HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

DOVURO PTY LIMITED APPELLANT

AND

ROBERT JOHN WILKINS & ORS RESPONDENTS

Dovuro Pty Limited v Wilkins [2003] HCA 51
11 September 2003
S357/2002

ORDER

1. *Appeal allowed with costs.*

2. *Set aside paragraph 1 of the orders of the Full Court of the Federal Court made on 21 December 2000 and paragraphs 3, 4 and 6 of the orders of that Court made on 5 March 2001 and, in lieu thereof, order that:*

    a) *the appeal by Dovuro Pty Ltd ("Dovuro") against the declarations made by Wilcox J on 19 May 2000 be allowed with costs; and*

    b) *the declarations made by Wilcox J on 19 May 2000 be set aside and, in lieu thereof, judgment be entered for Dovuro with costs.*

On appeal from the Federal Court of Australia

Representation:

B W Rayment QC with M M Macrossan for the appellant (instructed by Griffith Hack Lawyers)

C T Barry QC with J E Rowe for the first respondents (instructed by Long Howland Lawyers)

No appearance for the second and third respondents

CATCHWORDS

Dovuro Pty Limited v Wilkins

Negligence – Breach of duty – Canola seeds imported from New Zealand – Imported seed also contained weed seeds – Whether reasonably foreseeable that weeds would be declared prohibited plants by Western Australian Government with consequent financial loss to purchasers.

Practice and procedure – Federal Court – Proceedings under *Federal Court of Australia Act* 1976 (Cth), Pt IVA – Powers of Court to make "declarations of liability" – Interlocutory declaration of liability – Whether available and should have been made.

Evidence – Admissions – Civil proceedings for damages for negligence – Distinction between admission and apology – Availability of admission by party of mixed law and fact.

Appeal – Concession made at trial – Whether issue can be argued for first time on appeal.

Words and phrases – "declarations of liability".

Customs Act 1901 (Cth).
Quarantine Act 1908 (Cth).
Federal Court of Australia Act 1976 (Cth), Pt IVA.
Agriculture and Related Resources Protection Act 1976 (WA).
Quarantine (Plants) Regulations 1935 (Cth).
Customs (Prohibited Imports) Regulations 1956 (Cth).

1 GLEESON CJ. The principal issue in this appeal concerns a challenge to a finding of negligence on the part of a producer and distributor of canola seed. The finding was made by Wilcox J in the Federal Court[1], and upheld by a majority in the Full Court of the Federal Court[2] (Branson and Gyles JJ, Finkelstein J dissenting).

2 In *Graham Barclay Oysters Pty Ltd v Ryan*[3] I set out my views on the approach this Court should take where there are concurrent findings of negligence (or absence of negligence) at a trial and in an intermediate court of appeal. It is unnecessary to repeat what was said there. The problem that arises in the present case (coincidentally also involving a decision of the same trial judge and a division of opinion in the intermediate court of appeal) is of a similar nature.

3 The facts of the case, and the issues that arose at trial and on appeal, appear from the reasons for judgment of other members of the Court. I agree that the appellant should not be permitted to resile from its concession as to duty of care. I will confine my attention to the challenge to the finding of a breach of duty.

4 The case presented an unusual problem. The canola seed distributed by the appellant was not sold as being free of weeds. It was sold as of "minimum 99% purity". It conformed to that description. There is nothing unusual about such a product containing small quantities of weed seeds. This canola seed contained small quantities of three kinds of plant, cleavers, redshank and field madder[4]. As Gyles J pointed out[5], they "occur naturally and are not poisonous, noxious or diseased in themselves, and do not transmit disease or noxious qualities to stock or humans or even to the canola seed either as part of the seed mix or in the ground". His Honour also pointed out that "seeds and weeds are the subject of a comprehensive system of international, national and state regulation"[6], and there was no prohibition on the importation or sale in any part of Australia, including Western Australia, of canola seed containing weeds of the type, and in the quantity, in question. No actual harm to the crop, or the land, of

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1 *Wilkins v Dovuro Pty Ltd* (1999) 169 ALR 276.

2 *Dovuro Pty Ltd v Wilkins* (2000) 105 FCR 476.

3 (2002) 77 ALJR 183 at 194-196 [48]-[55]; 194 ALR 337 at 351-353.

4 (1999) 169 ALR 276 at 283 [28].

5 (2000) 105 FCR 476 at 528-529 [185].

6 (2000) 105 FCR 476 at 529 [187].

the growers who bought and sowed the seed was shown to have occurred. Their financial loss resulted from the fact that, after they bought and planted the seed, the Western Australian agricultural authorities became concerned about possible harm, and declared the weeds as prohibited species. Those declarations required the growers to take certain precautionary measures. Subsequently, the declarations were cancelled[7]. In the meantime, the farmers suffered financial loss and expense which they sued to recover.

5 The appellant's case was that, when it imported and distributed the canola seed, there was nothing in the complex and comprehensive regulatory schemes operating throughout Australia that prohibited the importation or distribution of seed containing weeds of the kind, and in the quantity, which it sold. As a reasonable seed merchant, it relied upon the regulatory system. It was unreasonable to require it to foresee what it said was an excessive and temporary response on the part of the Western Australian authorities. Accepting that it owed a duty to take reasonable care to avoid risk of economic loss to farmers who bought the seed, it did nothing wrong. Its conduct was reasonable.

6 After the event, officers and associates of the appellant apologised to the growers. An analysis of the reasons of the Full Court shows that those apologies, and the admissions they were said to contain, were decisive of the outcome in that Court. It will be necessary to return to them.

7 The findings of Wilcox J on the issue of negligence were expressed in the following form[8]. First, having previously dealt with some of the background history, he referred to the evidence as to "contentious matters". The problem in Western Australia arose as a result of some press reports that caused alarm to farmers and that called for action on the part of the authorities to prevent contamination of local agriculture. There had evidently been some difference of opinion within the Western Australian authorities. It was argued that they over-reacted. Wilcox J concluded that the authorities did not over-react[9]. That, however, is not to say that it was reasonably foreseeable that they would behave as they did. Secondly, Wilcox J recited the particulars of negligence relied on in the written submissions filed on behalf of the growers. Finally, adding reasons, he expressed agreement with certain of those submissions[10].

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7 (2000) 105 FCR 476 at 495-496 [74].

8 (1999) 169 ALR 276 at 293-311 [62]-[109].

9 (1999) 169 ALR 276 at 297 [71].

10 (1999) 169 ALR 276 at 308 [104], 311 [108].

8 The submissions with which Wilcox J agreed criticised the appellant for failing to do either or both of two things: failing to check specifically with the Western Australian authorities as to what their reaction to the sale of canola seed with the particular weeds in question was likely to be; and failing (by labelling or otherwise) to inform growers (and, through them, the authorities) of the exact contents of what they were buying[11]. For reasons that will appear, it is the second that became the most important. Those grounds of negligence necessarily involve a rejection of the contention that the appellant was entitled to rely upon the regulatory regimes, and upon the absence of any prohibition of the goods it sold. Wilcox J identified as "the question" whether reliance on the governmental agencies was a sufficient discharge of the appellant's duty of care. He answered that question in the negative[12].

9 In the Full Court, Branson J did not deal specifically with the finding that the appellant was negligent in failing to check with the Western Australian authorities. However, she attached importance to the apologetic communications from the appellant. She recognised that an apology might merely indicate regret that an incident has occurred, but saw in the terms of the appellant's communications an admission that, but for the commercial pressures under which it operated, the appellant "would have done something differently after seed production from that which it did do. That something, about which no evidence was given, could only have been greater efforts to clean the seed or greater efforts to inquire and, if necessary, warn about the weed seeds."[13] Her Honour thought the latter was the more likely explanation. This supported the second basis on which Wilcox J found negligence.

10 Finkelstein J dealt in detail with the trial judge's findings of negligence, and disagreed with them. His Honour's reasons are referred to by Hayne and Callinan JJ.

11 As to the first basis of negligence, Finkelstein J said[14]:

> "There is, in any event, an air of unreality about the suggestion that Dovuro should have made inquiries of relevant government departments to ascertain whether there would be any problem if it imported canola seed that contained a small quantity of cleaver, redshank or field madder. If it were required to make such inquiries, on the facts of the case those

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11 (1999) 169 ALR 276 at 304-311 [96]-[108].

12 (1999) 169 ALR 276 at 305 [97], 308 [102], 311 [107].

13 (2000) 105 FCR 476 at 481 [10].

14 (2000) 105 FCR 476 at 500 [90].

> inquiries would have been directed to five separate departments, one in the Commonwealth and four in the States. I suppose there to be no difficulty in formulating the question to be put to each department. But it is far from clear what Dovuro's obligation would have been had its inquiry yielded any of the following types of response, each of which was a possible response: 'We will let you know, but it may take some time'; 'It will be necessary to look into the matter and perhaps conduct tests to provide an answer'. Was Dovuro obliged to await a response? If so, for how long? What if the response was uninformative, such as 'We do not know whether the weeds are a problem'? It is plain enough, in my view, that the suggestion that Dovuro should make inquiries of relevant government departments proceeded on the assumption that Dovuro would be informed that the canola seed mixed with the weed seeds should not be brought into some areas where it may be sown. However, that assumption has no foundation."

12 The concluding sentence in that paragraph is inconsistent with the reasoning, and findings, of Wilcox J, especially in pars [63] to [72] of his reasons[15]. It is also inconsistent with what is implied in the reasoning of Branson J and Gyles J. However, there is force in the observation, in the earlier part of the paragraph, that a direct enquiry by a supplier to a government authority, on a matter that possibly could have political implications (in the widest sense), could not necessarily be expected to receive a prompt, direct and unequivocal response.

13 As to the second basis of negligence, Finkelstein J rejected the conclusion that the appellant acted negligently by failing to warn of the presence of the weed seeds[16]. He said[17]:

> "It is practically impossible for crop seed to be completely free of contamination by other seeds, including weed seeds. All growers are aware of this. According to the evidence the accepted practice in the seed industry (a practice which was later codified for members of the trade organisation, the Seed Industry Association of Australia Ltd) was that seed merchants informed purchasers of the presence and species of seed in a lot, if that seed was present by mass of one per cent or more in lawn or turf seed, or five per cent or more in other seed. Each bag of canola seed was labelled 'certified seed, first generation' and on the back of each label was printed 'minimum 99% purity, minimum 85% germination'. The label

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15 (1999) 169 ALR 276 at 293-297.

16 (2000) 105 FCR 476 at 507 [111].

17 (2000) 105 FCR 476 at 507 [113].

> alerted growers to the fact that the bag did not contain pure canola seed. In the absence of actual knowledge that the weed seeds were a risk to growers, Dovuro was not obliged to add further information to the label. The label was in accordance with industry practice and there are no facts from which it could be concluded that Dovuro acted unreasonably by confining itself to that practice."

14 Finkelstein J also found that it was not reasonably foreseeable that the Western Australian authorities would react as they did[18].

15 Subject to one critical qualification, Gyles J agreed with Finkelstein J. In particular, in considering the issue of duty of care (which he would have allowed the appellant to re-open) he expressed the view that it was not reasonably foreseeable that the Western Australian authorities would act as they did[19]. He pointed out that they had received certificates of analysis of the seed before it was released for sale, and did not attempt to prevent its release. The critical qualification related to "the apologies and admissions made on behalf of Dovuro"[20]. He said[21]:

> "They were not precise as to the defect, or as to the remedy, and were given in circumstances where an apology can be explained by commercial considerations. It would have been well open to the trial judge not to accept the [growers'] reliance upon them. However, the trial judge had the opportunity of seeing the authors give evidence, and of considering the admissions made against the backdrop of the other evidence. It also needs to be borne in mind that in case of doubt, labelling the goods with the actual MAF analyses was a precaution which was relatively simple and cheap."

16 Gyles J concluded this part of his judgment by saying[22]:

> "Thus, whilst the analysis of this issue by Finkelstein J would persuade me as a judge of fact to reject the [growers'] case, in my view the decision below was open to the trial judge and should not be disturbed."

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18 (2000) 105 FCR 476 at 506 [109].

19 (2000) 105 FCR 476 at 530-531 [188]-[191].

20 (2000) 105 FCR 476 at 539 [220].

21 (2000) 105 FCR 476 at 540 [221].

22 (2000) 105 FCR 476 at 540 [222].

17 In the result, therefore, in the Full Court, Finkelstein J, having analysed the facts, rejected the claims of negligence. Gyles J would have done the same "as a judge of fact" but he considered the trial judge's finding was "open ... and should not be disturbed" because of the apologies and admissions. Branson J upheld the second finding of negligence on the basis of the apologies and admissions.

18 Since the outcome in the Full Court turned upon the admissions, it becomes important to consider exactly what they amounted to. Two were quoted by Branson J, and referred to by Gyles J.

19 The first was a media release[23]:

> "We apologise to canola growers and industry personnel. This situation should not have occurred but due to strong interest in Karoo the unusual step was made of undertaking contract seed production in New Zealand to assist rapid multiplication; whilst the urgency to process and distribute the seed of Karoo in time for planting caused additional time pressures."

20 The second was a letter[24]:

> "I'd like to stress at this stage that this does not excuse Dovuro in failing in its duty of care to inform growers as to the presence of these weed seeds. We got it wrong in this case, and new varieties will not be brought on the market again in this manner. Dovuro will not be producing seed in New Zealand again. The company will continue in bulking up its varieties (as it does every year) in Western Australia."

21 Those communications were regarded as supporting, by admission, at least the second basis upon which Wilcox J found negligence, that is to say, that the appellant should have informed growers (and, perhaps, through them, the authorities) that the canola seed contained the weed seeds in question.

22 The proposition that the appellant (by labelling or otherwise) should have informed the growers of the presence of the three weeds in question, and that failure to do so involved negligence, depends upon the premise that such information would have been of concern to the growers. In another part of his reasoning, Gyles J pointed out[25] that there was no evidence, from any local agronomist or seed merchant, that, at the time of sale, there was concern about

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23 (2000) 105 FCR 476 at 481 [8].

24 (2000) 105 FCR 476 at 481 [10].

25 (2000) 105 FCR 476 at 536 [209].

cleavers, redshank or field madder of such a kind as would have led growers to do anything. To an extent, that undermines the reliance he placed on the admissions, as does his opinion, expressed in the context of duty of care, as to the foreseeability of the reaction of the Western Australian authorities. However, the evidence showed that at least some officers of the Western Australian governmental authority were very concerned about the introduction of some of the weeds in question. It is correct, as Gyles J pointed out, that it would have been easy and inexpensive to tell the growers of the weeds; and presumably the appellant had good cause to regret not having done so. But in the absence of a finding that, if the growers had been told, they would have been concerned about it, that proposition does not establish actionable negligence.

23 However, while it is correct to say that there was no such evidence from any local agronomist or seed merchant, as to concern in the industry, there was evidence, referred to by Wilcox J in the context of damage, that went some distance towards establishing the fact. The quality of the evidence is less than completely compelling, but it is there. It was discussed by Wilcox J as follows[26]:

> "Mr Wilkins said in his affidavit:
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> > 'Had I been warned that the Karoo canola seed available to fill my orders in 1996 may have contained weeds which were not known to broad acre farming in the State of Western Australia, I would have refused to accept that seed in satisfaction of my orders because it was not worth all the hassle.'
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> Mr Wilkins was not challenged in relation to that statement. In cross-examination, he conceded he knew there would always be some impurities in bags of seeds purchased from dealers, but he added 'most of them were listed on the bag'. However, Mr Wilkins agreed he knew in April 1996 that impurities were not always listed; so that, in buying seeds, he would 'buy weeds from time to time as well'.
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> Evidence was also given by Bruce Leslie Piper. Mr Piper conducts a farming operation in partnership with five other members of his family at 'Woolandoon', Bindi Bindi. The partnership purchased and sowed Karoo canola seed imported by Dovuro from New Zealand in early 1996. Mr Piper said, without challenge, that he would not have used the Karoo canola seed if he had known of the possibility of its contamination with weeds not known in Western Australia. Mr Piper also gave evidence of losses and expenses sustained in following the recommendations set out in the information package. I need not go into detail. Bearing in mind the number of people in each of the two partnerships (Wilkins and Piper), I

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26 (1999) 169 ALR 276 at 290 [50]-[51].

am satisfied at least seven persons suffered damage as a result of sowing the Karoo canola seed, the amount of which has yet to be quantified."

24 The reference to "all the hassle" appears to be to the sensitivity of the agricultural authorities to the introduction of certain kinds of weed, and the possibility that they would respond, to the cost of growers, as they did in this case. It was an (unchallenged) assertion by Mr Wilkins that he would have foreseen the kind of thing that actually occurred.

25 I agree with what is said by Gummow J as to the care that needs to be taken in identifying the precise significance of admissions, especially when made by someone who has a private or commercial reason to seek to retain the goodwill of the person or persons to whom the admissions are made. Common sense may dictate that they be used with caution by a fact-finder. And it is always necessary for the fact-finder to consider precisely what it is that is being admitted. If the driver of a motor vehicle says to an injured passenger: "I am sorry, I let you down", that may not mean much, or anything. If the driver says: "I am sorry, I was going too fast", that may be very significant. The statement that the appellant "[failed] in its duty of care to inform growers as to the presence of these weed seeds" cannot be an admission of law, and it is not useful as an admission of failure to comply with a legal standard of conduct. There is no evidence that the author of the statement knew the legal standard. But there were important factual questions on which there was other evidence, that is to say, whether telling the growers of the presence of the weeds would have served any useful purpose, or had any practical effect in avoiding the harm they suffered, and whether the presence of such seeds would have been a matter of concern to them. Those were facts to be decided in the light of the commercial and regulatory context in Western Australia at the time. The author of the letter, Mr Rath, was the manager of the appellant's Western Region. The statement by Mr Rath that there was no excuse for the appellant's failure to inform growers of the presence of the weed seeds was significant, because it enabled Wilcox J, in evaluating the evidence of officers of the agricultural authorities, and of growers, more readily to reach the conclusion that the presence of the weeds would have been of concern to those people.

26 In the result, as in the case of *Graham Barclay Oysters Pty Ltd v Ryan*, while I accept the force of the dissenting opinion in the Full Court, I am not satisfied that the majority view involved clear error or injustice, and I would not disturb the concurrent findings of negligence.

27 The appeal should be dismissed with costs.

28 McHUGH J. In the view that I take of this case, the issue for determination is whether the appellant, Dovuro Pty Ltd ("Dovuro"), breached the duty of care that at the trial it conceded it owed to the first respondents ("the Wilkins interests").

29 Dovuro also seeks to raise an issue as to whether it did owe any duty of care to the Wilkins interests. I would not permit it to raise that issue. It is beyond doubt that a manufacturer of any product owes a duty to a consumer to take reasonable care to prevent the product causing injury or loss to the consumer. As the facts in other judgments demonstrate, Dovuro's position was identical in principle with that of such a manufacturer. Because that is so, the only issue for determination at the trial – as the concession of Dovuro acknowledged – was whether it had breached that duty. This was not a case where there was any basis for contending that the losses suffered by the consumers might fall outside the ordinary duty owed by a manufacturer to a consumer. It was not a case where the Wilkins interests could succeed only on proof of a special duty to prevent economic loss to them.

30 A manufacturer breaches its duty of care if, by exercising reasonable care, it should have foreseen and avoided the loss. Like Gummow, Hayne and Callinan JJ, I find that Dovuro did not breach the duty of care that it owed. Accordingly, I agree with their Honours that the appeal should be allowed.

31 The facts and issues in this case are set out in other judgments. The case for the Wilkins interests depended upon obtaining a finding that Dovuro ought to have known that selling Karoo seed in Western Australia gave rise to a reasonably foreseeable risk that purchasers of the seed would suffer damage by reason of three plants, the seeds of which were mixed with the Karoo seed, becoming declared plants. In my opinion, that risk was not reasonably foreseeable.

32 In the Full Court of the Federal Court, Gyles J pointed out[27]:

> "[T]here was no evidence that the weeds in question, particularly cleavers, were or should have been known to have been of concern at the relevant time and place. The weeds were not revealed as being of concern under the comprehensive regulatory system. There was no evidence led by [the Wilkins interests] from any local agronomist or seed merchant to establish that there was concern about the weeds. No publicly available literature was tendered to establish that fact. No textbook was tendered. There was no bulletin from AgWest or any other Department of Agriculture warning of the risk."

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27 (2000) 105 FCR 476 at 536.

33 If the presence of cleavers, redshank and field madder was understood at the relevant time to constitute a risk to Western Australian agriculture, one would have thought that evidence concerning these matters would have been available and tendered. The lack of evidence indicates that, at the time of sale of the Karoo seed, the presence of these "plants" or weeds was not perceived by anybody as constituting a threat to agriculture in Western Australia or for that matter in Australia.

34 If negligence law is to serve any useful social purpose, it must ordinarily reflect the foresight, reactions and conduct of ordinary members of the community or, in cases of expertise, of the experts in that particular community. To hold defendants to standards of conduct that do not reflect the common experience of the relevant community can only bring the law of negligence, and with it the administration of justice, into disrepute. That is not to say that a defendant will always escape liability by proving that his or her conduct was in accord with common practice. From time to time cases will arise where, despite the common practice in a field of endeavour, a reasonable person in the defendant's position would have foreseen and taken steps to eliminate or reduce the risk that caused harm to the plaintiff. But before holding a defendant negligent even though that person has complied with common practice, the tribunal of fact had better first make certain that it has not used hindsight to find negligence. Compliance with common practice is powerful, but not decisive, evidence that the defendant did not act negligently. And the evidentiary presumption that arises from complying with common practice should be displaced only where there is a persuasive reason for concluding that the common practice of the field of activity fell short of what reasonable care required.

35 The present case is not a case of common practice in the usual sense of that term. But it is analogous to it. Dovuro imported and sold a product whose importation into Australia was authorised by the Australian Quarantine and Inspection Service and whose importation into Western Australia was authorised by the Western Australian Quarantine and Inspection Service. In other words, it was doing what sellers of seed ordinarily do. It had no reason to think that in importing the seed it was running the risk that cleavers, redshank and field madder would be declared by the Agriculture Protection Board, with consequent financial loss to the purchasers of Karoo seed. In contemplating the risk of harm from the sale of Karoo seed, a reasonable person would have regarded the risk as so negligible that it could be disregarded. Accordingly, there was no reasonably foreseeable risk of damage to the Wilkins interests.

36 Even if the presence of the weeds had given rise to a foreseeable risk of damage that a reasonable person would not have disregarded, orthodox negligence doctrine required a further question to be answered before there could be a finding of negligence against Dovuro. Did reasonable care require Dovuro to take steps to avoid that risk, a risk that, by hypothesis, could not be

disregarded? The answer to that question depended on how a reasonable person would respond after considering the magnitude of the risk, the *probability* of it occurring and the expense, delay and inconvenience in taking such steps[28].

37 The learned primary judge said that "it would not have taken any significant time for an officer of Dovuro to contact the Weed Seeds Unit of AgWest ... and obtain advice on the acceptability of the foreign seeds identified" in the Karoo seed[29]. But the failure to contact the Unit did not itself make Dovuro negligent. A plaintiff must show not only that an alternative course of conduct was open to the defendant, but that it would have eliminated or reduced the risk of damage. With the benefit of hindsight, it is now apparent that the Unit would probably have taken steps to have the three plants declared. But the position must be judged in the light of what Dovuro knew at the time and what reasonable choices were open to it.

38 A defendant is not negligent merely because it fails to take an alternative course of conduct that would have eliminated the risk of damage. The plaintiff must show that the defendant was not acting reasonably in failing to take that course. If *inaction* is a course reasonably open to the defendant, the plaintiff fails to prove negligence even if there were alternatives open to the defendant that would have eliminated the risk.

39 So negligence would not have been established by proving that a reasonable person would have foreseen some risk that the Agriculture Protection Board would have declared the three plants to be declared plants. Dovuro would not have been negligent if the risk of a declaration being made – though reasonably foreseeable – was so small that reasonable care did not require it to incur the delay and expense of contacting the Unit and waiting for its answer. Because I have held that the risk was so negligible that it could be disregarded, the question of the probability of the risk occurring does not arise. It is therefore not possible to calculate what the response of a reasonable person would have been if the risk was sufficiently significant to require Dovuro to consider the expense and delay of not selling the Karoo seed until it received the Unit's answer. But I mention it because it should not be thought that a finding of negligence in this case would automatically follow from a finding that the risk of damage was reasonably foreseeable.

40 Finally, I agree, for the reasons given by Gummow J, that the "admissions" in the correspondence from Dovuro provide no basis for a finding of negligence on the part of Dovuro.

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28 cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 46.

29 (1999) 169 ALR 276 at 308.

Order

41 The appeal should be allowed.

GUMMOW J.

History of the proceedings

42 The essential facts fall within a narrow compass. The appellant, Dovuro Pty Ltd ("Dovuro"), is a producer and distributor of agricultural seed, including, amongst others, Karoo canola seed. Karoo canola seed is a strain of canola (*Brassica napus*) designed to tolerate the otherwise harmful effects of triazine, a herbicide commonly used to control the spread of wild radish (a weed prevalent in canola crops in many parts of Australia).

43 On 8 September 1995, Dovuro and Crop Marketing New Zealand Society Ltd ("Cropmark") entered into a contract under which Cropmark agreed to cultivate and sell approximately 250 tonnes of Karoo canola seed to Dovuro. The canola seed was duly cultivated in various localities in New Zealand and was harvested in March 1996. The seed was then cleaned and packed into 25 kg bags by a contractor to Cropmark, Seedlands NZ Ltd, and delivered to Dovuro at sites in Melbourne and Fremantle. A label attached to each bag contained the statement "Minimum 99% Purity; Minimum 85% Germination". The statement reflected seed analysis certificates issued by the New Zealand Ministry of Agriculture and Fisheries. These certified that the Karoo canola seed was 99.8 per cent or 99.9 per cent pure (depending on the sample taken) and that it "[c]omplie[d] with the Seeds Acts of all Australian States". Of the total quantity of 168 tonnes (6720 bags) sent to Dovuro from New Zealand, 67.5 tonnes (2700 bags) were made available in Western Australia and were resold to local suppliers, including Elders Ltd ("Elders").

44 The first respondents, a family partnership trading as R & E Wilkins ("the Wilkins"), conduct a farming and grazing business at Kondinin, Western Australia. In May 1996, Elders supplied 40 bags of the Karoo canola seed to Mr Trevor Wilkins at the family property, "Narbethong". Mr Wilkins sowed 278 hectares of Narbethong with the seed and 238 hectares eventually returned a good Karoo canola crop (40 hectares having failed due to lack of moisture).

45 However, on 9 July 1996, Agriculture Western Australia ("AgWest"), the State government department responsible for agricultural matters, issued an information package to Western Australian canola growers, including Mr Wilkins. The package enclosed a letter from the Manager of AgWest's Pulses and Oilseeds Program indicating that the Karoo canola seed imported from New Zealand by Dovuro had been found to contain "undesirable weeds" including cleavers (*Galium aparine*), redshank (*Polygonum persicaria*) and field madder (*Sherardia arvensis*). Each of these species had been prohibited from importation and sale in Western Australia four days earlier on 5 July 1996. The information package also included a booklet setting out AgWest's recommendations as to the most effective methods for controlling the three weeds. These methods involved the thorough cleaning of windrowers and

headers used in affected paddocks, the cessation of livestock grazing in the affected paddocks, and the destruction of seed derived from the affected paddocks for a period of at least five years.

46 On 7 April 1998, the Wilkins instituted proceedings against Dovuro in the Federal Court of Australia alleging negligence and contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act"). The Wilkins brought their proceedings under Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) on behalf of themselves personally and as representative of other farmers who, in 1996, purchased and seeded Karoo canola seed supplied by Dovuro to distributors in Western Australia and which allegedly included cleavers, redshank and field madder seeds. Subsequently, on 4 September 1998, Dovuro filed a cross-claim against Cropmark. On 23 November 1998, the Wilkins filed an amended application and amended statement of claim in which they named Cropmark as second respondent. On 12 March 1999, Cropmark filed a cross-claim against Dovuro.

47 Issues of liability were tried in advance of questions of damages. Wilcox J made a finding that Dovuro was negligent in failing to disclose the presence of the weed seeds in the Karoo canola which it imported from New Zealand[30]. However, his Honour found that Dovuro had not contravened s 52 of the Act. An action against Cropmark for negligence also failed and each cross-claim was dismissed. A majority of the Full Federal Court (Branson and Gyles JJ; Finkelstein J dissenting) dismissed Dovuro's appeal against the finding of negligence[31]. Dovuro subsequently moved the Full Court for reconsideration of its orders on the basis that a majority of the Court had agreed that the primary judge's conclusions concerning Dovuro's liability for negligence were in error. Cropmark sought leave to make further submissions and amend its defence to Dovuro's cross-claim. The Full Court dismissed both applications[32].

Reasoning of the primary judge

48 The approach taken by the primary judge was premised on a concession made by Dovuro at the conclusion of the trial in respect of a duty of care. The summary of Dovuro's submissions provided at the conclusion of the hearing stated, in part, that "Dovuro concedes it owed Wilkins a duty to take reasonable care". However, Wilcox J recorded the concession as follows[33]:

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30 *Wilkins v Dovuro Pty Ltd* (1999) 169 ALR 276 at 311.

31 *Dovuro Pty Ltd v Wilkins* (2000) 105 FCR 476.

32 *Dovuro Pty Ltd v Wilkins (No 2)* (2001) 107 FCR 104.

33 (1999) 169 ALR 276 at 302.

> "Dovuro accepts it was under a duty of care *to those to whom it supplied the seed* in relation to its nature and the quality; the question is whether it breached that duty." (emphasis added)

That much may be accepted so long as it is remembered that Dovuro resold its seed to local suppliers, such as Elders, and had no direct commercial relationship with the first respondents. Later in his Honour's reasons, the concession is recorded again, this time consistently with Dovuro's summary of submissions[34]:

> "As indicated, Dovuro concedes the existence of a duty of care to [the Wilkins] and group members; but it denies breach of duty."

Wilcox J, with apparent approval, also quoted par 16.2 of the Wilkins' written submissions as follows[35]:

> "Both [Dovuro and Cropmark] had a duty to the consumers of the seed to exercise reasonable care not to expose the consumers to a risk of injury of which they knew or ought to have known."

49 In the Full Court, Branson J framed the concession in terms that Dovuro "owed to Wilkins and the group members a duty to take reasonable care to avoid injury to them"[36], while Finkelstein J noted[37]:

> "At the commencement of his final speech at trial, counsel for Dovuro conceded that his client 'owed Wilkins a duty to take reasonable care', but denied that it had breached the requisite standard of care. The content of the conceded duty was not described. However, having regard to the allegations made against Dovuro (both in pleadings and orally) it must be taken to have been accepted that Dovuro owed the Wilkins' interests and other purchasers of its canola seed, a duty to exercise reasonable care to avoid a risk of injury such as would be owed by a manufacturer or a distributor of a defective product who knew or ought reasonably to have known that his products might cause injury."

It is apparent that both the primary judge and the Full Court proceeded on the assumption that Dovuro had conceded that it owed a duty to the consumers of the

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34 (1999) 169 ALR 276 at 305.

35 (1999) 169 ALR 276 at 304.

36 (2000) 105 FCR 476 at 487.

37 (2000) 105 FCR 476 at 498.

seed to exercise reasonable care not to expose those consumers to a risk of injury of which Dovuro knew or ought to have known.

50 The existence of a concession in respect of a duty of care enabled Wilcox J to proceed directly to a consideration of whether Dovuro had breached that duty. This appeal primarily turns on the cogency of the primary judge's reasoning in that respect. If the finding of breach cannot be upheld, it will be unnecessary to rule on the submissions respecting the concession and the existence of the duty of care.

The federal and State regulatory regimes

51 Before turning further to consider the reasoning of the primary judge, it is convenient to consider the statutory regimes within which the importation of Karoo canola seed by Dovuro took place. Necessary approvals for importation were given by the federal and State authorities.

52 The importation of plant matter into Australia is the subject of a comprehensive system of federal and State regulation. This is usefully summarised in an appendix to the judgment of Gyles J in the Full Court[38]. At a federal level, the *Customs Act* 1901 (Cth) ("the Customs Act"), the Customs (Prohibited Imports) Regulations 1956 (Cth), the *Quarantine Act* 1908 (Cth) ("the Quarantine Act") and the Quarantine (Plants) Regulations 1935 (Cth) (repealed by the Quarantine Regulations 2000 (Cth)) play a significant role. Of particular relevance is s 13(1)(f) of the Quarantine Act, which provides that the Governor-General may, by proclamation, prohibit the importation into Australia of any plants, or parts of plants[39]. ("Plant" is, itself, defined in s 5 to include "any part of a plant" and would presumably include plant seeds.) At the relevant time, s 67(1) of the Quarantine Act stated:

> "No person shall knowingly import, or bring into any port or place in Australia … any … plant, or any part of any … plant, in contravention of this Act, the regulations or any proclamation under this Act."

53 In addition, s 51 of the Quarantine Act provided that, until released from quarantine, no plant imported into Australia might be moved, dealt with, or interfered with, except by authority and in accordance with that Act and its regulations[40]. Section 53(1) empowered quarantine officers to examine any plant

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38 (2000) 105 FCR 476 at 543-546.

39 See also s 50 of the Customs Act, prior to the section's repeal by the *Quarantine Amendment Act* 1999 (Cth).

40 Section 51 was repealed by the *Quarantine Amendment Act* 1999 (Cth).

imported into Australia which had not been released from quarantine. That power of inspection also applied to imported plants that had been released from quarantine[41]. Finally, a quarantine officer was empowered to order into quarantine any imported plant which, in his or her opinion, was, or was likely to be, infected with a disease affecting animals or plants, or which contained, or appeared to contain, any insect, pest or disease agent[42]. "Pest" was defined to include "weed pest"[43].

54 Several points may be noted in respect of the application of the above legislation to the present proceedings. First, it is common ground that at no stage during the importation of Karoo canola seed by Dovuro were the seeds of cleavers, redshank or field madder prohibited from importation into Australia pursuant to any Commonwealth statute or regulation. On the contrary, the evidence indicated that cleavers, redshank and field madder were common in the eastern States of Australia, and were also present in certain sections of Western Australia. Secondly, once Dovuro's Karoo canola seed arrived in Western Australia, it was held in quarantine pursuant to the provisions of the Quarantine Act. While in quarantine, samples of the seed were taken by the Australian Quarantine and Inspection Service for analysis. The seed was subsequently released from quarantine on completion of tests carried out in accordance with the International Seed Testing Analysis rules. Thirdly, although the Quarantine (Plants) Regulations in force at the time of the importation of the Karoo canola seed by Dovuro also made detailed provision for seeds, including a prohibition on the importation of "seed" into Australia unless the importer was the holder of a permit issued by the Director of Quarantine[44], the definition of seed contained in the Regulations did not include the seed of cleavers, redshank or field madder. The absence of the weed seeds from the list of seeds prohibited from importation without a permit is a further indication that cleavers, redshank and field madder were not considered a material threat to the Australian agricultural industry. The importation of these three seeds could therefore be carried out without a permit, although they would otherwise be subject to the provisions of the Quarantine Act.

55 A further system of regulation is imposed in Western Australia. Of particular significance are the *Seeds Act* 1981 (WA) ("the Seeds Act") and the *Agriculture and Related Resources Protection Act* 1976 (WA) ("the Protection Act"). Part III of the Seeds Act is headed "Unsaleable seed". Section 12(1)

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41 s 54(1).

42 s 55A.

43 s 5.

44 Quarantine (Plants) Regulations, reg 21.F.(2).

provides that the Minister may declare seed to be "prohibited seed" for the purposes of that Act. Section 13 prohibits a person from selling a seed lot containing "any prohibited seed". A concomitant power is enjoyed by the Agriculture Protection Board of Western Australia, which may declare plants to be "declared plants", with the result that such plants may not be introduced into the State[45].

56 Section 26(1)(b) of the Seeds Act empowers the Governor of Western Australia to make regulations "prescribing seed to be weed seed". Weed seed may still be sold and imported into Western Australia. However, one consequence of such a prescription is that a person selling a seed lot containing 2 per cent or more of a particular seed must attach a label to the seed package indicating, in respect of any weed seed contained in the seed lot, the name (or names) of the weed seed and the maximum proportion in which that weed seed is contained in the seed lot (expressed as a number of seeds per mass of the seed lot)[46].

57 During the period of time in which Dovuro imported the Karoo canola seed into Western Australia and resold it to local suppliers, neither cleavers, redshank nor field madder had been declared "prohibited seeds" by the Minister pursuant to s 12 of the Seeds Act. Nor had any of the three seeds been declared a "declared plant" by the Agriculture Protection Board pursuant to s 35 of the Protection Act. In addition, there was no evidence before the primary judge that cleavers, redshank or field madder had been declared "weed seeds" by the Governor of Western Australia[47]. For that reason, there is no suggestion that the labelling of Karoo canola seed bags sold to local suppliers by Dovuro contravened the Western Australian legislative requirements.

Breach of duty

58 For present purposes, it is unnecessary to consider whether Dovuro should be permitted now to withdraw the concession that, as ultimately formulated by the primary judge, it owed a duty to the consumers of its Karoo canola seed to exercise reasonable care not to expose those consumers to a risk of injury of which Dovuro knew or ought to have known. The question therefore becomes whether the primary judge erred in holding that Dovuro breached that duty.

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45 Protection Act, ss 35, 72.

46 ss 7(1), 7(2)(e).

47 cf Seeds Regulations 1982, Third Schedule.

59 In *Wyong Shire Council v Shirt*, Mason J emphasised[48]:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff."

That passage was relied upon by the majority in *Graham Barclay Oysters Pty Ltd v Ryan*[49] as a basis for allowing the appeal by the oyster growers.

60 A risk is real and foreseeable if it is not far-fetched or fanciful, even if it is extremely unlikely to occur[50]. The precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable; it is sufficient if the kind or type of injury was foreseeable, even if the extent of the injury was greater than expected[51]. Nevertheless, at bottom, the criterion remains one of "*reasonable* foreseeability"; liability is to be imposed for consequences which Dovuro, judged by the standard of the reasonable man, ought to have foreseen[52].

61 The critical passage in Wilcox J's reasons is as follows[53]:

> "It should have been readily evident, especially to a person trained in agricultural science, that it would be impossible for any regulatory authority to anticipate by declaration every exotic weed that might enter Western Australia and turn out to be a threat to Western Australian agriculture, if introduced to the wheatbelt. It should have been equally apparent that the concept of 'weed of agriculture' is necessarily limited to plants that have *already proved* a problem in the agricultural areas of the

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48 (1980) 146 CLR 40 at 47.

49 (2002) 77 ALJR 183 at 196 [58], 205 [106], 220 [190]-[191]; 194 ALR 337 at 354, 366, 387-388.

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

51 *Chapman v Hearse* (1961) 106 CLR 112 at 120-121. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 248-249 [185]-[186]; *Rosenberg v Percival* (2001) 205 CLR 434 at 455 [64].

52 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 249 [186]. See also *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 423.

53 (1999) 169 ALR 276 at 310-311.

> State; it could provide no guidance about plants, that *might* prove to be a problem if introduced into those areas. And the possibility of that occurring would have been obvious to anybody with even a superficial knowledge of Australian agriculture and agricultural history. Many of our worst agricultural and environmental scourges are plants and animals that are useful, ornamental or, at least, innocuous in their native habitat and had no reputation as pests before arriving in Australia." (original emphasis)

His Honour also accepted the balance of the Wilkins' contentions on breach, including par 16.10, which stated that[54]:

> "It was foreseeable the State government would take action to contain, evaluate and deal with the potential threat to the canola seed and oil market. The action taken by the government and the response by [the Wilkins] was what might reasonably be expected."

62 In their reasons, Hayne and Callinan JJ, with reference to the critical passage in the judgment of the primary judge, demonstrate the flawed reasoning involved in proceeding from the proposition that an introduced plant may prove to be a weed to the conclusion that, because cleavers, redshank and field madder were introduced, it should have reasonably been foreseeable to Dovuro that the authorities might treat them as weeds. Moreover, as their Honours also emphasise, a conclusion that Dovuro acted without reasonable care may be supported only if it were open to the primary judge to conclude that Dovuro should reasonably have foreseen that under the State legislation the three plants would or might be declared to be prohibited. Indeed, as McHugh J demonstrates, even that conclusion would not establish negligence on the part of Dovuro absent further findings, with reference to what Dovuro then knew or ought to have known, that the risk was sufficiently significant to require Dovuro to consider refraining from selling Karoo canola seed until it had contacted AgWest and received an answer, and that Dovuro acted unreasonably in failing to take that course.

63 Further, in the Full Court, Finkelstein J approached the matter in a fashion with which I agree. He said[55]:

> "The question the trial judge had to consider was whether it was foreseeable that the three weeds, cleaver, redshank and field madder, which were not known to be dangerous and which were not proven to be dangerous, would be declared to be prohibited weeds that were to be

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54 (1999) 169 ALR 276 at 305.

55 (2000) 105 FCR 476 at 506-507.

> eradicated in 1996 shortly after they were imported. In circumstances where no similar action had ever been taken by an Australian government, it is impossible to answer this question in the affirmative."

64 The primary judge erred in considering what would readily be apparent to an agricultural scientist when determining the standard of care owed to the Wilkins by a seed merchant, in this case, Dovuro. Nor was his Honour correct in relying on what would have been obvious to a person with a "superficial knowledge of Australian agriculture and agricultural history" given that, in the present circumstances, governmental experts in the field of agricultural protection had taken no steps to prohibit the importation or sale of the three seeds. The absence of any decision by the federal authorities to prohibit the sale or importation of the three species of seeds, notwithstanding that approximately 90 other species of weed seed were prohibited by the Commonwealth at the time Dovuro imported the impugned Karoo canola seed into Australia, is significant. It suggests that the presence of cleavers, redshank and field madder was not understood to be a material threat to Australian agriculture.

65 A similar point may be made in relation to the absence at the material time of any decision by the Western Australian Government to prohibit the seeds or declare them to be "weed seeds" pursuant to the legislation outlined earlier in these reasons. Moreover, if, as the primary judge suggested, it would be impossible for a regulatory authority to anticipate every exotic weed that might enter Western Australia and turn out to be a threat to Western Australian agriculture, it is difficult to justify the imposition of an equivalent standard of care on a seed merchant in the position of Dovuro. Gyles J noted, in a passage in his reasons with which I agree[56]:

> "[T]here was no evidence that the weeds in question, particularly cleavers, were or should have been known to have been of concern at the relevant time and place. The weeds were not revealed as being of concern under the comprehensive regulatory system. There was no evidence led by [the Wilkins] from any local agronomist or seed merchant to establish that there was concern about the weeds. No publicly available literature was tendered to establish that fact. No textbook was tendered. There was no bulletin from AgWest or any other Department of Agriculture warning of the risk."

"Admissions"

66 In joining in the order dismissing Dovuro's appeal before the Full Court, notwithstanding his favourable conclusions on other issues, Gyles J placed

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56 (2000) 105 FCR 476 at 536.

particular reliance on the existence of correspondence from Dovuro. This, in his Honour's view, amounted to an admission by Dovuro that it had breached the duty of care which it owed to the Wilkins[57]. The primary judge placed similar weight on the correspondence in holding Dovuro liable for negligence at first instance[58]. The first respondents submit that this Court should also give significant weight to that correspondence.

67 For present purposes, it is sufficient to refer to two pieces of correspondence said to contain "admissions" of liability. The first is a media release entitled "Weed Seeds in Karoo" which was issued by Mr William Tapp, the General Manager of Dovuro, in July 1996. The media release read, in part, as follows:

> "Weed seeds of *Galium aparine* (cleavers) and *Polygonum persicaria* (redshank), have been detected in certified seed of the triazine-resistant canola cultivar 'Karoo' imported from New Zealand in April/May 1996 … *We apologise to canola growers and industry personnel. This situation should not have occurred* but due to strong interest in Karoo the unusual step was made of undertaking contract seed production in New Zealand to assist rapid multiplication". (emphasis added)

The second piece of correspondence is a letter from Mr Eamonn Rath, Dovuro's Western Region Manager, to Mr K Norman of the Jerramungup Extension and Advisory Commission, a local grower based organisation. A copy of the letter appears to have also been sent to a number of officials in AgWest. The letter included a section entitled "Dovuro's role", in which the following was noted:

> "I'd like to stress at this stage that *this does not excuse Dovuro in failing in its duty of care to inform growers as to the presence of these weed seeds. We got it wrong in this case*, and new varieties will not be brought on the market again in this manner." (emphasis added)

68 What did these statements admit? A statement on behalf of a corporation that it has "failed in its duty of care" involves the proposition that the facts demonstrate that the corporation failed a standard fixed by law. In *Grey v Australian Motorists & General Insurance Co Pty Ltd*[59], Mahoney JA referred to *Allen v Roughley*[60] for the proposition that a defendant may admit another person

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57 (2000) 105 FCR 476 at 539-540.

58 (1999) 169 ALR 276 at 285-287, 311.

59 [1976] 1 NSWLR 669 at 684.

60 (1955) 94 CLR 98.

has a good title to particular land. Thereafter, in *Jones v Sutherland Shire Council*[61], Mahoney JA observed that "[a] party to litigation may make an admission, not only of a fact, but also a conclusion from facts, *a mixture of fact and law, or even of law*" (emphasis added). The emphasised portions of that statement state the proposition too widely.

69 Admissions on the pleadings are one thing. Modern rules of court commonly provide that a party may, by its pleading, raise any point of law[62]. That which is so raised may be admitted. But that is not the present case. Certainly a party may admit the facts from which a conclusion of law may then be drawn. The detailed statement made in support of the primary application under the *Real Property Act* 1900 (NSW) by the defendant in *Allen v Roughley*[63], as to the history of the occupation of the land in question, may be an example. The real significance of the admission made in *Allen v Roughley* was, as Kitto J pointed out[64], that, following *Lustre Hosiery Ltd v York*[65], it was properly received in evidence notwithstanding that the defendant had no direct knowledge of all of the facts and had relied upon the statements of others.

70 Different questions arise where, as here, the suggested admission includes a conclusion which depends upon the application of a legal standard. In *Grey*[66], Glass JA considered an admission sought from a witness to the effect that he had assigned certain choses in action at law or in equity. His Honour said[67]:

> "By extorting from a party an admission that he was negligent, or that he was not provoked, or that his grandfather possessed testamentary capacity, there is added to the record something which is, not merely of dubious value, but by definition valueless, owing to the witness' unfamiliarity with the standard governing his answer."

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61 [1979] 2 NSWLR 206 at 231. See also *Pitcher v Langford* (1991) 23 NSWLR 142 at 147, 160.

62 For example, Federal Court Rules, O 11 r 9.

63 (1955) 94 CLR 98 at 141-142.

64 (1955) 94 CLR 98 at 142.

65 (1935) 54 CLR 134 at 138-139.

66 [1976] 1 NSWLR 669 at 675.

67 [1976] 1 NSWLR 669 at 676.

71 That reasoning, which in terms applies to the suggested "admission" by Dovuro, has been applied in cases arising under the Act. In *Eastern Express Pty Ltd v General Newspapers Pty Ltd*[68], a question arose as to whether certain statements amounted to an express admission of a proscribed purpose for the application of s 46 of the Act. Lockhart and Gummow JJ said on that subject[69]:

> "As a general proposition, an informal admission as to a matter of fact, by words or conduct which is made by a party or a privy, is admissible evidence against that party of the truth of its contents. The complexity of the construction given in the case law to the ordinary words of s 46 must mean, at the very least, that in this area what is tendered as an express admission is likely to be a statement as to matters of mixed law and fact, rather than simply of fact. In the case of alleged contraventions of s 52 of the Act, admissions by a trader in the course of cross-examination that his conduct was 'misleading' and 'deceptive' cannot be relied upon to usurp the task of the court to judge the legal quality of that conduct[70].
>
> It is unsettled whether admissions may be made of matters of mixed law and fact[71]. In [*Grey*], Glass JA described various decisions accepting admissions by a party as to questions of mixed law and fact as having been given with no regard to principle. In his view, when a standard, measure or capacity is fixed by law, a party cannot be asked to admit a conclusion depending upon the legal standard; however, the witness may be asked to admit facts from which the conclusion of law may be drawn by the court.
>
> In our view, that is how the pieces of evidence in issue here should be considered, the question being whether the statements provide material from which his Honour should have drawn a conclusion as to predatory purpose for the purposes of s 46."

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68 (1992) 35 FCR 43.

69 (1992) 35 FCR 43 at 68. See also *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 13 [16], 14 [21], 19-20 [36].

70 See *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477 at 487-488, 504.

71 See *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669 at 675, 684-685; *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 at 231.

The so-called "admissions" of officers of Dovuro as outlined in the passages quoted above provide no basis for a finding of negligence in this case.

Orders

72 The appeal should be allowed with costs and consequential orders made as proposed by Hayne and Callinan JJ.

73 KIRBY J. This is another appeal in which, following a lengthy trial and a disposition upon what was substantially a contest of fact, this Court is invited to substitute its own factual evaluation for that reached by the primary judge, with the many advantages that he enjoyed[72]. Once again plaintiffs, successful at first instance, who have held a favourable decision in the intermediate court, lose in this Court because a different view is taken about the proof of the negligence of the defendant[73].

74 In this appeal, the transcript and materials are contained in six appeal books. The primary judge in the Federal Court of Australia (Wilcox J) saw many witnesses give their evidence. He had the responsibility of considering a mass of material, oral and written, concerning a somewhat complicated problem of fact. In earlier times, such a problem would have been decided finally by a jury. Now, this Court, working within the constraints of a final court[74], finds error in the primary judge's conclusion that, on the facts, a breach of a duty of care was proved.

75 The appeal presents an added twist. At trial, the appellant conceded that it was under a duty of care to persons in the position of the plaintiffs. In this Court (as it had attempted unsuccessfully to do in the Full Court[75]), the appellant sought to withdraw that concession. It sought to support a ground of appeal that it did *not* owe a duty of care to the plaintiffs after all. And there is a second twist, arising in this Court for the first time. Here it is suggested that the declaratory order, made by the primary judge, was invalid as a "form of order not known to the law"[76]. This is said although no ground of appeal has challenged the validity of the declarations in question.

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72 cf *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 77 ALJR 398 at 415 [85] per McHugh J (diss), 416-417 [95] of my own reasons (diss); 194 ALR 485 at 507-508, 510.

73 *Agar v Hyde* (2000) 201 CLR 552 at 584 [92], 601 [128]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 268-269 [36], 270 [42], 292-293 [113], 302 [147]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 at 205 [106], 221-222 [194]-[202]; 194 ALR 337 at 366, 388-391; see also *Suvaal v Cessnock City Council* [2003] HCA 41 at [71]-[76]; *Whisprun Pty Ltd v Dixon* [2003] HCA 48; cf Luntz, "Torts Turnaround Downunder", (2001) 1 *Oxford University Commonwealth Law Journal* 95.

74 cf *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330 [90]-[91]; 160 ALR 588 at 619-620.

75 *Dovuro Pty Ltd v Wilkins* (2000) 105 FCR 476.

76 Reasons of Hayne and Callinan JJ ("joint reasons") at [143] with the concurrence of Heydon J at [177].

76 I approach the appeal with a proper sense of modesty about the capacity of a Court like this, in such a substantial contest, to place itself fairly, in substance, into the position of a primary judge: comprehending, and giving effect to, the entirety of the evidence. The need for a measure of restraint also derives from a perception of the proper, and restricted, role of this Court in such matters, limited as it is, in a true appeal, to the correction of error[77].

The facts

77 The general nature of the claims brought at trial by the Wilkins (the first respondents) against Dovuro Pty Ltd (the appellant) and Crop Marketing New Zealand Society Ltd (In Liq) (the second respondent) are described in other reasons[78]. I shall use the same terms to identify the parties, the variety of the canola seed ("Karoo") imported into Australia and supplied by Dovuro to the Wilkins, as well as the three forms of weed with which the Karoo seed in question was affected (namely "redshank", "field madder" and "cleavers"). Unfortunately, in the way the appeal developed (substantially as a retrial in this Court based on the record) it will be necessary for me to refer to more of the evidence and to findings of the primary judge not contained in other reasons.

78 At its highest level of generality (leaving aside claims brought which were rejected at trial and not pursued[79]), the outline of the case on which the Wilkins succeeded was relatively simple. The Wilkins purchased Karoo seed from a local seed merchant which Dovuro imported into Australia from New Zealand. Dovuro did not actually manufacture or sell the seed, but as other members of this Court point out, it "occupied a position in the chain of distribution … which was not significantly different from that of a manufacturer"[80]. The seed was labelled "minimum 99% purity". The Wilkins purchased the seed without knowledge that the Karoo included elements of the three weed varieties that were later discovered amongst the Karoo seed. Dovuro, on the other hand, knew of the presence of those weeds in the seed. It failed (1) to draw that presence to the

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77 *Eastman v The Queen* (2000) 203 CLR 1 at 34-37 [108]-[115]; *Fox v Percy* (2003) 77 ALJR 989 at 995-996 [32]; 197 ALR 201 at 210.

78 Reasons of Gummow J at [42]-[57]; joint reasons at [132]-[149].

79 Such as the claim of the Wilkins against Dovuro based on an alleged breach of the *Trade Practices Act* 1974 (Cth), s 52 (see *Wilkins v Dovuro Pty Ltd* (1999) 169 ALR 276 at 311-313 [113]-[118]); the claim by the Wilkins against Cropmark (see (1999) 169 ALR 276 at 313-317 [119]-[128]) and the cross-claim of Dovuro against Cropmark (see (1999) 169 ALR 276 at 317-321 [129]-[153]).

80 Joint reasons at [155]; see also reasons of McHugh J at [29].

specific attention of the agricultural authorities of Western Australia and, before importing it, to consult them about any problems which it might present in that State or elsewhere in Australia; and (2) to bring the presence of weeds to the specific notice of the growers who were intended to (and, like the Wilkins, did) purchase and sow the Karoo seed.

79 At the time of the sale of the Karoo to the Wilkins, the three weeds were not "declared", in effect as prohibited weeds, in Western Australia. Later, however, when their presence in the Karoo seed was discovered, the Western Australian authorities moved promptly to have them prohibited. They recommended that all growers who had acquired Karoo seed take action to eradicate the weeds. This course, followed by the Wilkins, necessarily subjected them to costs and expenses. It was to recover damages, relevantly for negligence, to reimburse them for such costs and losses, that the Wilkins brought these proceedings.

80 Dovuro had acquired the Karoo seed in New Zealand from Cropmark which had informed Dovuro of the presence of the weed varieties in the seed. Such weeds were commonly found in New Zealand. They are not prohibited there. Central to the Wilkins' case was that Dovuro had simply relied on the absence of legal restrictions on the importation of seed containing the weeds into (relevantly) Western Australia and for not taking steps to notify the presence of the weeds to those who were foreseeably concerned.

81 Stated in this way, the claim by the Wilkins against Dovuro seems straight-forward enough. In some ways, it resonates with the plaintiffs' claims in *Donoghue v Stevenson*[81] and in *Perre v Apand Pty Ltd*[82]. Growers procuring seed from importers are in many ways as reliant upon the importers, who monitor and control the process of growing and importing the seed, as Mrs Donoghue was upon those who bottled and distributed the ginger beer that she purchased in Paisley, to ensure that it did not contain harmful extraneous matter or, if it did, that the presence of such matter was drawn to notice and reasonable steps taken to prevent the ultimate consumer from being harmed as a result.

82 As will appear, the finding of the primary judge in favour of the Wilkins was even less surprising when two additional considerations are taken into account. The first is that, in published materials, authorised by and known to Dovuro, as well as in the formal admission made during the trial, it was accepted that Dovuro owed a duty of care to the Wilkins to ensure that they were not harmed by the nature and quality of the Karoo seed that Dovuro supplied to

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81 [1932] AC 562 at 599.

82 (1999) 198 CLR 180.

them[83]. As well, once the presence of the weeds in the seed became known in Western Australia, and occasioned the urgent retaliatory action that was taken by the State authorities, Dovuro, in a number of communications, in effect apologised to growers for its want of care in introducing the seeds into that State[84]. It acknowledged that what had happened "should not have occurred". Effectively, it blamed the supply of the weed-contaminated Karoo seed and the way its importation had happened on the intense market pressure for Karoo at the time[85].

83 It will be necessary to refer to further facts later. But the foregoing is sufficient to indicate that the primary judge's finding at trial was unremarkable. It was largely factual. It was of a kind that would, of itself, rarely engage the attention of this Court. Essentially, it involved nothing more than the application to largely uncontested facts of the most basic principle of negligence law.

The issues

84 In the manner in which the appeal was argued, the following issues arise for decision:

(1) Should Dovuro be permitted to withdraw the concession made on its behalf at trial that it owed a duty of care to the Wilkins?

(2) If so, is this Court, for the first time, in a position to, and should it, determine whether Dovuro owed the Wilkins a duty of care, and, if so, did Dovuro owe such a duty of care to the Wilkins?

(3) If Dovuro did owe a duty of care to the Wilkins (or if that question will not be reopened by this Court and Dovuro is held to its concession at trial) did the primary judge err in finding that Dovuro was in breach of that duty causing damage to the Wilkins?

(4) If not, did the primary judge err in law in the order that he made in the form of interlocutory declarations?

(5) In light of the answers to the foregoing, did the Full Court err in ordering that Dovuro pay the costs of the Wilkins?

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83 (1999) 169 ALR 276 at 302 [90], 305 [97].

84 (1999) 169 ALR 276 at 285-286 [37].

85 (1999) 169 ALR 276 at 285-286 [37] quoting a media release issued by Dovuro.

Withdrawal of a concession made at trial

85 *Applicable principles*: In this Court Dovuro sought to withdraw the concession made at trial that it owed the Wilkins a duty of care for the purpose of the law of negligence. It treated the matter as one that required the consent of this Court to effect the withdrawal. Earlier, it had failed, by majority, to secure the agreement of the Full Court to the course that it proposed[86]. What are the applicable principles?

86 To some extent, like other branches of procedural law[87], the principles appear to have become somewhat more flexible in recent times. This development reflects a contemporary impatience with the rigid application of strict rules of pleading and procedure[88]. To some extent, in Australia, it may be influenced by an implication from the Constitution that, whilst matters are within the integrated Judicature of the nation, at whatever level, they must be dealt with justly and in accordance with law[89]. Coinciding with these considerations is the growth of case management and a greater appreciation of the injustices suffered by other litigants when trials are not conducted efficiently[90]. The determination of applications to reopen concessions made at trial must resolve these and similar competing factors. It must do so in the context of the particular circumstances in which the application arises.

87 In an appeal, an obvious restriction on permitting the withdrawal of a concession made at trial occurs where, by reason of the concession, the evidence has taken a course which it otherwise might not have followed. Where a party would be prejudiced by acting at trial on the faith of a concession formally made by another party, withdrawal will not normally be allowed[91]. In *H Clark (Doncaster) Ltd v Wilkinson*[92], Lord Denning MR explained this rule as based on

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86 (2000) 105 FCR 476 at 487 [38], 498-499 [85]-[86], 527 [180]-[181].

87 eg the deference given to fact-finding by a trial judge: *State Rail* (1999) 73 ALJR 306 at 327-330 [87]-[88]; 160 ALR 588 at 615-618.

88 *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539-543 [66].

89 cf *Gipp v The Queen* (1998) 194 CLR 106 at 153-155 [135]-[138].

90 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 167-172.

91 *The Clifton, Kelly v Bushby* (1835) 3 Knapp 375 [12 ER 695].

92 [1965] Ch 694 at 703 (CA).

a principle of estoppel. Similar reasoning has informed the approach of the House of Lords to such questions[93].

88 In this Court, a like principle has been insisted upon, although it is usually explained in terms of the rules of procedural fairness or natural justice[94]. If a concession withdrew from the field of litigation an issue that might have been affected by evidence, it would normally be unjust (unless repaired by relevant admissions or concessions) to permit a reopening of the issue on appeal.

89 Such cases apart, there remains in every contested application a decision to be made. On the one hand, if all of the facts of possible relevance to the issue have been adduced and the question is a pure question of law or of legal construction, the interests of justice may require that a party be allowed to withdraw a concession and to make submissions on a point of law or construction abandoned below[95]. Such an approach is hardly surprising. A court is normally obliged to apply the law. Parties do not have the power, by their concessions or agreement, to require a court to do otherwise[96]. Sometimes, however, by the course followed at trial, a party may put itself beyond rescue. In such a case, although the law remains as it is, that party may be disabled from invoking it[97].

90 Even where the issue is one of pure law or of legal construction and its consideration involves no procedural unfairness, a court may nonetheless refuse to allow a party to reopen an issue earlier conceded. The court must weigh the public interest in the finality of litigation; the desirability that appellate courts should normally have judicial findings and reasoning before considering the point; and the need to uphold the efficiency and authority of the judicial process[98].

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93 *Langdale v Danby* [1982] 1 WLR 1123 at 1135; [1982] 3 All ER 129 at 140.

94 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Coulton v Holcombe* (1986) 162 CLR 1 at 6-8; *Banque Commerciale SA, en Liq v Akhil Holdings Ltd* (1990) 169 CLR 279 at 283-284, 288, 290, 304-306.

95 *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545; *Saffron v Societe Miniere Cafrika* (1958) 100 CLR 231 at 240; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 241; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319.

96 *Roberts v Bass* (2002) 77 ALJR 292 at 320-321 [143]-[144]; 194 ALR 161 at 199.

97 cf *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 69.

98 *Council of the Borough of Randwick v Australian Cities Investment Corporation* [1893] AC 322 at 325 (PC); *North Staffordshire Railway Co v Edge* [1920] AC 254

(Footnote continues on next page)

91 It has been suggested that some of the earlier decisions, amenable to permitting issues of law and construction to be argued absent prejudice, represent "words … uttered in another age and in other circumstances"[99]. The more urgent contemporary demands for case management and efficiency indeed suggest the need to reconsider some of the earlier dicta[100]. On the other hand, such considerations do not override the duty of Australian courts to the law and to the determination of justice as between the parties according to law[101]. Especially in a lengthy and complex trial, it is easy enough for a point of law or construction to be overlooked or mistaken. Because judicial decisions are not mechanical but affect the interests of parties (and often express the law in ways important for other or later litigants) cases continue to arise where concessions at trial are seen to have been erroneous, unnecessary or unwise. So long as the appellate court can safely decide the point, taking into account the reasons that exist for denying it consideration, this Court would rarely interfere so as to require a different conclusion[102].

92 *The Full Court's decision*: The Full Court divided on Dovuro's application to revive the contention, as originally pleaded, that it owed no duty of care to the Wilkins. A majority (Branson and Finkelstein JJ) refused to permit the withdrawal of the concession. However, Gyles J dissented on this point[103]. From the reasons of the judges in the Full Court and the argument in this Court, it emerges that the substantive basis for permitting a withdrawal of the concession and the reargument of the duty of care was:

(a) that the concession was only made at trial at the commencement of the final address by counsel for Dovuro and then in very general terms[104];

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at 263-264; *United Marketing Co v Kara* [1963] 1 WLR 523 at 524; [1963] 2 All ER 553 at 555 (PC) cited by McHugh JA in *Holcombe v Coulton* (1988) 17 NSWLR 71 at 78.

99 *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738 at 746.

100 *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645-646; cf *Dovuro* (2000) 105 FCR 476 at 487-488 [38].

101 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 172.

102 Although it did so in *Coulton v Holcombe* (1986) 162 CLR 1 on the basis that the determination of the point would involve virtually a new trial of an issue different from that earlier litigated.

103 (2000) 105 FCR 476 at 487 [38], 498-499 [85]-[86], 508 [118].

104 (2000) 105 FCR 476 at 498 [85].

(b) that, because of the denial that a duty of care was owed, set out in the pleadings, all relevant evidence for the Wilkins on this issue must have been adduced by the time the concession was announced;

(c) that the question of the existence of a duty involved the application by the judge to the facts of the applicable principles of law and little time was lost or saved by the course taken at trial;

(d) that no hidden tactical or forensic motive for the course adopted by Dovuro at trial was proved or suggested; and

(e) that substantial issues of liability for economic loss to an allegedly indeterminate class and foreseeability of damage to that class arose on the evidence and warranted elucidation according to law for this and future cases.

93 As against these considerations several others supported the conclusion that Dovuro should be held to the concession that its lawyers made at trial on its behalf. The concession was a deliberate act, inferentially made on express instructions. It was supported by the explicit statements of officers of Dovuro received in evidence acknowledging the duty. Once made, it meant that the primary judge did not, as he otherwise would have done, analyse the issues and make findings of fact relevant to the duty issue upon the mass of evidence adduced before him. The case was, as Branson J pointed out, typical of the large and complex actions now being brought to Australian courts, including appellate courts, where a well-resourced litigant should not, on appeal, have the opportunity to "re-run its case … adopting a changed strategy"[105].

94 *No error is shown*: The responses of judges to applications such as that made by Dovuro in the Full Court tend to vary in accordance with their evaluation of the particular case and of the reasons propounded for withdrawing the concession, and the significance and utility they see in the proposed point, if it were allowed. If I had been participating in the Full Court, I might well have agreed on this issue with Gyles J. However, this Court must approach this issue mindful of its own limited role[106]. Neither in the consideration of the applicable principles nor in the identification of the parties' arguments did the majority in the Full Court err. Nor is its decision so clearly erroneous as to indicate error. It

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105 (2000) 105 FCR 476 at 487 [38].

106 cf *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879-880 [65]; 179 ALR 321 at 336-338; *Fox v Percy* (2003) 77 ALJR 989 at 993-995 [20]-[31]; 197 ALR 201 at 206-210.

follows that, in my view, the concession at trial should stand in the terms in which it was given. So far as I am concerned the issue is not whether, in this Court, Dovuro should be permitted to resile from its concession at trial[107]. It is whether error has been shown on the part of the Full Court authorising this Court to substitute a different conclusion. I can reach my conclusion more comfortably because I agree with the joint reasons in this Court that my conclusion on this point does not deprive Dovuro of its main argument[108].

95 The issue of the reasonable foreseeability of the harm that occurred to the Wilkins remains open on the question of the alleged breach of duty. The contention of Dovuro that it could not owe a duty of care to avoid economic loss to the Wilkins on the basis that this would expose it to liability to an indeterminate class is unpersuasive[109]. As in *Perre v Apand Pty Ltd*[110], the class involved was not open-ended or indeterminate. It was readily identified as the growers whom Dovuro intended to receive, and who did receive, the bagged Karoo seed containing the weeds of which it was aware. Dovuro therefore fails on the first issue.

Existence of a duty of care was established

96 The foregoing conclusion establishes, by Dovuro's concession, that it owed the Wilkins a duty of care. Trial counsel for Dovuro should not be criticised for making that concession. Whilst I accept that this Court has not yet provided a clear and simple formula to be applied to ascertain the existence, or absence, of a duty of care[111] (nor even a simple methodology that commands general assent[112]) I agree with Branson J in the Full Court[113] that it would be

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107 Reasons of Gleeson CJ at [3]; cf reasons of McHugh J at [29].

108 Joint reasons at [154].

109 cf (2000) 105 FCR 476 at 531 [193].

110 (1999) 198 CLR 180 at 289-291 [298]-[302].

111 Such as the tests of "proximity" and "reliance" formerly propounded: *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340; *Gala v Preston* (1991) 172 CLR 243; *Bryan v Maloney* (1995) 182 CLR 609.

112 Such as the three-fold test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618 per Lord Bridge of Harwich: see eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 281-286 [274]-[288]. See now *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49] and *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 at 226-227 [229], 227-229 [234]-[238]; 194 ALR 337 at 397-400.

113 (2000) 105 FCR 476 at 485 [26].

difficult to reconcile a contrary conclusion about the existence of a duty of care in this case with this Court's holding in *Perre v Apand Pty Ltd.*

97 In *Romeo v Conservation Commission (NT)*[114], I drew attention to the need to approach disputes in negligence cases by considering, in turn, a number of standard questions. These included whether a duty of care was established; if so, "the measure or scope of that duty in the circumstances"; and whether it was proved that the defendant was in breach of the duty so defined.

98 Inevitably, the questions, dissected in this way, merge into one another. The analytical divisions and subordinate questions are all designed to bring the mind of the decision-maker to the ultimate issue presented by the many cases that have followed *Donoghue v Stevenson*[115]. They address attention to whether, in all the circumstances of the case, it is reasonable to impose a legal duty of care of the postulated character upon the alleged tortfeasor[116].

99 In the search for consistent decision-making, lawyers endeavour to segregate the concepts of duty, scope and breach. Yet in truth they represent, ultimately, component parts of a unified notion that must be constantly brought back to the touchstone of reasonableness[117]. The concession of the existence of a duty of care in the present case was made without much clarity as to the scope of the duty being conceded. Obviously, the scope of the duty has significance for the related question of breach to which I now turn.

Breach of duty was correctly found

100 *Applicable legal principles*: A majority of this Court has concluded that the Wilkins' claim against Dovuro fails on the issue of breach[118]. I disagree. The majority decide that the events that unfolded as a consequence of Dovuro's importation of the Karoo canola seed containing weed seed, were not reasonably

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114 (1998) 192 CLR 431 at 475-476 [115].

115 [1932] AC 562.

116 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 at 230 [244]; 194 ALR 337 at 402 citing *Tame v New South Wales* (2002) 76 ALJR 1348 at 1380 [185]; 191 ALR 449 at 493. See also *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1 at 8; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198] per Gummow J.

117 *Tame* (2002) 76 ALJR 1348 at 1382 [195], 1409 [331]; 191 ALR 449 at 496, 533-534.

118 Reasons of McHugh J at [39]; reasons of Gummow J at [62]; joint reasons at [174].

foreseeable. Specifically, it was not foreseeable that the agricultural authorities of Western Australia would declare the three weed varieties to be prohibited plants, thereby imposing burdens on the Wilkins and growers in a like position to eradicate the weeds from the canola crop; to isolate the areas where the seed had been sown; and to limit resowing of the land and access of animals to it with consequent cost and loss to the growers concerned.

101 Two basic points differentiate the approach that I would take from that favoured by the majority. First, it follows from what I have already said that it is impossible to decide negligence questions without having substantial familiarity with the trial evidence, and all of it. In the present appeal this means familiarity with the six volumes of appeal papers presented to this Court. Conclusions about the reasonableness or otherwise of imposing a *duty* of care of a given scope on Dovuro and whether Dovuro was in *breach* of the duty so specified, are not safely made without a thorough understanding of those facts. A primary judge, sitting through and receiving all of the evidence, is obliged to consider that material in sequence as it is adduced. In the nature of later consideration of such evidence (but especially in this Court) appellate judges are taken in argument to selected passages only. Normally, those extracts constitute the passages deemed specially favourable to the parties who call them to notice.

102 Of nearly 1400 pages of the record of the proceedings, this Court was taken during oral argument to but 21. The burdens on appellate judges are such as to limit their ability to absorb, and reflect upon, all of the remaining pages[119]. In the nature of things, the reasons of primary judges can only explain some of the main considerations that have led them to their judgment[120]. It follows that appellate judges cannot easily substitute for primary judges, at least in trials with long and complex evidence. I have always thought that it was in this respect that primary judges enjoy advantages over appellate judges in decisions on the facts rather than in the oft repeated references to the assessment of witness credibility[121].

103 The second reason that informs my different conclusion concerns a point of law. As I read the majority reasons in this Court, they appear to suggest that it was necessary, if the Wilkins were to succeed, for them to demonstrate that it

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119 *State Rail* (1999) 73 ALJR 306 at 330-331 [89]-[92]; 160 ALR 588 at 619-620.

120 *Biogen Inc v Medeva Plc* [1997] RPC 1 at 45 per Lord Hoffmann; *Aktiebolaget Hässle* (2002) 77 ALJR 398 at 416 [90], 417 [97]; 194 ALR 485 at 509, 510.

121 *Fox v Percy* (2003) 77 ALJR 989 at 993-994 [23], 995 [30]-[31]; 197 ALR 201 at 207, 209-210; cf *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210.

was reasonably foreseeable that the particular circumstances that caused their losses would probably occur. Thus, much is made of the difficulty that the Wilkins were said to face of establishing (against a background in which the three weed varieties were not prohibited plants in Western Australia) that the State authorities would probably react as they did. It was suggested that the reaction of the State authorities was not reasonably foreseeable because of the unpredictability of the pressures (scientific, financial and political) imposed on them, the response of government and officials to such pressures, the inability of outsiders to know what the response would be and the unlikelihood that the authorities would have anticipated their reaction if earlier consulted about the presence of the weeds[122].

104 *The undemanding test*: Perhaps the law on this subject should be as these questions suggest. It has sometimes been argued that the decision of the Privy Council in *The Wagon Mound [No 2]*[123] resulted in a wrong turning of the law of negligence. Instead of asking what was "liable to happen" in the sense of "not unlikely to happen" (as some judges suggested[124]), their Lordships in *Wagon Mound* embraced what has been described as the "undemanding" test of reasonable foreseeability[125]. By that test, it is sufficient that a reasonable person in the defendant's position would have foreseen that its conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff[126]. It remains, if this question is answered in the affirmative, to decide what a reasonable person would then have done by way of response to such risk. However, the risk is posed at a general level of *possibility* and in terms of *risk* of harm. It is not posed in terms of the *likelihood* of the particular harm that allegedly occurred. There is a reason for this. The duty which the law of negligence invokes is concerned with securing a response to a risk of harm generally. It does not demand exact prescience, so that the putative tortfeasor will be expected to see into the future and predict the specific way in which events will work out.

105 In *Wyong Shire Council v Shirt*[127], this Court acknowledged the strong arguments that existed for "a narrower version of the foreseeability doctrine as

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122 cf joint reasons at [170]-[171].

123 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617.

124 *Caterson v Commissioner of Railways* (1973) 128 CLR 99 at 101-102 per Barwick CJ.

125 *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641-642 per Glass JA.

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

127 (1980) 146 CLR 40.

applied to breach of duty"[128]. However, by majority, it there accepted as part of Australian law the unanimous approach of the Privy Council in *Wagon Mound*. That approach has been applied ever since in countless cases everywhere in this country. If it is to be changed, such change should occur either by legislation or following a fully considered attack on the binding rule in *Shirt* mounted before the Full Court of all Justices of this Court. Whilst the rule in *Shirt* stands, this Court should apply it.

106 In the instant case, the undemanding test of foreseeability did not require of Dovuro super-human capacities to predict the exact course of events leading to the precise damage that the Wilkins suffered. It was enough that it was reasonably foreseeable that Dovuro's introduction of the three weed seeds into Western Australia involved a *risk* of harm to the Wilkins that was possible, that is, neither far-fetched nor fanciful[129]. If this "undemanding" test was satisfied, the question was then posed as to whether Dovuro, acting reasonably, would have taken either or both of the precautions postulated by the Wilkins. I remind myself that these were to (1) check with the Western Australian agricultural authorities in advance about any possible problems or sensitivities of introducing weed varieties common in New Zealand but which might not be common in Western Australia; and (2) inform the purchasers of the Karoo seed of the possible presence of the weed seeds so that they could take their own precautions and make their own judgments.

107 Dovuro took neither of these steps. Its omissions were rightly and publicly regretted by its management and associates. Together with the other evidence, the statements help sustain the primary judge's conclusion that breach on the part of Dovuro of the conceded duty of care to the Wilkins had been established. No error has been shown to warrant this Court's substituting a different view of the facts for that reached by the primary judge who applied the correct legal principles. In particular, no such error is shown as would warrant this Court, with its more limited familiarity with all the facts, substituting a different factual conclusion for that reached by the primary judge with the advantages that he enjoyed in this particular case.

108 *Relevant factual findings*: The majority refer to omissions in the evidence called by the Wilkins to establish Dovuro's negligence. In particular, they place emphasis upon the passage in the reasons of Gyles J in the Full Court commenting upon gaps that his Honour perceived in the evidence that could have been called at trial[130]. This Court's role is not to provide an *ex post* advice on

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128 (1980) 146 CLR 40 at 47.

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

130 Reasons of McHugh J at [32]; reasons of Gummow J at [65].

evidence about the manner in which a party could have proved its case at trial. Armed with wisdom after events, magnified by the perspective of a third-level hearing, we can always think of something better. But the true issue is whether error has been shown in the way the matter was resolved by the Full Court. In that Court, notwithstanding the defects he described in the evidence, Gyles J, correctly in my view, accepted that there was sufficient evidence to sustain the primary judge's conclusion on breach. Rightly in this case, he deferred to that conclusion. To the other evidence to which Gyles J referred, must be added the additional evidence mentioned by Gleeson CJ in his reasons[131]. And in addition to that evidence, there was much other material to sustain the concurrent findings of negligence made in this case. This Court has said many times that it will rarely disturb such concurrent findings. Yet that is what the majority do in this case upon grounds that appear, with respect, to be less than compelling.

109 To appreciate the primary judge's decision, it is necessary to read his Honour's reasons as a whole. It is also necessary to consider again much of the evidence and the many documents received in the trial.

110 Amongst relevant findings made, and evidence referred to, are the following. Canola, grown in Australia, competes on a world market for use in the manufacture of margarine, edible oils and livestock fodder. Until now, canola grown in countries other than Australia has been plagued with weed problems. Canola grown in Western Australia has enjoyed a particular market advantage, specifically in Japan, because it has been known to be weed-free[132]. The presence of more than a tiny proportion of weed seeds in the subject canola seed would have made it unsuitable for the growers, like the Wilkins, to whom it was supplied[133]. Mr Rudolf Kudnig, Dovuro's technical manager, who instigated the growing of the seed in New Zealand, knew of the presence of noxious weeds in the seed[134]. It was open to inference that Mr Kudnig would have been aware that, because of climatic and other differentials, particular weeds that are tolerated in one place (such as New Zealand) might present special problems in another place that has previously been free of such weeds (such as Western Australia).

111 Mr William Tapp, general manager of Dovuro, was informed of the presence of the three weeds, found in a germination test conducted for Dovuro by

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131 Reasons of Gleeson CJ at [23] referring to (1999) 169 ALR 276 at 290 [50]-[51].

132 (1999) 169 ALR 276 at 278 [9].

133 (1999) 169 ALR 276 at 278-279 [10]-[11].

134 (1999) 169 ALR 276 at 280-281 [19]-[20].

Cropmark. He acknowledged that their presence "was of concern"[135]. Yet he allowed his concern to be allayed by the fact that the New Zealand Ministry of Agriculture and Fisheries had given a certificate for the seed and that the three weed varieties notified were not then prohibited (relevantly) in Western Australia. Mr Tapp accepted it would not have been difficult for him to contact the Western Australian authorities to ask them if the particular weed seeds could be a problem. He could have done so by telephone at any time and at trivial cost[136]. Although it is suggested in other reasons that the officials might not have been willing to foreshadow their reaction, we will never know what they would have done. They were never asked. Put simply, Mr Tapp did not pursue the matter. In effect, he equated the discharge of Dovuro's obligations to conforming to the regulatory regime then in force. This was so, although he had particular knowledge about the presence of the three identified weeds and viewed them as being "of concern". In other areas of the law of negligence this Court has emphatically rejected this form of conclusive reliance on the standards of the profession or trade in question[137]. There is no good reason in this field to go back to that erroneous doctrine. On the contrary, sound policy upholds a vigilant obligation of care on the part of seed importers into Australia. Our international trade and foreign earnings continue to depend heavily upon such rural enterprises. This is not a time to send a signal that grain importers like Dovuro can act imprudently and shed crocodile tears afterwards, escaping liability for negligence which greater care on its part would have avoided.

112 On the basis of the evidence, the primary judge concluded that "[h]ad officers of AgWest's seed section been alerted to the presence of [cleavers] species seeds, they would almost certainly have taken steps to prevent release of the canola to farmers, at least pending further investigation"[138]. That conclusion rested on correspondence within AgWest, produced at trial, relating to the seriousness with which cleavers was regarded in Western Australia. In my view, it is a finding that is impregnable from appellate correction and factually correct.

113 Not long after the Wilkins received the bagged seed, which was labelled "minimum 99% purity", they sowed it over 278 hectares. Immediately afterwards there was a report in a rural newspaper of an alert to AgWest because of the discovery by another farmer of "foreign" seeds in newly purchased Karoo canola seed[139]. It was this report, and the controversy that it occasioned, that led

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135 (1999) 169 ALR 276 at 282 [26].

136 (1999) 169 ALR 276 at 282-283 [27].

137 *Rogers v Whitaker* (1992) 175 CLR 479 at 489.

138 (1999) 169 ALR 276 at 283-284 [30].

139 (1999) 169 ALR 276 at 284 [34].

Mr Tapp to issue a media release headed "Weed Seeds in Karoo". As the statements made in this release are set out in the reasons of Gleeson CJ[140], I will not repeat them. But they represent telling evidence of public acknowledgment by the body with superior access to expert global awareness of weed problems (Dovuro) that it could have done more if it had not been pursuing its own immediate profits so urgently.

114 Soon after this statement, Mr Keith White, a person described as having "a major indirect interest in Dovuro" who worked closely with Mr Tapp[141], wrote a letter, distributed to a number of recipients, with copy to Mr Tapp, saying[142]:

> "[W]e recognise that the seed should not have been released and that field production may cause a problem for some canola growers. It is easy to make excuses but the short time-frame for the importation … in association with the strong demand (perhaps euphoria) from dealers and growers for the seed, may have resulted in inadequate quality control checks. Perhaps we almost tried too hard. … [W]e are confident that future canola planting seed will have all necessary control checks to ensure that only high quality seed is released. We also have abandoned any thoughts of future seed production in New Zealand or Tasmania over Summer due to difficulty of adequate control procedures."

115 Mr Tapp never disassociated himself, or Dovuro, from Mr White's sentiments. Once they became aware of the presence of the three weed seeds, both relevant authorities in Western Australia sprang into action. AgWest secured the agreement of the Minister to declare the three weeds under the *Plant Diseases Act* 1914 (WA) within category P1 (Prevention: plants which cannot be introduced or spread)[143]. Urgent steps were taken to advise growers on the procedures that they should follow to ensure against spread of the weed. The particular seriousness of introduction of cleavers was noted by AgWest because that weed had afflicted canola crops in Canada[144]. The climate of south-western Australia (where the Wilkins farm was located) was described as "well suited to this weed". Mr Eamonn Rath (Dovuro's then Western Australian field officer) sent letters of apology to Western Australian growers. This statement too is set

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140 Reasons of Gleeson CJ at [19].

141 (1999) 169 ALR 276 at 280 [18].

142 (1999) 169 ALR 276 at 287 [39].

143 (1999) 169 ALR 276 at 287 [40].

144 (1999) 169 ALR 276 at 289 [45].

out in the reasons of Gleeson CJ so I will not repeat it[145]. But to the passage quoted in those reasons may be added the concluding words, by way of reiteration[146]:

> "Dovuro would like again to apologise unreservedly to all growers who purchased New Zealand Karoo seed. Dovuro did not break any regulation, and all its actions were legal at the time."

Copies of such letters were sent to Mr Tapp. He took no action to disclaim their contents.

116 The various apologies, statements of regret and promises of improvement do not, as such, establish the claim of negligence against Dovuro. They were not "extorted" from that company by the Wilkins or other growers[147]. They were made defensively, ostensibly to show regret and out of self-interest. However, they are indisputably evidence relevant to the conclusion that the primary judge was called upon to make in harmony with all of the other testimony in the trial. They lent support to the Wilkins' allegation of breach of the duty of care. That was the way in which the primary judge treated them. He was correct to do so.

117 The primary judge also heard evidence from an expert in agricultural science, Dr Terence Piper, acting manager of the Weed Science Group. He described how, previously, cleavers had not been reported as a problem weed in Western Australia. Whilst all weeds were undesirable, some, he said, were "more undesirable than others". The three weeds introduced with the Karoo canola seed supplied to the Wilkins by Dovuro were described by Dr Piper as falling within the "most undesirable" status. They had "no redeeming features"[148]. It was clearly open to the primary judge to accept this testimony, as he did.

118 On the basis of the foregoing evidence, the primary judge found that, prior to the Dovuro importation in 1996, the three weeds were not present in Western Australia, except in a few isolated places, and that there was good reason for regarding the introduction of the weeds into the wheat belt region of the State as most undesirable. They were especially undesirable as they might affect canola

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145 Reasons of Gleeson CJ at [20].

146 (1999) 169 ALR 276 at 289-290 [48].

147 Reasons of Gummow J at [70] referring to *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669 at 676 per Glass JA.

148 (1999) 169 ALR 276 at 292 [57].

crops grown in the Western Australian broad acre farming industry[149]. After examination of the foregoing and much more evidence, the primary judge rejected the contention that AgWest had over-reacted to the discovery of the presence of the weed seeds[150]. Having regard to the reasons given, his conclusion on that issue is likewise immune from appellate disturbance.

119 Similarly, on the basis of much evidence, the primary judge concluded that the bag labelling of the Karoo seed, adopted by Dovuro, was not sufficient to satisfy that company's obligation towards the growers intended to buy and use the seed[151]. Had the growers at least been notified of what Dovuro knew from Cropmark in New Zealand about the presence of weeds "of concern", the judge concluded "[they] might have [taken] precautionary action, either of their own initiative or at the behest of a governmental authority"[152].

120 In the past, in other areas of the law of negligence, this Court has insisted upon duties of notification to those affected of known risks to which they are exposed by the actions of others with superior knowledge[153]. The greater the risk, the higher the duty to notify. Involved in this principle is a respect for the autonomy of individuals to make informed decisions concerning their own interests when placed in a position of risk by the acts or omissions of others. Where there is potentially a high risk, as in the supply of imported seed into a vulnerable domestic farming area, the importer with technical and scientific expertise available to it, will be held to a high standard of care for, and of notification to, the growers who were necessarily reliant on being alerted to any unusual risks to which they are exposed.

121 It is against this background that the primary judge accepted that the Wilkins had proved that Dovuro had breached its duty of care to them and to other growers like them. There were the evidentiary admissions, apologies and acknowledgments. There was the failure, in advance, even to check with the Western Australian authorities whether the three known weed varieties might also have been "of concern" to those authorities. There was the misleading and inadequate labelling of the bags. In these premises, the primary judge did not err in concluding that it was reasonably foreseeable that the State authorities would

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149 (1999) 169 ALR 276 at 292-293 [60].

150 (1999) 169 ALR 276 at 297 [71]-[73].

151 (1999) 169 ALR 276 at 311 [108].

152 (1999) 169 ALR 276 at 302 [89].

153 *Rogers v Whitaker* (1992) 175 CLR 479; *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* (2001) 205 CLR 434.

take some action to defend the particularly valuable broad acre farming industry in Western Australia in which the Wilkins participated. There was thus no error on the part of the Full Court which this Court would be authorised and warranted to correct. I would prefer to state my conclusion in this way rather than by reference to criteria such as "clear error or injustice"[154]. Only when the peculiarities of the seed industry, specifically of canola exports and Western Australian conditions, are taken into account is the primary judge's conclusion of breach of duty fully appreciated. Then it is compelling.

122 *No error is shown*: This Court can safely leave the diminution of the ambit of the law of negligence, where that is desired, to the legislature which has not been backward in recent years in acting to that end. As a court of law, this Court should adhere to common law principle[155]. Above all, we should be cautious in assuming the function of a jury, redetermining factual conclusions in a complex case with a lot of evidence, where it is difficult, or impossible, to recapture all of the advantages of the trial.

123 Dovuro supplied the growers with a seed with three known weeds "of concern", two of which were of "serious concern" and one of which (cleavers) was treated as a menace in Canada. Little wonder in such circumstances that Dovuro and its associates apologised to the growers. Little wonder that the primary judge found, by the undemanding test, that the harm done to the growers was reasonably foreseeable and that elementary precautions that could, and should, have been taken were not. The growers were completely innocent. Dovuro, as it admitted, was far from faultless. The consequences of the ensuing loss are, by the law of negligence, to be borne by Dovuro. The Federal Court was right to so conclude. It is wrong, both as a matter of law and of fact, for this Court now to intervene to substitute its own contrary factual conclusion.

The declaration involved no error

124 In response to the suggestion that the primary judge also erred in entering an interlocutory judgment in favour of the Wilkins in the form of declarations relating to the matters of liability determined by him, I can only repeat what I said on this subject in *Graham Barclay Oysters Pty Ltd v Ryan*[156].

125 In this case, the primary judge was engaged in the determination of proceedings brought under Pt IVA of the *Federal Court of Australia Act* 1976

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154 cf reasons of Gleeson CJ at [26].

155 *Cattanach v Melchior* (2003) 199 ALR 131 at 167-168 [137].

156 (2002) 77 ALJR 183 at 234 [263]-[268]; 194 ALR 337 at 406-408.

(Cth). The Wilkins initiated proceedings on their own behalf and as representatives of persons in a class defined to include identified and yet to be identified canola growers who purchased the seed Karoo in 1996, including the weed seeds, planted the same and suffered loss[157].

126 The primary judge published his reasons on the issue of liability, which had been severed from the other issues in the trial. He ordered the continuation of the trial for the calculation of the damages payable to the Wilkins and the persons whom they represented[158]. It was to facilitate an interlocutory appeal, which Dovuro wished to bring, that the primary judge took the course that he did. The declaration relating to damage was deemed necessary to meet a possible objection that an essential element of the tort of negligence had not been found to have been established. The primary judge simply recorded a declaration that the applicants had suffered *some* damage in consequence of the breach[159]. The amount of that damage was still to be quantified. Obviously, assessing the damages suffered by the Wilkins and their class would be a large enterprise, given all that the Wilkins were obliged to do by the agricultural authorities in Western Australia to eradicate the offending weeds.

127 In the elucidation of legal rights, there is no point in this Court's repeatedly instructing others about the primacy of statutes[160] if it fails to observe the same rule for itself. It is beside the point that interlocutory declarations are a form of order not known to the law on procedural orders[161] when, in the particular case of the Federal Court, in proceedings such as these, provision is expressly made for such declarations by that Court's enabling statute. Representative proceedings are not traditional litigation[162]. In disposing of a matter in a representative proceeding, by determining any issue of law or fact and making "a declaration of liability" in the course of such determination, a court is moulding its orders to the special needs of such proceedings as the Parliament

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157 (1999) 169 ALR 276 at 277 [2] where the class is defined.

158 (1999) 169 ALR 276 at 322-323 where the orders are set out.

159 (1999) 169 ALR 276 at 290 [49].

160 eg *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; cf Hayne, "Letting Justice Be Done Without the Heavens Falling", (2001) 27 *Monash University Law Review* 12 at 16.

161 cf joint reasons at [143].

162 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

envisaged and provided[163]. It is no part of the function of this Court to narrow the powers given to the Federal Court by the Parliament in the widest terms, to determine such proceedings as their particular circumstances require or suggest.

128 The grant of power by statute to superior courts is always broadly construed[164]. Why, therefore, would we take a narrow view of a clear mandate in legislation governing representative proceedings, where flexibility and inventiveness are at a premium[165]? I dissent from the attempt to wind back the clock of procedural flexibility and to restrict the statutory power to make "a declaration of liability", clearly intended to include an interlocutory declaration, where that course would needlessly impede the attainment of the legislative objects of economy to the parties and the community as well as procedural fairness.

129 Understandably, Dovuro, which benefited by the interlocutory order that the primary judge made, raised no objection on this score. Nor did the Wilkins. The last thing Dovuro wanted at trial was to be forced to complete the ascertainment of the damages suffered by the Wilkins and those in the class whom they represented, before it mounted this appeal. Indeed, it is ironic that the wisdom of what the primary judge did is now vindicated by the very orders of the majority who express the criticism of the declarations that he made.

The costs order should stand

130 Dovuro challenged the costs orders made by the Full Court in the second proceeding heard by that Court in 2001[166]. In light of the conclusion that I have reached on the substantive issues in this appeal, there is no foundation for the disturbance of the costs orders made.

Orders

131 The appeal should be dismissed with costs.

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163 *Federal Court of Australia Act* 1976 (Cth), s 33Z(1).

164 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205; *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 505-506 [75]-[76].

165 cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 367-371 [80]-[89]; cf at 355-357 [45]-[49].

166 *Dovuro Pty Ltd v Wilkins (No 2)* (2001) 107 FCR 104 at 110 [25], order 4.

132 HAYNE AND CALLINAN JJ. The appellant ("Dovuro") lawfully imported into Australia, and lawfully sold to distributors in Western Australia, canola seed in which very small quantities of the seeds of three other plants had been found. The canola seed was sold in bags labelled "Minimum 99% Purity". The other plants, if they grew in a canola crop, would be regarded as weeds. After Dovuro had imported the seed, distributors had sold it, and farmers had planted it, government authorities in Western Australia decided that farmers who had sown the canola seed should be advised to take steps to prevent the growth of the other plants. If they did grow they had to be eradicated. Despite many farmers sowing the seed which Dovuro had imported, no farmer reported the growth of these other plants.

133 Farmers in Western Australia who had sown the seed which Dovuro had imported claimed damages alleging, among other things, that Dovuro had been negligent in failing to warn them that the 1 per cent or less foreign matter in the seed may include seeds of the three other plants. The farmers alleged that they had incurred costs and expenses complying with the recommendations which had been made. Two questions were argued in this Court. Did Dovuro owe the farmers a duty of care? If so, did Dovuro breach that duty? At trial, Dovuro conceded that the first question should be answered, yes. It will be necessary to consider the content and effect of that concession but, in this Court, it is the second question which is determinative. It should be answered, no.

The facts

134 Dovuro carried on business as a distributor of oilseed. It organised the production of commercial quantities of seed and sold the seed to distributors. In 1995, Dovuro made arrangements with a New Zealand company which has since been liquidated and dissolved (Crop Marketing New Zealand Society Ltd – "Cropmark") for Cropmark to grow a strain of canola seed which would tolerate high rates of application of triazine herbicides. This strain of canola was called "Karoo". Dovuro imported quantities of the Karoo seed produced by Cropmark into Australia. Some was sold to seed merchants in Western Australia who, in turn, sold it to Western Australian farmers, including the first respondents ("the Wilkins").

135 The New Zealand Ministry of Agriculture and Fisheries ("MAF") tested the seed before Dovuro sold it in Australia. The MAF found what its seed analysis certificates described as "[t]race" quantities of "weed seed". In particular, in some of the lines of seed that were tested, some seeds of cleavers (*Galium aparine*), redshank (*Polygonum persicaria*) and field madder (*Sherardia arvensis*) were found. The certificates said (and it was the fact) that the canola seed, even with these traces of "weed seed", complied with Quarantine Proclamations that had been made "under the Commonwealth of Australia Quarantine Act [the *Quarantine Act* 1908 (Cth)] [and] ... the Seeds Acts of all

Australian States". Importation of the seed into Australia was authorised by the Australian Quarantine and Inspection Service; its importation into Western Australia was authorised by the Western Australian Quarantine and Inspection Service.

136 In April and May 1996, the Wilkins bought and planted one tonne of this Karoo seed. In June 1996, officers of AgWest (as the Agriculture Department of Western Australia was known) became concerned about the presence of the cleavers, redshank and field madder seeds in the Karoo seed which Dovuro had distributed. On 5 July 1996, two declarations were made by the Agriculture Protection Board, under the *Agriculture and Related Resources Protection Act* 1976 (WA) ("the Protection Act"), declaring, in the one case, redshank and field madder, and in the other, cleavers, to be declared plants and assigning each to "categories P1 and P2 for the whole [S]tate". The effect of these declarations was to prohibit the introduction into, or movement within, the State of the plants identified[167] and to require their eradication[168]. A few days later, AgWest sent canola growers some advice about what they should do if they had sown Karoo seed, including recommendations that they inspect their crops and "[k]eep a constant look out for these weeds over the next 10 years". They were told what to do if they found any of the three plants and to take certain precautions to avoid spreading the seeds of the plants concerned.

137 By May 1998 (nearly two years after their original declaration as declared plants under the Protection Act), the declarations of redshank and field madder had been cancelled. Cleavers remained a declared plant.

138 In fact, despite many farmers buying Karoo canola seed from lines in which the seeds of these three plants had been detected in the MAF seed analyses, no farmer reported finding any of the plants growing. Why that is so has not been established. It may have been because the precautionary measures recommended by AgWest had the desired effect and prevented the other plants growing; it may have been because the seeds of the other plants did not germinate; it may have been because the growing canola smothered the other plants. Perhaps it was some combination of these reasons.

The proceedings below

139 The Wilkins brought action in the Federal Court against Dovuro claiming damages and alleging negligence and contravention of s 52 of the *Trade*

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167 s 36(3)(a).

168 s 36(3)(b).

Practices Act 1974 (Cth). They brought the action as a representative claim under Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) on behalf of a class identified essentially as those canola growers who, in 1996, bought and planted Karoo canola seed which had been supplied by Dovuro to distributors in Western Australia. Dovuro made a cross-claim against Cropmark. The Wilkins then amended their claim to join Cropmark as a respondent and to make claims against Cropmark similar to those they had made against Dovuro.

140 The primary judge (Wilcox J) directed that "the matter proceed on the basis of an initial hearing on liability, the question of damages being postponed to a later date". Presumably this was a direction under O 29 of the Federal Court Rules for the decision of the question of liability separately from other questions in the case.

141 The primary judge held[169] that Dovuro had been negligent but had not contravened s 52 of the *Trade Practices Act*. He dismissed the claims against Cropmark.

142 The difficulties of separating questions of liability for negligence from questions of damages are evident. Damage is an essential element of the tort of negligence. Proof of damage is essential to establishing liability. Further, assessing the standard of care to be met, by reference to the degree of probability of damage occurring, and the expense, difficulty and inconvenience of taking alleviating action[170], will often be assisted by knowing what happened as a result of the alleged negligence. In a case like the present, where the negligence is said to have had financial consequences, knowing the extent of those consequences may be particularly important. Splitting trial of the issues of liability and damage may, therefore, achieve little real saving in time or expense. More significantly, by truncating or abbreviating the evidence led about, and attention given to, questions of damage at the trial of questions of liability, separation of the trial of the issues may distort the determination of questions of liability.

143 Apart altogether from these difficulties, there is a further and different kind of difficulty presented by taking the course which was taken in this case. If the primary judge concludes, as he did in the case against Dovuro, that negligence has been established, no final judgment can be entered. In this case, while an appeal to the Full Court of the Federal Court was pending, the primary judge made orders in the form of declarations – declaring that Dovuro "owed a

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169 *Wilkins v Dovuro Pty Ltd* (1999) 169 ALR 276.

170 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 332 [435]-[436] per Callinan J.

duty of care to the [Wilkins] and group members and that it was in breach of such a duty" and that "some damage was suffered by the [Wilkins] as a result of such a breach of duty". It seems to have been thought that the making of such orders would facilitate an appeal against the primary judge's findings. Be this as it may, orders of that kind should not be made[171]. Interlocutory declaration is a form of order not known to the law.

144 If, as may have been the intention, all questions of liability were to be regarded as concluded as between the Wilkins and Dovuro, it may have been open to the primary judge to direct entry of judgment for the Wilkins in their proceeding against Dovuro, for damages to be assessed. But what is not clear from the orders that were made is what, if any, questions were concluded as between Dovuro and those whom the Wilkins represented. On no view of the orders was the question of liability finally determined; there was no determination that any of the represented parties had suffered damage as a result of Dovuro's breach of its duty of care. (Unlike the first declaration, which dealt with Dovuro's duty of care not only to the Wilkins but also to group members, the second declaration said only that "some damage was suffered by the [Wilkins] as a result of such a breach of duty". This second declaration reflected the primary judge's finding[172] that the Wilkins had suffered some damage as a result of Dovuro's breach of duty. There was no finding that any group member had suffered damage.)

145 Dovuro appealed to the Full Court of the Federal Court. That Court, by majority (Branson and Gyles JJ, Finkelstein J dissenting), dismissed Dovuro's appeal[173].

The course of proceedings at trial

146 In order to understand the issues which were argued in the Full Court and on appeal to this Court, it is necessary to say something more about the course of proceedings at trial. The case against Dovuro was put by the Wilkins in the final form of their statement of claim as having three important steps:

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171 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 at 208 [128] per Gummow and Hayne JJ; 194 ALR 337 at 370-371.

172 (1999) 169 ALR 276 at 290 [49], 311 [109].

173 *Dovuro Pty Ltd v Wilkins* (2000) 105 FCR 476.

(a) Dovuro knew or ought to have known that the canola seed Dovuro distributed contained, or may contain, "undesirable weed seeds including cleavers, redshank and field madder";

(b) Dovuro owed the Wilkins, and those whom they represented, "a duty ... to exercise reasonable care to avoid injury to them";

(c) Dovuro was negligent in that: (i) it failed to advise of the presence of the "weed seed"; (ii) it failed to place any warning on the bags of canola seed that the seed may contain the "weed seed"; and (iii) it failed "to generally advise the [c]anola seed growing industry" of the presence or possible presence of the weed seed.

Dovuro denied each of these allegations.

147 After the parties had closed their respective cases at trial, each filed written submissions. In their written submissions, the Wilkins contended that Dovuro "had a duty to the consumers of the seed to exercise reasonable care not to expose the consumers to a risk of injury of which they knew or ought to have known". (The Wilkins referred to the farmers who planted the seed as "consumers" of it.) They submitted that "[t]he risk of injury was to introduce a weed seed to the consumers' farm that had the potential to cause ... loss in eradicating it or in restricting [the consumers'] income potential in the use of [their] farm". They further submitted that Dovuro could have discharged its duty of care by providing a warning "or, perhaps, by labelling the bags thereby advising the consumers of the presence of the weed seeds".

148 In its final submissions at trial, Dovuro conceded that it owed the Wilkins "a duty to take reasonable care" but denied that it had breached that duty. Plainly, it would have been better if Dovuro had identified precisely what it was conceding and, in particular, the content of the duty that it was accepting that it owed[174]. Having regard to the point in the trial at which the concession was made, however, it was open to the primary judge to understand it, as he did, as conceding the existence of the duty which the Wilkins had asserted in their written submissions: a duty to exercise reasonable care not to expose the Wilkins (and other farmers who planted the Karoo seed) to a risk of injury of which Dovuro knew or ought to have known. The concession having been made, it followed, inevitably, that the focus of debate in final submissions at trial shifted to the question of breach. It also followed that the primary judge's reasons gave

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174 cf *Jones v Bartlett* (2000) 205 CLR 166 at 250 [286], 252 [289] per Callinan J.

little attention to the question of duty of care, beyond noting[175] that it was conceded.

149 On appeal to the Full Court, however, the question of duty re-emerged. At trial, Cropmark had denied that it owed the Wilkins any duty of care. The primary judge concluded that Cropmark did owe a duty of care to end-users of the seed it produced but that it had not breached its duty. The content of the duty which was said to be owed was not spelled out. On appeal to the Full Court, Cropmark sought to support the judgment that had been entered in its favour by contending that it had not owed the Wilkins any duty to take reasonable care to avoid causing them economic loss. This submission having been made, counsel for Dovuro sought leave to take the same point. The Full Court divided on whether the course of events at trial should be held to have prevented Dovuro submitting on appeal that it owed the Wilkins no duty to take reasonable care to avoid causing them economic loss. Two members of the Court, Branson and Finkelstein JJ, concluded[176] that Dovuro should not be permitted to withdraw its concession at trial; Gyles J was of the contrary view[177].

150 Because we hold that no breach of duty was established it may be thought unnecessary to consider whether Dovuro should, or should not, have been permitted to make the contentions it did about duty of care. But the point is not unimportant and it is as well to say something briefly about it.

Raising a new point on appeal

151 In deciding whether a party may take a point for the first time on appeal, the principles to be applied are well known. Those principles have been discussed, in this Court[178], in several cases. As was said in *Coulton v Holcombe*[179], "[i]t is fundamental to the due administration of justice that the

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175 (1999) 169 ALR 276 at 302 [90], 305 [97].

176 (2000) 105 FCR 476 at 487 [38] per Branson J, 508-509 [118]-[120] per Finkelstein J.

177 (2000) 105 FCR 476 at 527 [180]-[181].

178 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *Bloemen v The Commonwealth* (1975) 49 ALJR 219; *Green v Sommerville* (1979) 141 CLR 594; *O'Brien v Komesaroff* (1982) 150 CLR 310; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481; 60 ALR 68; *Coulton v Holcombe* (1986) 162 CLR 1; *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

179 (1986) 162 CLR 1 at 7.

substantial issues between the parties are ordinarily settled at the trial". But the rule against raising a new point for the first time on appeal is not absolute. As Mason J said in *O'Brien v Komesaroff*[180], "[i]n some cases when a question of law is raised for the first time in an ultimate court of appeal ... it is expedient in the interests of justice that the question should be argued and decided".

152 The concession which Dovuro made was a concession of law, not of fact. When Dovuro made its concession, there was no amendment made to the pleadings. It was, however, a concession which was to be understood in the light of the allegation that had been made about duty, an allegation couched in very general terms. The point which Dovuro sought to agitate in the Full Court was a point that had been alive on the pleadings and in the trial until final addresses. The parties, therefore, had adduced evidence, and cross-examined witnesses, in circumstances where duty remained a live issue. It could not be said that Dovuro's concession affected the course of evidence. But once the point was conceded, the primary judge was relieved of any need to make findings of fact relevant to the issue of duty and no such findings were made.

153 To decide whether making the concession barred Dovuro from making the submissions which it wished to make (that it owed no duty to take reasonable care to avoid inflicting economic loss on the Wilkins or others) it would be necessary to examine more closely the content of the argument which Dovuro sought to advance about duty of care on appeal to the Full Court and in this Court. It would be necessary to do that giving particular attention to whether the factual substratum for the competing arguments of the parties was sufficiently established by the findings that were made or could satisfactorily be established in the appellate court. If, for example, the argument advanced on appeal depended upon the appellate court making new or additional findings of fact, there may be difficulties in doing so which would bar the appellant making the new argument.

154 Because this matter should be resolved at the level of breach of duty, not duty of care, it is not necessary to decide whether Dovuro should be held to have been prevented by its concession at trial from advancing the arguments about duty which it did. Nonetheless, in order to understand what is said about breach of duty, it is desirable to say something more about Dovuro's contentions about duty, and to begin by noting some facts relevant to the question of duty.

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180 (1982) 150 CLR 310 at 319.

Duty of care

155 Although it did not grow the seed, Dovuro occupied a position in the chain of distribution from grower to farmer which was not significantly different from that of a manufacturer. Dovuro had the analyses of the seed and it knew, therefore, what was in the seed. It was Dovuro that decided to import the seed into Australia and it was Dovuro that decided the regions of Australia in which it would sell the seed by sale to distributors. It was Dovuro that supplied the bags in which the seed was sold. Obvious parallels can be drawn between Dovuro's role and that of the product manufacturer considered in *Donoghue v Stevenson*[181], but the inquiry about duty of care cannot stop at the point of making that comparison.

156 The duty of care which the Wilkins argued that Dovuro owed them, and others who had bought the Karoo seed which Dovuro imported, was a duty to exercise reasonable care not to expose them (as consumers of the seed) to a risk of injury of which Dovuro knew or ought to have known. That formulation of the duty was very general. It did not seek to differentiate between kinds of injury.

157 Dovuro's submissions about duty of care and breach of duty were not always separated. That may be the inevitable consequence of the role played by foreseeability of harm at each of those levels of inquiry. Dovuro submitted that it owed no duty to take reasonable care to avoid economic loss that followed from the government authorities taking the precautionary measures they did, because, among other things, the taking of such measures was not reasonably foreseeable. (It also submitted that to find a duty of care would expose it to liability to an indeterminate class, and to persons Dovuro would not expect to rely on it and to persons for whom Dovuro assumed no responsibility.) Dovuro further submitted that it owed no duty of care which had required it to do anything more before distributing the seed than the steps it had taken. This last contention rolled questions of duty and breach together by seeking to have the duty of care described in terms that would reveal the respect or respects in which it had been breached in the circumstances of the particular case.

158 Although reference was made in the course of Dovuro's submissions in this Court to the loss sustained by the Wilkins and others being properly classified as purely *economic* loss, the chief weight of Dovuro's argument appeared to be placed on the proposition that its conduct had not been unreasonable because what happened was not reasonably foreseeable. That proposition is evidently relevant to questions of breach. The nature of the

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181 [1932] AC 562.

damage suffered, and the respects in which it is said that Dovuro was negligent are relevant, as was said in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[182], to defining the scope and content of the duty of care. In cases where the *extent* of the relevant duty is not clear, it is useful to begin by considering the damage which the plaintiff suffered and the particular want of care which was alleged against the defendant. That may reveal the scope of the duty upon which the allegations of breach and damage depended. In the present case, however, in determining the effect of the concession made at trial, that Dovuro did owe the Wilkins and other farmers a duty of care, it is necessary to identify what was conceded. That is a task which is not assisted by introducing consideration of what was, or might be, said about breach, if only because the duty conceded was cast at a high level of abstraction and generality.

159 Since *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[183] it has been clear that there is no absolute rule denying a duty to take reasonable care to avoid pure economic loss. Those who claimed to have suffered loss, in this case, were farmers who had used the seed which Dovuro had imported. They were, in effect, the users or consumers of the seed which Dovuro had distributed. If Dovuro failed to act with reasonable care, it was reasonably foreseeable that there could be circumstances in which those farmers may suffer economic loss as a result of their using the seed. The class likely to be affected, being those who used the seed, would not be an indeterminate class and they would be persons vulnerable to loss if care were not taken[184], although it may be that assumptions about the respective vulnerabilities of experienced large scale farmers and a seed supplier should not be made too readily. All this being so, a duty to exercise reasonable care not to expose the farmers (as users or consumers of the seed) to a risk of injury of which they knew or ought to have known *could*, in some circumstances, extend to the risk of purely economic loss. But as the Wilkins' case was presented at trial, the critical question in this matter was to identify whether Dovuro knew or ought to have known that there was a risk of the sort of injury which it was alleged had been suffered – financial loss occasioned by pursuing a course of action recommended by government authorities to guard against the possible emergence of plants which had been declared to be harmful only after Dovuro had distributed the seed and the farmers had acquired it. Only if *that* sort of loss was reasonably foreseeable by Dovuro would the duty asserted by the Wilkins have been engaged.

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182 (2000) 205 CLR 254 at 290 [105] per Hayne J.

183 (1976) 136 CLR 529.

184 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [12] per Gleeson CJ, 231 [133] per McHugh J, 255-256 [206], 258 [213], 259-260 [216] per Gummow J, 326-327 [409], 327 [412], 328 [416] per Callinan J.

160 The concession made at trial did not foreclose, and was not understood as foreclosing, debate about foreseeability of the kinds of loss sustained. As the case was argued both at trial and subsequently, the concession about duty was, therefore, of little significance. Rather, the focus of debate was upon what reasonable care required of Dovuro and that required close attention to what should have been held to be reasonably foreseeable. Given the nature of the cases pleaded and presented at trial, both in evidence and final submissions, it is better to consider that question in the context of breach of duty rather than duty of care.

Breach of duty

161 At trial, the Wilkins submitted that it was foreseeable that the State government would take action of the kind it did, and that the Wilkins would respond to that action by incurring the costs which they did. Dovuro submitted that, because the importation of the seed had to be cleared by the Australian Quarantine and Inspection Service and because the three plants whose seeds were found in the canola seed were not prohibited or declared in Western Australia, it had not acted unreasonably.

162 The primary judge concluded[185] that Dovuro had acted unreasonably. There were two steps critical to that conclusion. First, the primary judge said[186] that it should have been "readily evident, especially to a person trained in agricultural science" that it would be impossible for a regulatory authority to anticipate by declaration every exotic weed that might enter the State and threaten agriculture. Secondly, he concluded[187] that the *possibility* that plants not proved to be a problem in the agricultural areas of the State *might* prove to be pests should be obvious "to anybody with even a superficial knowledge of Australian agriculture and agricultural history". Accordingly, so the primary judge held[188], it was not sufficient for Dovuro "to do no more than comply with the relevant quarantine regulations".

163 As Finkelstein J rightly pointed out[189], the usual knowledge of an agricultural scientist cannot set the standard of care to be observed by a seed

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185 (1999) 169 ALR 276 at 310-311 [106]-[109].

186 (1999) 169 ALR 276 at 310 [106].

187 (1999) 169 ALR 276 at 310 [106].

188 (1999) 169 ALR 276 at 311 [107].

189 (2000) 105 FCR 476 at 506 [110].

merchant[190]. Further, common knowledge of the kind to which the primary judge referred is of no significance unless there is a basis for concluding that the reasonable person in Dovuro's position not only ought reasonably to have known, or to have found out, whether any of the three plants already grew in the area concerned, but also knew, or ought reasonably to have known that, if the plants were exotic, they would or may later be declared to be prohibited plants.

164 The Wilkins' case depended upon them demonstrating that Dovuro knew, or ought reasonably to have known, that importing and selling the seed for distribution in Western Australia exposed the Wilkins, and other purchasers of the Karoo seed, to a risk of the injury that would follow if the three plants whose seeds were found in what was distributed were declared to be prohibited. The primary judge did not find that Dovuro knew that this would happen. Nor was there any finding that Dovuro ought to have known that it would or even might happen. Instead, the primary judge appears to have reasoned from the proposition that "an introduced plant may prove to be a weed" to what amounted to the proposition that "cleavers, redshank and field madder were introduced plants and, *regardless of whether they proved to be weeds*, it should have been reasonably foreseeable to a seed merchant that government authorities may treat them as if they were weeds". That reasoning is flawed.

165 The primary judge did not find that the plants had proved to be weeds. As pointed out at the beginning of these reasons, no farmer had reported the growth of any of the three plants and the primary judge made no finding about why it appeared that none had grown. Not finding (and there being no evidence to find) that all farmers who had bought the Karoo seed which Dovuro had imported had followed the recommendations of AgWest, the primary judge did not find (and could not have found) that but for those steps the plants would have emerged as a pest. Rather, as his Honour said[191], there were three possible explanations of why none had been reported: they had failed to germinate because of unfavourable soil or climatic conditions, or they had been smothered by the canola, or they had been killed by herbicides applied by farmers.

166 It was not possible, in this state of the evidence and findings, to say positively that the seeds of the three plants were "dangerous" or even "undesirable" seeds, unless account was taken of the fact that in Western Australia they were later declared to be prohibited plants. It was the fact of declaration which led most immediately to farmers incurring costs by carrying

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190 cf *Tame v New South Wales* (2002) 76 ALJR 1348 at 1409 [331] per Callinan J; 191 ALR 449 at 533-534.

191 (1999) 169 ALR 276 at 291 [52].

out the recommended precautionary steps. It was that which made them "undesirable".

167 As Finkelstein J pointed out[192], again correctly, when Dovuro imported and distributed the seed, none of the three plants whose seeds were present with the canola seed was known to be dangerous. Before the declarations under the Protection Act, no Australian government had declared any of them to be a prohibited weed. The finding that Dovuro had acted without reasonable care could be supported only if it were open to the primary judge to conclude that Dovuro should reasonably have foreseen the possibility that the three plants would or may be declared to be prohibited plants.

168 That is not demonstrated by saying that it is possible that any plant introduced into the State may be declared to be a prohibited plant. Nor is it demonstrated by attaching the label "undesirable" as a description of the seeds (as the Wilkins had done in their pleadings and submissions). The label "undesirable" provides no answer to an inquiry about what might be foreseen; it simply assumes the result of the inquiry.

169 Whether the steps taken by AgWest and the Agriculture Protection Board after the importation of these seeds were reasonably foreseeable had to be judged according to what Dovuro knew or ought reasonably to have known when it was importing and distributing the seed. It also had to be judged according to whether the steps that were taken by these governmental authorities were to be expected or foreseen. That latter question is not answered by asking only whether it was "reasonable" for the authorities to act as they did, or by asking, as the primary judge did[193], whether AgWest had over-reacted. Much would turn on the criteria used to determine what was reasonable or what constituted "over-reaction".

170 The criteria used to determine those issues differ in important respects from the criteria that must be engaged in considering whether a person has acted without reasonable care. For example, what account could be taken of financial and political pressures on bodies like AgWest or the Agriculture Protection Board? What is done by government or governmental agencies will often reflect such pressures, but is the person whose conduct is alleged to have been negligent to be thought to be aware of them? Is the allegedly negligent person to be assumed to be attuned to the relative strengths of various pressure groups both within and outside the administration of bodies like AgWest or the Agriculture

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192 (2000) 105 FCR 476 at 506 [110].

193 (1999) 169 ALR 276 at 293-297 [62]-[73].

Protection Board? Absent evidence to the contrary, there is no reason to answer any of these questions affirmatively. Yet each of the factors mentioned may be very important in motivating the decisions of AgWest and the Agriculture Protection Board.

171 The primary judge said[194] that "it would not have taken any significant time for an officer of Dovuro to contact the Weed Seeds Unit of AgWest ... and obtain advice on the acceptability of the foreign seeds identified" in the Karoo seed. That a request for advice could have been made quickly is self-evident. It is by no means clear, however, except through the lens of hindsight, that any relevant advice could have been obtained at all, let alone quickly. Given that the seeds were of plants that were not then declared plants, there is no reason to think that any advice could have been obtained from the department about what future legislative action would or might be taken. Certainly the department would not have been obliged to provide such advice, and it may greatly be doubted that it would have been prudent for AgWest or any other governmental agency to offer some prediction about whether a declaration would be made.

172 Finally, there was considerable emphasis given at trial, and some emphasis given in the reasons of the primary judge, to certain answers given in evidence by an officer of Dovuro to questions asked by the primary judge, and to some letters and memoranda of Dovuro which were tendered in evidence. The answers and the documents were taken to constitute significant admissions by Dovuro[195].

173 It may readily be accepted that what is said after an event may constitute an admission of relevant facts. Tendering an apology for what has happened (as Dovuro did to canola growers) may, in some cases, amount to such an admission. But there is always the risk that what is said after an event is informed only by hindsight and the speaker's wish that the clock might be turned back. In this case, the primary judge pressed one of the witnesses called by Dovuro with a series of questions about what the witness might have done differently. The witness said that "looking back" he "probably wouldn't have even grown seed in New Zealand" and that he "would have done a lot of things a little bit differently"[196]. Taken in their context, however, these statements, like the apologies which Dovuro offered growers, revealed nothing about the respect or respects in which Dovuro ought reasonably to have acted in the light of what it knew or ought to have known when it distributed the seeds.

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194 (1999) 169 ALR 276 at 308 [102].

195 (1999) 169 ALR 276 at 285-287 [37]-[39], 307 [101].

196 (1999) 169 ALR 276 at 307 [99].

174 Where none of the seeds was known to be dangerous or had been prohibited, there was no basis for concluding that Dovuro should reasonably have foreseen the events of the kind that occurred.

175 The appeal should be allowed with costs. Paragraph 1 of the orders of the Full Court of the Federal Court made on 21 December 2000 and paragraphs 3, 4 and 6 of the orders of that Court made on 5 March 2001 should be set aside and in their place there should be orders that:

(a) the appeal by Dovuro Pty Ltd ("Dovuro") against the declarations made by Wilcox J on 19 May 2000 is allowed with costs;

(b) the declarations made by Wilcox J on 19 May 2000 are set aside and in their place there be judgment for Dovuro with costs.

176 Dovuro also appealed against so much of the orders which the Full Court made on 5 March 2001 as disposed of Dovuro's motion seeking reconsideration of the orders made by the Full Court on 21 December 2000. Given the orders which we consider should be made otherwise disposing of the appeal to this Court it is neither necessary nor appropriate to interfere with the orders made in disposing of that motion.

177 HEYDON J. I agree with Gummow J, and also with Hayne and Callinan JJ.