphold those standards.

Causation and voluntary assumption of risk

122 *Causation and protective equipment:* The issues of causation that were argued in the appeal were addressed chiefly to the operative effect of any notice or warning that reasonable care obliged the respondent to provide for players such as the appellant. I will reach that issue shortly. However, an aspect of causation was raised in connection with the postulated provision of a helmet with an eye guard to prevent the penetration of the ball to the player's eye socket. It was argued that the ball could pass through the metal guards and that this had

been indicated during evidence by manually demonstrating that the ball would fit between the metal bars of the eye guard tendered with a helmet at the trial.

123 This argument does not constitute an answer to the appellant's case. What happens when a ball is gently manipulated through the helmet's metal barriers in a courtroom bears little relation to what would ordinarily happen to such a projectile during a game. A player would have to be extremely unlucky for the trajectory of the ball to be aimed exactly at the space between the metal barriers. Normally, it could be expected that the guard would repel the ball. In any case, it is scarcely open to the respondent to argue that no protective equipment should be given merely because the available equipment would carry a small risk of ineffectiveness in the most exceptional case postulated. The argument of causation in relation to the protective equipment should be rejected.

124 *Voluntary assumption of risk:* By its notice of contention, the respondent urged that the risk of serious eye injury was included in the "inherent" risks accepted, or appreciated, by the appellant, that it was obvious that he appreciated the risk of being hit by the ball and hence that this was not something from which a reasonable person in the position of the respondent was obliged to protect the appellant.

125 This argument should likewise be rejected. The only risks that might be described as "inherent" were those against which the respondent could not protect the appellant by the exercise of reasonable care and diligence[104]. Any other risks were not "inherent". They were unnecessary and unreasonable. The law would not impute to the appellant the acceptance of such risks. To satisfy the test of voluntary assumption of risk, it must be shown that the claimant fully comprehended the extent of the risk and chose to accept or ignore it[105]. Whilst it is true, as the respondent pointed out, that the appellant was an experienced cricket player, he was not experienced in the game of indoor cricket. He suffered his injury in what was only his second game. In circumstances where contributory negligence has been rejected, it is unpersuasive to suggest that the appellant must totally accept the consequences of the respondent's neglect for his safety.

Failure to provide a suitable warning

126 *Warning and obvious risks:* The trial judge's rejection of the appellant's claim that the respondent should have provided a suitable warning was based on

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104 *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 45-46; *Roggenkamp v Bennett* (1950) 80 CLR 292 at 298.

105 Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 349.

her conclusion that such a warning was unnecessary because the risk was "obvious". Alternatively, the respondent submitted that, on the probabilities, any postulated warning would not have restrained the appellant from playing on the occasion on which he was injured.

127 The first proposition was justified by the primary judge, in part at least, by reference to a comment I made in *Romeo v Conservation Commission (NT)*[106]. As Gleeson CJ has pointed out[107], that comment did not amount to a universally applicable rule of law. It was not intended to be. Yet as this Court has seen in several recent matters, it has been taken out of the context in which it appeared and elevated to a universal rule. I would adhere to what I said, read in the context of *Romeo*. That was a case where the proposition propounded by the claimant was that a warning sign should have been erected on the edge of an elevated cliff in a natural headland of a public park, to the effect that it was dangerous to approach the edge. Such a proposition had large consequences for every cliff in a natural setting on Australia's huge coastline. To suggest that such a warning ought to have been erected was, in my opinion, neither reasonable nor just in the circumstances of that case.

128 Obviously, that proposition could not apply to every situation of potential risk, so as effectively to abolish the need for warnings altogether. It could not apply, for example, to relieve a risk-creator simply because the risk was obvious. In a sense, the greater the risk, even if obvious, the greater may be the obligation of the party in control of it to warn others about it. Take the occupier with a deep hole in the middle of the path that in darkness could become a great danger[108]. Take employers who must warn employees of risks, taking into account possibilities of "inadvertence or carelessness" on the part of the employee[109]. Or take the manufacturer of cigarettes. Apart from any statutory obligations that might apply, it could not seriously be suggested that such a manufacturer was relieved of the duty to warn because the risk of cigarettes to health is now "obvious". Warnings are sometimes required by those in control of situations to alert those who are inattentive, distracted or unlikely in the circumstances to consider the risk, although objectively, and with hindsight, it is "obvious". The duty to warn depends on the circumstances of the case, not just a suggested lack of "obviousness" of the risk.

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106 (1998) 192 CLR 431 at 478 [123].

107 Reasons of Gleeson CJ at [44].

108 *Commissioner for Railways (NSW) v Anderson* (1961) 105 CLR 42 at 55.

109 *McLean v Tedman* (1984) 155 CLR 306 at 313.

129 I agree that, in this case, the common law did not oblige the respondent to install a warning to alert players such as the appellant to the fact that the game of indoor cricket carried occasional risks such as collision and body blows from the ball used in play. Such features of the game were indeed self-evident. However, that was not what the appellant submitted. He relied on three special features that might not have been clear or fully appreciated, to a person like him with little experience of the game but used to the different game of outdoor cricket. They were:

- the very close confines of the field;
- the absence of protective headgear, in part due to the rules of the State and national body; and
- the peculiar propensity of the indoor cricket ball, if it struck the player's face near the eye, to mould itself to the eye socket and thereby to destroy ocular vision, as in many cases it had done.

130 These were considerations that a commercial risk-creator, such as the respondent, acting reasonably, owed it to its customers to bring to their notice. Then, at least, they would be alerted to a feature of the particular game that the respondent was offering for reward to itself. In the circumstances, that risk was not "obvious". But, in any case, reasonable care required that it be brought to the notice of a person such as the appellant. Then, at least, any risk which the appellant faced would be an informed one. So far as the warning was concerned the respondent would then have done what reasonable care required.

131 It follows that I agree with McHugh J[110] that a notice in the form that his Honour has suggested should have been displayed. If that conclusion meant that a similar notice was required in every indoor cricket facility in Australia, that would have been no bad thing, given the number of significant ocular injuries caused by the game.

132 *Warning and causation:* This leaves only the question of whether the presence of the sign propounded would have deterred the appellant, unprotected, from playing the game in which he was injured[111]. On this point, I agree with McHugh J's conclusion[112]. Alone the issue would have warranted an order for

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110 Reasons of McHugh J at [80].

111 *Secretary to the Department of Natural Resources and Energy v Harper* (2000) 1 VR 133 at 152-155 [55]-[59] per Batt JA.

112 Reasons of McHugh J at [81].

retrial. But in light of the conclusion on the failure to provide protective equipment that is unnecessary. The trial judge should have held that the duty of care was breached by the respondent. The Full Court erred in failing to allow the appellant's appeal.

Orders

133 Against the possibility that the judgment might be reversed on appeal, the primary judge calculated, provisionally, the damages to which the appellant was entitled, should he succeed. That calculation has not been contested.

134 Accordingly, the appeal should be allowed with costs. The judgment of the Full Court of the Supreme Court of Western Australia should be set aside. In place thereof, it should be ordered that the appeal to that Court be allowed with costs; the judgment of the District Court of Western Australia set aside; and in its place judgment entered in favour of the plaintiff in the sum of $127,532.80 together with his costs of the trial.

135 HAYNE J. I agree that, generally for the reasons given by Gleeson CJ, this appeal should be dismissed but I wish to add something further about two aspects of the matter.

136 First, both the trial judge and the Full Court of the Supreme Court of Western Australia decided that the respondent had not been shown to have failed to act reasonably. Had the trial been by judge and jury, that question of failure to take reasonable care would have been a question for the jury. It would, therefore, be usual to speak of it as a question of fact, not a question of law. On appeal from the judgment entered after a jury's verdict, the issue in an appellate court would have been whether the jury's finding was one which it was open to the jury to make. Does the fact that the appeal to the Full Court of the Supreme Court, in this case, was an appeal from the finding of a judge that there had been no want of reasonable care mean that the task of the Full Court differed in some way? In particular, was the question for the Full Court whether the finding was one that was open on the evidence or was the question whether, on the proved or admitted facts, the Full Court would itself conclude that there had been no want of reasonable care?

137 Although conventionally described as a finding of fact, to make a finding that there has, or has not, been a failure to meet a standard of reasonable care requires the tribunal (be it the judge or a jury) to translate the relevant legal principle (that the defendant is obliged to take such care as the reasonable and prudent person would take in the circumstances) into what Fleming described[113] as "a concrete standard applicable to the particular case", and as a process which "involves not a determination of fact, but the formulation of a value judgment or norm".

138 In undertaking that task the tribunal of fact must first consider whether the reasonable person would have foreseen that his or her conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. The risk is foreseeable if not far-fetched or fanciful. The tribunal of fact must then decide what the reasonable person would do in response to that risk[114]. This latter decision requires attention to various considerations, very important among these being the magnitude of the risk of injury, the probability of its occurrence, the expense, difficulty and inconvenience of alleviating action, and any other conflicting responsibilities the defendant may have[115]. Some of these considerations (and there may be others presented by the facts of the particular

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113 Fleming, *The Law of Torts*, 9th ed (1998) at 345.

114 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 per Mason J.

115 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

case[116]) pull in different directions. Taking them all into account requires the striking of a balance.

139 Because the decision that there has, or has not, been a want of reasonable care requires this balancing exercise it is a decision which has at least some features like the exercise of a discretion. Without any failure to apply proper principles different minds may attribute different significance to particular elements in the balancing process; they may differ about the ultimate result that is to be reached.

140 It may be that considerations of this kind might lead to the conclusion that an appeal against a judge's finding about breach of the duty of care should be allowed only if there was an evident error of principle or if the decision was one not reasonably open. It may be that it is considerations of this kind which lie behind what has been said[117] to be the "perhaps more pronounced" reluctance of this Court to allow an appeal on an issue of fact, on which there are concurrent findings below, when the issue raises a question about the standard of care.

141 The proper approach of an appellate court to considering a finding about breach of duty was not the subject of any argument on the hearing of the appeal to this Court and it is not necessary to decide it. The decision that there was no breach of the duty of care was a conclusion that was open to the courts below. No error of principle was apparent in the manner in which they reasoned to that conclusion and no reason has been shown for this Court to disagree with it.

142 The second point I wish to deal with concerns the "obviousness" of risk.

143 The respondent sought to contend, in this Court, that the appellant's claim should fail because he had voluntarily assumed the risk of injury. If it had been necessary to consider that question, it may have been relevant to inquire whether the risk that came to pass was a risk that was obvious to all, and that, absent some evidence to the contrary, it should accordingly be found to have been known to the appellant. For the moment, however, it is important to notice another aspect of the obviousness of the risk that is not related to a defence of voluntary assumption of risk. The obviousness of the risk that a player participating in an indoor cricket match may be hit by the ball (whether on the head or elsewhere)

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116 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 455 [52], 456 [56] per Toohey and Gummow JJ, 481 [131] per Kirby J, 488-489 [157] per Hayne J.

117 *Webb v South Australia* (1982) 56 ALJR 912 at 912 per Mason, Brennan and Deane JJ; 43 ALR 465 at 466.

bore upon whether the respondent had acted unreasonably in not warning the appellant of this danger or in not providing protective helmets.

144 The trial judge found that the risk of being hit (by the ball, by a bat, or by another player) was an obvious risk of the sport. When one of the recognised techniques of the sport is to bowl the ball at the player who is batting at such a speed that it cannot be hit, the risk of being hit by the ball when batting is indeed obvious. It is no less obvious that the risk of injury would vary according to the part of the body that is hit, according to the force of the blow, and according to what it was that struck the blow – the ball, the bat, or another player. And in a fast moving and energetic game like indoor cricket, a collision with any of the equipment used in the game or with another player may be very serious indeed. A blow to the head or to the region of the eye could well cause very serious injury – more serious than a similar blow to some other part of the body. That a player could suffer serious injury, even permanent and disabling injury, by playing this sport was evident to all participants in it. Reasonable care did not require the respondent to warn participants of that. Nor was there any reason to single out one form of injury and warn of that. There is, therefore, no reason to disagree with the trial judge's conclusion that reasonable care did not require the respondent to warn of the specific risk of eye injury.

145 Nor, for the reasons given by Gleeson CJ, did the taking of reasonable care require the provision of helmets. And although the trial judge did not appear to do so, it should be added that obviousness of risk is a relevant matter to be taken into account in this context in the same way as it is in relation to the allegation of a failure to warn.

146 I agree with the orders proposed by Gleeson CJ.

CALLINAN J.

The facts

147 On 12 March 1996 the appellant, who was an experienced, orthodox, outdoor cricketer, was batting for a team calling itself "Dazed and Confused", during his second game of indoor cricket. The match was being played at an indoor cricket centre in Perth called "Striker Belmont" which was conducted by the respondent. In addition to providing the venue, the respondent supplied the equipment required to play, and an umpire to adjudicate upon the game. Those, including the appellant, who played at Striker Belmont paid the respondent a fee for doing so.

148 During his innings the appellant was bowled a full toss at about chest level by a member of the opposing side "Shark Attack", which he attempted to turn to the on-side by playing a form of "pull shot". His execution of the shot was imperfect. Instead of hitting the ball with the full face, he struck it with the edge of the bat. The ball flew off that edge and struck the appellant's right eye causing grave injury to it.

149 The question that this appeal raises is whether the respondent is liable for the injury to the appellant's eye and his consequential losses by reason of a failure to provide him with a helmet or other protective device to shield his eyes while batting.

Previous proceedings

150 The appellant sued the respondent in the District Court of Western Australia. He alleged various causes of action in contract, tort and breach of statutory duty. At trial however the questions were reduced to these: whether the respondent owed the appellant a duty, which it failed to observe, to provide him with equipment to protect his eyes, or, alternatively, to warn him that without it, his eyes were at risk; whether the respondent had made out a defence of *volenti non fit injuria*; and, the extent, if any, of contributory negligence on the part of the appellant in the execution of the pull shot attempted by the appellant. These issues were common, her Honour the primary judge said, to all of the causes of action, and each needed, for the appellant to succeed in whole or part, to be resolved in his favour. It was not suggested in this Court that her Honour's approach in this regard was wrong.

151 It is convenient to discuss the nature of the game of indoor cricket more fully. Unlike its progenitor, indoor cricket is a comparatively recently invented game which is played in large sheds or other enclosed spaces. It is a game played by eight members a side. There are two batsmen at the wicket at the same time, one at the bowler's end and one at the other end facing the bowler. The fielding side is distributed around the pitch in various fielding positions. Because

the playing area is confined, players are brought into closer proximity to one another during a game than is the case with outdoor cricketers. There is one umpire. The equipment supplied by the respondent included bats, batting gloves and groin protectors but no helmets or eye protectors, the former of which the appellant claimed he would have used had one been supplied to him by the respondent. It was claimed by the respondent that there was at the point of entry to the playing area, a prominent sign which bore the words "Players play at own risk". The trial judge, French DCJ, found however that the sign was not in use on 12 March 1996.

The trial

152 It is relevant to refer to some of the expert evidence which was called by the appellant at the trial. Dr Mary Bremner, an experienced ophthalmic surgeon and ophthalmologist specialising in paediatrics, a member of the Injury Control Council of Western Australia, with a particular interest in injuries to the eye, explained that eye injuries in indoor cricket may be more severe than in the orthodox outdoor game because of the confined space in which the game is played. This is so because, during an innings, there are ten players within that confined space, and the ball reaches significant velocities. In addition, the fact that an indoor cricket ball is slightly more malleable than the outdoor ball means that it can compress and reach and strike the eyeball within its bony socket. Dr Bremner said that in her opinion the risks of an injury to the eye could only be prevented by protection in the form of a helmet with a face guard or grid. Eye goggles or eye guards which have been designed for the game of squash would not provide adequate protection for indoor cricket. Although Dr Bremner pointed out that she was not an expert in the particular kind of safety equipment that would be appropriate for indoor cricket, she thought that the helmets worn in outdoor cricket, which include a grid for face protection, would probably be appropriate for indoor cricket. She said that she was unaware whether any helmets appropriately adapted for indoor cricket were available.

153 Squash and indoor cricket in Dr Bremner's opinion were the sports which presented the greatest risks to eyes. Her evidence and opinions were confirmed by another of the expert witnesses, Dr Anderson, who also said that although full face helmets should be effective to reduce or eliminate injuries to eyes, everyone, including the fielders, would need to, or should wear them. Dr Anderson accepted that no helmets specific for use by indoor cricketers had yet been devised or developed. Indoor cricket helmets would provide protection but they also presented a separate risk, of injury in a collision between players. Dr Bremner, as did Dr Anderson and another medical witness, Dr McAllister, said that equipment used in squash in accordance with the relevant 1992 Australian standard would not have provided adequate protection.

154 With respect to these matters the primary judge made these findings:

> "Despite some reservations in relation to the difficulties in providing a sufficient range of sizes and hygiene considerations in relation to multiple use of the helmets, I am satisfied that if the helmets were otherwise appropriate for use by players in indoor cricket the additional cost associated in the provision and maintenance of the helmets would not preclude a centre from making them available. If the additional cost was not commercially viable then there seems no reason why the helmets could not be available to players for a small hire fee to cover the cost of the purchase of the helmets and maintenance. However during the course of evidence it became apparent that there were other reasons apart from the question of cost and hygiene and other related considerations that militate against the wearing of such helmets while playing indoor cricket."

The primary judge also made these further findings:

> "The rules current at the time of this incident were published in March 1995 … In the foreword to the rules the reader is advised that they are the official rules of the sport of indoor cricket as endorsed by the Australian Indoor Cricket Federation [AICF]. It notes that the rules are simple but if an interpretation or adjudication is required that the match umpire is trained to undertake that function. Section 1 contains 27 rules relating to the way in which the game is to be played. Rule 3 provides for a uniform of long or short pants with T-shirts and rubber sole sport shoes. Rule 5 prescribes the playing equipment to be used in the game. This includes, inter alia, bats, batting gloves, balls and stumps."

Finally, the primary judge came to this conclusion:

> "It may well be that the time has now come in the light of the medical evidence of the potential for serious eye injury for a helmet of a more lightweight material with no visor and no protuberances to be designed and manufactured. It may be that the AICF should be actively pursuing that course. But that does not mean that it is reasonable to expect an individual operator of a suburban cricket venue to take steps to investigate and research this proposal. It also does not mean that it is reasonable to expect an individual operator to arrange for hire of outdoor cricket helmets as they are presently available on the retail market when as the rules of indoor cricket presently stand that would not be allowed as a matter of standard player equipment. The AICF organises the tournaments and the games played at the defendant's centre are organised and administered according to the rules of the federation. It is not a question of 'just because everyone else is doing it that makes it right'. Centres operating indoor cricket competitions are doing so under the AICF rules and as part of a state and national sporting organisation. Although the competition at the defendant's centre seems to be mainly between teams that are organised through the centre there are inter-centre

> tournaments and players coming to the centre knowing that it operated its competitions under the AICF rules would generally expect that there would be uniformity in rules and practices in relation to equipment used. Because of this significant constraint it is difficult to draw any analogy with a situation where there may be a failure to take reasonable care despite the fact that there is compliance with a common and acceptable practice in a particular area of human conduct such as the situation that sometimes arises in relation to cases of medical or professional negligence. In this case it is not a matter of following the 'example' of the AICF and other centres but of the reality of the constraints that are imposed because the centre was operating within the AICF rules. These rules are of course accepted by and adopted by other centres that organise games. Like the teams registered at the defendant's centre these teams participate in regional and interstate competition. I consider that all of these factors restrict the scope of the standard of care so that 'all reasonable steps' does not extend to the provision of helmets to protect players from injury from the indoor cricket ball."

With respect to the appellant's alternative case, that he should have been warned, her Honour said this:

> "Although the plaintiff did not specifically mention the risk of being hit in the head I am satisfied on the basis of his evidence and in the light of his comments in relation to the risks in playing outdoor cricket that the plaintiff was well aware that when he played indoor cricket he ran the risk of being hit by the ball, whether that was in the body or in the head."

The primary judge regarded a statement by Kirby J in *Romeo v Conservation Commission (NT)*[118] as apposite:

> "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 that risk is neither reasonable nor just."

The appeal to the Full Court

155 The appellant appealed to the Full Court of the Supreme Court of Western Australia. Murray J, with whom Malcolm CJ and Pidgeon J agreed, held that the primary judge was right to conclude that the respondent had not acted in breach of any duty owed to the appellant[119]:

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118 (1998) 192 CLR 431 at 478 [123].

119 Murray J did not disagree with the primary judge's conclusion that s 5 of the *Occupiers' Liability Act* 1985 (WA) had not been infringed. The section provides:

(Footnote continues on next page)

"**5. Duty of care of occupier**

(1) Subject to subsections (2) and (3) the care which an occupier of premises is required by reason of the occupation or control of the premises to show towards a person entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier is by law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by agreement or otherwise, his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

(2) The duty of care referred to in subsection (1) does not apply in respect of risks willingly assumed by the person entering on the premises but in that case the occupier of premises owes a duty to the person not to create a danger with the deliberate intent of doing harm or damage to the person or his property and not to act with reckless disregard of the presence of the person or his property.

(3) A person who is on premises with the intention of committing, or in the commission of, an offence punishable by imprisonment is owed only the duty of care referred to in subsection (2).

(4) Without restricting the generality of subsection (1), in determining whether an occupier of premises has discharged his duty of care, consideration shall be given to –

(a) the gravity and likelihood of the probable injury;

(b) the circumstances of the entry onto the premises;

(c) the nature of the premises;

(d) the knowledge which the occupier of premises has or ought to have of the likelihood of persons or property being on the premises;

(e) the age of the person entering the premises;

(f) the ability of the person entering the premises to appreciate the danger; and

(g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person."

> "Her Honour focused attention on the question of the scope of the duty and the question of its breach. She concluded that in the particular circumstances of the case there was no obligation reasonably to be imposed to provide a protective helmet or to warn the appellant of the risk of eye injury. In my opinion, she is not demonstrated to have erred in either respect and I would dismiss the appeal."

Contributory negligence therefore had no bearing on the outcome of the trial or the appeal. I would interpolate that, if, as was alleged by the respondent, a poorly executed pull shot, that is a pull shot inexpertly played with a cross bat, was negligence, then not only the appellant but many first-class batsmen of the orthodox game would on occasions have been negligent.

The appeal to this Court

156 The appellant repeats the argument in this Court that he should either have been warned or provided with a helmet. At all levels in this case, the respondent accepted that it owed the appellant a duty of care. The question was and is, therefore, whether that duty encompasses the obligations which the appellant argues the respondent owed here.

157 In my opinion, the conclusions of the primary judge and of the Supreme Court are correct.

158 Almost all sport involves physical exertion, physical competition and a degree of physical domination, in one form or another, by one person or team over another: whether by running faster, jumping higher or further, scrummaging harder, throwing straighter and faster, or hitting a ball with better timing and more accuracy, or bowling faster. Even seemingly gentle sports will not be without risk: in table tennis, of being hit by the bat or ball, or in over-reaching for a shot. It would be impossible to identify all of the risks associated with every sport, but the fact of that impossibility is of itself a matter of notoriety and therefore of significance.

159 The sport of indoor cricket involved many of the risks to which I have just referred. Played as it was, with a semi-flexible ball and a bat with which to hit it as hard as possible, it gives rise to an obvious risk that a ball might strike an eye. Any assertion to the contrary is simply untenable. Any person could not be other than aware of that particular risk after a few moments observation of the game. As I said in *Agar v Hyde*, sports injuries and duties of care owed by those involved in sport simply cannot be approached in the same way as non-recreational or involuntary activities[120]. What I have said is sufficient to dispose

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120 (2000) 201 CLR 552 at 600-601 [125]-[127].

of the appellant's argument that the respondent should have warned the appellant of the risk, which was realised, of injury to his eyes. And, for the reasons that I have given, that of the ultimate objective of most sports, of the achievement of physical superiority or domination of one form or another by one person or team over another, promoters and organisers of sport will rarely, if ever, be obliged to warn prospective participants that they might be hurt if they choose to play the game.

160 Should, however, helmets have been provided? The primary judge's opinion, which was affirmed by the Supreme Court, was that because the rules of the game forbade the use of helmets, the respondent was certainly not obliged to provide them, and further, that so far, no satisfactory helmet adapted to the peculiarities of the game has yet been designed and manufactured. A proper foundation for this finding was laid in the cross-examination of Dr Anderson who had been obliged to concede that outdoor cricket helmets which he had earlier suggested might be suitable for indoor cricket, suffered from the deficiency that the ball used in indoor cricket (which was a slightly smaller ball) could pass, unless an adjustment were made, through a gap in the outdoor form of helmet. I point out that at that stage it had never been the appellant's case that the respondent had been negligent in failing to design and manufacture an appropriate form of helmet. The proximity of the players in the indoor game, and the risk of a collision between them would require that consideration be given, if a helmet is to be designed, to one which would be unlikely to cause injury to other players, and would not obscure a player's vision. The primary judge was also right to point out that although the incidence of injuries to eyes is somewhat higher in indoor cricket than in many other ball games, it was still not a high risk game in terms of the frequency of injury in relation to the total number of participants playing the game in Australia. Of further relevance is the fact that, of those whose eyes have been injured, the majority were wicket-keepers and fielders rather than batsmen.

161 For those reasons, as well as that the rules of the game forbade the use of helmets, the respondent was not negligent in not providing the appellant with a helmet that would have protected him against the risk of injury to his eyes. Even though the respondent provided the umpire, it was neither for him nor the respondent to amend the rules, assuming that appropriate amendments to protect the appellant could have been formulated, to require the wearing of a suitable helmet by batsmen.

Statistics: judicial notice

162 In *Holland v Jones*, Isaacs J discusses, and emphasizes, the great caution with which courts must act in taking judicial notice of unproved matters[121]:

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121 (1917) 23 CLR 149 at 153.

> "The only guiding principle – apart from Statute – as to judicial notice which emerges from the various recorded cases, appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court 'notices' it, either *simpliciter* if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt."

163 I would resist any suggestion that the same degree of caution is not required when the extrinsic facts are so-called legislative facts, or facts a knowledge and understanding of which may assist the court to determine or develop the law, whether on grounds of policy or otherwise. With respect, it is no answer to say that the law as stated by this Court will on occasion have application to people and situations other than those before the Court in the proceedings in which resort is sought to be had to unproved facts. This Court has always insisted that it will not give advisory opinions[122]. It has always refused to entertain cases in which there has not been a properly constituted matter with real issues and genuinely affected litigants before it. In short, there is always going to be one party who fails in this Court. It would be unfair and entirely unsatisfactory for such a party to learn, after the event, for the first time, that he or she lost because the Court resorted to extrinsic, allegedly notorious facts with which he or she had no opportunity to deal.

164 In *Gerhardy v Brown*, Brennan J said that the "validity and scope of a law cannot be made to depend on the course of private litigation."[123] I do not take that to be a warrant for the reception and use of material that has not been properly introduced, received, and made the subject of submission by the parties. What his Honour said cannot mean that the interests of the litigants before the court can be put aside. They retain their right to an adjudication according to law even if other, conceivably higher or wider, interests may ultimately be affected.

165 Contrary to the suggestion of the learned current author of *Cross on Evidence*, judges are not free to apply their own views and to make their own inquiries of social ethics, psychology, politics and history without requiring evidence or other proof[124]. Two reasons why this is so are immediately apparent. The first is that the parties must be given an opportunity to deal with all matters which the court regards as material. The second reason is that rarely is there any universal acceptance of what are true history, politics and social ethics. Anyone

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122 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

123 (1985) 159 CLR 70 at 141-142.

124 Heydon, *Cross on Evidence*, 6th Aust ed (2000) at 122 [3010].

with any knowledge of these will be aware that there is a huge, indeed probably immeasurable, range of differences as to what they legitimately are, and the ways in which they are to be identified, understood and applied. For example, resort by me to the very recent and very short history of postmodernism would, if I were uncritically to accept its tenets, lead me to hold that there is no such thing as true history: history itself is no more than a series of subjective interpretations by different historians. It is in the light of such wide divergences of modern opinion as to what is historical fact that the statement of Dixon J in *Australian Communist Party v The Commonwealth*[125] has to be understood today. There his Honour said that courts may use the general facts of history ascertainable from the accepted writings of serious historians. It would only be if a very large measure of agreement could be obtained and, I would suggest, from the parties themselves, as to what are *accepted* writings and who are *serious historians* that the court would be entitled to resort to them.

166 In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[126], I referred (inter alia) to books, academic papers, a Senate Committee report, and other materials to show the realities of the modern publishing, entertainment and media industries as well as the activities of members of the Executive branch of government in this country. I also referred to a body of case law and State and federal legislation for the purpose of meeting assertions used in this Court as one of the foundations for the implication of a constitutional freedom of political expression. I concluded that there was no basis for such an implication. In so doing, I regarded myself as entitled to refer to the extrinsic materials mentioned because this Court in *Lange v Australian Broadcasting Corporation*[127] relied upon statements about modern conditions which had been made by McHugh J in *Stephens v West Australian Newspapers Ltd*[128]. It is unfortunate that the necessity to look at such extrinsic material arose in *Lenah*; but it did because a less incomplete and more rounded picture of relevant modern conditions was called for. It was because I was also concerned about the use of extrinsic facts generally that I prefaced my overview of modern conditions in *Lenah* with these observations[129]:

> "I embark upon a consideration of, and use the expression, 'circumstances prevailing today' because it was recently, as will appear,

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125 (1951) 83 CLR 1 at 196.

126 (2001) 76 ALJR 1; 185 ALR 1.

127 (1997) 189 CLR 520 at 570-571.

128 (1994) 182 CLR 211 at 264.

129 (2001) 76 ALJR 1 at 52-53 [251]-[253]; 185 ALR 1 at 71-72.

used as a justification for the implication of a Constitutional right which had apparently been lying dormant for 90 or so years.

Judges sometimes make assumptions about current conditions and modern society as bases for their decisions. Great care is required when this is done. An assumption of such a kind may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question, to enable an assumption to be made about it. That is why judges prefer to, and indeed are generally required to act on evidence actually adduced, and are conservative about taking judicial notice of matters of supposed notoriety. It is not without significance to this appeal, however, that in a case on the related topic of defamation, three Justices of this Court referred to 'the very different circumstances [prevailing] today'[130] from 100 years before, and presumably had regard to them in reaching the decision which their Honours did, although the joint judgment does not identify the circumstances said to have changed. A unanimous High Court made a similar observation in *Lange*[131]. There the only relevant considerations that were identified were those referred to by McHugh J in *Stephens v West Australian Newspapers Ltd*[132], who noted that bureaucracies are vast, intrusive upon daily life and affairs, and publicly funded[133]. I should point out that in neither of these cases was any evidence called which bore upon the nature and size of modern bureaucracies, and, how in number, authority, power and intrusiveness, they differed from bureaucracies in earlier times. Indeed it is not immediately apparent how evidence of this kind could have been called in respect of the issue ultimately involved, whether the defendant in each case had an arguable defence to a defamation action. Nor was any reference made to legislation establishing the bureaucracies that their Honours had in mind which might have gone some way towards making the relevant point. Had some such reference been made it might have provoked consideration of these matters: of other, modern legislation to which I later refer and which is designed to counter untoward intrusions, arbitrariness, secrecy and capriciousness on the part of bureaucracies; and whether, within the legislation by which such bureaucracies are

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130 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 128 per Mason CJ, Toohey and Gaudron JJ.

131 (1997) 189 CLR 520 at 570 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

132 (1994) 182 CLR 211.

133 (1994) 182 CLR 211 at 264.

established, there are provisions to ensure the propriety and transparency of their conduct.

Accordingly, just as members of this Court in *Stephens* and *Lange* referred to perceptions and matters not in evidence, I, too, intend to refer to a number of the realities of the modern publishing, entertainment and media industries, as well as the activities of members of the Executive branch of government in this country. These are to some extent inseparably intertwined."

167 The same concerns provided reason for me, whenever I could, to refer in *Lenah* to various pieces of legislation, the fact and content of which demonstrated the existence of various relevant modern conditions and the cures for the mischief caused by some of them[134].

168 In this case, however, resort to statistics contained in National Health Surveys is not only impermissible but also, with respect, unhelpful. The statistics in question do not fall into any of the categories of material which might properly influence the outcome of the appeal, or any other case; nor are they statistics going to the establishment of what has become, for many purposes, a conventional statutory yardstick and therefore a truly notorious fact, the Consumer Price Index. Nor is there any statutory basis for their reception. The statistics were not given in evidence at the trial. In my opinion, they would not have been admissible had they been sought to be tendered. The number and severity of sports-related injuries and the cost of treating them throw no light upon the incidence of injury to a batsman from a ricocheting ball off his own bat in the course of an innings in an indoor cricket match. They are irrelevant to that matter. Even if they were relevant, they would still constitute evidence, and this Court has held that it will not receive evidence in the exercise of its appellate jurisdiction[135]. The respondent has had no opportunity, here or elsewhere, of dealing with the surveys, either by leading evidence explaining them, distinguishing them or contradicting them, or by making submissions in any court about them or their relevance. Nor do such statistics provide a basis in policy for the formulation of any principle or rule to apply to cases in which negligence in the playing or conducting of sporting contests is alleged. Just as the respondent has had no opportunity of dealing with the surveys, by evidence or submissions, this Court has not had any opportunity of considering any cost-benefit analysis which may or may not show that the overall advantage to the community, in terms of fitness, occupation of leisure time, and community health

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134 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 73-74 [342]; 185 ALR 1 at 99-101.

135 *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.

generally, of participation in sport, or indoor cricket particularly, equals or outweighs the costs of the provision of health services to people injured playing sport.

169 Reference to such statistics in this Court in turn invites and, regrettably, necessitates some further reference to them and like matters in the same way as the reference in *Stephens* and *Lange* to modern conditions provoked further reference and consideration of other aspects of modern conditions by me in *Lenah*. The Australian Bureau of Statistics' *National Health Survey: Injuries, Australia*[136] does indeed record that 2.8 million Australians (16% of the population) had a current injury or injury-related condition, and that 228,800 of these people had been injured most recently due to a sport or recreation-related activity in the month prior to interview. These statistics are, however, unhelpful to the appellant's cause or indeed generally. The percentage involved, somewhat less than 10% of injured people, is a relatively small percentage. The expression "due to a sport or recreation-related activity" is a very imprecise one. A leisurely or a brisk walk can be recreation. The sense in which "recreation-related" is used in the statistics is unclear. The statistics show that persons aged 55-64 had the highest incidence of injury-related conditions. I doubt whether many people in that age group owe their injuries to indulgence in indoor cricket. And, far and away, dislocations, sprains and strains represented the leading type of current injury in 1995, being injuries rather removed from the sorts of injuries likely to be sustained by ordinarily healthy indoor cricketers. It was suggested by Dixon J in *Australian Communist Party*[137] that judges may refer to standard works of literature and the like. In conformity with his Honour's invitation to look to literature, I would conclude on this topic by referring to Disraeli's disdain for statistics by equating them with falsity[138].

Orders

170 This is sufficient to dispose of this appeal, and makes it unnecessary to deal with any question of a defence of *volenti non fit injuria*. The appeal should be dismissed with costs.

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136 (1998).

137 (1951) 83 CLR 1 at 196.

138 Neider (ed), *The Autobiography of Mark Twain*, (1960) at 149. Mark Twain there attributed to Disraeli the statement: "There are three kinds of lies: lies, damned lies and statistics."