HIGH COURT OF AUSTRALIA

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

STATE OF NEW SOUTH WALES APPELLANT

AND

GEMMA FAHY RESPONDENT

New South Wales v Fahy [2007] HCA 20
22 May 2007
S341/2006

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2 and 3 of the Court of Appeal of the Supreme Court of New South Wales made on 4 April 2006 and in their place order that the order of the District Court of New South Wales made on 28 February 2005 that there be a verdict for the plaintiff be set aside, and in its place order that there be judgment for the defendant.*

3. *The appellant pay the costs of the respondent of the appeal in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

P Menzies QC with P R Sternberg and B McDonald for the appellant (instructed by Crown Solicitor for New South Wales)

I M Barker QC with S Norton SC and E E J Welsh for the respondent (instructed by L J Sharpe & Co)

CATCHWORDS

New South Wales v Fahy

Negligence – Relationship between the *Police Service Act* 1990 (NSW) and the nature and extent of the duty of care owed by the "Crown" or Commissioner of Police to the respondent police officer.

Negligence – Respondent police officer assisted a stabbing victim without support from nearby police officers – As a result the respondent suffered post-traumatic stress disorder – Whether the "Crown" or Commissioner of Police breached duty of care owed to the respondent by failing to establish a system of work whereby, when possible, the respondent was supported by another police officer – Whether failure of nearby police officers to provide support to respondent was a breach of duty.

Negligence – Breach of duty – Foreseeability of risk of injury – Whether *Wyong Shire Council v Shirt* (1980) 146 CLR 40 should be overruled.

Words and phrases – "breach of duty" – "calculus of negligence".

Police Service Act 1990 (NSW), s 201.

1 GLEESON CJ. The issue in this appeal is whether a finding of negligence made in favour of the respondent by a District Court judge, and the Court of Appeal of New South Wales (Spigelman CJ, Basten JA and M W Campbell AJA)[1], should be overruled.

2 The facts are set out in the reasons for judgment of the other members of the Court. The respondent was a constable in the Police Service of New South Wales ("the Service"). As the other members of the Court have noted, the case was conducted by the parties, at some risk of over-simplification, upon the basis that the relationship between the respondent and "the Crown" was analogous to that of employee and employer, and that either "the Crown" or the Commissioner of Police owed the respondent a duty of care of the kind that exists in an ordinary employment setting, subject to any relevant statutory modification of the incidents of that relationship. The Statement of Claim alleged that the respondent was employed by the Service. The Grounds of Defence admitted that allegation, and also admitted that "an employer owes a duty to its employee to take reasonable care for the employee's safety". The main issue at trial, and on appeal, was breach of that duty. There were also some presently irrelevant questions about quantification of damages.

3 The damage said to have been suffered by the respondent, in consequence of the breach of duty by her employer to take reasonable care for her safety, was psychiatric injury diagnosed as post-traumatic stress disorder. The circumstances in which the injury occurred are explained in the reasons of the other members of the Court.

4 To observe that it was common ground that the Service, or the Commissioner, owed the respondent a duty to take reasonable care for her safety, and that this embraced a duty to institute and maintain a safe system of work, helps to set the context for the debate in this Court, but it raises questions as to the kind of act or omission that would constitute a breach of such duty. The relevant form of safety is protection from the risk of psychiatric injury and, in particular, post-traumatic stress disorder. Having regard to the nature of the duties of a police officer, and to the nature of post-traumatic stress disorder, concepts of risk, and safety, may require closer analysis. The duties of police officers commonly expose them to danger, sometimes from people who deliberately seek to cause them harm. Individual responses to stressful situations vary greatly, and police officers are sometimes called upon to deal with situations that many ordinary citizens would find unbearably stressful. Police service is not unique in this respect. Many callings expose people to forms of stress with which outsiders would be unable to cope. Furthermore, an individual's capacity to cope with stress may be affected by unpredictable personal circumstances.

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1 *New South Wales v Fahy* (2006) 155 IR 54.

5 In *Barber v Somerset County Council*[2], the House of Lords dealt with the case of a schoolteacher who suffered psychiatric injury caused by work-related stress. Applying as a standard of negligence "the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know"[3], the House of Lords disagreed with the Court of Appeal's decision that negligence had not been shown. However, Hale LJ in the Court of Appeal had formulated some practical propositions applicable to cases where complaint is made of psychiatric illness brought about by stress at work, and these were accepted in the House of Lords[4]. On the question whether psychiatric harm to the particular employee was reasonably foreseeable, they included the proposition that "there are no occupations which should be regarded as intrinsically dangerous to mental health"[5]. Another way of expressing a similar idea may be to say that the factors that may cause stress, and the circumstances in which an individual might suffer stress-related injury, are so various that to single out any occupation and treat it as intrinsically dangerous in this respect is unwarranted. There are circumstances, for example, in which caring for children might be at least as stressful as law enforcement.

6 This being a case about breach of duty, there was reference in argument to the well-known statement of principle of Mason J in *Wyong Shire Council v Shirt*[6]. As his reasons make clear[7], Mason J was applying the law as stated by Lord Reid on behalf of the Privy Council in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* ("*The Wagon Mound [No 2]*")[8]. Dealing with the two factors of reasonable foreseeability of a risk of harm, and avoidance of the risk, Mason J explained how a tribunal of fact should set about deciding whether there has been a breach of a duty of care. The tribunal asks first whether a reasonable person in the defendant's position would have foreseen that his or her conduct involved a risk of injury to the plaintiff or to a class of persons including the

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2 [2004] 1 WLR 1089; [2004] 2 All ER 385.

3 [2004] 1 WLR 1089 at 1110 [65]; [2004] 2 All ER 385 at 406, applying *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 at 1783.

4 [2004] 1 WLR 1089 at 1092-1093 [7], [10], 1109 [63]; [2004] 2 All ER 385 at 389-390, 405.

5 [2004] 1 WLR 1089 at 1092 [7]; [2004] 2 All ER 385 at 389.

6 (1980) 146 CLR 40 at 46-48.

7 (1980) 146 CLR 40 at 47.

8 [1967] 1 AC 617.

plaintiff. If the answer is yes, then the task is to consider what a reasonable person would do by way of response to the risk. He then set out factors which are likely to enter into such a consideration; factors which may need to be "balanced out"[9]. This has since been referred to, somewhat unfortunately, as a "calculus". What is involved is a judgment about reasonableness, and reasonableness is not amenable to exact calculation[10]. The metaphor of balancing, or weighing competing considerations, is commonly and appropriately used to describe a process of judgment, but the things that are being weighed are not always commensurate. As was pointed out in *Mulligan v Coffs Harbour City Council*[11], there are cases in which an unduly mathematical approach to the exercise can lead to an unreasonable result.

7 In 1856, Alderson B said: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[12] Reasonableness is the touchstone, and considerations of foreseeability and risk avoidance are evaluated in that context. In *Shirt*, Wilson J, in dissent, expressed some concern that some forms of judicial exposition of the concept of reasonable foreseeability might deprive the requirement of foreseeability of practical substance[13]. Later judges have expressed similar concerns. There may be cases where courts have lost sight of the ultimate criterion of reasonableness, or have adopted a mechanistic approach to questions of reasonable foreseeability, risk management or risk avoidance. Complaints about failure to warn seem to give rise to problems of that kind. There have been occasions when judges appear to have forgotten that the response of prudent and reasonable people to many of life's hazards is to do nothing[14]. If it were otherwise, we would live in a forest of warning signs. That, however, does not warrant reconsideration in this case of what was said by Mason J. In cases where the principles have been misapplied, that may have been the result of a failure to read the most frequently quoted passage in the context of the whole of Mason J's judgment.

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9 (1980) 146 CLR 40 at 47-48.

10 See *Ridge v Baldwin* [1964] AC 40 at 65.

11 (2005) 223 CLR 486 at 490 [2].

12 *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 at 784 [156 ER 1047 at 1049].

13 (1980) 146 CLR 40 at 53.

14 cf *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Neindorf v Junkovic* (2005) 80 ALJR 341; 222 ALR 631; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 425-427 [2]-[8].

8 There being no dispute that the respondent was owed a duty of care by her employer, and there being no dispute about the general nature of that duty (a duty to take reasonable care for the safety of the respondent by instituting and maintaining a safe system of work), the respondent has the benefit of concurrent findings that there was a breach of that duty. I expressed my views on the significance of this consideration in *Graham Barclay Oysters Pty Ltd v Ryan*[15], and do not intend to repeat them. The essence of the challenge to those findings is that the reasoning on which they were based was manifestly implausible.

9 The case for the respondent was somewhat more diffuse than the case that finally succeeded and, as Basten JA pointed out in the Court of Appeal, the findings of the primary judge were expressed in a manner that tended to confuse issues of breach of duty and causation. The respondent attributed her condition to a number of alleged shortcomings in the conduct of individual police officers, and of the Service, both during and after the traumatic events in the immediate aftermath of the armed robbery of 25 August 1999. She had various complaints about the way she was treated on the night in question, and later. Ultimately, however, it was the conduct of Senior Constable Evans in failing to assist and support the respondent as she rendered assistance to the victim of the armed robbery that was held to involve a breach of the duty of care owed to the respondent.

10 There was plenty of evidence to justify a conclusion that psychiatric injury of the kind suffered by the respondent was a reasonably foreseeable consequence of failing to provide support and assistance in the circumstances in which she was placed. I do not understand that to be in contest. One of the respondent's primary complaints was that she was left alone by Senior Constable Evans to cope with a situation in circumstances where the system under which they were both working required that he ought not to have left her alone without reason; and the primary judge found that he had no good reason. This idea of a system that was in place, but was departed from by Senior Constable Evans, was contentious. The primary judge referred to "the buddy system" and "the recognised risks of stress-related disorders" in the context of a conclusion that police officers assigned to work together, such as Senior Constable Evans and the respondent on the night in question, were duty-bound to give one another support unless there were reasons why that was not practical. The appellant argued that this so-called "buddy system" owed more to assumptions made by the respondent's medical witnesses than to any cogent evidence of police practice. There is some force in that criticism. However, as the trial was conducted, there was a dearth of evidence from senior police officers. The respondent gave unchallenged evidence that, when police officers were working in pairs, "you had

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15 (2002) 211 CLR 540 at 567-569 [48]-[54].

to look after who you were working with", and she gave examples of how this mutual support worked in practice.

11 Nobody suggested that it would be possible to prescribe with any precision the circumstances in which two police officers, working as a pair, should or should not separate. The decision in the present case was that there was a recognised risk of stress-related injury, that the Service had responded to the risk by requiring police officers working in pairs to give one another support and assistance unless there was some reason for separating, that Senior Constable Evans had shown no reason for leaving the respondent alone, and that the respondent's exposure to the trauma of the victim in the doctor's surgery without any help from her partner was a cause of her psychiatric injury.

12 Spigelman CJ said:

> "The critical issue in the present case was whether or not the failure on the part of the officers of the Appellant to provide support in the course of the traumatic incident was a breach of duty. It can readily be accepted, as the Appellant submitted, that the Court should be slow to require the police to generally have a second officer supporting another in the course of exposure to the trauma of victims of crime. Pressure and stress are part of the system of work which police officers must be prepared to carry out. There are numerous occasions on which one of two officers operating under the buddy system would reasonably leave the other to perform functions on his or her own. Indeed, it must often be the case that it is necessary to do so. In the usual case it would not take much in the way of evidence to satisfy a court that the performance by a police officer of his or her primary duties was such that any failure to offer support for another police officer did not constitute a breach of duty.
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> However, in the present case the plaintiff established a proper basis for an inference that there was no such call of other duties which made it reasonable not to take steps to support the [plaintiff]. In particular the presence of other police officers on the scene was such as to support a conclusion that the attendance of Constable Evans to other tasks was not such as to render reasonable, in all of the circumstances, his failure to support the [plaintiff]."

13 The other members of the Court of Appeal agreed in substance with that finding. I see no sufficient reason for this Court to reject the finding. The appeal should be dismissed with costs.

14 GUMMOW AND HAYNE JJ. In August 1999, the respondent, Gemma Fahy, was a constable[16] in what was then called the Police Service of New South Wales[17]. Ms Fahy had joined the Service in February 1996 and in the course of her duties had attended many traumatic incidents. On 25 August 1999, she was one of two officers stationed at Green Valley Police Station assigned to patrol in a police truck. The other officer, Senior Constable Evans, was senior to her. Ms Fahy considered Senior Constable Evans to be a friend but they had been assigned to work together only three or four times previously.

15 At about 9.00 pm on 25 August 1999, Ms Fahy and Mr Evans were directed to investigate a hold-up alarm at a pharmacy at Edensor Park Shopping Centre. Ms Fahy was later to allege that she suffered psychiatric injury in consequence of what happened thereafter.

16 In 2001, Ms Fahy brought an action in the District Court of New South Wales against the State of New South Wales claiming damages for negligence. She succeeded at trial. An appeal by the State to the Court of Appeal failed on the issue of liability but succeeded on a question about mitigation of damages[18]. By special leave, the State now appeals to this Court to agitate questions about liability, and in particular questions about breach of duty, including whether this Court should reconsider *Wyong Shire Council v Shirt*[19].

17 This abbreviated description of the facts that lie behind the appeal and of the course of litigation in the courts below masks a number of particular features of both the facts and the course of proceedings which it will be necessary to examine in some detail. It is as well to begin, however, by identifying some fundamental considerations that must inform examination of this matter.

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16 *Police Service Act* 1990 (NSW), s 73.

17 *Police Service Act*, s 4. The *Police Service Amendment (NSW Police) Act* 2002 (NSW) amended the short title of the *Police Service Act* to the "Police Act 1990" and deleted references to the Police Service of New South Wales, instead referring to "NSW Police". It will be necessary in these reasons to refer to the provisions of the *Police Service Act* as they stood at the time of the events giving rise to this matter, and convenient to refer to the "Police Service" rather than to "NSW Police".

18 *New South Wales v Fahy* (2006) 155 IR 54.

19 (1980) 146 CLR 40.

The essential statutory framework

18 Because Ms Fahy claimed damages from the State on account of events occurring during her service as a police officer, any inquiry about the liability of the State must begin by considering the statutes that governed Ms Fahy's service as a police officer, the statutes that regulated claims against the State, and the statutes that regulated claims brought by an employee against his or her employer. It is convenient to begin by examining relevant provisions of the *Police Service Act* 1990 (NSW).

19 The Police Service established by the *Police Service Act* comprised the members referred to in s 5, which included the Commissioner and police officers employed under the Act. The Police Service was not a body corporate. The functions of the Police Service included[20] providing "police services" for New South Wales. "[P]olice services" included[21] "the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way".

20 Subject to the direction of the relevant Minister, the Commissioner was "responsible for the management and control of the Police Service"[22]. Section 8(2) provided that: "The responsibility of the Commissioner includes the effective, efficient and economical management of the functions and activities of the Police Service."

21 The *Police Service Act* prescribed[23] the ranks of police officers within the Police Service. Read as a whole, the *Police Service Act* demonstrated that the evident purpose of the legislation was, as may be expected, to create an hierarchical and disciplined force. Chief among the statutory provisions giving effect to that purpose was s 201 which made it a criminal offence for a police officer to neglect or refuse either to obey any lawful order or to carry out any lawful duty as a police officer.

22 The ordinary statement of claim by which the proceedings in the District Court were commenced alleged that the State of New South Wales was sued "pursuant to the *Crown Proceedings Act*, in respect of New South Wales Police".

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20 s 6(2)(a).

21 s 6(3)(b).

22 s 8(1).

23 s 12.

Presumably, this allegation was intended to engage s 5 of the *Crown Proceedings Act* 1988 (NSW), and its provisions that:

> "(1) Any person, having or deeming himself, herself or itself to have any just claim or demand whatever against the Crown (not being a claim or demand against a statutory corporation representing the Crown) may bring civil proceedings against the Crown under the title 'State of New South Wales' in any competent court.
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> (2) Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case between subject and subject."

How s 5 applied was not stated in the statement of claim and was not examined at trial.

23 In the Court of Appeal[24] reference was made to the *Law Reform (Vicarious Liability) Act* 1983 (NSW). Section 8 of that Act, as in force when the proceedings in the District Court were commenced and tried, provided that:

> "(1) Notwithstanding any law to the contrary, the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function) where the performance or purported performance of the function:
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> (a) is in the course of the person's service with the Crown or is an incident of the person's service (whether or not it was a term of the person's appointment to the service of the Crown that the person perform the function); or
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> (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown."

For the purposes of that Act, a police officer was deemed, by s 6, "to be a person in the service of the Crown and not a servant of the Crown".

24 Some questions about the application of the *Crown Proceedings Act* and the *Law Reform (Vicarious Liability) Act* were considered recently in *New South*

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24 (2006) 155 IR 54 at 60 [30].

Wales v Ibbett[25]. The issues that arise in this matter differ from those considered in *Ibbett* but are issues whose resolution depends upon premises that have their origin in those two statutes.

25 Much of the argument of the appeal in this Court proceeded from the unstated premise that either "the Crown", or a person or persons for whom "the Crown" was made vicariously liable by the *Law Reform (Vicarious Liability) Act*, was to be treated as owing to Ms Fahy the duty of care owed by an employer to an employee. In particular, much of the argument in this Court proceeded from the assumption that "the Crown", or a person for whom "the Crown" was vicariously liable, was under a non-delegable duty to provide a safe system of work[26] for police officers.

26 This assumption depended upon a number of important intermediate steps, not all of which must now be examined. In particular, it is not necessary to decide whether the relevant duty of care was owed by "the Crown" or was to be understood as a duty of the Commissioner of Police (for whom "the Crown" was vicariously liable) qualifying, or giving content to, the statutory obligation imposed on the Commissioner by s 8(1) of the *Police Service Act* to manage and control the Police Service. No matter whether the asserted duty of care is that of "the Crown" or the Commissioner, it is necessary and important to recognise that it must be framed in a way that takes proper account of the statutory framework provided by the *Police Service Act* for the performance of police duties.

27 Police officers are required to undertake tasks of a kind that few, if any, commercial employers could ask of their employees. Police officers must confront death, injury and destruction. It is they who must waken the sleeping household to tell them of the sudden death or serious injury of another. Ms Fahy herself spoke of incidents she had attended in three years of police service: a fatal plane crash, a fatal industrial accident, numerous fatal car accidents, overdoses and hangings. And as well as confronting the consequences of folly and accident, police officers must confront the wrongdoer bent upon harm to both the police and members of the public. It is tasks of these kinds that are encapsulated[27] by the anodyne description of a function of the Police Service as being "the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way". And it is tasks of these kinds that constitute the duties of a police officer and may be the subject of

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25 (2006) 81 ALJR 427 at 430 [4]-[6]; 231 ALR 485 at 487-488.

26 cf *Kondis v State Transport Authority* (1984) 154 CLR 672.

27 s 6(2)(a) and (3)(b).

lawful orders to a police officer. To neglect or refuse either to obey those orders or to carry out those duties was a criminal offence. That is the work for which "the Crown" or the Commissioner was, so the parties' arguments assumed, duty bound to provide a safe system to perform. But the system that was devised had to be one which did not detract from the effectuation of the statutory purposes and functions of the Police Service. Examination of the facts and arguments in this case will reveal that too little attention has hitherto been given to these considerations.

28 The third kind of statutory provisions to which it was necessary to give attention at the trial of this matter were the provisions, regulating common law claims by employees against employers, of Div 3 of Pt 5 of the *Workers Compensation Act* 1987 (NSW) as in force at the time of the events giving rise to Ms Fahy's claim[28]. Reference was made to those provisions at trial and no point in the appeal to this Court was said to turn upon the application or operation of those provisions. It is, therefore, not necessary to examine what was said about these matters at trial or to make further reference to the provisions.

The facts

29 Something further must be said about what happened to Ms Fahy after she and Senior Constable Evans were directed to investigate the hold-up alarm.

30 When they arrived at the shopping centre, they were told that there had been a hold-up and that someone had been injured. (The hold-up had been at a video store, not the pharmacy to which they were originally directed.) Ms Fahy and Mr Evans were told that the victim had walked to a medical centre about 50 metres away. There was a trail of blood on the footpath.

31 At the medical centre the receptionist directed the officers to a treatment room where a doctor was attending to the injured victim. Ms Fahy went into the room; Mr Evans did not. The doctor was dealing with a stab wound to the victim's chest. Ms Fahy asked the doctor what she could do to help. He told Ms Fahy the victim was complaining of pain in his left side, and he asked her to look at that. Ms Fahy discovered that the victim had suffered another, very deep, laceration which extended from his left armpit to his waist. He was bleeding profusely. She tried to stop the bleeding by first applying dressings and then holding the wound together. Mr Evans may or may not have told Ms Fahy that he was going outside. Be this as it may, he did not stay with Ms Fahy.

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28 *Workers Compensation Act* 1987 (NSW), s 151U.

32 The victim, still conscious, but bleeding profusely and evidently fearing death, spoke of his wife, his children, and his love for them. Ms Fahy tried to comfort him while, at the same time, using her radio, she asked, several times, where was the ambulance that had been summoned. The victim told her what the offenders were wearing and this, too, she relayed by radio. Throughout it all she attempted to keep the victim's wound closed.

33 Other police officers arrived at the scene but none came into the treatment room at the medical centre. One, the duty officer, Inspector Whitten, came to the door of the treatment room, "took one look ... turned around and ... walked away". When the ambulance officers arrived (about nine minutes after Ms Fahy and Mr Evans had arrived at the scene) Ms Fahy helped them move the victim into the ambulance. As the ambulance was leaving, the duty officer, Mr Whitten, told Ms Fahy to "put [her] hat on", "the media is here".

34 There then followed a series of other events Ms Fahy was later to allege contributed to the psychiatric injury she suffered. They included events on the night of the incident, and subsequent events said by Ms Fahy to constitute a failure to observe or to respond adequately to the trauma she had suffered. These matters loomed large at the trial of the action but they need not be described in any detail here.

35 Central to Ms Fahy's complaint, at trial and subsequently, was the fact that she had been left alone in the treatment room with the doctor and the wounded victim when, as the trial judge found, her immediate superior, Senior Constable Evans, had no operational or other sufficient reason which required him to leave her alone. In her pleading in the District Court, Ms Fahy had referred to Senior Constable Evans as her "partner" and she had alleged that "[r]ather than assist her, the partner decamped".

36 A psychiatrist called to give evidence at the trial spoke of Ms Fahy as perceiving herself "to be abandoned by her partner or buddy" and said that the "absence of her buddy" was "the decisive factor" in her development of a post-traumatic stress disorder. The trial judge referred to "the lack of support from her senior officers, including Senior Constable Evans and Inspector Whitten", and described Ms Fahy's case as being that she had been treated "with extraordinary insensitivity, or by a deliberate course of conduct which had the effect of breaking down [her] resilience". In the Court of Appeal, Spigelman CJ identified[29] "[t]he critical issue" as being "whether or not the failure on the part of the officers ... to *provide support* in the course of the traumatic incident was a breach of duty" (emphasis added). But none of these descriptions identified

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29 (2006) 155 IR 54 at 58 [17].

precisely the relevant content of the duty that this "insensitive treatment", "failure to provide support", or "abandonment" breached.

The pleaded case

37 In her ordinary statement of claim Ms Fahy had alleged that the Police Service, "for which the [State] is liable", was under a duty of care to her, was in breach of that duty and was negligent. Seven particulars of negligence were given. None of them made any reference, in terms, to an alleged failure to provide a safe system of work.

38 Apart from particulars alleging, generally, a failure to take adequate precautions for the plaintiff's safety, and putting her in a position of peril, only two particulars referred to what had occurred at the shopping centre. First, it was alleged that there had been a failure to provide Ms Fahy "with proper and adequate assistance at the scene of the ... armed robbery". Secondly, it was alleged that the Police Service was negligent "[b]y its servant or agent, leaving the scene of the armed robbery and exposing [Ms Fahy] to the victim by herself". The remaining particulars of negligence concerned alleged failures to provide adequate counselling and adequate debriefing in respect of the incident.

39 The specificity of these particulars obscured the logically anterior question whether "the Crown" or the Commissioner was duty bound to establish a system of work for police that would not have left Ms Fahy as the only police officer in the treatment room when the doctor and Ms Fahy worked (desperately, and ultimately successfully) to save the life of the victim.

The trial

40 Evidence led at the trial focused upon two distinct subjects: what Senior Constable Evans and other officers did at the scene during and after the time Ms Fahy was assisting the treatment of the victim in the treatment room, and what counselling or debriefing was provided to Ms Fahy over subsequent days and weeks. As noted earlier, Senior Constable Evans was found not to have had any operational, or other sufficient reason that required him to leave Ms Fahy alone when she was in the treatment room with the doctor and the victim.

41 Evidence was given about police officers, who had been assigned to work in pairs, working as "partners". Consistent with the hierarchical and disciplined character of the Police Service, Ms Fahy pointed out that the senior of two officers assigned to work with each other was "in charge of decision-making", but that "whether you were the junior or the senior, you had to look after who you were working with". Ms Fahy accepted that if two officers attended an incident, the first priority was to look after any injured person. In that regard she described earlier incidents she had attended, and made plain that during those

incidents, she and the other officer with whom she was then working, whether that other officer was senior or junior to her, had worked closely together. But there were, she acknowledged, no "protocols" which controlled the senior officer's judgment about what each of two attending officers would do at any particular incident.

42 The evidence given by Ms Fahy about the way in which police officers who had been assigned to work in pairs did their work was generally to the same effect as evidence given by a former police officer (Terrence O'Connell) called to give expert evidence on behalf of the plaintiff. In particular, that witness did not suggest that any relevant rules had been made about how two officers should go about their work. And the general effect of his evidence was that no rules could be made about that subject. As he said, at a crime scene where a person has been injured, the arrangements between a pair of police officers attending the scene "tend to work themselves out, because when you're dealing with an emergent situation, the delineation between roles often isn't quite as clear as we imagine. In fact you do what you can do."

43 Further, the evidence given by Ms Fahy was consistent with the only documentary record of police operating procedures tendered at the trial – part of a pocket guide issued to police. Under the heading "Armed Robbery (Standard Operating Procedures)" the guide spoke of the need to "[e]nsure the well being of victims/witnesses", to "[c]irculate description of vehicle/offenders – as soon as possible", and to "[p]reserve crime scene". But it said nothing about how these tasks were to be divided if two officers attended the scene.

44 No other evidence was led to demonstrate that the system of work which did govern, or should govern, the performance of duties by two police officers attending a scene such as confronted Ms Fahy and Senior Constable Evans did, or should, regulate the performance of their duties in such a way that Mr Evans would not have left Ms Fahy alone with the doctor and victim in the medical centre treatment room.

The appeal to the Court of Appeal

45 The State's notice of appeal to the Court of Appeal gave 13 grounds of appeal. Three (grounds 11 to 13) concerned questions of quantum and may be put aside from consideration in the appeal to this Court. The remaining 10 grounds were, for the most part, cast in terms attacking particular factual findings made by the trial judge. Only the first ground (that the trial judge "erred in finding that the cause of [Ms Fahy's] post-traumatic stress disorder ... was as a result of the negligent acts and/or omissions of a number of officers of NSW Police") might be understood as inviting attention to the questions of breach of duty which the State agitated in this Court. And even that ground was cast in terms which might suggest the need to give closer attention to questions of

causation than questions about breach of duty. It appears, however, that argument in the Court of Appeal was directed to these questions of breach of duty. And it was not submitted in this Court that the issues which the State agitated in this Court had not been before the Court of Appeal. No submission was made that those issues did not constitute a part of the matter over which this Court has jurisdiction.

46 All members of the Court of Appeal agreed that the State's appeal in relation to questions of liability should be dismissed. Spigelman CJ, with whose reasons M W Campbell AJA agreed, understood[30] the State's grounds of appeal as "address[ing] issues of scope of duty, breach and causation". But Spigelman CJ recorded[31] that there was no issue that the State owed a duty to Ms Fahy to provide a safe system of work and that there was no issue that, if either Senior Constable Evans or Inspector Whitten were in breach of a duty of care, the State was vicariously liable for that breach. In the particular facts of the case his Honour found it unnecessary[32] to consider questions of vicarious responsibility for breaches of duty by Senior Constable Evans or Inspector Whitten and focused only on what he described as "the employer's direct obligation". He identified[33] the employer's duty as "a duty to take reasonable steps to avoid unnecessary risk of personal injury, relevantly psychiatric injury" and the risks to be avoided as those risks which are reasonably foreseeable. Having identified[34] the critical issue as being whether leaving Ms Fahy alone in the treatment room "satisfied the various elements of the tort including duty, breach and causation", Spigelman CJ concluded[35] "that the attendance of [Senior] Constable Evans to other tasks was not such as to render reasonable, in all of the circumstances, his failure to support" Ms Fahy.

47 Basten JA analysed the case differently. His Honour noted[36] some of the difficulties that lay behind the allegation that the State was sued pursuant to the *Crown Proceedings Act* "in respect of New South Wales Police" and the separate

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30 (2006) 155 IR 54 at 56 [3].

31 (2006) 155 IR 54 at 56 [2].

32 (2006) 155 IR 54 at 56 [4].

33 (2006) 155 IR 54 at 56 [5].

34 (2006) 155 IR 54 at 57 [10].

35 (2006) 155 IR 54 at 58 [18].

36 (2006) 155 IR 54 at 60-61 [30]-[33].

difficulties that might arise in determining whether "the Crown" was Ms Fahy's employer for purposes of determining the safety of conditions of employment. In that regard, Basten JA noted[37] that s 6 of the *Law Reform (Vicarious Liability) Act* expressly provided that a police officer was to be deemed to be a person "in the service of the Crown and *not a servant of the Crown*" (emphasis added).

48 Having observed[38] that despite the way in which the matter had been pleaded, the focus of the evidence was on the conduct of individual officers, Basten JA examined first[39] what it would have been necessary to establish to show that Senior Constable Evans had acted in breach of a duty of care which *he* had owed Ms Fahy. In particular, Basten JA concluded[40] that it would have been necessary to demonstrate that Mr Evans was, or should reasonably have been, aware of the risk of psychiatric injury to Ms Fahy. But because the case had not been pleaded or presented at trial in a way that depended upon showing that Mr Evans owed Ms Fahy a duty of care, there were no findings of fact that would support the conclusion that he had acted in breach of such a duty.

49 Basten JA then went on to consider the complaints made by Ms Fahy on the basis that they were complaints, first, that the failure of Senior Constable Evans to provide reasonably necessary support was a failure by the employer either to provide or to maintain a safe system of work[41], and second, that the treatment of Ms Fahy by Inspector Whitten, coupled with what had happened after the incident, was to be understood as a breach of duty "to provide appropriate support to an officer in the circumstances of the plaintiff, and monitor the effects of a potentially traumatic episode"[42]. The conclusion reached by Basten JA was expressed very briefly. His Honour said[43]:

> "The findings of the trial judge were that Senior Constable Evans was aware of the circumstances in which the plaintiff had been assisting

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37 (2006) 155 IR 54 at 61 [33].

38 (2006) 155 IR 54 at 61 [34].

39 (2006) 155 IR 54 at 71-74 [81]-[90].

40 (2006) 155 IR 54 at 73-74 [90], citing *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

41 (2006) 155 IR 54 at 73-74 [90].

42 (2006) 155 IR 54 at 74 [93].

43 (2006) 155 IR 54 at 75 [98].

> the doctor to stem the victim's bleeding; Inspector Whitten knew that there was a real risk that the victim would die; he further knew that the plaintiff had had contact with the victim's wife and was in the process of taking her to the hospital when she was called back to the crime scene, and if he did not know from his own observation, should have known from Senior Constable Evans, of the circumstances inside the surgery. *Those findings support the conclusion that there was a breach of the duty to provide reasonably safe conditions of employment.*" (emphasis added)

It is to be noted that this conclusion did not state expressly what it was that the reasonable employer should have done. In particular, the safe system of work was not identified. All that was said was that the particular events described constituted a departure from the provision of a safe system of work.

50 Moreover, the statement of the conclusion must be understood in the light of what Basten JA had earlier said[44] about the role of the "partner" or "the buddy system". The examination Basten JA undertook of the "partner" or "the buddy system" was made against an understanding[45] of "the real complaint being made" by Ms Fahy as being "that her employer had failed to provide an adequate system of work, so as to give her sufficient support both during and in the immediate aftermath of a potentially highly distressing event". His Honour continued[46]:

> "On that approach, it was not sufficient simply to put two officers on duty together and tell them to work together in a manner vaguely described as 'the buddy system'. In the absence of any evidence as to relevant instructions, one would be inclined to infer that 'the buddy system' was intended to provide physical protection and backup, which would not have been available if officers patrolled alone. Further, to the extent that the officers witnessed matters which needed to be recorded for the purposes of an investigation and possible criminal proceedings, a second officer would obviously provide a source of corroboration and a check on the accuracy of the observations of the other. On the other hand, if the colleague was expected to provide psychological support in a distressing situation, then each officer would need to have understood that that was part of the particular role envisaged under 'the buddy system'. There was no evidence to suggest whether or not that was so understood, but the gist of the plaintiff's case in relation to Senior Constable Evans appears to

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44 (2006) 155 IR 54 at 73-74 [90].

45 (2006) 155 IR 54 at 73 [90].

46 (2006) 155 IR 54 at 73-74 [90].

have been that such support was reasonably necessary and was not provided."

51 The conclusion reached by Basten JA, that there was a breach of duty to provide reasonably safe conditions of employment, is consistent only with a conclusion that safe working conditions required that police officers working in pairs were to be required "to provide psychological support in a distressing situation" to each other. But what was meant by the reference to "provid[ing] psychological support" was not stated expressly by either Spigelman CJ or Basten JA. The only conclusion stated by the Court of Appeal was that the trial judge's findings of fact supported the conclusion that what had happened to Ms Fahy was not consistent with the implementation of a safe system of work.

The appeal to this Court

52 The State attacked the reasoning of the Court of Appeal in a number of ways. The attacks, though variously expressed, took two principal forms. First, it was said that the Court of Appeal erred in not identifying, other than negatively, what was the safe system of work that should have been prescribed. This, so the State submitted, constituted a failure to identify properly the scope and content of the relevant duty of care or served to mask the error in determining the significance to be attributed to the "partner" or "the buddy system". This latter characterisation of the error was related by the State to the separate question whether the Court of Appeal erred in concluding that there was a reasonably foreseeable risk of injury for the purposes of determining breach of duty. The second principal strand of the State's arguments was that this Court should reconsider *Wyong Shire Council v Shirt* and, in particular, should abandon the equation of a "foreseeable risk" with "[a] risk which is not far-fetched or fanciful"[47].

53 As this summary of the State's submissions reveals, separate submissions were made about duty and breach of duty. But the accepted premise for argument of this litigation at all stages has been that either "the Crown", or a person for whom "the Crown" is vicariously liable, owed Ms Fahy a non-delegable duty of care to provide and maintain a safe system of work. As noted earlier, this conventional assumption for the litigation depends upon the validity of a number of unstated premises, but neither the State nor Ms Fahy suggested that the premises should be challenged. It is not necessary to go behind the conventional assumption of the parties and, given the way in which the case proceeded in this Court and in the courts below, it would be inappropriate to do so. It is not necessary to go behind the assumption because,

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

properly understood, the State's chief complaint about the conclusions reached in the Court of Appeal is better analysed as a complaint about breach of duty, not about the scope or content of the duty owed.

54 In that regard, this case may be contrasted with *Koehler v Cerebos (Australia) Ltd*[48] where attention focused upon the content of the employer's duty to an employee to take reasonable care to avoid psychiatric injury. That case concerned an allegation that the work expected of the employee was too great and that nothing had been done to modify her duties. As was pointed out in the joint reasons in *Koehler*[49], the content of the duty owed by an employer to an employee must take account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and any applicable statutory provisions. Considering those obligations reveals questions that bear upon whether the employer must modify the work an employee is to do.

55 In the present case, however, Ms Fahy's complaint was directed to what she alleged the Police Service should have required of other officers. That was a complaint about the system of work prescribed by the Police Service. In order to consider that complaint, it is necessary to recall what was decided in *Shirt*.

Wyong Shire Council v Shirt

56 The Court's decision in *Shirt* has rightly been understood as authoritatively stating how a tribunal of fact must set about deciding whether there has been a breach of duty of care. The description of that task, in the reasons of Mason J[50], though well known, should be set out:

> "[T]he tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the

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48 (2005) 222 CLR 44.

49 (2005) 222 CLR 44 at 53 [21].

50 (1980) 146 CLR 40 at 47-48.

> defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

57 This approach to questions of breach of duty has come to be known as the "*Shirt* calculus". The description may be convenient but it may mislead. Reference to "calculus", "a certain way of performing mathematical investigations and resolutions"[51], may wrongly be understood as requiring no more than a comparison between what it would have cost to avoid the particular injury that happened and the consequences of that injury. *Shirt* requires a more elaborate inquiry that does not focus only upon how the particular injury happened. It requires looking forward to identify what a reasonable person *would* have done, not backward to identify what would have avoided the injury.

58 In *Vairy v Wyong Shire Council*[52], it was explained why it is wrong to focus exclusively upon the way in which the particular injury of which a plaintiff complains came about. In *Vairy*, it was said[53] that:

> "[T]he apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable

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51 *The Oxford English Dictionary*, 2nd ed (1989), vol 2 at 778, citing Hutton, *A Mathematical and Philosophical Dictionary*, (1796), vol 1 at 234.

52 (2005) 223 CLR 422.

53 (2005) 223 CLR 422 at 461 [124] per Hayne J; see also at 443 [60]-[61] per Gummow J.

> risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be 'nothing'."

It is only if the examination of breach focuses upon "what a reasonable man *would* do by way of response to the risk"[54] (emphasis added) that it is sensible to consider "the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have"[55].

Breach of duty in this case?

59 How were the questions presented by *Shirt* to be answered in this case?

60 There can be no doubt that performing the duties of a police officer can often be very psychologically stressful. That is the inevitable consequence of the kinds of work police officers are required to perform. That a police officer may suffer psychiatric injury as a result of performing that work is, therefore, readily foreseeable. The risk of such injury is not far-fetched or fanciful; the risk of injury may not even be remote (if "remote" is understood as meaning extremely unlikely to occur).

61 The evidence led in this case revealed that the Police Service of New South Wales had long since recognised these risks. At least by 1991, the Police Service had established a psychology unit to provide "confidential services to members of the Police Service and to their immediate families". A psychologist was on call 24 hours a day to provide trauma crisis counselling for members of the Service "involved in a major incident or community crisis". Debriefings were compulsory following certain kinds of incidents and counselling was provided, as requested, "after other work related traumas ... eg assaults, attending particularly distressing fatal incidents, etc". In addition, counselling was available from the psychology unit to "staff suffering from a cumulative stress reaction". In June 1999, a special report was made to the New South Wales Parliament under s 31 of the *Ombudsman Act* 1974 (NSW) entitled *Officers Under Stress*. That report concerned "the need for the NSW Police Service to identify and support police officers whose psychological well-being has been affected by stress". In the same month a set of guidelines was published in the journal *Police News* (which it may be assumed was circulated to police officers) that was said to be "intended to protect the welfare and legal rights" of police

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54 *Shirt* (1980) 146 CLR 40 at 47.

55 *Shirt* (1980) 146 CLR 40 at 47-48.

officers in certain critical incidents. All of these matters demonstrate not only that the risk of a police officer suffering psychiatric injury was foreseeable, but also that the Police Service had foreseen the risk and had taken steps to avoid, or at least ameliorate, the consequences of the stresses of police work.

62 The State submitted that the relevant risk to consider in determining whether Ms Fahy had established that there had been a breach of duty to provide a safe system of work was whether "a police officer might suffer a psychiatric injury if that officer's partner did not remain to provide support whilst the officer was exposed to trauma whilst assisting a doctor". For the reasons given earlier, that formulates the relevant risk from the wrong perspective. It seeks to ask, in effect, whether the particular mechanism which led to the injury of which the plaintiff complained was a foreseeable risk. But breach of duty requires consideration of whether the defendant's conduct (which it is to be assumed is identified in this case as the formulation of systems of work for police officers) involved a risk of injury to the plaintiff. And here, there could be no doubt that police work involved a risk of psychiatric injury to police officers. The inquiry that was then to be undertaken was "what a reasonable man would do by way of response to the risk". The focus must fall upon how police officers should have been instructed to perform their work, not upon what steps the Police Service should have taken to provide support for officers who had been exposed to traumatic incidents. It is necessary, therefore, to identify the system of work that should have been prescribed in response to the risk of psychiatric injury.

63 The implicit premise for the conclusions reached in the Court of Appeal, and by the trial judge, appears to have been that the Police Service, if acting reasonably, would have issued a general instruction to police officers assigned to work in pairs that, whenever possible, or perhaps unless operational requirements dictated otherwise, the officers should remain together, and each should provide psychological support to the other during any traumatic incident. An instruction of that kind poses a number of questions that must be examined.

64 First, if the instruction is intended as a reasonable response to the foreseeable risk of psychiatric injury, why would it be reasonable to confine the response to officers assigned to work in pairs? Why is it only *those* officers who warrant this protection?

65 Yet it was *not* submitted that reasonable care required that police officers not be assigned to work alone. And it is a notorious fact that police officers do work alone.

66 Secondly, even when officers are assigned to work together, there are many circumstances in which their duties will require them to separate. So, to vary the facts of the present case only slightly, what if there had been two persons stabbed in the attempted robbery? What if one had collapsed at the video

store, but the other had managed to walk 50 metres to the medical centre? Inevitably, the first two police officers arriving at the scene would have had to separate.

67 Of course the second point is one that the exception or qualification, permitting separation when necessary, is intended to meet. And it is the content of the postulated exception that gives particular significance to the finding that Senior Constable Evans had no operational or other sufficient reason not to remain with Ms Fahy. But the fact that an exception or qualification must be made to the general rule is highly significant. The making of the exception or qualification, like the observation that officers can be and are assigned to work alone, reveals that there are cases where a police officer must face traumatic incidents alone. And it may reasonably be supposed that the worse an incident is, the more likely it is that officers will *not* be able to spend any time supporting each other because they will be fully occupied in controlling the situation and dealing with its consequences.

68 Thirdly, what is meant by one officer "providing psychological support" to another? The notion is replete with difficulty and ambiguity. Particular emphasis was given, in this case, to Ms Fahy's sense of abandonment and to the fact that, while trying to prevent a badly injured man bleeding to death, she had to do so many other things. She had to recall what the victim said. Not only was he giving what he thought were his last messages to those whom he loved, he gave some description of what the offenders were wearing. And at the same time Ms Fahy was using her police radio, more than once, to ask where was the ambulance, and to pass on what she had learned from the victim. These facts were critical to understanding the medical evidence that attributed such importance to what had happened during this period of nine or so minutes, compared with the litany of traumatic incidents Ms Fahy had confronted in the past, apparently without any ill-effect. But these particular facts give no useful content to the notion of "providing psychological support".

69 There was no evidence led at trial that suggested what content should be given to this expression. If, as seems very likely, what one person should do to give psychological support to another, varies with the individuals concerned and the circumstances that give rise to the need for support, it is evident that the expression has, and can have, no fixed or certain content. There are individuals for whom and circumstances in which support is best given by the individuals remaining close by each other. Yet in the workplace, support may sometimes best be given by withdrawing to a respectful distance. Allowing a distressed colleague to recover composure without feeling under immediate scrutiny may be the better course. And there may be cases in which support is best expressed by silence rather than the persistently intrusive inquiry about well-being.

70 Assuming, however, that the difficulties of giving content to the notion of providing psychological support could be surmounted, the first two kinds of difficulty identified above would remain. Why should there be an instruction confined to officers directed to work in pairs? Does not the exception to the rule (for operational necessity) falsify the conclusion that a reasonable employer would respond to the risk of psychiatric injury by issuing and enforcing such an instruction? Or are both difficulties sufficiently met by understanding the instruction as a response that recognises that the risk of psychiatric injury cannot be eliminated, but may be reduced?

71 Both difficulties that have been identified find their roots in the very nature of police work. It is the nature of that work that entails that the risk of psychiatric injury, occasioned by traumatic incidents, cannot be eliminated. It cannot be eliminated because police officers must confront traumatic incidents in the course of their duties. (Those observations may be thought to suggest the need to consider questions of voluntary assumption of risk but at no stage of the litigation has the State sought to raise such questions.) To perform the tasks that society expects of police, as those tasks were expressed in the *Police Service Act*, police officers *must* obey the lawful orders given by their superiors and *must* carry out their lawful duties. That is why to neglect or refuse either to obey a lawful order or to carry out any lawful duty is a criminal offence[56].

72 Once the content of the postulated general instruction is identified and set against the requirements of the *Police Service Act* it is evident that not to give and enforce compliance with such an instruction was not a breach of duty. That is not because the risks of psychiatric injury to police officers were and are not reasonably foreseeable. They are. The response that *Shirt* requires a court to identify when considering breach of duty is a response which must have regard, in this case, to the responsibilities cast on the Police Service and on individual police officers. They are the "other conflicting responsibilities" of which Mason J spoke[57] in *Shirt* and which were to be taken into account in identifying the reasonable response to the risk. In particular, obedience to lawful orders, and the carrying out of lawful duties, is of primary and determinative significance. Why that is so is illustrated by the facts of this case.

73 Senior Constable Evans said, in his evidence at trial, that he did not stay in the treatment room with Ms Fahy because he had other police duties to perform. In particular he referred to a need to secure what was a crime scene where a serious crime had been committed, to search for a weapon and to look at a

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56 s 201.

57 (1980) 146 CLR 40 at 47.

surveillance video record in the video store. The trial judge rejected Mr Evans' evidence as an "unconvincing" explanation for his absence. In the Court of Appeal the rejection of Mr Evans' account was treated[58] as consistent with a finding that other officers who had come to the scene could have done what Mr Evans said he was doing. Whether this understanding of the evidence is consistent with the trial judge's findings is a question that need not be examined.

74 What *is* important is that Mr Evans' explanation of what he was doing reflected what could have happened at the scene and, if it did, it would have been a course of conduct consistent with the requirements of the *Police Service Act*. The senior of two officers assigned to work together must take responsibility for the way in which duties are divided. The junior officer must comply with the senior officer's orders. Each must perform their duties and must protect "persons from injury or death, and property from damage, whether arising from criminal acts or in any other way"[59].

75 The postulated instruction would require police officers assigned to work in pairs to remain together unless operational requirements dictated otherwise. That creates tension between the performance of the officer's duties and the need to protect a fellow officer. On its face, the instruction resolves that tension, but it seeks to do that on the assumption that a choice can be made between performance of one duty and performance of the other. That is, it assumes that the dictates of operational necessity or other sufficient cause (which must be given precedence over the duty to protect a fellow officer) will be apparent at the time. It may greatly be doubted, however, that this is so. Indeed, the more difficult and pressing the circumstances confronting police officers, the more difficult it will often be to decide what should be done, and who should do it. And it is the most difficult and pressing circumstances that are most likely to carry the risk of psychiatric injury to the officers involved. This necessary imprecision in the practical application of the instruction is a strong reason to doubt that a reasonable "employer" would have concluded that it should be issued.

76 There is, however, a further, and more deep-seated, difficulty about the postulated instruction. Because it would require the making of a choice between the performance of duties owed generally and a duty owed to fellow officers, one duty would have to be given primacy. The hypothesis for the postulated instruction is that it is the first set of duties that is given that status. And as noted earlier, that strips the instruction to do what can be done to help and support

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58 (2006) 155 IR 54 at 59 [20].

59 s 6(3)(b).

fellow officers confronting traumatic incidents of much of its content. But because the qualification or exception to the instruction has that effect, a very likely, even inevitable, consequence of giving the instruction would be that the protection of fellow officers would be treated by those to whom it was given as being of no less importance than the performance of the duties imposed on police officers by the *Police Service Act*. This possible misunderstanding of the postulated instruction is a powerful reason for concluding that a reasonable "employer" would not have issued it. But more than that, no instruction could lawfully be given that would qualify the statutory responsibilities imposed upon police officers by the *Police Service Act* and enforced by s 201 of that Act. And by requiring officers to choose between whether their attendance to those duties is *necessary* and staying to support a colleague, the "employer" would seek to qualify those responsibilities.

77 The qualification or exception to the postulated instruction, whether it is expressed by reference to "operational necessity", "other sufficient cause" or both, qualifies the duties whose performance is enforced by s 201. Because those duties were statutory responsibilities, they trumped the other considerations which would ordinarily be put into the balancing exercise spoken of in *Shirt*. Neither the Court of Appeal nor the trial judge recognised this to be so, and in that respect failed to apply *Shirt*.

No reconsideration of *Shirt*

78 It follows from what has been said that there is no occasion, in this case, to reconsider the correctness of *Shirt*. It is as well to say, however, that no persuasive argument was mounted in this case for the view that *Shirt* should now be reconsidered[60]. It is a decision that has stood for more than 25 years and has been applied frequently both in courts of trial and appeal and in this Court. There may be cases when the principles stated in *Shirt* have not been applied accurately. In particular, arguments of the kind made, and rejected, in *Vairy* and in *Mulligan v Coffs Harbour City Council*[61] may suggest a misunderstanding of the so-called "calculus" that would seek to determine questions of breach in some cases by balancing the cost of a single warning sign against the catastrophic consequences of a particular accident. But the fact, if it be so, that *Shirt* has not always been applied properly does not provide any persuasive reason to reconsider its correctness.

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60 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 71 [55], 101-106 [152]-[167]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 45 [38].

61 (2005) 223 CLR 486.

79 Further, contrary to an argument advanced on behalf of the State, the fact that States and Territories have chosen to enact legislation which, in some cases, may alter the way in which questions of breach of duty of care are to be approached in actions for damages for negligence provides no reason to re-express this aspect of the common law. If anything, the diversity of legislative approaches manifest in legislation enacted on this subject[62] points away from the desirability of restating the common law.

Conclusion and orders

80 The appeal to this Court was conducted on the basis that disposition of the arguments about the provision of support to Ms Fahy at the scene was determinative. The respondent did not seek to uphold the judgment she had obtained at trial by reference to other considerations, whether concerning the Police Service's response to her participation in this traumatic incident or otherwise. It follows that, for the reasons given earlier, the appeal to this Court should be allowed, paragraphs 2 and 3 of the orders of the Court of Appeal made on 4 April 2006 be set aside and in their place there be an order that in place of the order of the District Court of New South Wales that there be a verdict for the plaintiff there be judgment for the defendant. Consistent with the terms on which special leave to appeal to this Court was granted, the orders for costs made at trial and in the Court of Appeal are not to be disturbed and the appellant in this Court should pay the respondent's costs of the appeal.

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62 *Civil Liability Act* 2002 (NSW); *Wrongs Act* 1958 (Vic); *Civil Liability Act* 1936 (SA); *Civil Liability Act* 2003 (Q); *Civil Liability Act* 2002 (WA); *Civil Liability Act* 2002 (Tas).

81 KIRBY J. This appeal, from the Court of Appeal of the Supreme Court of New South Wales[63], concerns the law of negligence. Specifically, it concerns the question whether the State of New South Wales ("the appellant"), as the admitted employer of Ms Gemma Fahy ("the respondent"), then a constable in the Police Service of the State[64], was liable to pay damages to the respondent. The damages were claimed for a severe condition of post-traumatic stress disorder ("PTSD") from which it was accepted the respondent suffered following circumstances arising in the course of her employment.

82 The respondent succeeded at trial in the District Court of New South Wales (Graham DCJ)[65]. By its appeal to the Court of Appeal, the appellant challenged that outcome. So far as the challenge related to the liability of the appellant, it was unanimously dismissed by the Court of Appeal, although the reasons for judgment were somewhat different as between Spigelman CJ (with whom M W Campbell AJA substantially agreed[66]) and Basten JA.

83 Upon a particular aspect of the damages awarded to the respondent by the primary judge (in total $469,893), the Court of Appeal unanimously upheld the appellant's appeal[67]. On this footing, the Court of Appeal ordered that the matter be remitted to the District Court for determination of the allowance to be made[68] for a reduction of the respondent's damages on the basis of a failure on her part to mitigate her damage by taking anti-depressant medication after this was prescribed for her[69]. No cross-appeal to this Court was brought on that issue. Accordingly, if the appellant's challenge to its liability fails, that would be the result, unless the parties earlier settled that "one outstanding matter"[70].

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63 *New South Wales v Fahy* (2006) 155 IR 54.

64 *Police Service Act* 1990 (NSW), s 73.

65 *Fahy v State of New South Wales* unreported, 28 February 2005 ("reasons of the primary judge").

66 (2006) 155 IR 54 at 59 [27], 87 [154]; but see at 87 [158].

67 (2006) 155 IR 54 at 59 [23], 84 [142], 87 [154].

68 Under the *Workers Compensation Act* 1987 (NSW), s 151L(3).

69 (2006) 155 IR 54 at 81-82 [129], 83-84 [137].

70 As Spigelman CJ urged them to do: (2006) 155 IR 54 at 59 [23].

84 The general background to the case is described in other reasons[71]. However, to explain the conclusion to which I come, it will be necessary to add certain relevant facts disclosed in the evidence taken at the trial. Specifically, it will be necessary to refer in greater detail to the conclusions of the judges below, all of whom were of the view that the respondent was entitled in law to succeed in her claim framed in negligence.

85 When the further facts are understood, concerning the system of work instituted for police constables faced (as the respondent undoubtedly was) with fraught circumstances, the conclusion of the primary judge, and of the Court of Appeal, can be better appreciated. This is a case of an employer that correctly recognised special risks and dangers for its employees. It devised a system which was carried out defectively on the occasion when the respondent suffered her damage. On this basis, the case is a relatively straight-forward one involving the failure of the employer to maintain and carry out its *own* system of work, protective of the respondent. So explained, it was open to the primary judge to find negligence against the appellant. There is no occasion for this Court to find error in the substantive conclusion reached below. The judgment of the Court of Appeal to that effect should be affirmed.

The issues

86 *Matters not in issue*: In this Court, a number of topics, canvassed earlier, or in argument, can be put to one side as ultimately not in issue. Thus, in defining the scope and content of the duty of care owed by the appellant to the respondent, this Court does not need to have regard to the *Occupational Health and Safety Act* 1983 (NSW). At trial, the respondent neither pleaded, nor relied upon, the provisions of that Act as affording evidence of negligence on the part of the appellant, as a body subject to the duties prescribed by that Act. Whilst some of the provisions of the Act were referred to in documents tendered in evidence in the respondent's case[72], the failure of the respondent to run such a case at trial would render it unfair, now, in this Court, to permit the issue to be raised substantively for the first time.

87 This is so, although it would appear that the Court of Appeal, in a series of decisions, has treated the obligations imposed by the Act as relevant to the ascertainment of the duty owed at common law to persons engaged in

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71 Reasons of Gummow and Hayne JJ at [14]-[16], [29]-[44].

72 Thus the expert report of Mr Terrence O'Connell referred to s 15(1) of the Act and to the New South Wales Police Service Occupational Rehabilitation Policy published in June 1996.

relationships of employment and quasi-employment[73]. Indeed, the Act has been specifically considered in that Court as relevant to the obligations of care arising in the employment of police officers[74]. Nothing significant would appear to turn on this issue, given that the Court of Appeal did not find that the Act, or its application to the peculiarities of police employment, obliged any different approach to the content of the duty of care from that expressed by this Court (in *Wyong Shire Council v Shirt*[75], to which reference will shortly be made).

88 Various other issues, or potential issues, can likewise be ignored. Thus, no one until the proceedings reached this Court ever suggested the possibility that a police constable might be excluded from recovery on the basis of negligence by reference to the notion of voluntary assumption of risk (*volenti*)[76]. If we have reached a stage in the law of employment and quasi-employment in Australia that this nineteenth century concept is to be revived for this purpose, notwithstanding all the legal reasoning that argues to the contrary[77], specifically in the case of police[78] and like employment[79], a specific argument to that effect would be necessary. Unsurprisingly, in my view, no such argument was advanced in this appeal.

89 Various other issues can also be taken as settled. They include the primary judge's general quantification of the respondent's damages, save for the point of mitigation[80]; his conclusion that the negligent acts or omissions of the appellant (if proved) "materially contributed to the onset of [PTSD] and

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73 eg *TNT Australia Pty Ltd v Christie* (2003) 65 NSWLR 1 at 15-16 [68]-[70].

74 *New South Wales v Williamson* [2005] NSWCA 352.

75 (1980) 146 CLR 40 at 47-48.

76 cf reasons of Gummow and Hayne JJ at [71]; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 58-59 [40], 65 [57].

77 See eg *Bowater v Rowley Regis Corp* [1944] KB 476 at 481; *Burnett v British Waterways Board* [1972] 1 WLR 1329; [1972] 2 All ER 1353; Blackburn, "'Volenti Non Fit Injuria' and the Duty of Care", (1951) 24 *Australian Law Journal* 351.

78 *Attorney-General for Ontario v Keller* (1978) 86 DLR (3d) 426.

79 *Ogwo v Taylor* [1988] AC 431 (fire service).

80 (2006) 155 IR 54 at 80 [119], 81 [128].

depression or anxiety conditions in the [respondent]"[81]; and his rejection of the defence of contributory negligence[82].

90 Contrary to what was suggested during argument in this Court, the pleadings in the record show that the respondent did plead a case based on the appellant's vicarious liability for the acts and omissions of its "servant or agent". Thus, it was specifically pleaded that the respondent at the critical time "was accompanied by her partner who was also a member of the New South Wales Police Service. Rather than assist her, the partner decamped."[83] Moreover, the particulars of negligence pleaded against the appellant included[84]:

> "By its servant or agent, leaving the scene of the armed robbery and exposing the [respondent] to the victim by herself."

91 Ultimately, it is of no consequence whether the appellant's liability arose directly, or through the acts and omissions of police officers (such as Senior Constable Steven Evans and Inspector Whitten) for whom it was made vicariously liable by the operation of the *Law Reform (Vicarious Liability) Act* 1983 (NSW)[85]. As was rightly noted by the Court of Appeal[86], on the facts of the case, "[n]othing turns … on the two different ways of approaching the duty".

92 Nevertheless, the great part of the respondent's case, as described in the reasons of the primary judge and of the Court of Appeal, concerned the appellant's system of work and its provision of counselling and follow-up after injury. On the evidence, it was the suggested failure of the system, at the point where the respondent suffered the trauma that triggered her PTSD and depression, that became the focus of most of the argument in this Court. Correctly, the primary judge did not treat PTSD as somehow excluded by law from the kind of damage that would render the appellant liable in negligence if the other ingredients of the tort were proved[87]. Nor did he treat the fact that the

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81 Reasons of the primary judge at 63, 66.

82 Reasons of the primary judge at 73-74.

83 Ordinary statement of claim, par 5.

84 Ordinary statement of claim, par 6(d).

85 ss 6, 8.

86 (2006) 155 IR 54 at 56 [2] per Spigelman CJ (with whom M W Campbell AJA agreed at 87 [154]).

87 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394, 407; *Tame v New South Wales* (2002) 211 CLR 317 at 390 [213]; cf *Campbelltown City Council v Mackay*

(Footnote continues on next page)

respondent had been a police officer with three years' operational experience before her exposure to the traumatic events that triggered her psychological illness, and had apparently adequately coped with earlier stressful incidents, as somehow placing her outside the duty of care owed to her by the appellant, to take positive steps to protect her from such well-known and recognised employment risks as face police constables in the State and throughout the Commonwealth[88].

93 *The "employment" of police*: As Gummow and Hayne JJ point out in their joint reasons[89], this is another case where, to define with legal accuracy the ambit of the duty of care owed to the respondent in the circumstances complained of, it was necessary to start with the statutory provisions governing the relationship in question[90]. No statement of the common law applicable to a case in respect of which a statute has relevant application, may ignore the material provisions of statute law.

94 The peculiarity of the office of a constable of police, viewed from the standpoint of common law principles, was explained by this Court in its early decision of *Enever v The King*[91]. As Griffith CJ pointed out in that case, the fundamental problem, from the point of view of rendering the government or the Crown liable vicariously for wrongs done by a constable, statute apart, was that the constable's exercise of powers was viewed by the law as conduct personal and incidental to that office[92]. This holding left police constables exposed to personal liability at common law at the suit of third persons and potentially outside the protections ordinarily applicable by that time to those engaged in the employment relationship[93]. It eventually led to legislative reform. At the

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(1989) 15 NSWLR 501 at 503-504; Tennant, "Liability for Psychiatric Injury: an Evidence-based Appraisal", (2002) 76 *Australian Law Journal* 73 at 75, 79.

88 Reasons of the primary judge at 75.

89 Reasons of Gummow and Hayne JJ at [18].

90 cf *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [3], 19 [27], 32 [71], 76-77 [214], 113 [343].

91 (1906) 3 CLR 969. *Enever* was approved by the Privy Council in *Attorney-General for New South Wales v Perpetual Trustee Co Ltd* (1955) 92 CLR 113 at 120; [1955] AC 457 at 479-480.

92 (1906) 3 CLR 969 at 975.

93 See Australian Law Reform Commission, *Complaints Against Police*, Report No 1, (1975) at 58-63 [213]-[229].

relevant time, the applicable legislation in New South Wales was the *Police Service Act* 1990 (NSW)[94].

95 In the Court of Appeal, Basten JA commenced his analysis by reference to the collection of State legislation relevant to ascertaining the ambit and extent of the duty of care owed by the appellant to the respondent in the "employment" relationship[95]. To use the word chosen by Basten JA[96], there are various reasons why the way in which the respondent sued the appellant, as if it were liable to her in law as an ordinary employer, was "inapt". As Basten JA observed, for specified statutory purposes the Commissioner of Police is expressly deemed to be the employer of a constable[97]. But there was no equivalent general provision in the *Police Service Act*[98].

96 In the trial of the present proceedings, these fine points of law were glossed over for a simple reason. In par 2 of her ordinary statement of claim, the respondent pleaded her cause of action asserting that she was "employed by the [New South Wales Police] Service as a Police Officer" and in par 1 she sued to recover from the appellant pursuant to the *Crown Proceedings Act* 1988 (NSW). In par 1 of its defence, the appellant admitted pars 1 and 2 of the statement of claim. Unsurprisingly, therefore, the respondent's claim went to trial, and was decided, upon the footing that the appellant was content to have its obligations decided as representative of the respondent's employer on the dual footing that the State or "the Crown in right of New South Wales"[99] was the proper party to be sued in the circumstances[100] and that the legal relationship existing at all relevant times was that of "employment".

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94 The *Police Service Act* is now known as the *Police Act* 1990 (NSW).

95 (2006) 155 IR 54 at 60-61 [30]-[33] noting the *Law Reform (Vicarious Liability) Act* 1983 (NSW), s 9B(2) and *Crown Proceedings Act* 1988 (NSW). See also *New South Wales v Ibbett* (2006) 81 ALJR 427; 231 ALR 485.

96 (2006) 155 IR 54 at 60-61 [32].

97 See eg *Anti-Discrimination Act* 1977 (NSW), s 4B; *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232 at 250 [90]-[94].

98 (2006) 155 IR 54 at 61 [33] where Basten JA called attention to s 41 of that Act.

99 *Crown Proceedings Act*, s 3.

100 cf *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 84-86 [145]-[153] referring to *Byrne v Ireland* [1972] IR 241 at 272 per Walsh J.

97 Once a legal problem of this kind is identified, no court can be required to accept concessions or assumptions agreed between the parties that would lead the court to knowingly ignore or misapply the law[101]. Yet no party to this appeal, either in the Court of Appeal or in this Court, asked the court to clarify the precise relationship that existed between the appellant and New South Wales police officers such as the respondent, if it was not that of employment. No party suggested that this Court should revoke special leave on that basis[102]. Both parties appeared to be content to allow the appeal to be decided on the basis stated in the pleadings, upon which footing the trial had been conducted and the arguments of the parties decided. Judicial *dicta* exist which suggest that, in contemporary circumstances, at least for the application of industrial relations legislation, members of a State police force are indeed "employees" of the State[103]. Self-evidently, the appellant is not without access to the advice of experienced lawyers, and particularly when it comes to clarifying its own legal status and amenability to be sued in respect of a specified relationship having well-known legal consequences.

98 In such circumstances, although the appellant's admissions on the pleadings gloss over potential problems that were correctly identified by Basten JA in the Court of Appeal, and although such problems are not theoretically immaterial to the resolution of the issues remaining in the appeal, I am content to deal with the dispute between the parties on the basis that they have chosen[104]. This means that the appeal to this Court must be decided on the footing that the respondent was an employee of the appellant, or of a body represented by the appellant, and was owed the duties that ordinarily attach in law to the employment relationship, without any relevant diminution or variation deriving from the peculiarities of the position held by the respondent, namely that of police constable, or the like positions held by the other relevant police officers whose conduct was put in issue, namely Senior Constable Evans (the respondent's "partner" or "buddy" at the relevant time) and Inspector Whitten (the duty officer in charge of the relevant operation during which the respondent suffered the damage for which she sued).

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101 *Roberts v Bass* (2002) 212 CLR 1 at 54 [143].

102 cf *Klein v Minister for Education* (2007) 81 ALJR 582 at 590 [38], 593-594 [57]; 232 ALR 306 at 315, 319-320.

103 *Konrad v Victoria* (1999) 91 FCR 95; but cf *Griffiths v Haines* [1984] 3 NSWLR 653.

104 cf *Klein* (2007) 81 ALJR 582 at 590 [38], 593-594 [57]; 232 ALR 306 at 315, 319-320.

99 *Issues in contest*: By the foregoing analysis, the actual issues in contest in this appeal are narrowed. Effectively, they are two:

(1) *The reopening of Shirt issue*: Whether this Court, as the appellant in an amended ground of appeal urged, should reconsider, and re-express, the authority stated in its decision in *Shirt*[105] as to the test for establishing a breach of the duty of care on the part of a party alleged to be liable to another in the tort of negligence; and

(2) *The standard/breach issue*: Whether, in the circumstances of this appeal, and according to the legal principles so expressed, the appellant has demonstrated error on the part of the Court of Appeal and the primary judge in expressing the ambit of the duty of care owed to the respondent and in upholding the suggested breach of that duty giving rise to liability in the appellant for negligence.

100 Having regard to this Court's authority, the duty of the respective courts, both at trial and in the Court of Appeal, was to apply the approach expressed in *Shirt*[106]. The only court in which that approach might be re-examined, and re-expressed, was this Court. Picking up some suggestions put to it in the course of argument of the special leave application[107], the appellant formally asked this Court to allow it to add a ground of appeal challenging the holding in *Shirt*. Even if, upon one view, the alternative approach available to the appellant (namely that the event was "not unlikely to occur")[108] would produce no different result in the present case, the correct starting point for this Court is the identification of the governing legal rule. Where, as here, the issue has been fully argued, it is desirable that it be squarely determined by the Court and laid to rest. For this reason, I shall deal first with the issue of the status of the "*Shirt* calculus" and whether it should be abolished, or re-expressed, as the appellant argued it should at the threshold of its submissions.

The maintenance of the approach in *Shirt*

101 *Context of the issue*: The appellant's concession that the relationship of the respondent to the Police Service was that of employment effectively concluded, in the circumstances of this appeal, any issue as to whether a duty of

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105 (1980) 146 CLR 40 at 47-48.

106 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17].

107 [2006] HCATrans 472 at 140.

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

care existed for which the appellant was liable in law. This was because the employment relationship is clearly one that falls within the concept of "neighbourhood" which Lord Atkin declared to be the first step in determining the existence of a legal duty of care for the purpose of the tort of negligence[109]. Indeed, the employment relationship is one of comparatively few that impose specific obligations on the duty bearer to take affirmative action to prevent injury to others, namely those who are employed by, and thus subject to the general direction and control of, the other[110].

102 At common law the general rule is that a person "is not bound to do acts for others' benefit; he may sit still and let things take their course"[111]. However, by long authority, the very nature of the employment obligation creates a duty of care between those party to it. Indeed, it is a relationship that obliges the employer affirmatively to establish and enforce a safe system of work[112]. In the employment relationship, the employer is responsible for keeping abreast of technological and scientific knowledge[113] and for taking positive action to consider, and respond to, the needs of accident prevention in accordance with "changing ideas of justice and increasing concern with safety in the community"[114]. Some of the most important contributions to the perception of the last-mentioned necessity, according to our law, were written by McHugh J[115].

103 Merely prescribing a safe system is not enough to discharge the obligation that is owed to employees. The system must be enforced. This must be done even against employee resistance[116]. Although an employer may not always have to take active steps to acquaint itself with special or unique weaknesses or

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

110 cf *Crimmins* (1999) 200 CLR 1 at 98 [276] per Hayne J (diss).

111 Terry, "Negligence", (1915) 29 *Harvard Law Review* 40 at 52.

112 See eg *Katsilis v Broken Hill Pty Co Ltd* (1977) 52 ALJR 189; 18 ALR 181.

113 *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 at 1783.

114 *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309.

115 See eg *Mihaljevic v Longyear (Australia) Pty Ltd* (1985) 3 NSWLR 1 at 9, 18; *Bankstown Foundry Pty Ltd v Braistina* (1985) Aust Torts Reports ¶80-713 at 69,127, see also at 69,125-69,126 per Priestley JA.

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

predispositions to injury and damage on the part of particular employees[117], where the employer becomes aware that there is such a susceptibility, or should be so aware in the ordinary course of reasonable conduct, special precautions need to be taken by it, to fulfil the duty of care that is inherent in the employment relationship[118].

104 Against the background of this established body of doctrine in the common law, which was not challenged in this appeal, the issue presented was not *whether* a duty of care existed on the part of the Police Service to an employee such as the respondent. The express acknowledgment of the employment relationship foreclosed that issue. So much was correctly recognised in the Court of Appeal by Spigelman CJ[119]:

> "There is no issue that the Appellant owed a duty to the Respondent to provide a safe system of work. Nor was there any issue that, if either Constable Evans or Inspector Whitten were in breach of a duty of care, then the Appellant was vicariously liable for that breach. Nothing turns, on the facts of the case, on the two different ways of approaching the duty."

105 Instead, the argument advanced for the appellant, in this Court as in the Court of Appeal, concerned what that given duty of care reasonably entailed in the circumstances of this case and whether, as so defined, it had been breached by the acts and omissions of the Police Service. These were the questions that took the Court of Appeal to the approach required in *Shirt*.

106 The decision in *Shirt* is so well known, and frequently applied, that it was not cited by name in the Court of Appeal's reasons. But in the statements of the ambit of the duty of care, both of Spigelman CJ[120] and of Basten JA[121], the resonances of *Shirt* can clearly be observed. Moreover, in each of those reasons, care was taken to distinguish the then recent authority of this Court in *Koehler v Cerebos (Australia) Ltd*[122]. That was a case in which this Court unanimously

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117 *Blackman v Commonwealth* (1978) 20 ACTR 33 at 43.

118 cf *Paris v Stepney Borough Council* [1951] AC 367; *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at 753; *Silvestro v Verbon Pty Ltd* [1973] 2 NSWLR 513.

119 (2006) 155 IR 54 at 56 [2].

120 (2006) 155 IR 54 at 56 [5] (M W Campbell AJA agreeing at 87 [154]).

121 (2006) 155 IR 54 at 74 [92]-[94].

122 (2005) 222 CLR 44.

rejected an appeal by an employee who claimed to have been exposed to the risk of psychiatric injury as a consequence of her employment duties. *Koehler* was plainly distinguishable on the facts. But it was common, both to the joint reasons in *Koehler*[123] and, more reluctantly, the concurring reasons of Callinan J in that case[124], that the proper approach to the ascertainment of the duty of care owed by the employer to the employee (and whether it was breached) was that stated in *Shirt*.

107 With *Koehler* fresh in mind, the Court of Appeal therefore approached the task before it by asking the questions mandated in the familiar passage in the reasons of Mason J in *Shirt*, which Callinan J in *Koehler* had ruefully observed had "been constantly applied throughout this country and in this Court since it was decided"[125].

108 *The Shirt calculus*: Because it is central to the resolution of the issues argued in this appeal, it is necessary to remember that the critical passage in the reasons of Mason J in *Shirt*[126] directs the decision-maker to ask two questions, viz (1) would a reasonable person in the defendant's position have foreseen that the conduct postulated involved a risk of injury to the plaintiff or a class of persons including the plaintiff; and (2) if so, what would a reasonable person do by way of response to such risk. However, there then immediately follows a passage which, as McHugh J remarked in *Tame v New South Wales*[127], has sometimes been overlooked, namely[128]:

> "The perception of [that] response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

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123 (2005) 222 CLR 44 at 53 [19].

124 (2005) 222 CLR 44 at 64 [54].

125 (2005) 222 CLR 44 at 64 [54].

126 Cited in full in the reasons of Gummow and Hayne JJ at [56].

127 (2002) 211 CLR 317 at 353 [99].

128 *Shirt* (1980) 146 CLR 40 at 47-48. In his reasons in *Tame*, McHugh J added emphasis to the words in the last sentence.

109 This passage in the reasons of Mason J in *Shirt* followed a decision of the Judicial Committee of the Privy Council in *The Wagon Mound [No 2]*[129]. In that decision, Lord Reid, giving the reasons of the Board, in an appeal from a decision of Walsh J in the Supreme Court of New South Wales[130], remarked[131]:

> "If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense."

110 It was this approach which had led Glass JA, in the New South Wales Court of Appeal decision from which the appeal in *Shirt* came to this Court[132], to describe the test of foreseeability, in the context of breach of duty, as "undemanding"[133]. When *Shirt* was heard in this Court, Mason J observed that[134]:

> "Despite the force of Mr McHugh's argument I am not persuaded that a finding of breach of duty was beyond the jury's competence."

111 In stating the principles, later described as the "*Shirt* calculus", Mason J took considerable pains to emphasise that, in the context of breach of duty, "in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk", although "it certainly does not follow that a risk which is unlikely to occur is not foreseeable"[135]. He also emphasised that the touchstone which alone opened up a finding of civil liability in negligence at common law was "what a reasonable man would do by way of response to the risk".

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

130 *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] SR (NSW) 948.

131 [1967] 1 AC 617 at 643-644. See also *Koufos v C Czarnikow Ltd* [1969] 1 AC 350.

132 *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631.

133 *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641. The adjective was noted by Mason J in *Shirt* (1980) 146 CLR 40 at 44.

134 (1980) 146 CLR 40 at 48.

135 (1980) 146 CLR 40 at 47.

112 The decision in *Shirt* was given by this Court at a time when appeals still lay in Australia from State courts to the Privy Council, a point noted by Mason J[136]. Although this was a factor in persuading Mason J to accept and adopt the formulation of Lord Reid, his Honour made it clear that he also did so because "there are sound reasons for accepting it as a correct statement of the law"[137].

113 The issue now presented by the appellant's threshold attack on the principles so stated, is whether the formulation in *Shirt* should be revised and re-expressed.

114 *Suggestions for revision of Shirt*: One of the foremost proponents of a revision of the approach expressed in *Shirt* was McHugh J, expressing in his judicial reasons arguments which he had advanced as counsel, but which had not found favour in *Shirt* with Mason J (or with Stephen J, Murphy J and Aickin J, who expressly or impliedly agreed with Mason J in his conclusions and reasoning[138]).

115 In McHugh J's repeated opinions in this Court[139], the endorsement by Mason J in *Shirt*[140] of the principle that "a risk which is not far-fetched or fanciful is real and therefore foreseeable" was the beginning of "the problems that now beset negligence law"[141]. Although the *Shirt* formulation is one which encourages, and promotes, consideration of the necessities of accident prevention (a principle which McHugh J elsewhere repeatedly favoured[142]), his Honour several times suggested that this Court should return to the test proposed by Barwick CJ in *Caterson v Commissioner of Railways*[143]. That test would confine the risk to be guarded against to one that is "not unlikely to occur". This, or some other formula designed to exclude remote and insubstantial risks from the

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136 (1980) 146 CLR 40 at 47.

137 (1980) 146 CLR 40 at 47.

138 (1980) 146 CLR 40 at 44, 49, 50 (Wilson J dissented at 50ff, see esp at 53).

139 See *Tame* (2002) 211 CLR 317 at 352-354 [98]-[101].

140 (1980) 146 CLR 40 at 48.

141 *Tame* (2002) 211 CLR 317 at 352 [98], 353 [100]. See also *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at 548-549 [79]-[81].

142 See below these reasons at [132].

143 (1973) 128 CLR 99 at 101-102.

need for positive response, was the course propounded by McHugh J in order to return the Australian law of negligence, in this respect, to what he saw as the path of reasonableness from which it had strayed following *The Wagon Mound [No 2]* and *Shirt*.

116 Equally, or more, insistent about the need to revisit the *Shirt* formulation have been successive opinions of Callinan J in *Tame*[144] and *Koehler*[145], and Callinan and Heydon JJ in *Vairy v Wyong Shire Council*[146]. That view is repeated in this case in the reasons of Callinan and Heydon JJ (although their Honours say that it is not necessary for the decision of this case that *Shirt* be overruled)[147].

117 The appellant agreed that the test in *Caterson* could not now be adopted, as least in New South Wales, as it would be inconsistent with the *Civil Liability Act* 2002 (NSW) which requires that the risk be "not insignificant". The appellant therefore urged this Court to substitute the requirement that the risk be regarded as reasonably foreseeable only where it is so significant that it is reasonable to require a defendant to examine the need for precautions to eliminate it. This is the "significance" test. In effect, the appellant urged the Court to adopt the test stated in s 5B of the *Civil Liability Act* 2002 (NSW) which provides:

> "(1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions."

118 Whilst I respect the repeated expressions of opinions of my colleagues who hold to the contrary view, I cannot agree that it is timely, appropriate or desirable to re-express the common law of Australia in this respect. I will state my reasons for this conclusion.

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144 (2002) 211 CLR 317 at 429 [331].

145 (2005) 222 CLR 44 at 64 [54].

146 (2005) 223 CLR 422 at 480-481 [213].

147 Reasons of Callinan and Heydon JJ at [213].

The re-expression of *Shirt* should be rejected

119 *The Shirt rule is nuanced*: First, the decision in *Shirt* was stated by this Court with a high degree of unanimity in what was effectively a test case propounded to permit a re-expression by the Court of an applicable legal principle of broad application. Even Wilson J, who dissented as to the outcome and would have pulled back from the "undemanding test of foreseeability", stated that he had "some misgiving as to the use of the term 'not unlikely to occur' which in my opinion is patently obscure"[148]. Moreover, Wilson J remarked that he did not "understand [Barwick CJ in *Caterson*] to be adopting a standard significantly different to that enunciated in *The 'Wagon Mound'* [No 2]"[149].

120 This last remark was perceptive, although it doubtless arose out of the then prevailing deference to the Privy Council in those areas of the law still subject to its appellate review of Australian judicial decisions. When the actual words of Lord Reid, later blamed as occasioning a wrong turning, are examined it is clear (as Mason J pointed out in *Shirt*[150]) that their Lordships in *The Wagon Mound [No 2]* positively rejected the view that "risk of injury which is remote is of necessity not a real risk and that it falls outside the concept of foreseeability". However, what Mason J went on to emphasise in *Shirt* was that the foreseeability of the risk was only the first question that the decision-maker had to ask. It might be answered in the affirmative. But a second question remained. It was what a reasonable person would do by way of response to the then identified risk. It was in that connection that Mason J listed the factors relevant to what was later called the "calculus" that had to be performed. Those factors introduced, in a much less obscure and more nuanced way, the practical considerations that Barwick CJ in *Caterson* had sought to express in his "patently obscure" ambit phrase "not unlikely to occur".

121 It follows that it is quite wrong for critics to portray *Shirt* as providing an "open sesame" to liability by removing the requirement of reasonableness inherent in Lord Atkin's approach in *Donoghue v Stevenson*[151]. The law has not lost the moorings of that fundamental requirement. On the contrary, the *Shirt* formulation, in a highly practical way, directs specific attention to a series of considerations that are typically such as to moderate the imposition of legal liability where that would not be reasonable.

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148 (1980) 146 CLR 40 at 53.

149 (1980) 146 CLR 40 at 53.

150 (1980) 146 CLR 40 at 46.

151 [1932] AC 562 at 580.

122 *Shirt has been misapplied*: If there has been an incorrect application by trial courts of the full force of the formulation expressed by Mason J in *Shirt*, that is not a weakness in this Court's formulation. It simply shows that the "calculus" has not been given its full operation and perhaps, as McHugh J observed in *Tame*[152], those courts have been overly transfixed by reference to the "undemanding" test of foreseeability and insufficiently mindful of the second question to be asked and of the specific criteria which give that question a practical operation.

123 In a number of cases, this Court has pointed to the failure of trial counsel and judges to have regard, and to give proper weight, to the "magnitude of risks, the likelihood of the occurrence of risks, the expense and difficulty of responding to every possible risk in an effective way and the potentially conflicting considerations to be given weight"[153]. It is not a rational response to this problem to re-express a formulation that expressly calls attention to considerations which, in a proper case, may persuade the decision-maker that what a reasonable person would do by way of response to a foreseeable risk in the particular circumstances of a case might be: nothing[154].

124 *"Calculus" is not mathematical*: The fact that the *Shirt* formulation has sometimes been ignored or misapplied is not a reason for abandoning it. In countless cases, courts of trial and of appeal have applied the formulation accurately, according to its terms. In the nature of things, this Court rarely sees such instances. Any excuse for overlooking the repeated reminders about the criteria of practical reasonableness contained in the latter part of the *Shirt* formulation, that might have existed before such decisions as *Tame*, *Swain v Waverley Municipal Council*[155] and *Koehler*, has now well and truly been dealt with by the judicial observations made in those decisions.

125 Moreover, self-evidently, the reference to the *Shirt* formulation as a "calculus" is not intended to suggest a mathematical or scientific precision in the endeavour. The very components of the "calculus" deny any such expectation, most (if not all) of them being insusceptible to exact computation[156].

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152 (2002) 211 CLR 317 at 353 [99].

153 *Swain* (2005) 220 CLR 517 at 577 [191].

154 Reasons of Gummow and Hayne JJ at [58]. See also *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 480 [128]; *Vairy* (2005) 223 CLR 422 at 461 [124].

155 (2005) 220 CLR 517.

156 cf reasons of Gummow and Hayne JJ at [57].

Furthermore, although the *Shirt* formulation must be applied retrospectively by a court which knows that a misfortune of some kind is alleged to have happened to the plaintiff, of its nature it is designed to be applied prospectively (what the reasonable person "*would have* foreseen" and "*would do* by way of response to the risk"[157]). In this, there is nothing inconsistent with the approach stated in *Shirt* or indeed that earlier expressed by Barwick CJ in *Maloney v Commissioner for Railways (NSW)*[158] to which Wilson J called attention in his reasons in *Shirt*[159]. In *Maloney*, Barwick CJ had said[160]:

> "Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. That matter must be judged in prospect and not in retrospect. The likelihood of the incapacitating occurrence, the likely extent of the injuries which the occurrence may cause, the nature and extent of the burden of providing a safeguard against the occurrence and the practicability of the specific safeguard which would do so are all indispensable considerations in determining what ought reasonably to be done."[161]

126 Whatever may once have been the danger of oversight of the latter parts of the *Shirt* formulation, recent decisions, and recent trends in the law, have ensured that those risks need not now unduly trouble this Court.

127 *Relevance of new legislation*: It is also relevant here to consider the enactment of legislation designed to re-express legal liability in negligence in ways intended to reduce such liability, such as the *Civil Liability Act* 2002 (NSW). This is because the common law operates in the crevices left after statutory provisions have addressed subjects on which the common law once spoke with uninterrupted authority. As this Court has said so many times in

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157 (1980) 146 CLR 40 at 47 (emphasis added).

158 (1978) 52 ALJR 292; 18 ALR 147.

159 (1980) 146 CLR 40 at 55.

160 (1978) 52 ALJR 292 at 292-293; 18 ALR 147 at 148.

161 See eg *Ardern v Ritchies Stores Pty Ltd* [2001] VSCA 5; *Campbelltown City Council v Frew* [2003] NSWCA 154; *O'Leary v Oolong Aboriginal Corporation Inc* (2004) Aust Torts Reports ¶81-747; *Tomisevic v Menzies Wagga Southern Pty Ltd* [2005] NSWCA 178.

recent years, where statute speaks, it is the parliamentary command that takes primacy and constitutes the starting point for legal analysis[162].

128 Nevertheless, the significance of legislation of this kind is not as the appellant urged. On the contrary, the disparity and specificity of the various legislative approaches in different States of Australia suggest that it would not be timely or appropriate for this Court, on this ground, to attempt a re-expression of the general principles of the Australian common law. In this, I agree with the reasons of Gummow and Hayne JJ[163]. This is not an area where the legislature has been neglectful or is unlikely to repair a demonstrated defect in the law[164]. Nor is it one where this Court's intervention is required to correct demonstrated injustice, departure from basic principle or disproportional consequences that cannot safely be left to particular parliamentary repair[165].

129 *Shirt correctly states the law:* Ultimately, I would not favour a re-expression of the law expressed in *Shirt* because I share the view expressed by Mason J in that case that there are sound reasons for accepting the formulation there expressed as a "correct statement of the law"[166]. Not only is it a statement that emerged from a long series of decisions dating back, at least, to *Donoghue v Stevenson*[167]. By expressing the approach to "foreseeability" in the first question stated in *Shirt*, in the undemanding way that appears there, for the purpose of deciding whether a breach of a duty of care has been established, this Court has encouraged all those in a relationship of "neighbourhood" (and certainly employers) to keep in mind and act upon the affirmative obligations of accident prevention that can sometimes arise out of the particularities of the relationship in question.

130 A similar thought was expressed in the United States of America by Professor (later Chief Judge) Richard Posner in his influential essay "A Theory

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162 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1528 [84] and cases there cited; 229 ALR 1 at 22-23.

163 Reasons of Gummow and Hayne JJ at [79] by reference to the legislation noted in fn 62.

164 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 601-602 [229]-[233].

165 cf *Clayton v The Queen* (2006) 81 ALJR 439 at 462-463 [119]; 231 ALR 500 at 530-531.

166 (1980) 146 CLR 40 at 47.

167 [1932] AC 562.

of Negligence", published in 1972[168]. Writing about the issue of foreseeability, Professor Posner pointed out that "[c]ourts invoke the doctrine of 'proximate cause' to excuse defendants from liability for unforeseeable consequences of negligence"[169]. He instanced the case of a train stopping at a crossing to allow a group of rowdy passengers to disembark. If this event were to cause fright to a car driver waiting at the crossing for the train to move on and to occasion erratic driving of the car because of such fright and anxiety resulting in a mishap and injury, the law would deny recovery. It might do so on the basis of causation. But Professor Posner indicated that the same result "follows from the economic standard of negligence". He explained[170]:

> "If negligence is a failure to take precautions against a type of accident whose cost, discounted by the frequency of its occurrence, exceeds the cost of the precautions, it makes sense to require no precautions against accidents that occur so rarely that the benefit of accident prevention approaches zero. The truly freak accident isn't worth spending money to prevent. Moreover, estimation of the benefits of accident prevention implies foreseeability."

131 That is why, in judging the existence or otherwise of a breach of a duty of care, the door is left open by the "undemanding" test posed by the first question stated by Mason J in *Shirt*. Generally speaking, it is highly desirable that the law should encourage those with the power to do so (and one might say especially employers) to turn their attention to issues of accident prevention. Yet because such prevention is not to be purchased at excessive cost nor required for the "truly freak accident", or otherwise unreasonably, the *Shirt* "calculus" proceeds to require attention to what the reasonable person would do in all the circumstances. And it gives guidance about the types of considerations that such a person would take into account in acting reasonably.

132 Because, with McHugh J, I regard the communitarian notion of accident prevention as an important and desirable operative consequence of the law of negligence[171], I would not myself favour any re-expression of the law that would endorse a reduced vigilance in respect of accident prevention. Parliament can, if

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168 (1972) 1 *Journal of Legal Studies* 29.

169 (1972) 1 *Journal of Legal Studies* 29 at 42.

170 (1972) 1 *Journal of Legal Studies* 29 at 42.

171 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 477-478 [62]-[63] per McHugh J (diss), 492-493 [107] of my own reasons; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 483-484 [38]-[41] per McHugh J (diss).

it chooses, endorse "notions of selfishness that are the antithesis of the Atkinian concept of the legal duty that we all owe, in some circumstances, to each other as 'neighbours'"[172]. However, it is not a direction that, in my view, the common law of Australia has taken or should take. Importantly, in my respectful view, it is the approach which, without re-expressing the test, majorities of this Court have repeatedly taken in recent times; and now, once again, is taken in this appeal. It is the antithesis of the neighbourhood concept that lay behind the modern law of negligence. It places the decisions of this Court outside the legal mainstream on this topic.

133 *Conclusion: Shirt stands*: I would therefore reject the appellant's application to have this Court re-express the formulation stated in *Shirt* for the decision about the content of the duty owed by the Police Service, for which the appellant has accepted liability, to the respondent as employee and for the standard to be applied in deciding whether the Police Service breached its duty of care to the respondent. The liability of the appellant therefore falls to be decided in accordance with the principles explained by Mason J in *Shirt*. Both as a matter of binding authority and for reasons of basic legal principle applicable in Australia, the courts below were correct to so decide.

The standard and breach of the duty of care

134 *Awareness of police stress*: The occurrence of stress (and specifically the risk of PTSD) in the employment of police officers, specifically police constables such as the respondent, was well established by the evidence adduced in the trial of the present proceedings. It is a reality that might to some degree also be the proper subject of judicial notice[173].

135 The duties of police officers sometimes present them with circumstances of violence, horror, death, anger and destruction. In such circumstances, the risk of PTSD as a consequence of employment duties is far from far-fetched or fanciful. It is actual and real. A reasonably careful employer would not simply occasionally praise and exhort its employees and wash its hands of the responsibility to minimise the risks and dangers of such stress. It would do what is reasonable to prevent and minimise the dangers. What is reasonable will not, and could not, involve elimination of all such risks. But preventative and supporting strategies are known and available. Conformably with the discharge of the duty of care imposed by the common law of Australia on employers,

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172 *Neindorf v Junkovic* (2005) 80 ALJR 341 at 359-360 [85]; 222 ALR 631 at 653 referring to Lord Atkin's speech in *Donoghue v Stevenson* [1932] AC 562 at 580 citing, in turn, St Matthew's Gospel.

173 Reasons of Gummow and Hayne JJ at [60]-[61].

appropriate protective strategies have to be devised, adopted, maintained and enforced.

136 There was ample evidence at trial that, prior to the events that caused PTSD to the respondent, the Police Service was aware of the particular risks faced by police constables on the job and of the need to respond to them in every reasonable way. In June 1999, the State Ombudsman had published a special report to Parliament, *Officers Under Stress*[174]. The opening words of the summary to the report describe it as one concerning "the need for the NSW Police Service to identify and support police officers whose psychological well-being has been affected by stress". The Ombudsman cited the Police Service's own research which in 1998 had found that:

> "• For every five police officers involved in incidents, only three were offered professional support.
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> • Of those who were offered support, 72 per cent were not offered further assistance after the initial intervention.
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> • 18 per cent of those interviewed indicated a clinically significant reaction to the incident; only half of this 18 per cent had received assistance.
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> • More experienced officers were significantly more likely to be affected.
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> • A third of those surveyed were unaware of the Police Service's psychology and welfare services."

The report concluded that the managers within the Police Service had a responsibility to "identify and respond to the needs of staff experiencing difficulties".

137 According to the evidence, by the late 1990s, the Police Service in New South Wales was responding to external pressures to recognise the need to improve and maintain a safe and healthy working environment for police personnel, to the fullest extent practicable. This was the declared occupational rehabilitation policy of the Service, released in June 1996[175]. In addition to acknowledging a need for compliance with "statutory obligations under Sections 15, 16 and 19 of the *Occupational Health and Safety Act* 1983", the Service, in recognising the specific obligations of "Commanders/Managers and Supervisors", stated that they:

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174 Tabled June 1999 pursuant to the *Ombudsman Act* 1974 (NSW), s 31.

175 New South Wales Police Service, *Occupational Rehabilitation Policy*, (June 1996).

> "[a]re required to exercise a duty of care over all systems of work and the work environment in all workplaces under their control, and support the process of joint consultation with all employees, employee representatives and committees on all issues associated with occupational health and safety in the workplace."

138 According to Mr Terrence O'Connell OAM, a long-time serving member of the Police Service and an expert witness on police systems, "at the time of Ms Fahy's incident, it was well known within the Police Service that inappropriate police management was likely to negatively impact on police exposed to traumatic events. An important study undertaken by Jeannie Higgins [Clinical Psychologist] into traumatic stress reactions amongst New South Wales Police between 1993 and 1995, found that 'rookie' recruits within the first 18 months of police service, were likely to exhibit disproportionate symptoms of PTSD".

139 Mr O'Connell referred to a study of traumatic incidents in Scotland and Northern Ireland[176] which found that insensitive management practices following an incident can exacerbate, or even produce, post-traumatic symptoms. In the case of policing, "it is the organisational or operational culture that largely shapes and influences management practice". Various ways of dealing with the problem of police stress were recorded by Mr O'Connell. One was denial and stigmatisation of psychological injury with "inappropriate coping strategies (such as excessive or 'binge' drinking) … widespread among police". Mr O'Connell suggested that this culture provided "an insight into why Ms Fahy may have been reluctant to share her experience earlier with other police". The other strategy was operational modification, officer support and systems adaptation, accompanied by candid acknowledgment of the existence of a potential problem and the need to address it systematically, scientifically and empathetically[177].

140 The report of Ms Higgins of March 1995, referred to by Mr O'Connell, was in evidence[178]. It was prepared for the Police Association of New South Wales. Inferentially it (or equivalent data) was given or available to the Police Service. Senior police officers cooperated in the production of this report. The

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176 Mitchell, Boyle and Smith, "The Nature of Traumatic Incidents: New Data from Scotland and Northern Ireland", paper delivered at the International Society for Traumatic Stress Studies Conference, Melbourne, 2000.

177 There has been a similar cultural resistance to acknowledging stress in the legal profession and judiciary: see Thomas, "Get Up Off the Ground", (1997) 71 *Australian Law Journal* 785.

178 Higgins, *Traumatic Stress Reactions in Police*, (1995).

report emphasised the importance of basing employment strategies for reducing avoidable stress to police officers upon empirical data. But it recognised that PTSD commonly arose from exposure to a traumatic event in which both of the following were present: "1) actual or threatened death or serious injury to self or others; and 2) the person's response involved intense fear, helplessness, or horror"[179].

141 The cultural inhibitions on police constables seeking professional psychological assistance and expressing feelings, especially if they were female, was recorded and illustrated. Ms Higgins' report concluded[180]:

> "We cannot prevent police being exposed to traumatic events but some current intervention programmes may simply further numb police to their feelings, perpetuate existing difficulties, and cost a lot. … Since we cannot easily prevent operational police being exposed to potentially traumatising events, policing organisations have a legal responsibility to make occupational environments as favourable as possible to optimal functioning and recovery. There is currently almost a complete lack of focus on organisational issues which perpetuate the negative effects of traumatisation."

142 This, then, was the employment environment known to the appellant as the respondent's employer. The risk of serious injury (PTSD), found to have occurred to the respondent, was not only foreseeable. It was actually foreseen. It was impossible to remove entirely exposure to traumatic initiators of PTSD. However, two initiatives were knowable and known. They were (1) compliance with a strategy of mutual support and reinforcement to police officers at the scenes of such trauma; and (2) subsequent follow-up, reinforcement and support after exposure to serious risks, to ensure that the police officers principally involved were coping adequately or knew of support services available to help them to deal with feelings of stress. Initiatives of the second kind were devised because it was known that police officers might feel reluctant to discuss their feelings of stress with superiors or immediate work colleagues, for fear of revealing evidence of personal vulnerability.

143 This Court, like the courts below, does not have to invent these systems for the New South Wales Police Service. They already existed at the time of the respondent's exposure to serious trauma and consequent triggers for PTSD. The primary judge found (and the Court of Appeal agreed) that neither of the applicable systems was properly implemented in the respondent's case. This was

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179 Higgins, *Traumatic Stress Reactions in Police*, (1995) at 8.

180 Higgins, *Traumatic Stress Reactions in Police*, (1995) at 11.

the foundation for the conclusion that the respondent had established negligence on the part of the police employer and was entitled to damages for the injury suffered as a consequence. Out of fairness to the respondent and the judges who found in her favour on this issue, it is therefore necessary to record in these reasons the evidence and analysis that supported the conclusion reached, applying the orthodox reasoning of the *Shirt* analysis.

144 *The partner system*: The respondent, in her evidence, described the way that, shortly before the incident of 25 August 1999, she was "paired" with Senior Constable Evans. She had worked with him as a "partner" on fewer than ten occasions dealing with "domestic violence incidents; break and enters; assaults". She described the system that was in place, according to the training that she had received at the Police Academy:

> "There's always the senior person on the truck, and they are in charge of decision-making, et cetera; and besides whether you were the junior or the senior, you had to look after who you were working with. So if I was a senior on the car and went to a fatal car accident, for example, I would say … 'You do this duty or that duty', and they would report back to me … But I'd have to constantly keep an eye on them because I'm the senior person, I'm responsible for them."

145 The respondent described the way she had been exposed to trauma in events that happened before 25 August 1999 and the way she had worked with her partner in typical circumstances and was able to look to the partner to "just counsel each other". The respondent was not cross-examined to suggest that the partner (or "buddy") system was a fabrication. It was clearly open to the primary judge to accept that it was a system introduced by the employer both for operational purposes and for the provision of mutual support so as to combat the weaknesses exposed by internal and external reports. It was not absolutely universal, inflexible or rigid in its implementation. Occasions would inevitably arise when the police constables had to work separately to cope with particular duties and multiple needs. However, as described by the respondent, the procedure accepted and implemented the principles of mutual assistance and professional support. Unless there was some other conflicting obligation or legal duty that made an inconsistent demand on the police partner, it was expected that he or she would be there to help the other with their essential duties. That was the employment system of work that was in place.

146 Once this system of work is properly appreciated, concerns as to its practicality and feasibility fall away. It is not to the point to say, as do Gummow and Hayne JJ[181], that the duty to maintain a safe system of work could not

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181 Reasons of Gummow and Hayne JJ at [75].

reasonably require one police officer to "protect" another, as such a requirement would be in conflict with the other duties imposed on police officers by the *Police Service Act* and by the instructions of their superiors. Nor is it to the point to say, as do Callinan and Heydon JJ, that the duty could not require that a police officer not be left alone in a stressful situation, because such a requirement would be inconsistent with the exigencies of police work, and police officers are sometimes required to work alone[182]. With respect, each of those formulations of the standard of care seriously misstates the standard that was presented by the evidence, and which was found by both the primary judge and the Court of Appeal to be owed by the appellant.

147 The relevant standard of care was not one of protection or of accompaniment at all times. Rather, it was that a police officer was to "provide support" to their designated partner[183]. The nature of the support which a partner can provide will depend upon the circumstances. But the requirement to provide support, to act, as it were, as a "buddy" to a designated partner, is not an instruction which "trumps"[184] the other duties of a police officer, at the cost of the performance of those duties. Rather, the giving of assistance and support by one police officer to another officer who is his or her designated partner, where it is possible and reasonable to do so, furthers the performance of their duties by both police officers.

148 The respondent's own description of the partner system was confirmed by the evidence of Senior Constable Deanne Abbott. It was not contested by the evidence of expert witnesses Mr O'Connell or Inspector Stephen Egginton. Naturally, they laid emphasis on the need for flexibility and the primary duty of police partners attending a scene of trauma to isolate the crime scene; to pursue suspects; to assist the injured; and to protect property. Yet none of these duties was disputed by the respondent or her witnesses. Her complaint (upheld by the primary judge and sustained on appeal) was that her partner, Senior Constable Evans, had none of these excuses. Instead, he simply "decamped", unjustifiably leaving the respondent, who was the junior officer in the pair, attending to grossly unreasonable and overwhelming duties, without the proper backup that was reasonable in the circumstances.

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182 Reasons of Callinan and Heydon JJ at [207]-[209].

183 (2006) 155 IR 54 at 58 [17]-[18] per Spigelman CJ, 87 [155]-[158] per M W Campbell AJA; cf reasons of Gleeson CJ at [11]-[13] and reasons of Crennan J at [261]-[262].

184 Reasons of Gummow and Hayne JJ at [75]-[77].

149 The particular significance of mutual support at the scene of gross trauma was best explained in the evidence of Dr Andrew Robertson, a psychiatrist in practice for thirty years. He gave evidence for the respondent. He explained why the system of police partnership, and mutual support at the scene of serious trauma, was important both from an operational point of view and also to help the officers cope with trauma at the time and to avoid PTSD subsequently:

> "I think that the absence of any sort of physical or emotional support from a buddy did not allow her to *maintain a sense of professional detachment*, which is what protects one when dealing with people like this. It became very much a personal concern of hers, and the whole purpose of a buddy system, as it's sometimes called, is to share the trauma and to allow those who are working to maintain a sense of professional detachment; because of the absence of her buddy, she wasn't able to do that, and I think that this was the decisive factor, I think this was reinforced by what happened in the immediate aftermath" (emphasis added).

150 *Unjustified abandonment*: If Senior Constable Evans had gone off to isolate the crime scene, to pursue witnesses, to tend the injured or to protect property, the failure of the system of partner work to provide the respondent with the presence and support of her partner, and sharing of duties, would have been unfortunate. But it would not have been unreasonable. Within the language of Mason J in *Shirt*, it would then have been open to the tribunal of fact to conclude that the employer had done what was reasonable by way of response to the risk. Senior Constable Evans would have been fulfilling "other conflicting responsibilities which the defendant may have"[185]. On such evidence, a finding of negligence would then have been wrong.

151 However, this was not the way the primary judge concluded. To the contrary, he accepted that the worst thing that the respondent felt at the crime scene was "her feeling of abandonment"[186]. And he concluded[187]:

> "I am satisfied, on the balance of probabilities, that senior constable Evans left the [doctor's] room without giving any reason to the plaintiff".

Moreover, he said[188]:

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185 *Shirt* (1980) 146 CLR 40 at 47-48.

186 Reasons of the primary judge at 26.

187 Reasons of the primary judge at 60.

188 Reasons of the primary judge at 33-35.

> "[Senior Constable Evans] was not a particularly impressive witness and the explanation as to why it was that he needed to go outside, and why it was that he was unable to leave those outside duties to any of the other police who were there, was, in my view, quite unconvincing. In the circumstances, that issue of credit, in so far as it is a real issue of credit, ought to be resolved in favour of the plaintiff.
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> …
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> It follows then, that … the plaintiff was, during this episode, albeit for only a few minutes, left without her buddy, her senior partner, whose responsibility was essentially to look after her welfare. That had operated in previous incidents to provide her with a measure of comfort and enabled her then to perform her work with professional detachment."

152 This was a very important finding in the respondent's favour. It was based substantially on the primary judge's assessment of the truthfulness of the respective testimony of the respondent and of Senior Constable Evans. As such, it would have required compelling reasons or strong objective evidence to authorise an appellate court to substitute a different conclusion[189]. There were no such compelling reasons or objective testimony. The finding was not disturbed by the Court of Appeal.

153 These then are concurrent findings of fact. A final court is ordinarily most reluctant to disturb such findings and will only do so in compelling circumstances. As the primary judge pointed out, the appellant refrained from calling other relevant police witnesses who had been at the crime scene. Even the duty officer, Inspector Whitten, was not called in the appellant's case. He too, according to the respondent, had simply looked into the surgery while the respondent was in there and left without comment[190]. He too failed to give appropriate support to the respondent, to check how she was coping and to provide her with the *detachment* necessary to depersonalise the trauma and stress to which she was subjected and so to externalise it from herself.

154 Inspector Whitten's omissions were unexplained by him. That failure was available to reinforce the primary judge's conclusions. These were that the first element in the system of work which the Police Service had put in place to respond to the risk of PTSD had not been properly fulfilled in the circumstances. In fact, on the findings made, the partner system had broken down. Neither the senior duty officer nor the respondent's designated police partner had fulfilled the

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189 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23], 127-128 [27]-[29].

190 A fact remarked upon by the Court of Appeal: (2006) 155 IR 54 at 57 [10], 63 [42].

essential purpose of the partnership arrangement. Specifically, the absence from the medical practitioner's surgery of Senior Constable Evans, leaving the respondent to cope there with overwhelming and multiple duties, was not explained or justified by "any other conflicting responsibilities" that Senior Constable Evans or the Police Service had at that time.

155 *Subjection to gross stress*: Allowing that police officers, in the course of their duties, are subjected to stress and pressure of a kind that few other vocations are submitted to, that to which the respondent was subjected in the medical surgery on 25 August 1999 was truly exceptional, even by abnormal police standards:

- She was in the presence of an injured man who appeared to her to have been stabbed through the heart and who had a massive cut to his back which exposed his ribs to full view and was bleeding profusely;

- She was obliged to attempt to stem the victim's blood loss and effectively to hold his body together whilst the medical practitioner attended to the wound at the front of his chest;

- She had to attend closely to the victim's conversation and to what he wished her to tell his family, should he not survive, as seemed a high possibility at that time;

- She was also required, at the same time, to seek, remember and transmit by police radio his descriptions of the assailants and the circumstances of the attack;

- She was concurrently obliged to radio descriptions and to enquire about the urgent arrival of the ambulance to transport the victim to hospital;

- It was at that time that Inspector Whitten entered the surgery as the respondent was speaking on the police radio. He could see that she was attending to multiple tasks. However, he did nothing to assist and support her either physically or by just staying with her or attempting momentarily to share her efforts at the centre of the drama;

- When the ambulance arrived, and the respondent emerged from the surgery, she noted that there were five police officers standing outside, including Inspector Whitten and Senior Constable Evans. When asked what they were doing, she said: "Nothing. They were standing there" and "all I remember, is … them standing there looking at me";

- It was at that stage that Inspector Whitten peremptorily instructed the respondent to put her police cap on, as the media were present; and

- Then, as the respondent went with another police partner to transport the victim's wife to the hospital, Inspector Whitten summarily ordered her to return to the crime scene, stating that he was unwilling to authorise overtime that might be involved, were she to proceed to the hospital.

156 The circumstances in the medical surgery were, as the primary judge said, "gruesome and traumatic". It was clearly open to the primary judge to conclude on the evidence that Inspector Whitten and Senior Constable Evans had unnecessarily abandoned the respondent to the multiple tasks she was obliged to perform. That was her subsequent complaint and a trigger for the PTSD that the primary judge found. When the cross-examiner pointed out to the respondent that "You had the doctor", the respondent answered: "But he never talked to me. He wasn't a policeman."

157 Unfortunately, neither Inspector Whitten, nor Senior Constable Evans nor others of the police at the scene came in to assist the respondent, to talk to her, or to encourage or support her. This was therefore the very antithesis of the police partnership system, with its dual operational and personal purposes.

158 Because of the strong and repeated medical evidence that PTSD can be initiated by abandonment and perceived lack of support, the conclusion of the primary judge that the breakdown of the employer's system of work was a major contributor to the respondent's distress and causative of her condition[191] is unremarkable. It was fully sustained by the findings of fact that he made[192]. Not only did Inspector Whitten, as the duty officer, fail to ensure that the partnership system was fulfilled, by directing Senior Constable Evans or one of the other police officers to go immediately to assist the respondent or at least to take over the communication on the police radio. He left her where she was, unaided. He simply joined the other officers waiting outside doing "[n]othing". If this conclusion was in any way unfair to Inspector Whitten, it was certainly one that was open to the primary judge on the evidence. It was reinforced by Inspector Whitten's unexplained failure to give evidence in support of the appellant's case[193]. It was not disturbed by the Court of Appeal.

159 *Default in proper follow-up*: When the traumatic events thus described occurred, the respondent had only a few weeks of service left before she was entitled to commence her annual leave. According to the evidence, she attended for duty until then. She found that she was not coping. Although a system of

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191 Reasons of the primary judge at 61.

192 Reasons of the primary judge at 45.

193 cf *Jones v Dunkel* (1959) 101 CLR 298 at 321 per Windeyer J.

psychological support had allegedly been put in place, the respondent said that she was unaware of it. Two weeks after the trauma, she made her own enquiries about contact with a police chaplain to help her cope. The evidence did not disclose any immediate follow-up or positive initiative on the part of the Police Service itself to check how the respondent was coping after events that would be unimaginable for most citizens in whose service they are performed.

160 The coldness, indifference and lack of support for the respondent was evidence of the culture of the police employment described in the reports tendered at trial. Whilst the evidence did not suggest that this neglect was deliberate or personal to the respondent, it was open to the primary judge to conclude that the absence of support allowed the condition of PTSD to accumulate and to become, for a time, debilitating in the respondent's case. It was, on an institutional level, akin to the reaction of Inspector Whitten when he saw the respondent in the midst of the trauma, performing, unaided, multiple and horrendous tasks. Her predicament was noted. Then the police authority simply withdrew.

161 This was not a case, as *Koehler* was, of an individual employee with an alleged special or personal vulnerability. This was, as the primary judge and the Court of Appeal concluded, a case of institutional failure to respond in a reasonable manner to a well-known, and repeatedly manifested, service-wide problem inherent in the nature of this particular employment.

Conclusion: negligence established

162 It was therefore well open to the primary judge, on the basis of his findings, to conclude that the Police Service had failed to maintain and enforce a reasonably safe system of work for its employees such as the respondent. The Police Service was well aware, from a number of prior reports, of the need to address systematically the special problems of exposure to trauma faced by those whom it accepts to be its employees and to provide them with safe systems of work designed to prevent or reduce the risks of PTSD and work-induced depression. The Police Service responded by instituting the partnership (or "buddy") system. However, in the circumstances of this case, it failed to ensure that that system was properly and reasonably carried into effect.

163 Furthermore, after she had been exposed to intense trauma and pressure, the respondent was dealt with in a seriously neglectful, seemingly indifferent and insensitive manner. Police personnel are expected, on behalf of society, to perform extremely important, dangerous and sometimes horrifying and life-threatening duties. But they are human beings and they are citizens. They are also employees of the Service, accepted as such in this case. They are entitled to the protection of the ordinary principles of the common law.

164 The reasonable, and therefore the lawful, obligations of the Police Service towards the respondent on the contested issue of the content and breach of the duty of care owed by the Service are to be found in the decision of this Court in *Shirt*[194]. For the reasons stated earlier, the appellant's attempt to have that approach overruled as a matter of law, and re-expressed, should be rejected.

165 Applying the approach laid down by this Court in *Shirt* to the present circumstances, it was open to the primary judge and the Court of Appeal to conclude that a reasonable employer in the Police Service's position would have foreseen that its conduct and omissions involved the risk of injury to the respondent or a class of persons including the respondent. The risk was well known. Indeed, some steps had been taken to respond to it. To the question of what a reasonable employer would do by way of response to the risk, the considerations mentioned in *Shirt* support the conclusion reached in this case by the primary judge and by the Court of Appeal. The magnitude of the risk was significant. That risk demanded affirmative and institutional responses in the context of an employee exposed to such risk. The degree of probability of the occurrence of the risk was great given the near certainty that, in the course of their duties, police constables and other police officers would be repeatedly exposed to conditions of trauma in an employment culture traditionally unsympathetic to revelations of perceived stress or weakness. The expense, difficulty and inconvenience of taking alleviating action are real. But insufficient appears to have been done to publicise the availability of confidential trauma counselling. This eventually forced the respondent to look to her religion rather than to her employer for assistance.

166 There are "conflicting responsibilities" that modify what a police employer can be expected to do for police employees to whom it owes a duty of care. Those conflicting responsibilities include the legal and professional duties imposed on police to secure a crime scene, to assist victims of crime, to investigate crime and bring those responsible to justice and to protect property[195]. In some circumstances, such duties would indeed "trump" the Police Service's common law duties to those accepted as its employees.

167 However, in the present case, such considerations can be put aside because of the finding of the primary judge, undisturbed by the Court of Appeal and indeed confirmed by it[196], that the respondent's police partner was not

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194 (1980) 146 CLR 40 at 47-48.

195 cf *Police Service Act* 1990 (NSW), ss 6(2)(a) and (b) and 201. See reasons of Gummow and Hayne JJ at [27], [71]-[72].

196 (2006) 155 IR 54 at 57 [10], 58-59 [18]-[20], 87 [154].

otherwise engaged on police duties but, like Inspector Whitten, was simply standing around doing "[n]othing". Unless that collateral finding of fact is now overturned by this Court, it supports, and confirms, the conclusions of negligence reached below.

168 According to ordinary principles of appellate review, this Court has no authority to displace the finding. On that basis, this was a relatively simple case where the employer's system of work was not properly and safely implemented. This occurred with the knowing involvement of the duty officer who failed to give evidence to deny or qualify what the respondent said about him and his conduct. All such conclusions were fully open to the courts below.

169 There is one final consideration that reinforces the foregoing conclusions. As has often been said, the law of torts serves a dual purpose. It exists to provide means of redress and compensation for those who suffer actionable civil wrongs caused by others. But it also states the community's standards[197], including standards of accident prevention that have their clearest application in the employment context[198].

170 What follows from the fact that this Court concludes that there was no breach of the duty of care owed by the Police Service to the respondent? The ambit of employer responsibilities to address a well-known vulnerability and special risk of police employment is narrowed. The stimulus of the law to the provision and maintenance of a safe system for police employment is diminished. The previous police culture of denial is once again reinforced. This entails both personal and institutional costs. An encouragement, where reasonable, to provide operational assistance and reinforcement is overridden. Effective measures to promote professional detachment and mutual support fail to receive the law's backing. These results were not necessary. They are certainly not desirable.

171 In its 1997 report, received in evidence, the Royal Commission into the New South Wales Police Service emphasised that the Police Service needed to change its approach to staff, from its traditional approach which was "inward-looking … characterised by command and control, autocracy and suspicion of new ideas"[199]. It is a significant misfortune that, by its decision in the present

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197 cf *Woods* (2002) 208 CLR 460 at 498 [121].

198 *Braistina* (1986) 160 CLR 301 at 308-309; *Neindorf* (2005) 80 ALJR 341 at 359-360 [84]-[85]; 222 ALR 631 at 653.

199 Royal Commission into the New South Wales Police Service, *Final Report, Volume II: Reform*, (May 1997) at 207 [1.1] (conducted by Justice J R T Wood).

matter, reversing the judgments below, this Court now encourages a restoration and re-entrenchment of the old approach to police employment in contemporary Australia.

172 The approach of the majority in this appeal is yet another instance of the Court's recent disfavour towards plaintiffs' claims in personal injury cases[200]. It is the more surprising because it is expressed in a context of employment, where the law has traditionally been at its most protective. It is specially unfortunate because the facts disclose the devoted, but unsupported, work of Ms Fahy whose conduct as a police constable helped save a crime victim's life but at the same time needlessly subjected her to unrelieved stress. There was no one with whom to "share the trauma", a technique that tends to reduce the long-term impact of such stress[201]. I regard this decision as a reaffirmation of this Court's retreat from its former communitarian approach to negligence liability. The Court turns its back on accident prevention in employment which, not so long ago, was a major theme of our negligence doctrine. Indifference on the part of employers is restored and rewarded. Most remarkably, all this is done in the present case where there were concurrent findings of fact in favour of the respondent at both levels of the courts below, a result that, conventionally, this Court would be most reluctant to override. Respectfully, I dissent.

173 Subject to the resolution of the issue of mitigation left open by the Court of Appeal's orders, which orders should stand, the respondent was entitled to damages for the established negligence of the Police Service for which the appellant is liable.

Order

174 The appeal should be dismissed with costs.

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200 See Luntz, "Torts Turnaround Downunder", (2001) 1 *Oxford University Commonwealth Law Journal* 95 at 96.

201 Evidence of Dr Robertson, quoted above in these reasons at [149]; see also the reasons of Callinan and Heydon JJ at [209]-[210] and the reasons of Crennan J at [258].

175 CALLINAN AND HEYDON JJ. Several questions were argued in this appeal: the scope of the duty of care owed to police officers by the State; whether there has been a breach of that duty; and whether *Wyong Shire Council v Shirt*[202] should be overruled.

The facts

176 The respondent joined the Police Service of New South Wales in February 1996. By 1999 she seems, in the course of her work, to have encountered more situations of stress than many of her colleagues, who, in consequence, referred to her as "Dr Death". Her account of her experiences included this:

> "[E]veryone died on my shift, in any weird wonderful way, it always happened on my shift. I have a friend who's been in the job 10 years and she's never been to a fatal, and I've been in the job three and a bit, and I've been to over 10."

177 Her claim was, in effect, that her resilience was more than matched by the insensitivity with which her superiors treated her after the events which gave rise to this litigation and which, she claims, triggered the illness which she now suffers. In the past, she had been able to manage stress, because, she said, "my partner had always been there".

178 A robbery was attempted on 25 August 1999 at a video store at Edensor Park, a suburb of Sydney, by two men, one of whom stabbed and slashed the proprietor before fleeing. The proprietor was able to make his way to a nearby medical centre.

179 The respondent and Senior Constable Steven Evans were called to the store from which they followed a trail of blood to the medical centre. An "extremely pale" and shocked receptionist took them into a surgery at the medical centre, where a doctor was attending to the victim's wounds. The respondent described what she saw:

> "My initial thought is – excuse the French – 'well, he's f***ed; he's dead'. Like, he's just covered with blood everywhere, and it's just running off him, like someone had got his shirt and dunked it in a bucket of water, and that's how much blood there was – just soaked – and he's just gasping all the time."

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202 (1980) 146 CLR 40.

180 When the respondent turned to speak to Senior Constable Evans, she saw that he had left the room. She described her reaction to this as follows:

> "It was like a, 'Sh**' – you know – 'what am I going to do?' Then I could hear [the victim] again, so I just went straight into work mode. Like, I took an oath to protect life and property, so I asked the doctor, 'What can I do to help?'"

181 At the doctor's request she examined the victim's left side and saw that he had suffered a knife wound of about 60 centimetres in length, from the left armpit to the waist. She ripped the shirt off so that access could be gained to the wound.

182 The respondent then performed a number of tasks simultaneously. She tended to the wound by holding the opening together with one hand, and applying medical pads to stem the bleeding with the other. She kept talking to the victim, both to keep him conscious, and to try to obtain a description of his assailants. She spoke to other police officers by radio, relaying the information provided, and called for an ambulance. She did not ask for help, and competently managed the tasks she had set for herself.

183 The respondent was alone with the doctor and the victim for perhaps ten minutes, certainly no longer, before an ambulance arrived. The trial judge said that these minutes "were hectic and emotionally fraught". The respondent "was confronted with an awful sight".

184 Just before the ambulance arrived, a senior police officer, the duty officer, looked into the surgery and saw the respondent, the victim and the doctor there. According to the respondent, the duty officer "just took one look and ... turned around and ... walked away". She impliedly criticized him in this evidence:

> "Q. When that occurred, how did you feel?
>
> A. Helpless. I mean, I was there; I was tired from holding on, and I've looked at him, you know – –
>
> Q. Did you catch his eye?
>
> A. Yes; more in disbelief of what I was seeing. And he's just looked and just turned and walked away.
>
> Q. Take a moment. Would you prefer a few minutes?
>
> A. No, please, no.

Q. Apart from that moment where [the duty officer] came in, had any other police come in to give you any assistance while you were in there?

A. No.

Q. Had you heard anything from them?

A. No."

185 After that, the respondent assisted the ambulance officers with their equipment. Six or so other police officers were "just standing there" while she did.

186 As the ambulance left, the duty officer approached the respondent. He told her to put her hat on because the media had arrived.

187 The respondent accompanied another police officer to the proprietor's house to tell his wife about the assault. The woman "collapsed" when she was told what had happened. The respondent and the other officer were on their way to the hospital with the woman when the respondent was instructed on the radio to return to the scene, where she remained until about 11.30pm. When, in response to a question by the duty officer, she informed him she had started work at midday, he told her to go home because he was not going to pay her overtime. The respondent reminded the duty officer that the scene could be a murder scene if the victim died. He said that he did not care: he was not paying the respondent overtime and she was to go home. The respondent left, feeling ill, and even the next day the image of the victim's injuries "kept playing over and over and over in [her] head". She said this in her evidence:

"Q. What can you remember of the journey home?

A. Nothing. I remember suddenly being at my front gate and my dog waiting for me to walk in.

Q. How did you spend the balance of the night?

A. I sat and cried. I'd pat my dog. It was outside and I thought I'd better go inside and I walked inside, hands in my jacket, and I'd just got blood all over. So I went inside to soak my clothes, to get the blood out.

Q. How much did you sleep, if at all, that night?

A. I didn't."

188 At work the next day, the respondent kept a "stiff upper lip". She neither sought nor was offered counselling. She did however obtain the telephone number of the police chaplain.

189 It was not disputed that the respondent suffered a post-traumatic stress disorder as a result of the events of 25 August 1999, although there was disagreement as to its severity and the relevance of other contributing factors.

The proceedings at first instance

190 The respondent sued the appellant in the District Court of New South Wales, for damages under the *Workers Compensation Act* 1987 (NSW), alleging negligence in these respects:

> "(a) Failing to take any or any adequate precautions for the Plaintiff's safety;
>
> (b) Putting the Plaintiff in a position of peril in the circumstances;
>
> (c) Failing to provide the Plaintiff with proper and adequate assistance at the scene of the said armed robbery;
>
> (d) By its servant or agent, leaving the scene of the armed robbery and exposing the Plaintiff to the victim by herself;
>
> (e) Failing to counsel or adequately counsel the Plaintiff following the incident;
>
> (f) Failing to provide the Plaintiff with proper and adequate debriefing in respect of the incident;
>
> (g) Further and alternatively, following the incident and the months thereafter it was necessary for the Plaintiff to undergo counselling and debriefing which did not occur. The plaintiff relies on the failure of the said service to provide these measures to the Plaintiff as being negligent and a breach of the duty of care which the Service owed her."

191 There is no express allegation, it may be observed, of any deficiency in the system of work.

192 The trial judge was obliged to resolve conflicts in the medical evidence before him. As to one of the principal issues argued, of the necessity for, and the sufficiency of, a proper system of work for police officers, a high point for the respondent was some evidence given by a psychiatrist, Dr Robertson:

"A. ... I think that the absence of any sort of physical or emotional support from a buddy did not allow [the respondent] to maintain a sense of professional detachment, which is what protects one when dealing with people like this. It became very much a personal concern of hers, and the whole purpose of a buddy system, as it's sometimes called, is to share the trauma and to allow those who are working to maintain a sense of professional detachment; because of the absence of her buddy, she wasn't able to do that, and I think that this was the decisive factor, I think this was reinforced by what happened in the immediate aftermath with – but that's really all I was going to say.

Q. Now assume that the incident had been the same but that she had received that support, commendation, of which you have told us – her partner did his job and the support and commendation you speak about were there – what's the likely outcome, do you feel, in this patient's case would have happened?

…

Q. What would be the outcome probably?

A. I think – it's very difficult to be dogmatic on this – but I think that it would be significantly less likely that she would have developed a post-traumatic stress disorder, or had she done so, it would have been a disorder of considerably lesser severity."

193 There was evidence – it is unnecessary to elaborate upon it – that the appellant was aware that the work of police officers could be so stressful that special measures should be adopted to deal with it, including counselling and psychological therapy. The availability of these and other aids was notified to police officers by, among other means, a journal.

194 An experienced police officer, over objection, gave this evidence for the appellant which it is not suggested in this Court was inadmissible:

"4. Is it appropriate for the more senior partner to leave the other officer at a crime scene or should the senior partner stay with the other officer?

The location the victim was in would not technically be regarded as the crime scene. The crime scene would have been the location where the robbery and stabbing occurred.

As the senior officer has further responsibilities they must make a decision as to how to deploy staff at the scene. This may involve

tasking some staff to assist victims and others with crime scene preservation. Given that this situation, at the time of the officer's arrival, involved a possible homicide and a large crime scene it would take some resources and time to set up appropriate measures to preserve it. It is evident that some officers, at least in the early parts of the police involvement, would be required to carry out duties by themselves, as limited resources would be available. Given this, it would be appropriate for Constable Evans to leave [the respondent] with the doctor to ensure Crime Scene Preservation was commenced immediately.

5. Is it inappropriate for the more senior partner to leave another officer with 3 years experience with a doctor to treat a seriously injured victim?

The senior officer must decide on how best to deploy staff given the responsibilities of managing a crime scene. This would, naturally, involve leaving some staff to perform duty by themselves. An officer of three years experience would be expected to know what to do in such a situation given their exposure to policing incidents over that time and training provided to them. The senior officer needs to take into account the capabilities of the officers available to them and deploy them accordingly. Given that at the time [the respondent] was left with the doctor and patient and there were [sic] only one other car crew at the scene it would be appropriate to leave her to assist the doctor and go about attempting to manage the scene as a priority."

195 The trial judge, Graham DCJ, summarized the respondent's case:

"The plaintiff's case is that the fact that she contracted a posttraumatic stress disorder arising from this incident was due, at least in part, to what might be termed a differential. The experience with the victim was a serious one, and one which was, no doubt, unpleasant and, in a general sense, very traumatic. But the plaintiff's case is that the difference in this case was that, during her involvement with the victim, and in the immediate aftermath, she was treated in a way which was calculated to bring about an exacerbation of her situation, so as to render it more likely that she would contract that disorder or make that disorder, if it were to be contracted, much more serious, due to the lack of support from her senior officers, including senior constable Evans and inspector Whitten [the duty officer], and the insensitivity with which she was treated by them and, in particular, by inspector Whitten.

The plaintiff's case is, also, that a material contribution to the contracting of posttraumatic stress disorder, or of making it a more severe

> form of that disorder, was attributable to the failure of the plaintiff's superiors in the police service, over the next month or so in particular, to monitor her reactions and to make her aware of the availability of various forms of assistance within the police service, such as the welfare branch, the psychology unit, peer support officers and various other measures of that type.
>
> The plaintiff's case is that, by being left to her own devices, as it were, without being observed or advised, in circumstances where she was clearly displaying symptoms consistent with a seriously adverse reaction to the incident, the defendant was negligent and failed in its duty of care to the plaintiff. There is no dispute that senior constable Evans left the room."

196 His Honour accepted that police officers will inevitably be exposed to extraordinary and stressful events and that they must be, and are, subject to strict discipline. As to some of the issues in the case, the trial judge took the view that, by reason of the absence of the duty officer Inspector Whitten from the witness box, he should infer that his evidence, had it been adduced, would not have been favourable to the appellant. He was prepared to draw a similar inference from the absence of other potential witnesses for the appellant.

197 The findings, relevant for present purposes, of negligence made by the trial judge are these:

> "Thus, the plaintiff was left without support, both during and after what was, on any view of it, a very traumatic event. It is, in my view, clearly foreseeable that such a course of treatment could materially contribute to the onset of, or the severity of, post traumatic stress disorder, a psychiatric injury which was, in any event, foreseeable in the circumstances, and was neither a farfetched nor fanciful risk in those circumstances.
>
> Given the buddy system, and the existence of programs recognising the risk of the development of posttraumatic stress disorder for police officers engaged in traumatic events or incidents, it amounted to a lack of reasonable care on the part of the defendant, both at the scene of the incident, on 25 August 1999 and, secondly, in the aftermath, especially in the period between 25 August and early September when the plaintiff went on leave.
>
> ...
>
> The steps taken, for example, by inspector Whitten, as I have indicated, are conceivably explicable for proper operational reasons, but his absence from the witness box leads more firmly to the conclusion that

> his manner was simply grossly insensitive and verging on a deliberate degrading of the situation of the plaintiff who, to his knowledge, had been engaged in what can be described, without hyperbole, as a life and death situation.
>
> No operational or economic factors stand in the way of the conclusion that to have dealt properly with the plaintiff, in accordance with the buddy system and in accordance with the recognised risks of stress-related disorders, would have required no more effort, no more resources, on the part of the police, than were available to them on that evening."

198 In the result, the trial judge held for the respondent and assessed damages of $469,893.

The appeal to the Court of Appeal of New South Wales

199 The appellant appealed to the Court of Appeal (Spigelman CJ, Basten JA and M W Campbell AJA)[203]. That Court was not unanimous as to all of the matters in issue. Spigelman CJ (M W Campbell AJA agreeing with the Chief Justice) and Basten JA all accepted that the relationship of employer and employee is a special relationship giving rise to a duty of affirmative action, and that, in a context in which exposure to risk is an integral part of the work, as here, the law requires affirmative action on the part of each employee to the others. M W Campbell AJA differed from the other members of the Court in finding that the conduct of Inspector Whitten, in directing the respondent to put on her hat, to return to the scene of the crime, and later to return to the police station because he would not approve overtime, was not in breach of any duty of care, and did not make a material contribution to the respondent's illness. The three judges did agree that the fact that a person may not have reacted adversely to exposure to trauma on an earlier occasion, or occasions, did not mean that further exposure, particularly of the intense character of the present instance, would not reasonably foreseeably lead to psychiatric injury. They further agreed that while courts should be slow to insist upon the presence of a second officer in every case of exposure to victims of crime, in the present circumstances, another officer, whether Senior Constable Evans or someone else, should have been present.

200 Basten JA gave separate consideration to the relationship between the respondent and Senior Constable Evans, as well as between Inspector Whitten and the respondent, and the respondent and the Crown as her employer. Having regard to the way in which the parties had conducted their cases at the trial, his

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203 *New South Wales v Fahy* (2006) 155 IR 54.

Honour did not find it necessary to reach any conclusion about the significance of the provisions of s 6 of the *Law Reform (Vicarious Liability) Act* 1983 (NSW) which deems a person such as the respondent to be "in the service of the Crown", and not a servant of the Crown. The vicarious liability of the appellant, his Honour held, consisted in Inspector Whitten's failure to give, or provide support to the respondent in the knowledge that Senior Constable Evans was not there to give it.

201 As to causation, Spigelman CJ (M W Campbell AJA agreeing) said that the primary causal factor was the respondent's exposure to the trauma of the victim in the doctor's surgery. The fact, however, that the respondent was isolated was part of the incident itself. The onus therefore shifted to the State to establish that the injury would have occurred in any event, even if there had been no breach of duty on the part of the State: it failed to discharge that burden.

202 Specifically as to system of work, Spigelman CJ said[204]:

> "The critical issue in the present case was whether or not the failure on the part of the officers of the Appellant to provide support in the course of the traumatic incident was a breach of duty. It can readily be accepted, as the Appellant submitted, that the Court should be slow to require the police to generally have a second officer supporting another in the course of exposure to the trauma of victims of crime. Pressure and stress are part of the system of work which police officers must be prepared to carry out. There are numerous occasions on which one of two officers operating under the buddy system would reasonably leave the other to perform functions on his or her own. Indeed, it must often be the case that it is necessary to do so. In the usual case it would not take much in the way of evidence to satisfy a court that the performance by a police officer of his or her primary duties was such that any failure to offer support for another police officer did not constitute a breach of duty.
>
> However, in the present case the plaintiff established a proper basis for an inference that there was no such call of other duties which made it reasonable not to take steps to support the Respondent. In particular the presence of other police officers on the scene was such as to support a conclusion that the attendance of Constable Evans to other tasks was not such as to render reasonable, in all of the circumstances, his failure to support the Respondent. The Appellant acquired an evidentiary burden to prove that performance of the other tasks by Constable Evans was

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204 (2006) 155 IR 54 at 58 [17]-[18].

consistent with his duty of care to Constable Fahy. It did not discharge that onus."

203 The appellant enjoyed a minor success in its appeal, but not in respect of the issue of causative negligence. The only ground upon which the appellant's appeal did succeed was as to mitigation of damages, a matter with which this Court is not concerned.

The appeal to this Court

204 There was reference in argument to the *Police Service Act* 1990 (NSW), and in particular to s 201 of it, which makes it a criminal offence for an officer to refuse, or neglect, to obey a lawful order, or to perform a lawful duty. Of a member of a disciplined armed force, hardly less could be expected. That such an expectation is given statutory expression, and the common knowledge of what the work of law enforcement may require, provide the context for a consideration of the respective rights and obligations of the parties.

205 In this Court the appellant's arguments were essentially twofold: that the trial judge and the Court of Appeal erred in holding that the appellant failed to adopt a safe system of work – effectively, that in either all, or any, stressful situation in which another officer *could* be present, he or she should be present; and, that the test of foreseeability propounded in *Wyong Shire Council v Shirt*[205] raises too low a threshold for negligence, and ought no longer be followed.

206 As appears however from the passages from the reasons in the Court of Appeal that we have quoted, that Court did not formulate a requirement of a duty of care quite as expansive, or impose quite as heavy an evidentiary onus on the appellant of proving necessity of absence of a supporting officer in all, or practically all stressful situations, as the appellant's submissions assume. Nonetheless the Court's holding certainly suggests that, save for cases of demonstrated necessity, the appellant should not allow an officer to be alone in stressful situations.

207 It may be accepted that there will be occasions upon which the mere presence of another officer might be of value to a police officer in the course of police work. The same might be equally true of other occupations in which there is, from time to time, an element of danger or stress. But the fact that the possibility of danger or stress is a regular incident of a particular occupation, is also an indication that emergencies and events calling for a division of labour,

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205 (1980) 146 CLR 40.

and a need and capacity for improvisation or adaptation on the part of an officer coping alone, will inevitably occur.

208 In our opinion, the appellant is not under an obligation to provide and maintain a system of work requiring the presence of a minimum of two officers, except when as a matter of real necessity that is not possible. Nor is it obliged to discharge an evidentiary onus in cases in which an officer is acting alone to establish any such necessity.

209 Certainly, the respondent's earlier resilience is not to be held against her. But that she had performed her work well in stressful circumstances in the past, without any apparent qualms and ill-effects would at least suggest: first, that her training had helped her to do so; secondly, that police officers could be expected to, and did, not infrequently, encounter and need to deal alone with events of the kind that occurred here; and, thirdly, that such events might obviously call for the carrying out of several tasks simultaneously by an officer in attendance. It is not difficult to think of situations in which the availability of more even than two officers would still not enable each of them to stand side by side: for example, if three or more criminals fled in different directions and were to be pursued and apprehended separately by a police officer; or a picket or demonstration during which the participants were so numerous that from time to time an officer would inevitably be isolated. Exposure to danger and stress are almost as necessary concomitants of civil law enforcement as they are of military service. Of course, as Dr Robertson said, maintenance of professional detachment by people in occupations of these kinds is desirable. But it is in the nature of human affairs that complete professional detachment on all occasions is an ideal, rather than a universal practicality.

210 Another difficulty for the respondent is that the medical evidence generally, and for example, Dr Robertson's also, left unexplained how the mere presence of another officer, presumably any other officer, either someone else, or Senior Constable Evans with whom the respondent had worked for a few other shifts only, could have arrested the onset, or made a substantial contribution to the arrest of the onset, of a psychiatric illness. That this is so highlights the substantial difficulties about a categorical requirement of the presence of two or more officers together in stressful situations as a necessary element of a safe system of work for police officers. What, it may be asked, if the two officers assigned to a shift dislike each other, or one has a temperament, mannerisms or a personality which would make his or her presence unhelpful? These are matters with which the appellant has to deal on a day by day basis, which go beyond, and are outside, medical expertise alone. As the evidence of the senior police officer called by the appellant explained, police resources are finite, and deployment at or about a place of criminal activity, and elsewhere as a consequence of it, is a matter for decision and adaptability at the time and in the circumstances prevailing. The respondent had been a police officer for three or so years. Her

experience and training could reasonably be expected to have enabled her to perform alone the tasks that she did, in the presence of, and for the medical practitioner, for the ten minutes required, without suffering a psychiatric illness. The system of work was not deficient. Even if the risk of a psychiatric illness as a result of exposure for a period alone to a wounded victim could be, in circumstances of the kind existing here, as we do not think it may be, regarded as a not fanciful possibility, that it might develop in ten minutes clearly is so remote that the appellant was not obliged to abate it by rostering, and insisting upon another police officer's presence throughout.

211 It was of no significance therefore that other witnesses for the appellant were not called by it. No inferences adverse to the appellant should be drawn from their absence. In the circumstances there was no evidence that they could have given that was relevant to any of the issues, of duty of care, the system of work, or breach of duty.

212 There was no obligation upon the appellant to provide such a system of work as would almost always, and in this case have, required the presence of another officer. The other measures adopted by the appellant, of training, and to reduce and relieve stress, and the inevitable exigencies of police work generally, together negate such a requirement. For those reasons, the appellant's appeal must be allowed.

213 It is not strictly necessary therefore to decide whether *Shirt* should be reopened and overruled. In deference however, to the full argument about that, we propose to express our view of it.

214 In *Shirt*, Mason J, with whom Stephen and Aickin JJ agreed, stated the test of foreseeability and the requirements of the response to the risk in this way[206]:

> "[T]he tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that

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206 (1980) 146 CLR 40 at 47-48.

> the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

215 His Honour's statement reflects, and enlarges somewhat upon, the advice of Lord Reid speaking for the Privy Council in *The Wagon Mound [No 2]*[207] in which his Lordship coupled the foreseeability of an injury, with the expense of guarding against it as relevant, indeed decisive, matters in establishing negligence.

216 The test posited in *Shirt* has, we think, given rise to problems in practice. It is unrealistic to expect or require people to imagine in advance, and then grade as likely, very likely, extremely likely, remote, or far-fetched or fanciful, all of the various possible consequences of their intended conduct. That a result falling just short of the far-fetched or fanciful might happen is something that is unlikely to occur to even a farsighted person. We do not doubt that the degree of likelihood or otherwise of a particular result, or an injury, has a real bearing on the foreseeability of it. That is not to say that people should not carefully consider the courses of conduct upon which they are to embark, and the possibility that injury might flow from them. The development of the law of negligence has done much to improve standards of conduct generally. But it is, in our opinion, not reasonable to say, acting as courts do, in hindsight, that everything falling short of the far-fetched or fanciful should have been foreseen. We adhere, in this regard, to what Callinan J said in another case of psychiatric injury[208], that is of an injury of a peculiarly unpredictable kind by reason of the vast range of personal susceptibilities to it, and the frequent absence to the lay observer of readily ascertainable and objectively verifiable symptoms and manifestations of it[209]:

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207 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 at 642-643.

208 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

209 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 64 [54].

> "Three Justices of this Court in *Wyong Shire Council v Shirt* held that any risk, however remote or even extremely unlikely its [realization] may be, that is not far-fetched or fanciful, is foreseeable. I suppose that it is true that there is nothing new under the sun. With enough imagination and pessimism it is possible to foresee that practically any misadventure, from mishap to catastrophe is just around the corner. After all, Malthus in 1798 famously predicted that the population of the world would inevitably outstrip the capacity of the Earth to sustain it. The line between a risk that is remote or extremely unlikely to be [realized], and one that is far-fetched or fanciful is a very difficult one to draw. The propounding of the rule relating to foreseeability in the terms that their Honours did in *Wyong* requires everyone to be a Jeremiah, and has produced the result that undue emphasis has come to be placed upon the next element for the establishment of tortious liability, the sorts of measures that a reasonable person should be expected or required to take to guard against the risk." (footnotes omitted)

217 The observations of McHugh J in *Tame v New South Wales* are in point[210]:

> "I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall – perhaps it already has fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable."

218 The unsatisfactory nature of the test has also resulted, on occasions, in the application of double standards by the courts, stemming perhaps from a reluctance to require of an injured plaintiff the same high degree of foresight as has been required of defendants. Otherwise, apart from cases in which duties are owed by reason of the particular respective positions of the parties, some, perhaps many plaintiffs would either fail in their claims, or be saddled with contributory negligence equal to, or greater than that of the defendants, or even be held voluntarily to have assumed risks.

219 The test posed has caused undue emphasis to be placed upon an inquiry as to the expense of guarding against injury. If anything of any conceivable utility could have been done easily or inexpensively, there has been an unfortunate tendency to make these assumptions when it has not been done: that regardless of the likelihood of injury in fact, had it been done it would have prevented, or at least reduced, the chance of injury – that it should therefore have been done – and that the failure to do it constitutes negligence. In fact, the reality is often that it

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210 (2002) 211 CLR 317 at 354 [101].

was not done, because it would not have occurred to a reasonably careful person either that injury would result, or that the "neglected measure" would have made a difference. The failure to erect a warning sign, usually something that can be done inexpensively, is a classic instance of this. In *Commissioner of Main Roads v Jones*[211] a motorist who was seriously injured when his car struck a horse on a stretch of unfenced road alleged that a highway authority was negligent in failing to erect a sign warning of the possible presence of wild horses on the highway. The Full Court of Western Australia found for the motorist, holding that the absence of such a sign caused his injuries even though, as Callinan J pointed out[212] on appeal to this Court, there was irrefutable evidence that on the journey in question, before the collision, the motorist had for long distances repeatedly and flagrantly ignored a multiplicity of signs notifying speed limits.

220 *Vairy v Wyong Shire Council*[213] and *Mulligan v Coffs Harbour City Council*[214] are two other recent cases in which it had been held in the courts below that warning signs were the panacea for all injuries[215]. Too many cases have turned on the understandable, but often unconvincing, assertion by a plaintiff that he or she would have seen and heeded a warning sign had one been in place[216].

221 These and very many other cases in which the test in *Shirt* has been sought to be applied are not simply ones of misapplication. They demonstrate how unrealistic and difficult in practice the test is. In the result, plaintiffs' hopes of large awards of damages have been raised by unduly sympathetic trial and intermediate courts only and inevitably to be dashed on final appeal, and too onerous a burden has been placed upon defendants and insurers. Legislatures too have reacted against the test by enacting legislation to make the recovery of substantial damages for personal injuries for negligence more difficult[217]. So

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211 (2005) 79 ALJR 1104; 215 ALR 418.

212 (2005) 79 ALJR 1104 at 1119 [81]; 215 ALR 418 at 438.

213 (2005) 223 CLR 422.

214 (2005) 223 CLR 486.

215 See also *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 in which this Court made such a finding.

216 cf *Rosenberg v Percival* (2001) 205 CLR 434 at 504-505 [221].

217 *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act* 2002 (NSW); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT); *Civil Liability Act* 2003 (Q);

(Footnote continues on next page)

unrealistic on occasions have been the decisions, that the courts themselves have jeopardized their standing and reputation.

222 There is a further problem. In *Donoghue v Stevenson*, Lord Atkin said[218]:

> "The liability for negligence … is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay."

223 It is no doubt true that in many respects defendants have been found liable in negligence even though their acts or omissions are not morally wrong. *Shirt* has, however, often had the effect of making morally innocuous defendants liable in a very striking way. Its reversal would bring the law of negligence more into line with the underlying principles on which Lord Atkin sought to base it in *Donoghue v Stevenson*.

224 The case for a reconsideration of *Shirt* is very strong. It has stated the relevant common law for fewer than 27 years. *Buckle v Bayswater Road Board*[219] had stated the law of negligence of highway authorities for 65 years yet this Court in *Brodie v Singleton Shire Council*[220] reopened and swept it away, upon the basis that the majority thought that its difficulties of application requiring the drawing of a distinction between misfeasance and nonfeasance justified it in doing so.

225 In our opinion the justification for overruling *Shirt* is greater.

226 Just as it is not necessary for the decision of this case to overrule *Shirt*, so it is not necessary to consider what test should replace it. However, it is appropriate to say something brief on that subject. In the law of tort, of negligence particularly, absolute rigidity of principle in practice turns out to be impracticable. When it is sought to be imposed it so often proves incapable of sensible application. Accordingly, a flexible and realistic test should be substituted for a test of foreseeability of fancifulness or otherwise. The test that

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Wrongs Act 1936 (SA), as amended by the *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA), subsequently renamed *Civil Liability Act* 1936 (SA); *Civil Liability Act* 2002 (Tas); *Wrongs Act* 1958 (Vic), as amended by the *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic); *Civil Liability Act* 2002 (WA).

218 [1932] AC 562 at 580.

219 (1936) 57 CLR 259.

220 (2001) 206 CLR 512.

commends itself to us is the one stated by Walsh J at first instance in *The Wagon Mound [No 2]*, that what should be foreseen is a risk that is "significant enough in a practical sense"[221].

227 Such a test would usually produce, we think, a similar result to that favoured by Barwick CJ in *Caterson v Commissioner for Railways*[222], that an event should only be regarded as a foreseeable one for the purposes of the law of negligence if it is "not unlikely to occur". On balance however Walsh J's test has the advantage of greater practicality and flexibility.

228 We would allow the appeal and join in the orders proposed in the judgment of Gummow and Hayne JJ.

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221 *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] SR (NSW) 948 at 957.

222 (1973) 128 CLR 99 at 101-102.

229 CRENNAN J. The facts, the issues to which they give rise and the course of the litigation have been set out in the reasons for judgment of others rendering it unnecessary for me to repeat those matters except for the purposes of explaining these reasons.

230 As a result of performing her duties as a police constable, the respondent suffered particular harm, a "recognisable psychiatric illness"[223], capable of "objective determination"[224]. It was not disputed that she suffered acute and extreme post-traumatic stress disorder.

231 The respondent's psychiatric illness arose after she assisted a doctor attending a victim of violent criminal acts.

232 During the course of an armed robbery, injuries inflicted on the victim included a cut of approximately 60cm in length under his left armpit to his waist, and a stab wound in the centre of his chest causing arterial blood loss. The victim thought he was dying. The respondent worked at the victim's left side, holding his slashed body together, staunching blood loss, receiving the victim's messages for his wife and children and his information about the assailants, and operating her radio to the extent that she could. The doctor worked from the victim's right side, attending to the stabbing injury near the victim's heart. The respondent was taxed by the situation and throughout the incident she kept looking for assistance.

233 There was no dispute that the incident was a serious emergency or that the victim had incurred life-threatening injuries. There was no doubt that what the respondent did was within the normal scope of her employment.

234 As explained in more detail in the joint reasons of Gummow and Hayne JJ, police officers' duties can be generally construed by reference to the services described in the *Police Service Act* 1990 (NSW)[225]. Police officers' duties include "the protection of persons from injury or death ... arising from criminal acts"[226]. All constables in the New South Wales Police Service take an oath to uphold this duty.

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223 *Hinz v Berry* [1970] 2 QB 40 at 42 per Lord Denning MR, approved by Windeyer J in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394-395.

224 *Tame v New South Wales* (2002) 211 CLR 317 at 382-383 [194] per Gummow and Kirby JJ.

225 Reasons of Gummow and Hayne JJ at [18]-[22].

226 Section 6(3)(b).

235 The respondent brought a modified claim in the District Court of New South Wales for common law damages pursuant to the *Workers Compensation Act* 1987 (NSW) as it stood prior to amendments made in November 2001. The question arising was whether the State of New South Wales ("the State") (whether as the "Crown" or the Commissioner of Police), through its "employee", Senior Constable Evans, was in breach of an admitted duty to take reasonable care for the respondent's safety while at work.

236 The respondent relied on an established system of work in which senior and junior police officers were paired as partners and were required to give mutual support and assistance, to the extent that such support and assistance could reasonably be provided in any particular situation. The State denied that such a system existed.

237 By the time of the appeal to this Court, the respondent concentrated on her complaint that Senior Constable Evans, her senior and partner on this occasion, did not give her proper and adequate support and assistance while she was attending to the victim. She was accompanied by Senior Constable Evans to the crime scene and to the medical centre to which the victim had gone. Her pleading recited that "[r]ather than assist her, [he] decamped". Another pair of police oficers, a senior constable and a probationary constable, had arrived at the medical centre at approximately the same time, and within minutes some five police officers were present, including Inspector Whitten, then the commanding officer on the scene. Whilst there was a contest about what Senior Constable Evans said to the respondent when he left her with the victim and the doctor, there was no dispute that he did not return, or contact her by radio, while she attended to the victim.

238 Argument was not aimed at the question of the foreseeability of risk in terms of determining whether there was a real and not far-fetched or fanciful risk to the respondent of psychiatric injury, particularly post-traumatic stress disorder, as a result of attending to a victim of violent criminal acts.

239 There was a considerable uncontradicted body of evidence which showed that police work involved a risk of psychiatric injury, including post-traumatic stress disorder, to police officers as a class, as a result of the nature of many of the tasks which police officers are obliged to perform. Plainly, criminal acts can involve violence and the consequences of protecting victims of criminal acts from death can be distressing.

240 The New South Wales Police Service recognised that police officers were exposed to high levels of stress when dealing with crime scenes or motor accidents, and the victims involved. It was also known that significant numbers of police officers suffered psychiatric injury, including post-traumatic stress disorder, after attending gruesome crime and accident scenes. In a relevant report of a 1995 study in evidence, it was stated that "[t]here is an extraordinarily

high rate of police retired as medically unfit with a psychiatric diagnosis." That statement was not contradicted.

241 Since the existence of the risk was incontestable, this case does not provide an opportunity to consider whether the test in *Wyong Shire Council v Shirt*[227], that a reasonable risk is one which is not "far-fetched or fanciful"[228], is too "undemanding"[229].

242 Because the risk was foreseeable, the argument before this Court was principally aimed at the question of what a reasonable person in the position of the State should do "by way of response to the risk"[230]. The answer to that question determines the question of whether, on this occasion, there had been a breach of the State's duty to provide a safe system of work.

243 In the Court of Appeal of New South Wales, Spigelman CJ proceeded on the basis that there was no issue that the State was under a duty as employer to set up a safe system of work to avoid the risk of personal injury, including psychiatric injury[231]. In the common law of Australia liability for psychiatric injury has been recognised where the plaintiff and defendant were in an employer and employee relationship[232].

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227 (1980) 146 CLR 40.

228 (1980) 146 CLR 40 at 48 per Mason J.

229 *Tame v New South Wales* (2002) 211 CLR 317 at 352-353 [97]-[99] per McHugh J.

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

231 *New South Wales v Fahy* (2006) 155 IR 54 at 56 [2] and [5].

232 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *New South Wales v Seedsman* (2000) 217 ALR 583; cf *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 ("*White*"), in which a majority in the House of Lords decided that a duty, analogous to an employer's duty to protect an employee from physical harm, did not extend to protecting "employees" from psychiatric injury when there was no breach of the "employer's" duty to protect "employees" from physical injury. *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 concerned the tragic Hillsborough stadium collapse. Spectators had not been compensated for psychiatric injury. One of the complications in *White* was a perceived injustice if police were compensated for psychiatric injury but spectators were not. Lord Goff of Chieveley (in dissent) at 486 noted that the majority decision was contrary to *Chadwick v British Railways Board* [1967] 1 WLR 912; [1967] 2 All ER 945 and *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

244 In *Mount Isa Mines Ltd v Pusey*[233] ("*Mount Isa Mines*") Windeyer J upheld the plaintiff employee's claim for psychiatric injury. The duty of care was based on the foreseeability of psychiatric injury by shock and on the employer's legal duty to provide safe working conditions for employees. In relying on two English authorities[234] and "known medical fact"[235] in support of this finding, his Honour deprecated arbitrary and illogical restrictions on claims for psychiatric injury[236].

245 Until medical science enabled courts to better distinguish immediate emotional responses to distressing experiences[237] from psychiatric injury, courts were cautious about allowing claims because of a fear of "imaginary claims"[238]. A second factor which militated against allowing claims for "nervous shock" was the fear that "an unduly onerous burden would be placed on human activity"[239], especially where a claimant was not shocked by apprehending injury to him- or herself, but injury to another.

246 To discourage claims which were spurious, or claims which would unduly burden human activity, courts developed and applied a number of "control mechanisms"[240], "more or less arbitrary conditions"[241] which plaintiffs needed to satisfy in addition to the requirement of reasonable foreseeability of psychiatric injury. It is unnecessary to say more here because these developments are traced in the joint judgment of Gummow and Kirby JJ in *Tame v New South Wales* ("*Tame*"), which was heard together with *Annetts v Australian Stations Pty Ltd*[242]. The same developments, and the fact that English courts came within a "hair's

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233 (1970) 125 CLR 383.

234 *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271; *Chadwick v British Railways Board* [1967] 1 WLR 912; [1967] 2 All ER 945.

235 *Mount Isa Mines* (1970) 125 CLR 383 at 394 per Windeyer J.

236 *Mount Isa Mines* (1970) 125 CLR 383 at 403-408 per Windeyer J.

237 *Mount Isa Mines* (1970) 125 CLR 383 at 394 per Windeyer J.

238 *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222 at 226.

239 Fleming, *The Law of Torts*, 9th ed (1998) at 174.

240 *Page v Smith* [1996] AC 155 at 189 per Lord Lloyd of Berwick.

241 *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 502 per Lord Hoffmann.

242 (2002) 211 CLR 317 at 374-378 [170]-[183].

breadth" of some retreat from established control mechanisms, are considered by Lord Hoffmann in *White v Chief Constable of South Yorkshire Police*[243].

247 Advances in medicine and psychiatry which enable more reliable classification of psychiatric illness, greater understanding of aetiology and better diagnosis have been recognised in the courts[244].

248 Those advances in medicine and psychiatry have been taken into account when novel problems emerged, which highlighted the limitations of established control mechanisms and impelled their review[245].

249 In *Tame* a majority in this Court rejected established control mechanisms as definitive tests of liability, although the factors which gave rise to them may still be relevant to questions of reasonableness[246]. The majority stated that the criterion of reasonableness imposed at all levels of inquiry (to determine the existence and scope of a duty of care, breach of duty and damage[247]) is an intrinsic control mechanism. The criterion of reasonableness sets boundaries in respect of liability for psychiatric injury, and anchors the boundaries in principle, rather than allowing them to depend on arbitrary and indefensible distinctions[248].

250 A claim in respect of a psychiatric injury which is reasonably foreseeable is limited only by reference to general considerations: the compatibility of a duty of care with any conflicting professional responsibilities[249], whether imposed by

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243 [1999] 2 AC 455 at 502. See also Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage*, 2nd ed (2006) at 124-128 [5.270]-[5.330] and 518-527 [21.50]-[21.180].

244 See, for example, *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628 at 679-680 [152]-[153] per Lord Hobhouse of Woodborough.

245 *Tame* (2002) 211 CLR 317 at 378 [183] per Gummow and Kirby JJ.

246 (2002) 211 CLR 317 at 333 [17] per Gleeson CJ, 340 [51] per Gaudron J, 380-381 [190]-[191] and 383 [196] per Gummow and Kirby JJ.

247 *Donoghue v Stevenson* [1932] AC 562.

248 *Tame* (2002) 211 CLR 317 at 333 [18] and 337 [35]-[36] per Gleeson CJ, 339 [45] and 340 [51] per Gaudron J, 380-381 [189]-[191] per Gummow and Kirby JJ. In *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 304 [99], Hayne J raised the possibility of the need to develop new control devices in substitution for rejected control mechanisms.

249 *Tame* (2002) 211 CLR 317 at 335 [26] per Gleeson CJ, 342 [57] per Gaudron J.

statute[250] or contract[251], and considerations of legal coherence[252]. Likewise, the question of what a reasonable employer should do as a response to a foreseeable risk of psychiatric injury to employees as a class or individually is subject to those general considerations.

251 It was submitted on behalf of the State that the admitted duty of care to employ a safe system of work could not reasonably extend to pairing police officers as partners and requiring them to provide mutual support and assistance. It was submitted that such a system would be impracticable and would lack common sense given the operational duties of any pair of police officers.

252 An employer's duty to take care of an employee's safety has to be performed in the light of the obligations on the employees to undertake stressful work. By reference to established principle, a proven risk of physical injury to an employee which can be averted by requiring employees to work in pairs can give rise to a duty on the employer in those terms[253]. Determining the reasonableness and practicality of a duty to have such a system of work in the circumstances here requires an examination of the duties of the employees and a consideration of the accommodation of possible conflicts between different duties.

253 In the proceedings before the primary judge, the respondent, Senior Constable Deanne Abbott, and Mr Terrence O'Connell (who was a member of the police force between 1971 and 2000) gave evidence for the respondent. Inspector Stephen Egginton gave evidence for the State. Senior Constable Evans also gave evidence. They were all familiar with an established system of work, of pairing a senior and junior police officer as partners and requiring each to provide mutual support and assistance, subject to the exigencies of the situation, when attending crime scenes or motor vehicle accidents. This case was not concerned with, and the evidence did not cover, systems of work which might apply in the context of other police duties, some of which might be expected to be undertaken by a police officer working alone.

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250 *Sullivan v Moody* (2001) 207 CLR 562 at 582 [60].

251 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

252 *Tame* (2002) 211 CLR 317 at 335 [28] per Gleeson CJ, 342 [58] per Gaudron J, 361 [123] per McHugh J, 381 [191] per Gummow and Kirby JJ, 417-418 [296] per Hayne J, 425 [323] per Callinan J. See *Sullivan v Moody* (2001) 207 CLR 562 at 582 [60].

253 *Collins v First Quench Retailing Ltd* 2003 SLT 1220.

254 Consistent with the statutory duties mentioned above and a police officer's oath, the primary objective of the system of working in pairs on such occasions was the preservation of a victim's life, a task known to create a risk of psychiatric injury, particularly post-traumatic stress disorder, to the police officers involved.

255 The system of working in pairs was the subject of police officer training. The senior partner of a pair was expected to control a crime scene and organise resources, including personnel. Such a responsibility could entail leaving an officer to perform duties alone. Duties such as securing a crime scene, recording details of witnesses and calling for assistance were all important but they were ranked as a lower priority than saving the lives of victims.

256 The senior partner in a pair was required to be very clear about his or her intentions, the responsibilities of the junior partner and the senior partner's expectations. The specific tasks which individual officers would undertake in a given situation would vary, but communication between officers paired as partners was important. Decisions calling for fine judgment in the allocation of priorities were made by the senior officer in a pair. Common sense governed such decisions. Senior Constable Evans agreed in oral evidence before the primary judge that on the occasion in question he was responsible for the respondent's welfare. Further, a commanding officer at a scene had a responsibility to support the other officers.

257 The respondent had been a police officer since 1996 and had been involved in at least 10 prior emergencies involving trauma without suffering psychiatric injury. On each of those occasions her partner gave her support and assistance and she gave several examples of the ways in which this was done, especially by reference to the division of operational tasks between partners on a rational and efficient basis.

258 As to the effect of a system of working in pairs for mutual support, Dr Robertson, a qualified psychiatrist, gave evidence that the purpose of such a system "is to share the trauma". He explained that a system of having two people working together in a traumatic situation helped both of them to maintain professional detachment.

259 Medical experts called by both parties agreed that there was a risk of police officers developing post-traumatic stress disorder as a result of attending traumatic events. However, none of them was able to state with certainty what were the critical predictors of the illness or whether repeated exposure to traumatic events increased the risk of developing the illness. No evidentiary

basis was established for limiting the duty of care by reference to prior episodes of illness[254].

260 While the severity of exposure to grotesque aspects of trauma was considered by all of the medical experts to be important, they all also agreed that support during and after such an experience could decrease the risk of developing the illness and mitigate its severity or, putting it another way, assist in "adaptation following traumatic experience".

261 Be that as it may, in the context of a partner's exposure to traumatic events, all serving or former police officers who gave evidence about the system of working in pairs had a common understanding, and shared sensibilities, relating to support and assistance. Whilst it was agreed that crime scenes were dynamic, the demands on police officers were fluid, and the tasks were various, their common understanding of support and assistance was not confined by a "Cartesian distinction" bearing on "the interrelation of mind and body"[255]. Their common understanding encompassed support and assistance to avert the risk, to the partner, of psychiatric injury.

262 The system of work did not require Senior Constable Evans to stay with the respondent every minute when she was attending the victim. As the system was explained in the evidence, it required Senior Constable Evans to communicate with the respondent (something he could have done by radio, in person or through another police officer); it required him to check on how the respondent was coping with the primary duty to the victim. What was appropriate had to be determined by common sense and the exigencies of the situation. Senior Constable Evans was trained in the system of work and experienced in its operation. In giving an explanation for his conduct, namely that he was guarding or securing the crime scene and had other duties associated with that task, Senior Constable Evans did not demonstrate that giving support and assistance to the respondent was incompatible with those other duties.

263 The system of work had been set up as a reasonable, obvious and practical mechanism by which the State addressed the known risks to which police officers were exposed when attending victims of criminal acts or motor accidents.

264 In the absence of direct and persuasive evidence to the contrary, the system of work as described did not impose any unduly onerous burden on police

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254 cf *Walker v Northumberland County Council* [1995] 1 All ER 737 at 739 per Colman J; *Keen v Tayside Contracts* 2003 SLT 500 at 511 [69] per Lady Paton.

255 *Mount Isa Mines* (1970) 125 CLR 383 at 405 per Windeyer J.

work. It was not incompatible or inconsistent with the proper and effective discharge of police officers' statutory duties, or multiple operational duties as they arose. The system of work cannot be said to lack common sense, or to be impractical, when it is designed to protect victims' lives, and to avoid known risks to the police officers, which included the risk of psychiatric injury, particularly post-traumatic stress disorder.

265 The institution of the system of work was a step which a reasonable person in the position of the State would take in order to deal with the known risks associated with exposure to traumatic events. It was a step which the State did take. The evidence permitted the inference drawn by the trial judge, and upheld on appeal, that on this occasion the State (through Senior Constable Evans) breached its duty. The decision of the Court of Appeal should stand.

266 I agree with the orders proposed by Gleeson CJ and Kirby J.