HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

COMMISSIONER OF MAIN ROADS APPELLANT

AND

LLOYD RUSSELL JONES RESPONDENT

Commissioner of Main Roads v Jones [2005] HCA 27
20 May 2005
Amended Order made 25 May 2005
P31/2004

AMENDED ORDER

1. *Appeal allowed.*

2. *Appellant to pay the costs of the respondent of the appeal.*

3. *Set aside orders 1 to 4 of the Full Court of the Supreme Court of Western Australia made on 20 November 2002 and in their place order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of Western Australia

Representation:

B W Walker SC with G R Hancy for the appellant (instructed by Corser and Corser)

D F Jackson QC with K J Bradford for the respondent (instructed by Bradford & Co)

CATCHWORDS

Commissioner of Main Roads v Jones

Negligence – Standard of care – Breach – Respondent driver injured after car collided with wild horse on highway – Appellant a body corporate upon which care, control and management of highways was conferred – Whether appellant should have been aware of attraction of animals to water sources near accident site and exercised power to reduce speed limit and to erect warning sign.

Courts – Appeals – Whether Full Court of the Supreme Court of Western Australia justified in overturning findings of trial judge on danger posed by animals straying on highway.

Negligence – Causation – Whether, if speed limit reduced or warning sign erected, respondent's injuries would have been prevented.

Practice – Discovery – Material discovered by appellant between trial and appeal – Whether availability at trial would have warranted different result.

1 GLEESON CJ. The facts are set out in the reasons for judgment of Callinan J.

2 The respondent sued the appellant for damages for negligence. The respondent suffered serious personal injury when a car he was driving collided with a horse on a stretch of unfenced road on the Great Northern Highway about 6 km south of Turkey Creek in Western Australia. The principal allegations of breach of duty of care on the part of the appellant were failure to erect road signs in the locality warning of the danger of animals on the highway, and failure to impose in the locality a speed limit lower than the general limit of 110 km per hour. The extent of "the locality" was rather imprecise. The argument concentrated on that part of the highway extending for a distance of about two or three kilometres either side of the point of impact. The trial judge rejected both allegations, holding that a reasonable response by the highway authority to the danger constituted by straying animals did not require either of those steps. The trial judge also found for the appellant on the issue of causation, holding that the conduct of the appellant before the accident showed that he would not have slowed down or driven more cautiously even if there had been a warning sign, or a reduced speed limit. Both of those findings were reversed, by majority, in the Full Court of the Supreme Court of Western Australia. The question before this Court is whether the Full Court was justified in reversing the trial judge's findings.

3 As to the issue of negligence, a central, and in my view persuasive, aspect of the reasoning of the trial judge was that the evidence did not justify a conclusion that the risk of animals straying onto the road in the place where the collision occurred was materially different from the risk that extended over hundreds of kilometres of the highway. Murray J, who dissented in the Full Court, said[1]:

> "[T]he [respondent's] case failed because he was unable to establish any unusual concentration of wild animals in the area where the accident occurred. The risk was not materially different from that which applied at any number of places over the whole area traversed by the highway between Kununurra and Halls Creek. There was no particular requirement, therefore, for a reduction in the speed limit or a sign or signs in some way warning of the possibility that wild animals would be encountered on the road. The findings to that effect by the trial judge were well warranted by a body of evidence which his Honour was entitled to accept and rely upon."

4 The difference of opinion between the majority in the Full Court, on the one hand, and Murray J and the trial judge, on the other, was largely concerned

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1 *Jones v Commissioner of Main Roads (WA)* 2002 37 MVR 451 at 460-461 [51].

with the proper inferences to be drawn from a body of evidence about the comparative risks of straying animals along the Great Northern Highway, and at particular locations.

5 In this respect, the case provides another example of the danger involved in considering warnings without making due allowance for the distorting effect of litigious hindsight. The matter was discussed in *Rosenberg v Percival*[2]. When a foreseeable risk has eventuated, and harm has resulted, the particular risk naturally becomes the focus of special attention. Yet, if it was only one risk among many, there may have been no reason, at the time of the allegedly tortious conduct, to single it out. The Great Northern Highway extends, unfenced, for long distances, through cattle stations. The respondent knew that, all along the highway, there was a risk of colliding with animals. His case was not that there should have been a warning sign, or a reduced speed limit, covering the entire length of the road. His case was that there should have been such a sign, and a reduced speed limit, covering the place where the collision occurred. Yet the evidence accepted by the trial judge showed that there was nothing so unusual about that locality as to warrant the measures for which the respondent contended.

6 In my view the trial judge's conclusion on the issue of breach of duty should not have been disturbed. There was, however, a substantial basis for the difference of opinion. It related to the significance of the evidence of a number of local residents as to their appreciation of the risk in the locality. If the present appeal had turned only upon this first issue, it would have been necessary to deal with that evidence in more detail. However, on the issue of causation, the outcome is more clear-cut, and turns upon facts that can be stated shortly.

7 The evidence showed that the respondent's average speed, over a distance of more than 200 km before the collision, was between 135 km and 140 km per hour. The road was not entirely straight and clear. There were places where the respondent would have been forced to reduce speed. To achieve that average, his maximum speed must have been significantly greater than 140 km per hour. He drove through Turkey Creek, a settlement only 6 km from the place of the accident, where the speed limit was 90 km per hour, at such a high speed that he attracted local attention. The trial judge accepted the evidence of a witness who estimated the respondent's speed through Turkey Creek at about 140 km per hour.

8 The trial judge said:

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2 (2001) 205 CLR 434 at 441-442 [16].

> "Having regard to the [respondent's] knowledge of the risks of travel at night, he would not have heeded warning signs had they been erected; nor would he have decreased his speed to a safe speed had the speed limit been reduced – this is illustrated by his travelling at a dangerously fast speed through Turkey Creek where the speed limit was 90 km/h and at a dangerously fast speed in the vicinity of two narrow bridges upon a two lane highway with cattle grids."

9 The respondent, by reason of his injuries, was unable to give evidence. In reversing the finding of the trial judge on the causation issue, the majority of the Full Court relied upon evidence of the respondent's wife, who was not in the car when the collision occurred, and of a passenger, who was asleep. They both said that it was the respondent's usual practice, when driving, to adapt his speed to warning signs.

10 The finding of the trial judge was not based on the respondent's credibility. It was based on objective evidence of the conduct of the respondent in the course of the journey in question and, in particular, over the period immediately before the collision. The trial judge was satisfied, on the evidence, that the respondent was aware of the danger constituted by animals, both wild and domestic, along the whole length of the road on which he travelled at very high (and legally excessive) speed. He did not slow down on account of the danger to people at Turkey Creek. He ignored a sign reducing the speed limit. In fact, he appears to have ignored speed limits altogether. The likelihood that he would have responded to another sign reached a few minutes after he passed through Turkey Creek seems remote. The trial judge heard the evidence of the respondent's wife, and the passenger, and did not regard it as of sufficient weight or cogency to displace the inference clearly available from the objective evidence of the respondent's behaviour on the occasion in question. The Full Court was not justified in substituting its own view for that of the trial judge on the point. The reversal of the finding on causation was unwarranted.

11 I agree with what is said by Callinan J concerning the new evidence.

12 I would allow the appeal, set aside orders 1 to 4 of the orders of the Full Court, and order that the appeal to the Full Court be dismissed. In accordance with the undertakings given at the time of the grant of Special Leave to Appeal, the appellant must pay the costs of the appeal to this Court.

13 McHUGH J. In my opinion this appeal should be allowed. The respondent, Lloyd Russell Jones, suffered serious injuries on the night of 11 May 1992 when his car collided with a horse that had strayed onto the Great Northern Highway in the Kimberley district of Western Australia. The accident occurred between Mabel Spring Creek and Rocky Creek, two creeks over which the Highway passes. The accident site was 5.8km south of the town of Turkey Creek, situated 194km south of Kununurra.

14 Mr Jones sued the appellant, the Commissioner of Main Roads, for damages for negligence in the District Court of Western Australia alleging that the Commissioner had breached the duty of care that he admittedly owed to Mr Jones. Mr Jones' Further Re-Amended Statement of Claim alleged that, within 500 metres of the accident site – at Rocky Creek and at the junction of Rocky Creek and Turkey Creek – were watering holes and that about 1.5 to 2km from that site was a water bore. It also alleged that the watering holes and bore were likely to attract wild animals including horses. Mr Jones claimed that the Commissioner had breached his duty by failing to exercise his power to reduce the speed limit applicable "in the area where the collision occurred" to 80km/h. The speed limit that applied in that area was 110km/h. Mr Jones also alleged that the Commissioner had breached his duty by failing to erect signs warning motorists of the hazards created by animals in that area of the Great Northern Highway. The trial judge, Charters DCJ, rejected Mr Jones' claim for damages[3], but, by majority, the Full Court of the Supreme Court of Western Australia allowed Mr Jones' appeal against that decision[4]. The Full Court found that the Commissioner had been negligent and that Mr Jones' contributory negligence was 50 per cent responsible for his injuries.

15 The trial judge found that there was "a significant danger of encountering animals at night on the road throughout the station or cattle country in the Kimberley region". His Honour said that there was always a prospect of encountering wild animals, such as horses, donkeys and kangaroos. His Honour found that Mr Jones was aware of the danger posed to motorists by animals straying onto the Highway in the area where the accident occurred. The learned trial judge also found that the speed at which Mr Jones was travelling had averaged between 135 and 140km/h and that he had driven through Turkey Creek at a speed of about 140km/h. His Honour also held that the evidence did not establish the risk of injury from straying animals was greater upon the section of the highway between Kununurra and Halls Creek, which was 358km south of Kununurra, than upon other parts of the Highway. His Honour said that there

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3 *Jones v Commissioner of Main Roads* (1998) 20 SR (WA) 117.

4 *Jones v Commissioner of Main Roads (WA)* (2002) 37 MVR 451.

was no particular propensity for animals to approach the section of the Highway in question. Accordingly, his Honour found:

> "Signs warning of animals in the area were not warranted having regard to the overall character of the highway and likely presence of animals over a very large area.
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> [Mr Jones] failed to take reasonable care for his own safety by driving at a most dangerous speed at night and by that failure caused his injury. As a matter of ordinary commonsense his negligence was the sole real cause of the accident.
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> Having regard to [his] knowledge of the risks of travel at night, he would not have heeded warning signs had they been erected; nor would he have decreased his speed to a safe speed had the speed limit been reduced – this is illustrated by his travelling at a dangerously fast speed through Turkey Creek where the speed limit was 90km/h and at a dangerously fast speed in the vicinity of two narrow bridges upon a two lane highway with cattle grids."

16 These findings inevitably led the learned trial judge to reject Mr Jones' claim for damages. However, a majority of the Full Court found[5] "that there was a need, throughout the length of the road between Kununurra and Halls Creek, to place signs, warning of the danger of straying animals, on those parts of the road (including that in which the accident occurred) in which animals were more frequently to be found." The majority also found that the Commissioner "should have imposed lower speed limits in those areas where the danger was most acute."[6] The majority judges also rejected the trial judge's finding on causation. Steytler J, with whose judgment Malcolm CJ agreed, said[7]:

> "As to the issue of causation, I find myself, with due respect, entirely unable to accept the proposition, accepted by the trial judge, that merely because [Mr Jones] had previously travelled in the Kimberley region, including the area between Kununurra and Halls Creek, he would have been aware of the extent of the risks posed by straying animals. He was, no doubt, aware of the risk of straying animals. He had previously driven in the area, and in the Kimberleys generally, and his attempts to hire a four-wheel-drive vehicle demonstrated his concerns in this respect. However, there was nothing to suggest that he knew which areas along his

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5 (2003) 37 MVR 451 at 470.

6 (2003) 37 MVR 451 at 471.

7 (2003) 37 MVR 451 at 471.

> chosen route were particularly dangerous. He had, on the available evidence, only limited experience of this particular stretch of road and it seems to me to be improbable that he would, in the absence of any warning signs or even a reduced speed limit, have known of the particular danger presented by straying animals in the Rocky Creek and Mabel Spring Creek area."

17 Steytler J found it "to be probable that, had there been a warning sign as to the particular danger presented by straying animals in the area around Mabel Spring Creek and Rocky Creek, [Mr Jones] would have slowed down, to some extent at least."[8]

18 It is unnecessary for me to determine whether the Full Court was justified in overturning the trial judge's findings concerning the dangers arising from animals straying onto the Highway in the area between Mabel Spring Creek and Rocky Creek. That is because, in my opinion, even if warning signs were needed in that area and even if the speed limit should have been reduced to about 80km/h, Mr Jones failed to prove that their presence would have prevented his accident or reduced his injuries.

19 The evidence established a high probability that, for much of the 200 kilometres that Mr Jones travelled before the accident, his speed significantly exceeded the speed limit of 110km/h. Indeed, the evidence did more than indicate that his average speed was somewhere between 135 and 140km/h. Given the winding nature of parts of the Highway, to have achieved an average speed of 135-140km/h over that distance, he must have travelled at times at speeds in excess of 140km/h. Moreover, the evidence established that he was travelling at a high speed – 50km/h in excess of the speed limit – shortly before the accident. Turkey Creek is 5.8km from the accident site. The speed limit at Turkey Creek was 90km/h. Yet Mr Jones went through Turkey Creek at a speed of about 140km/h according to a witness whose evidence the trial judge accepted.

20 With great respect to the majority judges in the Full Court, it seems fanciful to suppose that a speed sign of 80km/h in the area before the accident site would have caused Mr Jones to reduce his speed to any significant extent. He had probably disregarded the speed limits for the whole or almost the whole of his journey and he had travelled at a speed more than 50 per cent in excess of a 90km/h sign less than three minutes before the accident. Nothing in the evidence accepted by the trial judge suggests that Mr Jones would have reduced his speed because of an 80km/h sign in the Mabel Spring Creek-Rocky Creek area. The trial judge made his finding concerning causation despite the evidence of Mr Jones' wife and his passenger that he was a careful driver who took notice of

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8 (2003) 37 MVR 451 at 473.

road signs. Given the evidence of Mr Jones' speed through Turkey Creek and the entire journey, rejection of their evidence was inevitable, assuming that it was admissible as evidence of habit.

21 A more difficult question is whether the accident could have been avoided if, as the Full Court found, the Commissioner breached his duty by not erecting signs between Kununurra and Halls Creek warning of the danger of straying animals. Mr Jones' case on this aspect of causation depends on whether it is reasonable to draw the inference that the presence of such signs would have reinforced the need to obey the speed limits or alternatively would have caused him to keep a better lookout.

22 The view that a warning sign would have induced Mr Jones to keep a better lookout is easily dismissed. There was no evidence that he was not keeping a proper lookout. It would be speculation – not inference – to conclude that the presence of signs would have induced him to keep a better lookout than he did.

23 The majority judges in the Full Court thought that warning signs would have caused Mr Jones to slow down with the result that he would have had a better chance of avoiding the collision and of suffering less severe injuries. Steytler J said[9]:

> "In all of these circumstances, it seems to me to be probable that, had there been a warning sign as to the particular danger presented by straying animals in the area around Mabel Spring Creek and Rocky Creek, [Mr Jones] would have slowed down, to some extent at least. It also seems to me to be probable (although some speculation is required) that his failure to do so contributed to the accident which occurred or added to its severity".

24 The reinforcement claim, however, faced formidable difficulties. First, the evidence did not reveal the circumstances in which the accident occurred. Whether the collision with the horse would have been avoided if Mr Jones had been travelling at 80km/h can only be a matter of speculation. Secondly, the trial judge accepted the evidence of an expert on road planning and traffic control that the effectiveness of warning signs can be maintained only "where the road environment is likely to present a hazard which is outside the probable driver expectation." The Australian Standards concerning road signs also accepts that a multiplicity of such signs undermines their influence on drivers. A proliferation of warning signs between Kununurra and Halls Creek would probably have had little effect on drivers generally and Mr Jones in particular, given his disregard of

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9 (2003) 37 MVR 451 at 473.

speed limit signs for 200km between Kununurra and the accident site. Thirdly, Mr Jones knew that, in driving along this Highway, he ran the risk of colliding with domestic and feral animals straying onto the Highway. That risk was present, to his knowledge, throughout the entire section of the journey from Kununurra to Halls Creek. Yet his average speed throughout the journey was between 135 and 140km/h, well in excess of the speed limit.

25 Once the trial judge declined to accept the evidence of Mr Jones' wife and his passenger concerning his response to road signs, nothing in the evidence justified the Full Court in refusing to accept the inferences flowing from his cavalier disregard of the speed limits governing his journey. It may or may not have been open to the trial judge to make a positive finding that Mr Jones would not have been influenced by a straying animal warning sign or obeyed an 80km/h sign. But however that may be, it was not open to the Full Court to find that he *would have* acted in accordance with either of such signs.

26 This was not a case where the only evidence concerning causation was that the defendant had breached his duty of care and that the injury that occurred was within the scope of the risk of injury arising from the breach of duty[10]. In such cases, it is always open to the tribunal of fact to find a causal connection between the breach and the injury even though the exact cause of the injury or conduct of the plaintiff is unknown[11]. In this case, however, the evidence showed that Mr Jones travelled at speeds throughout his journey that were well above the speed limit of 110km/h even though he was aware of the danger of animals straying onto the Highway. It also showed that less than three minutes before the collision he had travelled through Turkey Creek at 140km/h although a sign erected on the outskirts of the town proclaimed a 90km/h speed limit. Far from the accepted evidence proving that Mr Jones would have slowed down if he had seen 80km/h speed limits and straying animal warning signs, it tends to suggests that they would not have influenced his conduct. What he did in relation to traffic signs during his journey was the best evidence of what he might have done if additional or different signs were present during the journey. And his flagrant and persistent breaches of the traffic speed signs that did exist indicate that an 80km/h speed sign and an animal warning sign would have made no difference to his driving as he approached the accident site. Even if the accident would have been avoided or the severity of Mr Jones' injuries reduced by erecting an 80km/h sign in the accident area, the evidence does not support a finding that he would have driven at 80km/h or at a lesser speed than he did. With great respect to the majority judges in the Full Court, they were not entitled to reverse the findings of the learned trial judge concerning the causation issue.

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10 cf *Chappel v Hart* (1998) 195 CLR 232 at 244 [27]; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 279 [32], 312 [128].

11 cf *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 24, 27.

27 Mr Jones also relied on new evidence that was tendered in the Full Court. However, once the finding of the trial judge on the causation issue is accepted, the new evidence on which Mr Jones relied could make no difference to the result of the case. It goes to the issue of breach, not the issue of causation.

Order

28 The appeal must be allowed. Orders 1 to 4 of the orders of the Full Court of the Supreme Court of Western Australia allowing the appeal to that Court must be set aside and in their place order that the appeal to that Court be dismissed. In accordance with the undertakings that were given at the time of the grant of special leave to appeal, the appellant is to pay the respondent's costs of this appeal.

29 GUMMOW AND HAYNE JJ. At about 5.30 pm on 11 May 1992, the respondent, Mr Jones, with a passenger, Mr Stewart, left Kununurra in the Kimberley district of Western Australia to travel south to Halls Creek along the Great Northern Highway ("the Highway"). The respondent was driving a hired sedan motor vehicle. At about 7.00 pm, while the passenger was asleep, the car collided with a wild horse which had strayed onto the Highway. The respondent was 57 years old. He suffered severe head injuries and never recovered total consciousness.

30 The respondent's claim for damages in negligence was brought by his wife as his next friend. The action was tried in the District Court of Western Australia (Charters DCJ sitting without a jury)[12]. His Honour dismissed the action. However, an appeal to the Full Court of the Supreme Court of Western Australia (Malcolm CJ and Steytler J; Murray J dissenting) was successful[13]. By majority, the decision of the District Court was set aside and an order was made that the appellant was liable to the respondent for 50 per cent of the damages he sustained; in the absence of agreement as to the quantum of damages, the matter was to be returned to the District Court for assessment[14].

31 Against that decision, the defendant in the action, the Commissioner of Main Roads ("the Commissioner") appeals to this Court seeking reinstatement of the outcome in the District Court. It is convenient first to say something respecting the statutory powers and functions of the Commissioner.

32 The Commissioner is constituted as a body corporate by s 9 of the *Main Roads Act* 1930 (WA) ("the Roads Act"). At the relevant time, the Roads Act (s 15(2)) conferred upon the Commissioner the care, control and management of land over which a highway or main road was declared. Further, s 16(1) empowered the Commissioner to do all things necessary for or incidental to the proper management of all highways and main roads in Western Australia.

33 Further provision was made by regulations titled the *Road Traffic Code* 1975 (WA) ("the Code"). This authorised the Commissioner to erect, establish or display traffic signs and traffic control signs (reg 301(1)). Persons contravening the direction of the inscription on a traffic sign committed an offence (reg 304). The Code also prescribed a general speed limit throughout Western Australia of 110 kms per hour (reg 1001).

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12 *Jones v Commissioner of Main Roads* (1998) 20 SR (WA) 117.

13 *Jones v Commissioner of Main Roads (WA)* (2002) 37 MVR 451.

14 (2002) 37 MVR 451 at 473.

34 The Highway began as a dirt track constructed in the 1880s by station owners running bullock teams and was used by those participating in the gold rush in the Halls Creek area in about 1885. With financial assistance under the *Western Australia Grant (Beef Cattle Roads) Act* 1961 (Cth), the Highway was graded and gravelled and, in 1972, it was sealed. At the time of the accident, the Highway was a dual sealed carriageway.

35 Halls Creek is 358 kms south of Kununurra. Turkey Creek, where there is a roadhouse and a signed speed restriction of 90 kms per hour, is 194 kms south of Kununurra. The accident site was 5.8 kms south of Turkey Creek. A speed derestriction sign appeared at the southern exit of Turkey Creek. The result was to restore the general State limit of 110 kms per hour.

36 The accident site was between Mabel Spring Creek and Rocky Creek. The Highway is carried over these creeks (or creek beds) by one-lane bridges; there are signs before each bridge indicating "Narrow bridge, one lane" and "No overtaking or passing". There were signs warning of stock crossing or straying onto the Highway at Rosie's Yard and Tikalara Bore, respectively well north and south of the accident site.

37 Given the starting time of the trip, the time of the accident and the distance travelled, the trial judge, whilst not confident that the times could be said with great accuracy, found that the speed at which the vehicle was travelling was somewhere between 135 and 140 kms per hour as an average. His Honour also found that the respondent had driven through Turkey Creek at a very high speed, probably about 140 kms per hour, despite the signed speed restriction of 90 kms per hour.

38 This was not a case which turned upon the state of the Highway. The accident occurred because the vehicle came into collision with a wild horse which appears to have run onto the road coincidentally at the time when the vehicle was passing. The collision caused the respondent to lose control of the vehicle so that it left the road and struck a tree 20 to 30 metres south on the left side of the road. The relevant duty imposed by the law upon the Commissioner was one to take reasonable care for the safety of the respondent as a user of the Highway. The relevant powers of the Commissioner were those dealing not with the construction and maintenance of the Highway but with the creation and maintenance of appropriate signs where necessary for the guidance and protection of road users, including the imposition of particular speed limits.

39 Consistently with the decision in *Brodie v Singleton Shire Council*[15], it is not an issue that a statutory body, such as the Commissioner, may come under a common law duty of care in relation to the exercise or failure to exercise its powers and functions. In submissions to this Court, the Commissioner did not dispute the existence of a duty of care. This obliged the Commissioner to take reasonable care that its exercise or failure to exercise its powers and functions did not create a foreseeable risk of harm to road users, including the respondent.

40 Where the state of a highway or main road created such a risk, the Commissioner was obliged to take reasonable steps to alleviate the danger. But what was reasonable in this case? On that subject, the following was said in the joint judgment in *Brodie*[16]:

> "The perception of the response by the authority calls for, to adapt the statement by Mason J in *Wyong Shire Council v Shirt*[17], a consideration of various matters; in particular, the magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps described above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does not extend to ensuring the safety of road users in all circumstances. In the application of principle, much thus will turn upon the facts and circumstances disclosed by the evidence in each particular case."

Counsel for the Commissioner emphasised the propositions in these last two sentences as particularly important for the present appeal. Counsel also emphasised the "localised" nature of the response pleaded by the respondent as that which ought to have been given by the Commissioner. A fundamental problem with the case for the respondent has been its reliance upon broadly expressed evidence.

41 The statement of claim in its final form alleged the presence of watering holes in Rocky Creek and at the junction of Rocky Creek and Turkey Creek, being located within 500 metres from the accident site, and the existence of a bore known as Six Mile Bore, located some 1.5 to 2 kms south-east from the site. The respondent pleaded that the Commissioner should have been aware of the attraction of wild animals, including horses, to the watering holes and bore.

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15 (2001) 206 CLR 512 at 577 [150], 605 [243].

16 (2001) 206 CLR 512 at 577-578 [151] (footnote omitted).

17 (1980) 146 CLR 40 at 47-48.

42 The respondent did not complain of a failure to take measures to stop animals straying onto the Highway, for example by fencing off the road from the surrounding countryside. Rather, the contention was that the hazard was such as to call for the exercise by the Commissioner of its powers to reduce the speed limit and require some form of warning sign or signs to warn motorists of the nature of the hazard; the wording of those signs was not specified. The respondent pleaded that the Commissioner had failed to take any measures to reduce the speed limit "in the area where the collision occurred" below the general State limit of 110 kms per hour, and that the Commissioner had failed to erect and to display warning signs "in the area where the collision occurred" so as to warn motorists of the hazard created by animals on the Highway.

43 The trial judge made findings that (i) throughout the Kununurra region there was a significant danger of encountering wild animals, including wild horses, donkeys and kangaroos, on the road at night; (ii) this was true of the whole stretch of the Highway between Kununurra and Halls Creek; (iii) but in 1992 there was no unusual concentration of animals at any particular section of the Highway between Kununurra and Halls Creek; (iv) the reported accident statistics for the Highway from Kunuurra to the accident site did not show a greater rate of accidents in the area of the two creeks, Mabel Spring Creek and Rocky Creek, than encountered in any other area; for the area of the two creeks, there were two reported accidents with horses in the years 1985 to 1992, in 1987 and 1992; (v) pictorial signs for straying stock on the Highway between Mabel Spring Creek and Rocky Creek were not warranted given the presence of the risk of straying animals along the whole of the Highway; and (vi) the introduction of local speed limits in areas of perceived concentration of animals with a propensity to stray onto the Highway would have been impractical.

44 His Honour also found that, in May 1992, the creeks in the Kununurra region, of which there were hundreds, contained water and there was no logical reason why the Turkey Creek area should have attracted more animals than elsewhere on the Highway. In 1992, an average of 252 vehicles per day travelled the Highway between Kununurra and Halls Creek. In a period of more than seven years before 11 May 1992, 50 accidents were reported along that length of the Highway as having involved animals; 14 of these required admission of persons to hospital or other provision of medical treatment.

45 From the judgment of the District Court, an appeal lay to the Full Court of the Supreme Court, as from the Supreme Court itself[18]. The Rules of the Supreme Court (WA) provide (O 63 r 10(2)):

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18 *District Court of Western Australia Act* 1969 (WA), s 79.

> "The Full Court shall have power to draw inferences of fact and to give any judgment, and make any order which ought to have been made, and to make such further or other order as the case may require."

46 In essence, the Commissioner's case is that the trial judge correctly applied the law to facts properly found by him, and there was no occasion for intervention by the Full Court. That submission should be accepted and, subject to consideration of a further or fresh evidence submission, it follows that the appeal to this Court should be allowed.

47 In his judgment for the Full Court majority, Steytler J was impressed by the "local" evidence from nine witnesses, from which his Honour concluded that there was "overwhelming support for the proposition that the road from Kununurra to Halls Creek was, in 1992, a dangerous stretch of road as a consequence of the threat of straying animals"[19]. That, however, is not a contentious proposition. It is not the case pleaded by the respondent which was, as has been indicated, concerned with steps which should have been taken in the exercise of the Commissioner's powers with respect to a particular locality "in the area where the collision occurred". His Honour referred to the preference given by the trial judge to the statistical evidence over what had been said by the local inhabitants. Steytler J said[20]:

> "What that statistical information established, in my opinion, was that the whole of the road between Kununurra and Halls Creek presented a particular danger. What the evidence of the local inhabitants established was that that danger *was at its most acute*, as I have said, *in areas such as* Mabel Spring Creek and Rocky Creek in which water and good food were to be found." (emphasis added)

48 In the appeal to this Court, detailed reference was made to the statistical materials and the evidence of the local inhabitants. If regard be had to all the material on which the parties placed their respective emphases, the conclusion to be drawn must be to the same effect as that stated by Murray J in his dissenting judgment in the Full Court. Murray J said of the trial judge[21]:

> "In my view, his Honour was right to note that the anecdotal evidence represented the perception of those witnesses who gave it, but as evidence that the place where the accident occurred was a place of any

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19 (2002) 37 MVR 451 at 470.

20 (2002) 37 MVR 451 at 470.

21 (2002) 37 MVR 451 at 460.

> unusual danger, the evidence presented the difficulty that it was subjective, imprecise, expressed in terms of descriptive conclusions about the degree of danger and the notoriety of the road, and it was lacking in its capacity to provide hard evidence of primary fact. It was not supported by the statistical evidence. As to that, however, the trial judge noted the shortcomings of statistical information which must be rendered incomplete once it is appreciated that accidents may have happened which were not reported to the [Commissioner].
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> ... [I]t was well open to the trial judge to take the view ... that there was insufficient evidence to support a conclusion that the place where the accident occurred was a place which presented any substantially greater danger of collision with animals on the road than other places on the [Highway] between Kununurra and Halls Creek. ... [C]onsideration of the question of breach of the [Commissioner's] duty of care had to be approached upon the basis that the danger at the place where the accident happened was not materially different in kind or degree from many other places along the [Highway]."

49 With respect to the absence of measures to reduce the speed limit in the area where the collision occurred (being a failure pleaded by the respondent), Murray J said[22]:

> "So far as I can tell, the evidence did not address the question of what speed limit ought to be prescribed, having regard to such relevant considerations."

These included the capacity of the driver of average skill and competence to drive a vehicle of a common kind with reasonable safety, having regard to the state of the road and driving conditions and hazards likely to be encountered.

50 In this Court, counsel for the Commissioner urged acceptance of the conclusions expressed in the dissenting judgment in the Full Court that there had been no occasion to interfere with the findings of the trial judge. Counsel's submissions as to the cogency of the reasons given by Murray J should be accepted.

51 Counsel for the Commissioner went on to allege deficiencies in the expression by Steytler J of what should have been drawn from the evidence as to breach of duty. The critical passages in the reasoning of Steytler J appear as follows in pars 105 and 106 of his Honour's reasons[23]:

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22 (2002) 37 MVR 451 at 461.

23 (2002) 37 MVR 451 at 470-471.

> "The evidence, taken in its entirety, seems to me quite plainly to have established that there was a need, *throughout the length of the road between Kununurra and Halls Creek*, to place signs, warning of the danger of straying animals, *on those parts of the road* (including that in which the accident occurred) in which animals were *more frequently* to be found. It would, in my opinion, have been a relatively simple matter for the [Commissioner], which was well aware of the risk of straying animals, to have made inquiries in the area in order to determine which locations were *the areas of highest risk* and to have placed signs accordingly. In my opinion it should have done so. Indeed, Mr Holdsworth [an expert engineer called by the Commissioner] himself acknowledged that local knowledge 'most definitely' had a role to play in considering what safeguards should be implemented by the [Commissioner].
>
> It seems to me, *also*, that the [Commissioner] should have imposed lower speed limits in those areas *where the danger was most acute*. On the evidence of the local residents, a speed limit of 110 km per hour was far too high in the area between Rocky Creek and Mabel Spring Creek and one of 80 km per hour should, in my opinion, have been imposed in that area. The fact that some motorists might have ignored that speed limit does not, in my opinion, absolve the [Commissioner] of the need to impose it." (emphasis added)

With respect to the first paragraph, what is missing from the use of comparative and superlative terms is an identification of any yardstick. Counsel for the Commissioner correctly stressed that the significance attached to the failure by the Commissioner to impose lower speed limits did not allow for the counter-productive effect of placing too many signs. The trial judge had accepted the evidence of Mr Holdsworth that "[t]he effectiveness of warning signs in instances where they are important can only be maintained if the use of warning signs is limited to instances where the road environment is likely to present a hazard which is outside the probable driver expectation."

52 Mr Holdsworth also had agreed that "there is a high probability that a motorist could encounter an animal anywhere on the highway between Kununurra and Halls Creek" and that "the dangers associated with large animals and the road would be obvious".

53 Steytler J's view also depended upon what was said to be the evidence of local residents that the standard speed limit was far too high in the area between Mabel Spring Creek and Rocky Creek, a matter, however, both contentious and expressive of opinions not always fully reasoned. Likewise the reference in par 105 of Steytler J's reasons to those parts of the Highway in which animals were more frequently to be found and to the areas of highest risk could be turned

to account in the respondent's case only by attributing to the particular locality of the accident site the characteristic of a high risk area. That can be done only by overturning the findings of the trial judge.

54 The Commissioner has made out the case in this Court that there was no occasion for the Full Court to interfere with the conclusions reached by the trial judge[24].

55 In the interval between the adjudication at the trial and the hearing by the Full Court, the Commissioner gave discovery of documents which ought to have been, but which had not been, discovered at trial. The majority of the Full Court did not have to consider the matter, but Murray J did so and concluded that the material did not support an application for a new trial[25]. The respondent reagitated the question in this Court. We agree with what has been said in the reasons of Callinan J upon this question.

56 The appeal should be allowed. Consequential orders should be made as stated by Callinan J.

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24 cf *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934 at 1939 [24]-[27]; 201 ALR 470 at 476.

25 (2003) 37 MVR 451 at 455.

57 CALLINAN J. Western Australia is a vast and sparsely populated State. The provision and maintenance of roads to service remote communities must be an onerous and expensive task. One such road is the Great Northern Highway which extends for more than 1,430 kilometres. The stretch of it with which this appeal is concerned lies between Kununurra and Halls Creek, and consists, for the most part, of an unfenced, sealed dual carriageway, generally level and fairly straight. It passes through country in which there are waterholes that attract wild horses and other animals. On 11 May 1992 the respondent approached and drove through the area at an average speed of 135 kilometres per hour despite that the maximum speed permitted anywhere in Western Australia[26] was 110 kilometres per hour The appellant, who has responsibility for the highway[27], had not erected signs warning that wild animals might stray onto it. A horse did, at about 7:00 pm. The respondent's vehicle collided with it. He suffered serious injuries in consequence. Is the appellant liable to the respondent for damages for negligence? A District Court judge thought not. An intermediate appeal Court, the Full Court of the Supreme Court of Western Australia thought that it was. The question which this Court has to decide is, who was correct?

The trial

58 The only issue tried in the District Court of Western Australia was of liability[28]. If the respondent were to establish it, a further hearing for an assessment of damages would be necessary.

59 In his particulars of negligence the respondent put what was fundamentally the same case, in several ways:

> "(1) In the knowledge that wild animals were attracted to and near the highway by the presence of nearby watering holes, failed to take any or any adequate steps to warn motorists of the hazard thereby created;
>
> (2) Failed to erect warning signs to warn motorists of the hazard created by animals straying onto the highway in that area;
>
> (3) Failed to erect speed limit signs to prescribe a speed which was safe in the area in the circumstances;

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26 See r 1001(1) of the *Road Traffic Code* (WA).

27 at the relevant time, see: *Main Roads Act* 1930 (WA), ss 14, 15, 16 and 19.

28 *Jones v Commissioner of Main Roads* (1998) 20 SR(WA) 117.

(4) In designing and constructing the highway to take a path close by the watering holes, failed to take any or any adequate steps to protect motorists from the risks thereby created;

(5) On sealing the highway in or about 1972 and subsequently, failed to take into account the increased risk to road users posed by the combination of animals on and near the highway and the increased motor vehicle speeds associated with the sealed highway; and

(6) Failed at any time to make enquiries in the locality as to areas of extraordinary animal hazards."

60 In addition to denying negligence and asserting that the respondent's driving, at the excessive speed that he did, most dangerously, as the trial judge held, was the sole cause of the collision, the appellant contended that if there were a negligent failure on its part to erect warning signs, that failure should be characterised as non-feasance for which it was not liable.

61 The respondent was an experienced traveller in the area. Carcasses of kangaroos, donkeys, dingos and horses were all occasionally on the highway. The frequency with which cattle were lost there was a matter on which the witnesses differed. The dangers and risks of travelling are greatly increased at night when visibility is limited and animals move around: this is particularly so at about 6:00 pm, that is, at dusk. The number of accidents involving animals between 6:00 and 8:00 pm exceeded the total number of accidents during the remaining 22 hours. One witness said that 50 animals were lost in collisions on the highway annually. Statistics showed that between 1985 and 1992, 50 accidents involving animals had been reported between Kununurra and Halls Creek.

62 The respondent and the appellant were both aware of the danger to motorists of animals, feral and domesticated on the Highway in the area where the accident occurred. It could hardly be otherwise. The evidence, decaying carcasses, on the roadside, was there for all to see.

63 The Australian Standards relating to signs recognise that a multiplicity of warning signs tends to diminish sensitivity to them.

64 The trial judge (Charters DCJ) made this finding:

> "I find that there is a significant danger of encountering animals at night on the road throughout the station or cattle country in the Kimberley region – within and outside station country there is always the prospect of encountering wild animals such as wild horses, donkeys and kangaroos. There is no evidence to lead me to believe that the risk is greater upon that part of the highway between Kununurra and Halls Creek, where there is

certainly the danger at night of encountering cattle and wild animals. There was a lesser risk during the day."

65 Other relevant findings of his Honour were as follows:

"There was no particular propensity for animals to approach the section of the highway between the two creeks in question ... Apart from concentrations at bores such as Tikalara Bore and Rosie's Yard there was no unusual concentration of animals at any particular section of the highway between Kununurra and Halls Creek in 1992.

...

Signs warning of animals in the area were not warranted having regard to the overall character of the highway and likely presence of animals over a very large area.

The [respondent] failed to take reasonable care for his own safety by driving at a most dangerous speed at night and by that failure caused his injury. As a matter of ordinary commonsense his negligence was the sole real cause of the accident.

Having regard to the [respondent's] knowledge of the risks of travel at night, he would not have heeded warning signs had they been erected; nor would he have decreased his speed to a safe speed had the speed limit been reduced – this is illustrated by his travelling at a dangerously fast speed through Turkey Creek where the speed limit was 90km/h and at a dangerously fast speed in the vicinity of two narrow bridges upon a two lane highway with cattle grids.

The [respondent] claims the speed limit should have been reduced to about 80km/h. Bearing in mind the distances to be travelled in that region, the variability of the risk depending on the hour of travel and perhaps on the season and the overall character of this station country, a reduction of the speed limit over the whole stretch from Kununurra to Halls Creek would not have been observed and for that reason would have been neither practicable nor desirable. Local speed limits in areas of perceived particular concentrations of animals with a propensity to stray on the highway would also have been neither practicable nor desirable."

66 That was sufficient for the trial judge to conclude that the respondent's action should fail. He would also have exculpated the appellant upon the other

basis pleaded, that an omission, if any, to erect warning signs, was non-feasance for which the appellant could not, in the circumstances, be liable[29].

The appeal to the Full Court of the Supreme Court of Western Australia

67 The respondent's appeal to the Full Court succeeded (Malcolm CJ and Steytler J, Murray J dissenting) to the extent that the respondent was held to be entitled to 50 per cent of the damages he suffered[30]. One of the respondent's grounds was that fresh evidence which, had it been available at the trial, would have given him a significant chance of winning his case, had been only belatedly discovered by the appellant. Steytler J (with whom Malcolm CJ agreed), after reviewing the evidence said this:

> "When regard is had to all of this evidence, even putting to one side the fresh evidence proposed to be relied upon by the [respondent], it seems to me that it provides overwhelming support for the proposition that the road from Kununurra to Halls Creek was, in 1992, a dangerous stretch of road as a consequence of the threat of straying animals. The evidence also established, conclusively in my opinion, that the danger was at its greatest in areas such as those around Mabel Spring Creek and Rocky Creek, where animals wandered nearby and where water and good food were to be found. In my respectful opinion, it was not open to the trial judge to dismiss all of this evidence ... as merely representing the 'perception' of those who gave it and to prefer the 'statistical information ... embracing the whole of the area between Kununurra and Halls Creek'. What that statistical information established, in my opinion, was that the whole of the road between Kununurra and Halls Creek presented a particular danger. What the evidence of the local inhabitants established was that that danger was at its most acute, as I have said, in areas such as Mabel Spring Creek and Rocky Creek in which water and good food were to be found.
>
> …
>
> The evidence, taken in its entirety, seems to me quite plainly to have established that there was a need, throughout the length of the road between Kununurra and Halls Creek, to place signs, warning of the danger of straying animals, on those parts of the road (including that in which the accident occurred) in which animals were more frequently to be found. It

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29 The case was decided before the decision of this Court in *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

30 *Jones v Commissioner of Main Roads (WA)* (2002) 37 MVR 451 at 470-471 [103], [105]-[107].

> would, in my opinion, have been a relatively simple matter for the department, which was well aware of the risk of straying animals, to have made inquiries in the area in order to determine which locations were the areas of highest risk and to have placed signs accordingly. In my opinion it should have done so. Indeed, Mr Holdsworth himself acknowledged that local knowledge 'most definitely' had a role to play in considering what safeguards should be implemented by the department.
>
> It seems to me, also, that the [appellant] should have imposed lower speed limits in those areas where the danger was most acute. On the evidence of the local residents, a speed limit of 110 km per hour was far too high in the area between Rocky Creek and Mabel Spring Creek and one of 80 km per hour should, in my opinion, have been imposed in that area. The fact that some motorists might have ignored that speed limit does not, in my opinion, absolve the [appellant] of the need to impose it.
>
> As to the issue of causation, I find myself, with due respect, entirely unable to accept the proposition, accepted by the trial judge, that merely because the [respondent] had previously travelled in the Kimberley region, including the area between Kununurra and Halls Creek, he would have been aware of the extent of the risk posed by straying animals. He was, no doubt, aware of the risk of straying animals. He had previously driven in the area, and in the Kimberleys generally, and his attempts to hire a four-wheel-drive vehicle demonstrated his concerns in this respect. However, there was nothing to suggest that he knew which areas along his chosen route were particularly dangerous. He had, on the available evidence, only limited experience of this particular stretch of road and it seems to me to be improbable that he would, in the absence of any warning signs or even a reduced speed limit, have known of the particular danger presented by straying animals in the Rocky Creek and Mabel Spring Creek area. From the respondent's point of view, on the other hand, the danger was one which ought readily to have become apparent to the department in the course of one or more of its 'audits' (which should, in my opinion, have encompassed the making of reasonable inquiries) and, as I have said, one which should have been addressed by appropriate warning signs and a reduced speed limit."

68 His Honour then considered the question whether the respondent would have heeded a warning sign and a sign indicating a reduced speed limit, had both been there. In that consideration his Honour was influenced by some remarks of Kirby J in *Romeo v Conservation Commission of the Northern Territory*[31] and Gaudron J in *Bennett v Minister for Community Welfare*[32]. The former were no

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31 (1998) 192 CLR 431 at 482 [134].

32 (1992) 176 CLR 408 at 420.

more than to the effect that, absent direct evidence from a plaintiff regarding his likely response, it is for the court to decide whether any suggested protective measures would have been effective to prevent the damage. The latter of the remarks effectively invited courts to reason cause from effect. This Steytler J was prepared to do and did, even though to do so was in part at least, as his Honour acknowledged, to speculate. He was not prepared however to hold the appellant solely responsible for the accident. His Honour said[33]:

> "In all of these circumstances, it seems to me to be probable that, had there been a warning sign as to the particular danger presented by straying animals in the area around Mabel Spring Creek and Rocky Creek, the [respondent] would have slowed down, to some extent at least. It also seems to me to be probable (although some speculation is required) that his failure to do so contributed to the accident which occurred or added to its severity ... Had the [respondent] driven more slowly, he would have had more time to attempt to avoid the collision. Also, it is reasonable to infer that an impact at a slower speed would have resulted in the [respondent] suffering less severe injuries."

69 In dissent, Murray J observed that the anecdotal material was imprecise, and expressed in terms of subjective conclusions about the degree of danger, and the notoriety of it, on the relevant stretch of road, and fell short of hard evidence of primary fact. Accordingly, in his opinion, it was open to the trial judge to take the view that he did, that there was insufficient evidence to support a conclusion that the place where the accident occurred, was a place of substantially greater danger of collision with animals than other sections of the highway between Kununurra and Halls Creek.

70 On the appeal, the respondent also sought to have the Full Court receive in evidence a bundle of relevant documents which was not discovered by the appellant before the trial as and when it should have been. Only Murray J found it necessary to deal with the application. It was his opinion that some of the documents added nothing to the evidence adduced at the time. Many did not relate to the length of the highway in question. Others contained statements by the appellant's officers that great care was required in locating signs. In short, in his Honour's opinion, the documents could and would have made no difference to the result.

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33 *Jones v Commissioner of Main Roads (WA)* (2002) 37 MVR 451 at 473 [112] (footnotes omitted).

The appeal to this Court

71 Section 79 of the *District Court of Western Australia Act* 1969 (WA) provides as follows:

"**79 Appeal to the Full Court**

(1) A party to an action or matter who is dissatisfied with –

(a) a final judgment, may appeal from that judgment to the Full Court constituted under the *Supreme Court Act 1935*;

(b) a judgment that is not a final judgment or an order remitting any action or matter from one court to another, may by leave of the Supreme Court or a Judge thereof, appeal to such Full Court,

notwithstanding that the action or matter to which the final judgment or judgment relates may have been brought in the Court by consent as provided in this Act.

(1a) Notwithstanding anything in this section, an appeal to the Full Court constituted under the *Supreme Court Act 1935* in respect of a judgment, order or determination in proceedings in the Court under the *Commercial Arbitration Act 1985* may be made only by leave of the Supreme Court, or a Judge thereof.

(2) An appeal under this section shall be made in the same way as an appeal from a judgment or order of the Supreme Court or a Judge thereof, may be made to the Full Court, and in all respects the practice and procedure of the Full Court in the appeal shall be the same as though the appeal were an appeal to the Full Court from a judgment or order of the Supreme Court or a Judge thereof.

(3) The Full Court has jurisdiction to hear and determine the appeal accordingly.

(4) Nothing in this section authorises a party to appeal to the Full Court against a decision of the Court —

(a) given upon a question as to the value of any real or personal property for the purpose of determining the jurisdiction of the Court under this Act; or

(b) on the ground that the proceedings might or should have been taken at any other place where the Court was sitting."

Section 58(1)(a) of the *Supreme Court Act* 1935 (WA) is as follows:

> "(1) Subject as otherwise provided in this Act and to the Rules of Court, the Full Court shall have and shall be deemed since the coming into operation of this Act always to have had jurisdiction to hear and determine –
>
> (a) applications for a new trial or rehearing of any cause or matter, or to set aside or vary any verdict, finding or judgment found given or made in any cause or matter tried or heard by a Judge or before a Judge and jury."

72 The very ample, indeed generally unconfined powers of the Full Court are stated in O 63 r 10(2) of the Rules of the Supreme Court (WA) which is as follows:

> "(2) The Full Court shall have power to draw inferences of fact and to give any judgment, and make any order which ought to have been made, and to make such further or other order as the case may require."

The provisions that I have set out are in different language from the provisions regulating appeals to the Court of Appeal of New South Wales, but they do not dictate any different an approach to appeals from the latter which was considered by this Court in *Fox v Percy*[34]:

> "... mistakes, including serious mistakes, can occur at trial in the comprehension, recollection and evaluation of evidence. In part, it was to prevent and cure the miscarriages of justice that can arise from such mistakes that, in the nineteenth century, the general facility of appeal was introduced in England, and later in its colonies. Some time after this development came the gradual reduction in the number, and even the elimination, of civil trials by jury and the increase in trials by judge alone at the end of which the judge, who is subject to appeal, is obliged to give reasons for the decision. Such reasons are, at once, necessitated by the right of appeal and enhance its utility. Care must be exercised in applying to appellate review of the reasoned decisions of judges, sitting without juries, all of the judicial remarks made concerning the proper approach of appellate courts to appeals against judgments giving effect to jury verdicts. A jury gives no reasons and this necessitates assumptions that are not appropriate to, and need modification for, appellate review of a judge's detailed reasons.

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34 (2003) 214 CLR 118 at 126-127 [24]-[25] per Gleeson CJ, Gummow and Kirby JJ.

> Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'. In *Warren v Coombes*[35] the majority of this Court reiterated the rule that:
>
> > '[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.'
>
> As this Court there said, that approach was 'not only sound in law, but beneficial in … operation'".

73 In the same case I sought to make these points[36]:

> "Section 75A of the [*Supreme Court Act* 1970 (NSW)] imposes positive duties upon the State appellate court, the performance of which is in no way conditioned by judge-made rules stated in very different language, and to a substantially different effect from the plain meaning of the section which, by sub-ss (6) and (10) imposes affirmative duties on the Court of Appeal, including to do what the nature of the case requires."

74 I do not discern the majority in the Full Court or Murray J, to have attempted to do otherwise than conduct an appropriate review on the appeal to that Court. The majority in several ways however erred in that undertaking.

75 Their review of the facts was incomplete in some highly relevant respects. Some inferences which they drew were not reasonably open. And their reasoning from effect or result to cause, was simplistic and flawed. The burden that they held that the appellant should have assumed, but did not discharge, of conducting an "audit" of accidents was not a burden which the appellant was obliged to assume either under the *Main Roads Act* 1930 (WA) regulating its

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35 (1979) 142 CLR 531 at 551.

36 *Fox v Percy* (2003) 214 CLR 118 at 164 [146].

powers and duties or otherwise. In any event, the inference that the majority drew, that an audit would have demonstrated such a number of accidents of the same or a similar kind as to oblige the appellant to erect signs, was not reasonably open.

76 The majority in the Full Court approached the matter as if the appellant were the creator of the danger that caused the respondent's injury[37]. A duty of care may of course, indeed often does, arise even in cases in which a defendant has not been the author of a hazard, but different considerations will apply if that is not the case. Ordinarily, and absent particular circumstances, for example, the existence of a statutory duty[38], an allurement to children[39], the existence of a special relationship such as employer and employee[40], or occupier and entrant[41], a court will be less ready to find a defendant who has not created the danger liable for it[42]. The construction and maintenance of the highway along the great length that it extends, did not create the danger presented by straying animals.

77 The majority did prefer imprecise anecdotal evidence of witnesses called by the respondent to statistical evidence to which the respondent was privy. In this respect I do not overlook the material, including the manual in the belated discovery of which the appellant was delinquent. Its proposals and recommendations were not adopted, nor indeed could they, as a practical matter, have been, along the length of the highway. It was apparent in the approach of the majority that they thought that even if the appellant was not obliged to conduct an audit, he should at least have inquired of local users of the highway of the number and kinds of accidents that they believed to have occurred, and to have acted on their estimations rather than on the official information in his possession. That was not something that the appellant was bound to do.

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37 *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274 at 284-286.

38 *Waugh v Kippen* (1986) 160 CLR 156.

39 *Munnings v Hydro-Electric Commission* (1971) 125 CLR 1 at 13 per Menzies J, 21 per Windeyer J; *Latham v Johnson* [1913] 1 KB 398; *Bates v Stone Parish* [1954] 1 WLR 1249; [1954] 3 All ER 38, cf *Dyer v Ilfracombe Urban District Council* [1956] 1 WLR 218; [1956] 1 All ER 581.

40 *Betts v Whittingslowe* (1945) 71 CLR 637.

41 See *Voli v Inglewood Shire Council* (1963) 110 CLR 74.

42 *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540 at 575-576 [81] per McHugh J; *Cole v South Tweed Heads Rugby League Football Club* (2004) 78 ALJR 933 at 944 [56] per Gummow and Hayne JJ; 207 ALR 52 at 65.

78 The truth is that the risk that animals would stray onto the highway, the types of animals that would do so, where they would stray, and their behaviour when they did, depended upon the weather, the time of year, the time of day, and any propensities peculiar to them. These variables would necessarily complicate the making of decisions where signs should be placed, and the contents of them. Logically, the fact that these variables existed would require the appellant to shift the signs from time to time, a requirement that in the circumstances of the length and location of this long highway, and the terrain through which it passed, would be unreasonable. The alternative, that more signs should have been erected and kept in place at all times, overlooks, as did the majority in the Full Court, that a multiplicity of warning signs would detract from their effectiveness.

79 An allied problem is that the majority did not say what any warning sign should contain or depict. Having regard again to the variables to which I have referred, the contents of the signs might themselves have to vary, as otherwise they might be irrelevant, or indeed perhaps even misleading on different occasions and in different places.

80 This was not a case in which cause could be inferred from the result, that is the collision. In the dictum of Gaudron J in *Bennett*[43], upon which Steytler J relied, there is reference to a statement by Dixon J in *Betts v Whittingslowe*[44], a case of breach of statutory duty, to the effect that the breach coupled with the fact of an accident of the kind that might thereby be caused, is enough to justify an inference that in fact the accident occurred owing to the breach. But contained within that statement is the important qualification of an "absence of any sufficient reason to the contrary."

81 In my opinion in this case there were sufficient, indeed overwhelming reasons to the contrary. The most important is that the appellant's speed averaged at least 135 kilometres per hour throughout his journey. Self evidently he must have either ignored or overlooked speed limit signs which were in place, and the overall State speed limit in order to achieve that average speed. As an experienced traveller in the area, a matter to which the majority in the Full Court accorded no relevant and sufficient weight, he chose to maintain that average speed through country and on a highway over which he must have known animals both domestic and feral strayed.

82 The majority made a further error: in preferring and giving almost conclusive weight to the evidence of the respondent's wife, and his passenger who was asleep at the time of the accident, that the respondent was a careful

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43 (1992) 176 CLR 408 at 420.

44 (1945) 71 CLR 637 at 649.

driver responsive to road signs, in the teeth of the inexorable arithmetic of the distance that he travelled over the time elapsed. The admissibility of the wife's and passenger's evidence was not the subject of any objection, but assuming it to be admissible little probative value could possibly be attached to it in the circumstances.

83 In *Rosenberg v Percival*[45] I counselled against too ready an acceptance of a plaintiff's evidence, given after the event, that had she been informed of a risk, even a slight one, subsequently realized, she would have elected not to take it[46]. Unfortunately the respondent in this case could give no useful evidence of any kind as to what he would have done in relation to signage because of the serious and disabling injuries that he suffered. But his inability to do so could provide no warrant for the drawing of an inference that he would have heeded a warning sign or signs in the light of the other, compelling evidence and inferences to the contrary to which I have referred.

Fresh evidence

84 The appellant submits that the view of Murray J in the Full Court that the "fresh evidence" could not justify a new trial is correct. It is surprising that an arm of a State government should have failed, as the appellant here did, to make proper discovery. Governments and their emanations should be model litigants. The failure to discover does not mean however that the respondent is entitled to succeed but it does mean that the material in question should be carefully scrutinized to see whether its availability at trial could have made a difference. Unfortunately for the respondent I do not think it would have for these reasons. The relevant parts of it are principally concerned with the dangers presented by straying stock and the potential for liability of their owners on that account, rather than the straying of feral creatures. A manual compiled within the appellant's department – it is not clear whether it is a draft only – recommends the erection of signs to warn of the presence of stock, "where straying stock [are] known to present a significantly greater hazard than is normal for remote areas or where subsequent to an application from the owner of a pastoral property a thorough investigation ... shows that any particular section of road nominated by the owner does present a significantly greater hazard than normal." The materials suggested the erection of signs where warranted at intervals of 20 to 30 kilometres. The material did not disclose that the relevant stretch of road was one on which the percentage of accidents involving straying animals was high. Signs warning of stock crossings can be misleading by implying that the stock are being controlled. A sign of such a type would be inappropriate in the

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45 (2001) 205 CLR 434.

46 (2001) 205 CLR 434 at 504-505 [221].

relevant region. Signs depicting the possible presence of wild animals are almost unknown in Western Australia. "Locals know to be careful". The appellant was alive to the need to maintain the credibility of warning signs. The responsible minister reported to a local progress association in May 1987 in these terms:

> "Cattle are evident on many roads in the north of the State but it is important that warning signs only be installed where a hazard is considerably greater than would normally be expected. The credibility of such signing can only be maintained if cattle are frequently sighted near the signs. The widespread indiscriminate use of the signs would detract from their value as a warning device. There is also a problem where the placing of signs on one road may lead motorists to believe that other unsigned roads are hazard free."

I would hold accordingly, as Murray J did that the undiscovered evidence and any expert commentary that might have been obtained upon it, were not of such a kind or quality as to warrant any different a result. The cause of the collision was the respondent's grossly excessive speed. The respondent's determined flouting of speed limits throughout his journey meant that the presence or absence of signs in the vicinity of the place of the accident could have no bearing on the outcome of this case.

85 The decision of the trial judge and of Murray J in dissent are correct. The appeal must be upheld. In accordance with the undertaking of the appellant given on the application for special leave to appeal to this Court, the order for costs made by the Full Court should not be disturbed and the appellant should pay the respondent's costs of the appeal to this Court.

86 I would make these orders:

1. Appeal allowed.

2. The respondent's action should be dismissed and the orders of the District Court of Western Australia should be restored.

3. The appellant should pay the respondent's costs of the appeal to this Court.