# HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

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HOYTS PTY LIMITED APPELLANT

AND

DIANE BURNS RESPONDENT

*Hoyts Pty Limited v Burns*
[2003] HCA 61
*9 October 2003*
S450/2002

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 8 February 2002 and, in lieu thereof, order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of New South Wales

**Representation:**

D F Jackson QC with A J McInerney for the appellant (instructed by Herbert Geer & Rundle)

B W Walker SC with P A Regattieri for the respondent (instructed by R J Rimes)

## CATCHWORDS

### Hoyts Pty Ltd v Burns

Negligence – Causation – Failure to warn customers that cinema seats retracted automatically – Respondent injured attempting to sit on a retracted seat – Whether Court of Appeal erred in interfering in primary judge's finding that warning sign would not have altered respondent's conduct.

Appeal – Rehearing before Court of Appeal – Relevance of credibility findings – Whether primary judge's conclusion based upon assessment of credibility of party – Whether Court of Appeal erred in disturbing such conclusion – Whether Court of Appeal omitted to find error before substituting its own conclusion on the evidence.

1 McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. This appeal raises no difficult question of principle. It requires this Court to decide whether an intermediate Court of Appeal was justified in reversing orthodox and carefully considered findings of fact and credibility by a trial judge.

The facts

2 The appellant owns and exhibits films at the Hoyts Cinema Complex at Bankstown in Sydney. The respondent, who was working as a teacher's aide specializing in disabled children, attended the appellant's cinema complex on 17 March 1997. She was then aged about 47. She was accompanied by five adults and eight disabled young children. Her particular responsibility was Joshua, a boy of four years of age who could crawl very quickly but still required a wheelchair.

3 The respondent did not go to the cinema regularly. She had never been to the Bankstown complex before. Indeed, by 17 March 1997 she had not been inside a picture theatre for many years.

4 Neither outside or inside the theatre nor on the screen at any time was there exhibited a sign referring in any way to the seats in the theatre.

5 The group of which the respondent was a member went down an aisle of the particular theatre where the film that they wished to see was being shown. They seated themselves in the front row. The lights of the theatre were on when the respondent entered.

6 Because each seat automatically rose to rest at an angle of 70 degrees to the floor when there was no weight upon it, the respondent's seat must have been in an upright position immediately before she sat down on it. In order to sit upon it she must have exerted force of some kind upon it, either by pushing it or sitting down on it, to bring it to a position generally parallel to the floor.

7 When the respondent seated herself, Joshua was in his wheelchair just to the right in front of her. After a time the lights darkened and the film started. Some light was emitted from the screen. Joshua became very agitated. He began to scream. The respondent thought that if he were taken out of his wheelchair he might calm down. As soon as the respondent placed him on the floor he quickly crawled away from her. She left her seat to retrieve him. He was screaming and kicking and apparently continued to do so as she attempted to resume her seat which had of course by then become upright again. This is how the respondent accounted for what followed:

> "Well, I had hold of him with my right arm, felt for what I thought was the seat, I sat down, I moved my arm like this and held him and when I sat down there wasn't any seat there but by the time I realised I had gone past the point of no return I couldn't stand up. ... I hit the metal bar and fell forward. ... The very bottom of my spine, the tailbone."

8 The respondent suffered injuries as a result of the events which have just been described.

The trial

9 The respondent brought proceedings in the New South Wales District Court against the appellant for damages for negligence. The particulars that she alleged, and which involve what in this Court remain live issues, were that the appellant was negligent in failing to warn the respondent of the dangers from seats folding up when no weight was upon them and in failing to warn the respondent that, when looking after disabled children, her seat would rise should she need to leave the seat for any reason.

10 The action was heard by Gibb DCJ in February 2001. Each of the parties engaged an expert whose written report was received in evidence. Neither of the experts gave oral evidence.

11 The respondent's expert, Dr Emerson, an engineer, described himself as a specialist in accident analysis. In addition to asserting a number of argumentative matters he said that projecting obstructions, the hinged steel brackets which supported the seats, could have been eliminated by a better engineering design. It was not necessary for the brackets to be constructed so as to project 60 mm from the base of the seat: flat brackets "located closer to the underneath section of the chair without the need to project so far" would have sufficed. He also said that if this form of seating were to be used, the metal brackets should be covered with high density rubber or foam. Alternatively, the seats could be fixed as was the situation in a number of other theatres. He also suggested the provision of a sign to indicate to patrons that the seats had an automatic return to the upright position.

12 The appellant's expert, Mr Eager, also an engineer, was of a quite different opinion. He was unaware of any Australian Standard covering theatre seating design. The installation of seats of the kind in use at Bankstown was a frequent occurrence. It had the advantage of allowing easier access by patrons and cleaners. The theatre complex at Bankstown had been in operation for about 10 years. It had a seating capacity of more than 2,400 people. No other previous

incident of the kind which the respondent alleged to have occurred had been recorded.

13 Notwithstanding that the respondent had alleged as a particular of negligence a failure to warn, the respondent initially gave no evidence of the effect that any warning had it been given might have had upon her. At the close of the appellant's case the respondent applied for leave to adduce further evidence to repair this omission. The application was opposed but over objection the primary judge allowed evidence as follows to be given:

> "[Counsel for the respondent]: Q. If you had been made aware by the way of signs as you came into the theatre, or a sign placed in front of your feet where you sat in the front row, or by a warning sign on the screen that these seats would retract and go back to an upright position by that, when you picked up the child and went back to the seat what would you have done in relation to placing yourself on that seat?
>
> ...
>
> [A.] Had there been signs there to warn me I would have been aware that the seat would retract and I would have made sure that the seat was completely down and held it down before I sat down.
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> [Counsel]: That's the evidence of the [respondent], your Honour, on this position.
>
> CROSS-EXAMINATION
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> [Counsel for the appellant]: Q. Mrs Burns, to be frank you don't know what your reaction would have been if there were signs, do you?
>
> A. I would have taken notice of the signs, had there been signs, and I would have been aware more aware to make sure, would have been aware to make sure that the seat, I had to pull the seat to sit down, yes.
>
> Q. You see, you did have to pull the seat to sit down, didn't you?
>
> A. I didn't know that at that time.
>
> Q. Well, I suggest to you that you did, because you had to pull the seat down to sit on it, did you not?
>
> A. That was in the first instance.
>
> Q. And it was under pressure that you pulled it down?

A. I actually sat at the same time as I pulled the seat down.

Q. You knew that you had to put pressure on the seat from the time you started to push it down to be able to sit on it?

A. No, I was not aware of that at all, I'm sorry.

Q. You see, how can you say now if there were signs in the theatre, that you would become aware of them?

OBJECTION.

HER HONOUR: I think it is a fair question in cross-examination.

[Counsel for the appellant]:Q. How can you say now that if there were signs in the theatre that you would have become aware of them?

A. Because I would have read the signs.

Q. How do you know you would have read them?

A. Well, if there had of been signs on the walls, or on the floor, or on the screen, I would have read the sign. I can only say I would have read the signs.

Q. Do you agree what you are saying is mere speculation about what you would have done?

A. That's very hard. No, I would still say that had there of been signs I would have read them and known that the seat retracted.

Q. You see, you came to the theatre with what you say was a group of highly disabled children, didn't you?

A. That's correct.

Q. And these children needed a fair degree of care, didn't they?

A. They do.

Q. And you had children spread in front of you, between you and the screen, didn't you?

A. I had one to my right and one on a bean bag to my left that was for the other person, yes.

Q. So you don't know, you can't say now that [if] there were signs whether you would have seen them, or not?

A. If the signs were as I came through the door, on the walls or in front of the screen itself, or on the front of the stage, I would have obviously seen them.

Q. How is it so obvious that you would have seen them?

A. For the same way you can see the exit sign which was to my right. There was a sign with lights around it. It was quite noticeable. You couldn't help but miss that's where the exit was.

Q. You see, I suggest to you what you are saying is purely speculation of what you might have done if there were signs there.

OBJECTION. QUESTION ALLOWED.

[A.] I'm sorry, if I had of seen signs I would have been more aware to know I would have known the seat automatically retracts and I would have made sure that having that knowledge that I would have made sure that the seat was down."

14 The primary judge reserved her decision. When she gave it she found against the respondent whom she described as an unreliable witness, whose evidence was to be treated with caution. Her Honour referred to a difference between the version of the accident that the respondent gave to Dr Emerson and the version that she gave in evidence, but we do not think that very much turns on that. She found that the respondent attempted to seat herself when under a misapprehension as to the height of the seat.

15 The primary judge referred to the absence of the incidence of any similar events. She held that the cause of the respondent's injury was her miscalculation as to the position of the seat. Her Honour said that she did not find "that provision of the (front row) retracting seating as provided with the metal supporting pedestal was unreasonable in the circumstances of the cinema and its commercial operations, including the circumstances in which [the respondent] attended". The seats were not inherently dangerous because they retracted automatically when not under pressure, or because they were fitted with a protruding pedestal support structure. There was no relevant breach of duty by the appellant.

16 Her Honour then considered the question of the need or otherwise for a warning. She pointed out that there was no evidence as to how and where a

warning should have been given or the form that it might have taken. She was satisfied that a warning would have ensured that the respondent became aware that the seats retracted automatically when not under pressure but it did not follow that awareness would have changed her course of conduct. "What she would have done differently is a matter of pure speculation." Her Honour was of the opinion that the respondent's testimony to the contrary was not of "any weight, or credibility". She sought to locate the seat by touch and she may well have done exactly the same had she adverted to the fact that it retracted automatically.

17 Her Honour concluded that portion of her judgment dealing with liability as follows:

> "I am not satisfied that a warning would have had any impact upon [the respondent's] consciousness or conduct in the circumstances. I do not find that had a warning [been] given, [the respondent] would have done other than as she did, with the same consequence.
>
> Assuming (although this is speculative) [the respondent] had read a warning to the effect that the seat pivoted upright automatically when not under pressure, I am not satisfied that [the respondent] would have acted upon such a warning and desisted from pursuing the course of conduct she adopted - relevantly seeking to seat herself without looking directly at her seat, holding the struggling Joshua in one arm across her chest, and locating the seat by touch.
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> The [respondent's] claim of negligence by reason of lack of warning fails."

The Court of Appeal

18 An appeal by the respondent to the Court of Appeal of New South Wales (Sheller and Heydon JJA and Ipp AJA) succeeded.[1] The leading judgment was given by Sheller JA with whom the other members of the Court agreed. The issues on the hearing of the appeal were the need or otherwise for a warning and its efficacy had it been given. Sheller JA said that the primary judge did not address the question whether a reasonable person in the position of the appellant would have foreseen that some persons returning to their seats in the dark might have assumed that the seats were still down as they left them because they did not know or realize that the seats were automatically retractable. His Honour had no doubt that a reasonable person conducting a cinema with automatically

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**1** *Burns v Hoyts Pty Ltd* [2002] Aust Torts Rep ¶81-637.

retractable seats would foresee a risk of injury to persons returning to seats in the dark. "The chance of its occurring may be slight but the risk of injury if it does occur is substantial."[2] A sign, "Take care. Seats retract automatically. Ensure your seat is down before you sit"[3] should have been displayed in the foyer.

19 His Honour went on to say that despite the primary judge's rejection of the respondent's evidence upon her recall there was[4]

> "an overwhelming inference that a person, who did not know from observation or experience that the seats retracted automatically when she stood up but who read on a warning notice that they did, would have included that added piece of knowledge in the thinking processes in play when returning to the seat and would have taken care to ensure that the seat was down before she sat. ... This is not a case in which the impetuous nature of the [respondent's] conduct was such that it was unlikely that a mere sign would have deflected her from putting the seat down before she sat. The fact that the most upright plaintiff's recollection, after suffering a disaster, may move in the direction of saying that if only they had been warned they would have done something else, does not rule out a finding that they would, even if the evidence itself may be regarded as of less weight in the circumstances in which it was given. As [the primary judge] pointed out, the [respondent] was an intelligent and capable woman."

The appeal to this Court

20 The appellant has appealed to this Court upon the following grounds:

"The Court of Appeal erred in:

(a) disregarding the trial Judge's finding that the Respondent's conduct would not have been different if a warning sign had been erected;

(b) not dealing with the trial Judge's finding as to the actual conduct of the Respondent immediately prior to her injury."

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**2** *Burns v Hoyts Pty Ltd* [2002] Aust Torts Rep ¶81-637 at 68,347 [20].

**3** *Burns v Hoyts Pty Ltd* [2002] Aust Torts Rep ¶81-637 at 68,347 [22].

**4** *Burns v Hoyts Pty Ltd* [2002] Aust Torts Rep ¶81-637 at 68,347 [23].

21 The appeal should be upheld. The reasons why this is so may be shortly stated and are these.

22 First, the findings by the primary judge were based not only on a general impression of the respondent but also upon specific instances of unreliability, albeit not of conscious dishonesty.

23 Secondly, the Court of Appeal had no sufficient regard to the circumstances in which the respondent came to give the evidence as to what she might or would have done had a warning sign been erected, in effect as an afterthought, at the close of the appellant's case. We do not suggest that this should be regarded as a decisive matter but it is at least as relevant a matter as the timing of a similar belated passage of evidence in *Rosenberg v Percival*[5]. And just as the evidence there was unpersuasive, the respondent's evidence here was unconvincing.

24 Thirdly, with respect, it is not a likely, let alone "an overwhelming inference" that a person generally unfamiliar with retractable seats would have acted upon, or in any way have been affected by, a sign of the kind suggested. Apart from any question of whether the sign would have been read, it is far from clear that such a warning would invariably have been heeded.

25 Fourthly, the so-called "overwhelming inference" was drawn in respect of a generality of persons, rather than the relevant person, the respondent, in respect of whom specific observations and comments had been made by the primary judge, and it was an inference that took no account of the particular circumstances that might affect an individual's conduct.

26 Fifthly, and most importantly, the Court of Appeal had no proper regard to the fact that the respondent was so distracted by the disturbed child when she sat down that she was unlikely to have been acting with deliberation, and with any conscious awareness of a warning sign seen some time before, rather than impulsively.

27 Having had her evidence rejected by the primary judge, the respondent then had the heavy burden of demonstrating from other evidence that she would have considered the warning and pulled the seat down before attempting to resume it. However, nothing in the evidence pointed positively to that

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**5** (2001) 205 CLR 434 at 443-444 [24]-[27] per McHugh J, 463-464 [91]-[92] per Gummow J, 486-487 [158]-[159] per Kirby J, 504-505 [220]-[223] per Callinan J.

conclusion. Indeed, the circumstances in which the respondent found herself suggested that she would have acted as she did. Hence the ultimate finding by the primary judge in the passage set out earlier in these reasons, where her Honour understandably used the term "speculative" to identify the hypothesis on which it was necessary to proceed.

28 In the Court of Appeal, having identified an inference, said to be overwhelming, which was expressed in universal terms, the only qualification then offered with respect to the position of the respondent was that she was not a person whose conduct was "impetuous". However, that did not meet the circumstances of the particular case and the importance attached by the primary judge to the stressful and distracting situation in which the respondent attempted to resume her seat.

29 There was no basis for intervention by the Court of Appeal in this case. The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside and in place thereof the appeal to that Court should be dismissed. The respondent should pay the appellant's costs at first instance and of the appeal to the Court of Appeal.

30 KIRBY J. The issues raised by this appeal[6] concern whether the New South Wales Court of Appeal erred in disturbing a judgment reached at trial and, in that regard, whether the primary judge erred in dismissing the complaint that the plaintiff's injuries were caused by the negligent failure of the defendant to provide a suitable warning against the risk that befell her.

The facts

31 *The relevant facts*: Most of the facts relevant to my conclusions are set out in the reasons of McHugh, Gummow, Hayne and Callinan JJ ("the joint reasons")[7]. Ms Diane Burns (the respondent) was injured on 17 March 1997 at a cinema complex in Bankstown, near Sydney, owned by Hoyts Pty Ltd (the appellant). Whilst trying to control a four year old handicapped boy in her charge, who was screaming and kicking as she returned with him towards her seat in the darkened cinema, the respondent went to sit down. She moved her arm as if to feel for her seat. She was not aware that the seat was designed to retract towards the vertical plane. She only realised this when she had "gone past the point of no return". In consequence, she fell to the floor, missing the elevated seat and striking her coccyx at the base of her spine upon an uncovered protruding metal bar ("the pedestal"). That bar was part of the seat mechanism, positioned underneath the retracted seat. As a result of this blow, the respondent sustained a disc injury. Although the primary judge found that some of her testimony about her disabilities was "distorted by considerable exaggeration"[8], she accepted that the impact of the pedestal on the spine had caused "serious consequences" especially coming on top of other disabilities from which the respondent suffered.

32 The respondent sued the appellant in negligence. To establish the duty of care, and to define its scope, she alleged that she was an entrant on the appellant's premises pursuant to a contract negotiated for reward with the appellant. In these circumstances (which were not disputed) the duty owed by the appellant to the respondent was that of ensuring that "the premises are as safe for [the mutually contemplated] purpose as reasonable care and skill on the part of any one can make them"[9]. That explanation of the warranty relating to the safety of premises implied in a contract between an occupier and a person who enters under the

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**6** From a judgment of the Court of Appeal in *Burns v Hoyts Pty Ltd* [2002] Aust Torts Rep ¶81-637.

**7** Joint reasons at [2]-[8].

**8** *Burns v Hoyts Pty Ltd*, unreported, 20 February 2001, Gibb DCJ ("Reasons of the primary judge") at 20.

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

contract has been accepted by this Court as a correct statement of the law[10]. It has also been accepted (and was not challenged in this appeal) that the restatement of the principles of the common law governing the liability of an occupier of premises[11] has not replaced the particular duty owed to entrants pursuant to contract[12].

33 In some ways (as would be expected by reason of the mutuality of the purposes of occupier and contractual entrant) the standard of care expected in cases involving contractual entrants is somewhat higher than that required where the relationship of the parties rests on nothing more than the "neighbourhood" principle[13]. Nevertheless, it remains a duty to exhibit "reasonable care and skill". It is not a duty of insurance against *any* risk of injury.

34 *The issues at trial*: The respondent framed her case in various ways. Ultimately, two propositions were advanced to support her claim against the appellant in negligence. They were that the appellant had breached the duty owed to her in:

(a) Providing a seat of negligent design, with an unnecessary defect caused by the protrusion of the pedestal below the retracted seat which could expose to a risk of serious injury a person, such as the respondent, who for whatever reason missed the seat and fell to the floor; and

(b) Failing to warn the respondent and others who, like her, might be unaware of the design of the seat that caused it to retract towards the vertical plane, that this presented a danger against which persons resuming their seats should be conscious so that, before sitting, they would "force the seat down again".

35 It is easy to feel sympathy for the respondent, working as a teacher's aide, trying to maintain control over the seriously handicapped child in her care. She was not young. She was slim and small in stature. She had a pre-existing unrelated disability in her right arm that limited her power of physical control over the young boy, disabled but highly mobile who was making a lot of noise

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**10** *Watson v George* (1953) 89 CLR 409 at 424; cf *Jones v Bartlett* (2000) 205 CLR 166 at 196 [106].

**11** As in *Hackshaw v Shaw* (1984) 155 CLR 614; *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 and *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

**12** *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 38.

**13** *Donoghue v Stevenson* [1932] AC 562 at 580.

and disrupting the enjoyment of the film by others. The respondent gave evidence that she was not a regular film-goer; had not previously attended that cinema; and indeed had not been to a cinema since her own children were young[14].

The findings of the primary judge

36 *Finding as to injury*: The primary judge accepted that the respondent did not know that the cinema seats, including her seat, had been retracted when she arrived at the cinema, the lights being then illuminated. Although, of necessity, she would have had to push her own seat down before initially occupying it, the judge accepted that "[s]he did not notice that her seat retracted when she got up to collect [the boy] immediately before the accident"[15]. The judge continued[16]:

> "I find that Ms Burns attempted to seat herself when under a misapprehension as to the height of the seat - assuming it to be where she had felt, being somewhat higher than it actually was. She recognised that there was a problem, but was unable to control her descent when the error became apparent (in part at least because she was carrying [the boy] and had only one arm free).
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> Having located what she (mistakenly) thought was the edge of the lowered seat base, [she] then lowered herself so that she made no contact with the seat - ie, outside of the edge of that which she had located but mis-identified as the seat base. She thus attempted to lower herself through a plane that was outside the edge of what she thought was the seat base.
>
> [She] then speared (plunged?) down and backwards at an angle that was sufficient to ensure that she cleared the inclined seat base but collided with the recessed pedestal."

37 *Finding as to seat and design*: The course taken at trial is explained in the joint reasons[17]. The primary judge gave short shrift to any suggestion that the cinema seats were dangerous in themselves and that retracting seats, which did not stay in a down position, were enough to make out a case of negligent breach

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**14** Reasons of the primary judge at 1.

**15** Reasons of the primary judge at 6.

**16** Reasons of the primary judge at 10.

**17** Joint reasons at [9]-[17].

of duty[18]. Her Honour then turned to the complaint about the design of the particular seat containing the pedestal. She rejected that case, whilst noting the evidence of the respondent's expert, Dr Emerson, that it would have been possible to design a seat in which the pedestal was replaced with a hinge that was "flat and free of sharp edges [which do] not protrude and cause a hazard" or to cover such metal edges with "a high density rubber or foam to minimise the potential for injury"[19]. By reference to decisions of this Court concerning the requirements of accident prevention[20], the primary judge dismissed the claim so far as it was based on the features, including the design features, of the cinema seat. She also found that, having regard to the way the respondent fell, any such design modifications would not have prevented the injury in the way the respondent received it.

38 *The issue of a warning sign*: These conclusions left the respondent's case based on the appellant's alleged failure to warn. It was common ground that there was no warning, at least in the form of a notice displayed in the vestibule or included in the shorts, screened before the lights of the cinema were extinguished for the film, warning patrons that their seats would retract or pivot upwards when not under pressure[21].

39 The respondent's case concerning the warning that she claimed to be necessary was presented at trial in very general terms. True, the provision of a sign indicating that seats had an automatic return to the upright position was included in Dr Emerson's advice as one of the counter-measures that could have been taken by the appellant to avoid injury to a person such as the respondent[22]. However, there was no real elaboration of what any such sign would say; where it would be displayed to ensure it was noticed; and whether it would be screened in the cinema and if so whether, by that stage, any such warning sign would be too late because, by definition, most patrons would already be seated and those not distracted would already probably have noticed the design feature that led to automatic retraction of the seats when not in use. All such issues were left in a state of generality. No evidence was tendered to indicate that any such signs were displayed in other cinemas, theatres or public venues where retractable seats have long existed.

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**18** Reasons of the primary judge at 15-17.

**19** Reasons of the primary judge at 16.

**20** The primary judge in her reasons at 16, referred to *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 and the dissenting reasons of McHugh J in *Jones v Bartlett* (2000) 205 CLR 166.

**21** Reasons of the primary judge at 18.

**22** Noted by the primary judge in her reasons at 16.

40 After the conclusion of the evidence in the respondent's case, the primary judge pointed out that she had what she called "a spectacular lack of evidence as to what [the respondent] would have done if she was warned". There followed an exchange with counsel as to whether any such evidence would be admissible or helpful. However, the judge having raised the point, respondent's counsel (understandably enough) applied to reopen the evidence. Over objection for the appellant, the primary judge permitted the respondent to be recalled. The respondent then stated that "had there been signs there to warn me I would have been aware that the seat would retract and I would have made sure that the seat was completely down and held it down before I sat down".

41 The respondent was cross-examined on this assertion. She stuck by her evidence. The exchange is extracted in the joint reasons[23].

42 The primary judge made a number of general observations about the credibility of the respondent. She accepted a submission for the appellant that she should treat the respondent as "being of little credit and view her evidence with considerable caution". Yet she went on to qualify this conclusion stating[24]:

> "I do not find that she was deliberately dishonest. On the contrary, I am of the view that Ms Burns now believes that of which she testified to be true. But that belief is not well founded."

There are similar passages elsewhere in the reasons[25].

43 Against the background of these general findings, the primary judge added a specific conclusion in relation to the additional testimony that the respondent had been allowed to give concerning the effect that viewing a hypothetical warning sign would have had upon her. On this point, the judge was quite emphatic. She did not accept that the respondent's belated evidence had "any weight, or credibility"[26]. She pointed to the fact that the respondent was holding a struggling child, manoeuvring back to her seat and had imperfectly attempted to satisfy herself as to the location of the seat by touch. The judge concluded "[w]hat she would have done differently is matter of pure speculation"[27].

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**23** Joint reasons at [13].

**24** Reasons of the primary judge at 1.

**25** Reasons of the primary judge at 6.

**26** Reasons of the primary judge at 19.

**27** Reasons of the primary judge at 19.

44 On the basis of this conclusion about the negative impact which any warning sign would have had upon the respondent's consciousness or conduct in the circumstances, the primary judge dismissed the claim based on the alleged lack of warning. It followed that the respondent's action failed. Judgment was entered for the appellant.

The decision of the Court of Appeal

45 Against that judgment, the respondent appealed to the Court of Appeal. In her grounds of appeal, she challenged the findings and conclusions of the primary judge. Specifically, she persisted with her claim based on the alleged design defect of the cinema seat as well as the alleged failure to give a warning of the retractable feature of the seat. The Court of Appeal, whilst noting the way in which, at trial, the case had been presented in terms of the alleged defect of the seat design[28] confined itself to the issue of the lack of warning of the retractable features of the seat[29]. It did so on the basis that other grounds of appeal (including those relating to the suggested defects of design) were not pressed in argument[30].

46 The Court of Appeal defined the scope of the duty of care in terms of the general principles of negligence. In this respect it did not appear to notice the point made by this Court, following an earlier claim also based on a cinema injury, in *Calin v Greater Union Organisation Pty Ltd*[31]. That case affirms the continuing operation, in circumstances of contractual entrants, of the principles stated in *Watson v George*[32]. Nothing appears to turn on this different formulation of the scope of the duty of care accepted by the Court of Appeal. In this Court, the respondent did not suggest to the contrary. No notice of contention was filed raising this point, asserting a larger duty of care or seeking to revive the case at trial based upon the design defects of the cinema seat with its protruding pedestal.

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**28** [2002] Aust Torts Rep ¶81-637 at 68,344-68,345 [12].

**29** [2002] Aust Torts Rep ¶81-637 at 68,344 [13].

**30** [2002] Aust Torts Rep ¶81-637 at 68,346 [17].

**31** (1991) 173 CLR 33 at 38; cf at 44.

**32** (1953) 89 CLR 409 at 424.

47 The Court of Appeal's treatment of the suggested error of the primary judge was confined to two paragraphs of its reasons[33]. In the first, it postulated a simple and inexpensive warning in the cinema foyer bearing the words "Take care. Seats retract automatically. Ensure your seat is down before you sit". In the second, the Court of Appeal noted the primary judge's rejection of the respondent's additional evidence, when she was recalled. However, it went on to state that there was "an overwhelming inference" that a person so warned "would have included that added piece of knowledge in the thinking processes in play when returning to the seat and would have taken care to ensure that the seat was down before she sat"[34]. It was on this basis that the Court of Appeal proceeded to reach its own conclusion "on the material placed before the District Court"[35]. On that footing, judgment was entered for the respondent. A new trial was ordered to assess the damages.

48 In this Court, the appellant contended that the Court of Appeal had erred in the performance of its appellate functions. Specifically, the appellant argued that, in the proper discharge of those functions, there was no basis for substituting an inference (still less an "overwhelming inference") that the posited warning would have caused the respondent to avoid the injury that befell her, contrary to the findings of the primary judge.

The appellate error issue

49 The first question is whether the Court of Appeal erred in the discharge of its functions in substituting its opinion on the issue related to the effect of a warning sign for that reached by the primary judge having regard to the adverse finding about the credibility of the respondent's evidence on that issue. That question takes this Court once again to a matter that has occupied it in a number of recent appeals[36].

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**33** [2002] Aust Torts Rep ¶81-637 at 68,347 [22]-[23] per Sheller JA, Heydon JA and Ipp AJA agreeing.

**34** [2002] Aust Torts Rep ¶81-637 at 68,347 [23].

**35** [2002] Aust Torts Rep ¶81-637 at 68,347 [25].

**36** eg *State Rail Authority (New South Wales) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306; 160 ALR 588; *Fox v Percy* (2003) 77 ALJR 989; 197 ALR 201; *Shorey v PT Limited* (2003) 77 ALJR 1104; 197 ALR 410; *Joslyn v Berryman* (2003) 77 ALJR 1233; 198 ALR 137; *Whisprun v Dixon* (2003) 200 ALR 447.

50 It is important to note that, in the discharge of its constitutional function[37], this Court is not (as the Court of Appeal is) conducting an appeal by way of rehearing. As was pointed out in *Fox v Percy*[38]:

> "Our sole duty … is to determine whether error has been shown on the part of the Court of Appeal. This Court is not engaged in a rehearing. As such, it is not this Court's task to decide where the truth lay as between the competing versions of … the parties. Nevertheless, in considering the supposed error of the Court of Appeal, it is necessary to understand how, respectively, the primary judge came to his conclusion and the Court of Appeal felt authorised to reverse it."

51 I would reject the suggestion that the Court of Appeal intruded upon the primary judge's factual conclusions without first determining for itself that her Honour had erred in deciding as she did[39]. Nor do I see in the reasons of the Court of Appeal any impermissible want of attention to the findings and conclusions of the primary judge. Those that were relevant were carefully described. There is no rudimentary mistake of this kind that calls for this Court's intervention in what, before us, is a strict appeal[40].

52 Nor do I believe that the oft stated[41], and recently affirmed[42], principle of restraint, limiting reversal of a primary judge's conclusion based on findings dependent on an assessment of the credibility or demeanour of a witness, was offended by the course that the Court of Appeal took in its reasoning. Once its jurisdiction was invoked, as it was by the respondent, the Court of Appeal was obliged by statute[43] to decide the matter under appeal following a rehearing

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**37** Constitution, s 73.

**38** (2003) 77 ALJR 989 at 996 [32]; 197 ALR 201 at 210.

**39** cf *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879-880 [65]; 179 ALR 321 at 336-338.

**40** *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [16]-[17], 24 [68], 35 [111]-[112], 96-97 [290]; cf 81-82 [248]-[249], 123 [370]-[371]. See also *Fox v Percy* (2003) 77 ALJR 989 at 995-996 [32]; 197 ALR 201 at 210.

**41** *Jones v Hyde* (1989) 63 ALJR 349 at 351-352; 85 ALR 23 at 27-28; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479, 482-483.

**42** *Fox v Percy* (2003) 77 ALJR 989 at 995 [28]-[29], 1001 [65]; 197 ALR 201 at 209, 217; *Whisprun v Dixon* (2003) 200 ALR 447 at 470-472 [90]-[96].

**43** *Supreme Court Act* 1970 (NSW), s 75A.

conducted, as in this case, on the record. By statute, the Court of Appeal enjoyed all the "powers and duties of the court … from whom the appeal is brought, including powers and duties concerning … the drawing of inferences and the making of findings of fact"[44]. Whilst an appellate court, which does not see or hear witnesses give their testimony, may not ordinarily reach conclusions different to those of the trial judge where such conclusions are dependent upon advantages enjoyed at trial and not on appeal, neither the character of the primary judge's conclusions nor the way her Honour expressed them presented an obstacle forbidding the Court of Appeal from performing its statutory powers and duties.

53 In her expression of her assessment of the credibility of the respondent, the primary judge was quite careful. There was no blanket rejection of the respondent's testimony.[45] On the contrary, different conclusions were expressed in relation to different parts of the respondent's evidence, in so far as it was relevant respectively to liability and damages. On the issue of liability, the primary judge accepted that the respondent was personally honest. She simply concluded that the respondent was mistaken in her assertions of what she would have done had she seen a warning notice alerting her to the fact that the cinema seats retracted.

54 It is important to remember that the evidence on this point was only introduced because the primary judge called the suggested evidentiary omission to notice. Both trial counsel for the respondent and, later, trial counsel for the appellant protested that the "evidence" about what would have been done if a sign had been displayed was a matter of "speculation". So indeed it was. Whether or not, strictly, such evidence is admissible, it is commonly received in Australian courts[46]. Presumably this practice emerged once it was established that the relevant test of causation applicable in Australia was a subjective one[47]. Nevertheless, the evidence of what a claimant would have done if a non-existent

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**44** *Supreme Court Act*, s 75A(6)(b).

**45** cf *Whisprun v Dixon* (2003) 200 ALR 447 at 451 [12]-[13].

**46** *Chappel v Hart* (1998) 195 CLR 232 at 272-273 [93.7]; *Rosenberg v Percival* (2001) 205 CLR 434 at 483-487 [153]-[159]; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 572.

**47** In Canada and the United States of America an objective test has been adopted: *Reibl v Hughes* (1980) 114 DLR (3d) 1 at 16; *Arndt v Smith* [1997] 2 SCR 539; *Canterbury v Spence* 464 F 2d 772 at 791 (1972). However, the test in Australia is a subjective one: *Rogers v Whitaker* (1992) 175 CLR 479 at 492; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 433; *Chappel v Hart* (1998) 195 CLR 232 at 246, 272

warning had been given by a hypothetical sign is so hypothetical, self-serving and speculative as to deserve little (if any) weight, at least in most circumstances[48].

55 In the present case, the evaluation of what the respondent would have done, if a sign of the kind devised by the Court of Appeal had been displayed, is truly a matter of hypothesis based upon an evaluation of circumstances that did not in fact occur, rather than an assessment of whether the respondent was telling the truth about her postulated belief in what she said in the additional evidence that the judge allowed.

56 The primary judge's rejection of that evidence was not, ultimately, based (as she made clear) on a conclusion that the respondent's evidence in that regard should be dismissed because it amounted to deliberate lies. Instead, it was based upon the judge's assessment of the probabilities, reliant in turn, as she put it, on all the circumstances[49]. It was by reference to those circumstances that the judge decided that a warning would not have had any impact on the respondent's consciousness or conduct. In respect of drawing inferences about, and evaluating those circumstances, the Court of Appeal was, generally speaking, in as good a position to reach its own conclusions as was the primary judge.

57 In *Chappel v Hart*[50] McHugh J, as if foreseeing a case such as the present, remarked:

> "[G]iven that most plaintiffs will genuinely believe that they would have taken another option, if presented to them, the reliability of their evidence can only be determined by reference to objective factors, particularly the attitude and conduct of the plaintiff at or about the time when the breach of duty occurred. For that reason, the restrictions on appellate review laid down in *Abalos* … and other cases are likely to have little application."

58 This is not, therefore, a case where credibility findings stood as a barrier to the performance by the Court of Appeal of its appellate functions. I agree with this much in the reasons of Callinan J in *Fox v Percy*[51]: Errors of fact (including

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**48** A point made in *Ellis* (1989) 17 NSWLR 553 at 582 per Samuels JA; cf at 560; *Chappel* (1998) 195 CLR 232 at 272 [93.7]; *Rosenberg* (2001) 205 CLR 434 at 486 [158].

**49** Reasons of the primary judge at 20.

**50** (1998) 195 CLR 232 at 246, fn 64.

**51** (2003) 77 ALJR 989 at 1012 [131], 1014 [139], 1015-1017 [145]-[149]; 197 ALR 201 at 232-233, 235, 236-239.

in factual inferences) occur at trial. They can have very serious and sometimes unjust consequences. The statutory functions of appellate courts provide an important means to correct such errors. The invocation of credibility in the findings at first instance does not, without more, impose in every case an automatic barrier against the performance of appellate review as mandated by Parliament[52]. The joint reasons in *Fox v Percy* make this clear[53]. So does the statute.

59 In each case it is necessary to analyse the role, if any, that credibility has actually played in the critical findings of the primary judge. The mere mention of credibility by the primary judge does not slam the door to effective appellate review of factual findings. It did not do so in this case. It remained for the Court of Appeal to perform its functions as explained by this Court in *Warren v Coombes*[54] and later cases. There was therefore no error in this respect in the Court of Appeal's appellate approach.

The requirement of a warning and causation

60 *The High Court's role*: This leaves, however, the second attack of the appellant on the Court of Appeal's conclusion. In performing its function in a strict appeal, this Court is authorised by the Constitution, as carried into effect by the *Judiciary Act* 1903 (Cth)[55], to "give such judgment as ought to have been given in the first instance". To this end, this Court is obliged to consider the way in which the Court of Appeal performed its function of rehearing and, allowing for any advantages that that Court may itself have enjoyed[56], to substitute a judgment, being that which the Court of Appeal should have entered if error of law or fact is demonstrated[57].

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**52** (2003) 77 ALJR 989 at 1016-1017 [148]; 197 ALR 201 at 238-239.

**53** (2003) 77 ALJR 989 at 995 [30]-[31]; 197 ALR 201 at 209-210.

**54** (1979) 142 CLR 531 at 551; cf *Fox v Percy* (2003) 77 ALJR 989 at 994-995 [25]-[29]; 197 ALR 201 at 208-209.

**55** s 37.

**56** cf *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 370; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879-880 [65]; 179 ALR 321 at 336-338; *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 77 ALJR 398 at 416-417 [95]; 194 ALR 485 at 510.

**57** *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 107-110.

61 It is here, with respect, that I part company from Sheller JA, who gave the reasons for the Court of Appeal. I pay due regard to the fact that three experienced judges of the Court of Appeal concluded that the added ingredient of a warning notice would have been sufficient to forestall the injury to the respondent in the manner in which it happened. However, like the other members of this Court, I am unconvinced that the primary judge was wrong in her conclusion to the contrary.

62 *Cases on warning signs*: The centrepiece of the respondent's argument, in defence of the conclusions of the Court of Appeal, was the reasoning of the majority of this Court in *Nagle v Rottnest Island Authority*[58].

63 *Nagle* was a case in which a plaintiff was injured when he dived into water at a swimming reserve and hit a submerged rock sustaining profound injuries. The statutory authority in charge of the reserve had promoted it for recreational purposes. It conducted the reserve "effectively … as a business, deriving revenue from visitors"[59]. The trial judge in *Nagle* had upheld the diver's submissions that the authority owed him a duty of care that extended to the provision of a warning about the presence of submerged rocks; that the risk of injury was reasonably foreseeable; and that the failure to provide a warning had constituted a breach of the duty of care. However, he dismissed the claim on the footing that the absence of a warning had not caused the diver's injuries. In short, it would not have averted the harm suffered[60]. Although the Full Court of the Supreme Court of Western Australia unanimously rejected the trial judge's analysis of causation[61], by majority, it dismissed the diver's appeal on the basis that the authority had owed no duty to the appellant. In this Court, the primary judge's approach was upheld, except that his conclusion on the causation issue was reversed, resulting in a judgment in favour of the injured diver.

64 The respondent in this appeal urged that consistency with the approach taken in *Nagle* sustained the result to which the Court of Appeal had come and the judgment in her favour. Even the dissenting opinion of Brennan J in *Nagle*[62] determined the case against the plaintiff on the footing that there was no duty of care owed in the circumstances. On the issue of causation, Brennan J, like the majority, had been willing to accept that "a notice might have transformed the

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**58** (1993) 177 CLR 423.

**59** (1993) 177 CLR 423 at 427.

**60** (1993) 177 CLR 423 at 433.

**61** *Nagle v Rottnest Island Authority* [1991] Aust Torts Rep ¶81-090.

**62** *Nagle* (1993) 177 CLR 423 at 443.

plaintiff's knowledge of the existence of [a danger] into a more lively appreciation of the danger"[63]. There is a resonance in these words with the language used in the Court of Appeal to explain its conclusion in this case.

65 Since *Nagle*, two further cases involving the suggested failure to provide warnings have come before this Court. In neither case (nor in the present appeal) was the authority of *Nagle* questioned. In each case, there were differences of view concerning the suggested breach of duty to the injured plaintiff and whether the discharge of the duty of care in the circumstances required the provision of a specific warning. In neither case was the obligation to provide a warning upheld. Accordingly, in neither case was the issue of causation reached.

66 In *Romeo v Conservation Commission (NT)*[64] the case concerned the alleged failure of an authority to provide a barrier and a warning sign at the top of a cliff in a nature reserve to discourage persons in an intoxicated state, like the plaintiff, from approaching the cliff edge, the dangers of which were otherwise obvious. In *Woods v Multi-Sport Holdings Pty Ltd*[65] the case concerned the suggested need to provide a warning against the special risks of indoor cricket with a ball having a commonly demonstrated propensity to enter the eye socket because of its softer, porous material.

67 In *Romeo*, in the context of the issues fought in that case, I remarked[66]:

> "Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just."

The dangers of taking this comment out of context and viewing it as a universal proposition of law were noticed in *Woods*[67]. In every case, it is necessary to evaluate the suggested need for, and effectiveness of, a warning by reference to the proved circumstances.

68 In *Woods*, together with McHugh J[68], I considered that the failure of the indoor cricket company which, for reward, provided facilities to entrants to its

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**63** (1993) 177 CLR 423 at 444.

**64** (1998) 192 CLR 431.

**65** (2002) 208 CLR 460.

**66** (1998) 192 CLR 431 at 478 [123].

**67** (2002) 208 CLR 460 at 474 [45], 499-500 [127].

**68** (2002) 208 CLR 460 at 484 [80]-[81].

premises for the playing of that game, to provide a warning of the kind propounded[69], constituted a breach of the duty of care owed to the players. Both McHugh J and I[70] accepted that the issue of whether any such notice would have been effective to deter the plaintiff, a novice player, from playing and being injured involved a conclusion of fact that had to be determined in a retrial. However, a majority of this Court[71] rejected the need for a notice, considering that the particular risks were self-evident and inherent in voluntary participation in the sport.

69 *The duty to warn entrants*: Where does this series of decisions leave the requirement to give entrants upon premises a notice concerning risks present in the place? It would be erroneous for us to approach the present appeal on the basis that a warning sign was required if the authority of this Court was now to the contrary. No concession of the appellant or confirmation of its grounds of appeal could oblige this Court to approach the appeal in a way that was discordant with legal authority.

70 However, whilst *Nagle* stands, it cannot be said that there is no such obligation. True, *Romeo* and *Woods* appear less favourable to the obligation to provide notices and more emphatic of the need in every case to show that the warning in such a notice would have prevented the injury that ensued[72]. To decide whether, in a particular case, a notice is required, it is necessary to take into account the social considerations that the law is seeking to advance. From the point of view of the *occupier*, it is seeking to encourage attention to, and consideration of, accident prevention by the party ordinarily with the superior means and interest to "keep abreast of publicly available or expert knowledge concerning the risks of injury in such activities"[73]. From the point of view of the *entrant*, the law is seeking to uphold that person's entitlement to make informed choices concerning the kind of risks in which he or she will participate on the basis of knowledge provided by the occupier. At the heart of the latter objective lies a conception of respect for individual autonomy that probably has its source in notions of fundamental human rights and human dignity[74].

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**69** (2002) 208 CLR 460 at 484 [80].

**70** (2002) 208 CLR 460 at 484 [81]-[82], 501 [132].

**71** (2002) 208 CLR 460 at 474 [43] per Gleeson CJ, 501 [135], 503-504 [144] per Hayne J; 509 [159] per Callinan J.

**72** *Woods* (2002) 208 CLR 460 at 484 [81].

**73** *Woods* (2002) 208 CLR 460 at 477 [60] per McHugh J.

**74** *Rosenberg* (2001) 205 CLR 434 at 480 [145].

71 Considerations relevant to the obligation to provide a warning notice will include (1) whether the occupier has an economic or other interest in the entry of the plaintiff[75]; (2) whether, because of previous incidents, public discussion or otherwise the occupier could be expected to know of any particular risks against which warnings should be given[76]; (3) whether there was any hidden feature of the place or activity that might not be plain to an ordinary entrant but which should be known to, or reasonably discoverable by the occupier, calling for a warning[77]; (4) whether, if the risk eventuated, the consequences would be likely to be minor or significant for the person affected[78]; (5) whether the imposition of a requirement to give a notice could be confined to a particular place or places or would have large implications, costs and other consequences[79]; and (6) whether the nature of the activity in question was such as to render the presence of a sign irrelevant to the actual prevention of injury[80].

72 These, and doubtless other, considerations must be weighed in the particular circumstances, to decide whether the duty of care owed to the entrant extended to the provision of a warning and, if it did, whether a sign containing the warning would have prevented injury in the particular case. Decisions upon such questions are primarily the responsibility of trial judges or where they still exist, juries. But where an appeal is brought, appellate courts may, in appropriate cases, correct erroneous decisions reached at trial, as this Court did in *Nagle*[81].

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**75** *Nagle* (1993) 177 CLR 423 at 427; *Woods* (2002) 208 CLR 460 at 477 [60]; cf *Calin* (1991) 173 CLR 33 at 38.

**76** *Woods* (2002) 208 CLR 460 at 500 [128].

**77** Such as the porous features of the indoor cricket ball as considered by the minority in *Woods* (2002) 208 CLR 460 at 500-501 [129].

**78** Such as quadriplegia from striking submerged rocks difficult to see in certain circumstances in *Nagle* (1993) 177 CLR 423 at 426.

**79** Such as the disfigurement of public places to little gain in accident prevention: *Romeo* (1998) 192 CLR 431 at 485 [140]; cf Allen, "Liability of a public authority as occupier: *Romeo v Conservation Commission of the Northern Territory*", (1997) 5 *Torts Law Journal* 7 at 16.

**80** As the injury to an intoxicated person on a cliff edge in *Romeo* (1998) 192 CLR 431 or injury to a person who has attended ready to play indoor cricket as in *Woods* (2002) 208 CLR 460.

**81** *Nagle* (1993) 177 CLR 423.

73 *The present appeal*: With these considerations in mind, I return to the facts of the present appeal. Assuming that the provision of some form of warning sign would have been appropriate (a matter that the appellant did not formally concede) the factual issue for decision was whether, in the circumstances, a sign of the kind postulated by the Court of Appeal would have prevented the respondent's injuries.

74 Two reasons given by the primary judge for a negative answer to this question were not addressed, sufficiently or at all, in the reasons of the Court of Appeal. The first was that the respondent was materially distracted and preoccupied by a highly agitated child in her care and therefore unlikely to take into account the message in a sign, which message could only have been conveyed fleetingly if at all. The second, related, consideration was that the respondent's movement in seating herself was not a deliberate, conscious one. As indicated by her imperfect attempt to gauge the presence and height of the seat behind her, it was a hurried, virtually instinctive move, unsurprising in the circumstances.

75 *Conclusion: no error at trial*: It was open to the primary judge to conclude that no added ingredient of notice of the retractable feature of the cinema seats would have altered the respondent's conduct in the circumstances. Although it was not impetuous, it was not advertent or carefully executed conduct. To this extent, the case was factually different from that presented in *Nagle*. Although in each case the occupier had an economic interest in the presence of the respective entrants, in *Nagle* it was the evidence of the plaintiff's "cautious approach to diving"[82], accepted by the trial judge and revealed in uncontradicted evidence, that persuaded a majority of this Court that the plaintiff would have been deterred from diving by the installation of an appropriate sign. There was no such factual foundation in the present case to warrant reversing the primary judge's conclusions. To some extent those conclusions would have been influenced by an assessment of the respondent's likely conduct in the circumstances hypothesised. It was in this respect, rather than in evaluations of credibility, that the primary judge had advantages that could not be wholly recaptured by the Court of Appeal. They lent weight to the conclusion that her Honour reached on the evidence. That conclusion was not shown to be wrong.

76 This opinion is sufficient to require the restoration of the primary judge's judgment in favour of the appellant. It is unnecessary to decide whether the discharge of the appellant's duty of care extended to the obligation to provide a warning sign such as the Court of Appeal devised. But it would be a mistake to infer from *Romeo* and *Woods* that the provision of warnings by occupiers to entrants upon their premises is no longer part of the law. *Nagle* clearly holds to

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**82** *Nagle* (1993) 177 CLR 423 at 433.

the contrary. Common sense and frequent experience confirm that notices can be important means of accident prevention.

Orders

77 I agree in the orders proposed in the joint reasons.