AUSTRALIAN LAWYERS ALLIANCE
QUEENSLAND STATE CONFERENCE
Sheraton Mirage Resort and Spa, Gold Coast, Friday, 13 February 2015

Developments in the Law of Negligence: Have plaintiffs lost their *Shirt?*

The Honourable Justice Margaret McMurdo AC

President, Court of Appeal*

I acknowledge the traditional owners in the Gold Coast region, the Kombumerri and Yugambeh people, and pay my respects to their elders past and present.

Thank you Rod. Thank you Michelle for your inspiring words.

It is a great pleasure for me to be speaking at this annual conference of the Queensland branch of Australian Lawyers Alliance. I appreciate that many of you provide access to justice to those who otherwise would not have it and advocate on their behalf. I sincerely thank you for this. I especially congratulate those who have received the Civil Justice Award: the parents and legal team of baby Ferouz.

The *Shirt* Calculus

Have plaintiffs lost their *Shirt?* I refer, of course, to the famous words, written 35 years ago by Justice Mason in *Wyong Shire Council v Shirt*[1] with which Justices Stephen and Aickin agreed. In considering the foreseeability doctrine as applied to breach of duty in negligence, Justice Mason, adopting the approach of the Privy Council in *The Wagon Mound (No 2),*[2] held that the risk of injury and the likelihood of the risk occurring are two different things. A

* I gratefully acknowledge the assistance of my Associate, Anne Crittall LLB (Hons) for her research and editing assistance and my Executive Assistant, Kelly Morseu, for her typing and editing assistance.
[1] (1980) 146 CLR 40, [44], [47]-[48], [50].
[2] *Overseas Tank Ship (UK) Ltd* v *The Miller Steamship Co (The Wagon Mound (No 2))* [1967] 1 AC 617.

foreseeable risk is one that is not far-fetched or fanciful. The first question for a court deciding whether there has been a breach of duty is 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 plaintiff. If yes, the court must next determine what a reasonable person would do in response to the risk. This turns on:

- the probability of the risk occurring; and
- the gravity of the harm if it does; and
- the cost and difficulty of taking precautions; and
- any conflicting responsibilities of the defendant. [3]

In the circles you lawyers move in, these principles have come to be known as the *Shirt* calculus. They have ensured *Shirt* is one of the most frequently cited civil cases in Australian courts.

But "calculus" is a curious nomenclature for this important development in the law of negligence in Australia. After all, calculus is mathematical reasoning. As you more than most will appreciate, there is nothing mathematical about the *Shirt* calculus. Even after a case has been pleaded, the evidence given and the judge has found the relevant facts, an assessment in a particular case of a reasonable person's response to the risk, the probability of it occurring, the gravity of harm if it does, the cost and difficulty of taking precautions, and any conflicting responsibilities of the defendant, will often vary with the world view of the judge making the assessment. In finely balanced cases (these days, all those that come to court) different judges can reasonably reach different conclusions in conscientiously applying the calculus.

[3] (1980) 146 CLR 40, [47].

It is not unusual in the most difficult cases for a trial judge to find one way; the Court of Appeal in a split decision to find the other way; with the High Court's ultimate decision in a 3-2 or 4-3 divide. Sometimes the final split decision may be for a plaintiff but more judges in the trial and appellate process will have found for the defendant or vice versa. Famous examples include *Nagle v Rottnest Island Authority*[4]; *Swain v Waverley Municipal Council*[5]; and *Roads and Traffic Authority of NSW v Dederer*.[6] You can probably add your own case names to that list. Such examples do not suggest the mathematical precision of a calculus and do not allow you to give mathematically precise advice to prospective litigants.

The expression, the *Shirt* calculus, seems to have arisen from the influence of US culture, which permeates even Australian law where US influence is ordinarily limited. It appears to be derived from the dictum of Judge Learned Hand in *United States v Carroll Towing Co*[7] where his Honour described the following notion in algebraic terms: "…If the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; that is whether B is less than P L." For those of you like me who chose a career in law because you were not big on maths, you may prefer Justice Mason's version!

Developments in the *Shirt* Calculus

The *Shirt* calculus has been refined since it was first pronounced in 1980, especially as a perception arose within some sectors of the community that it was being applied too liberally in favour of plaintiffs, and not as the High Court originally envisaged.

[4] (1993) 177 CLR 423.
[5] (2005) 220 CLR 517.
[6] (2007) 234 CLR 330.
[7] (1947) 159 F.2d 169.

Tame v New South Wales

In 2002 Justice McHugh acknowledged those concerns in *Tame v New South Wales*.[8] Mrs Tame, you will remember, developed a psychiatric condition after a policeman mistakenly recorded her having a blood alcohol level of 0.14 after a car accident. He had confused her reading with that of the other driver. She rarely drunk alcohol, was distressed that her good name had been tarnished, and became fixated on the mistake. As a result she developed a psychotic depressive illness and post-traumatic stress disorder. The trial judge found the police officer owed her a duty to take reasonable care to avoid causing her injury of this kind and gave judgment in her favour. The New South Wales Court of Appeal overturned that decision, finding that a defendant will not be liable in cases of nervous shock unless they knew the plaintiff was particularly susceptible to psychiatric damage. The High Court dismissed the appeal, determining that Mrs Tame's illness was not reasonably foreseeable.

Relevantly for the purpose of this address, Justice McHugh stated that he considered the High Court's treatment of *The Wagon Mound (No 2)* in *Shirt* was an unfortunate development in the law of negligence adding,

> "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 will fall – perhaps it already has fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable.[9]
>
> …
>
> When it is necessary to determine foreseeability in the duty context, development of the law of negligence as a socially useful instrument now requires rejection of the attenuated test of foreseeability propounded in *The Wagon Mound (No 2)* and adopted

[8] (2002) 211 CLR 317.
[9] Above, [101].

by this court in *Shirt*. We should return to Lord Atkin's test (*Donoghue v Stevenson* [1932] AC 562, 580) that:

> 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.'"[10]

Koehler v Cerebos (Aust) Ltd

The High Court did not adopt Justice McHugh's approach and in 2005 in *Koehler v Cerebos (Aust) Ltd*[11], Justices McHugh, Gummow, Hayne and Heydon confirmed the application of the *Shirt* calculus. Ms Koehler, a merchandiser, was engaged for three days each week to set up displays for her employer in supermarkets. She told her employer she could not cope with the workload but she was asked to try. She repeatedly complained, orally and in writing, that she had too many stores and she suggested ways to improve the situation. She did not say that the work was affecting her health. After five months, she saw her doctor about aches and pains from lifting boxes of goods. She was ultimately diagnosed with fibromyalgia syndrome, a psycho-physical disorder resulting in severe pain, and a depressive illness, all said to have been caused by her employment. The trial judge found that the employer breached its duty of care by failing to implement the steps Ms Koehler suggested; the workload was excessive and the employer failed to take all reasonable steps to provide a safe system of work. The Full Court of the Supreme Court of Western Australia in allowing the appeal, unanimously held that the employer could not reasonably have foreseen that Ms Koehler was exposed to a risk of psychiatric injury as a consequence of her work. The High Court, also unanimously, dismissed her appeal.

[10] Above, [104].
[11] (2005) 222 CLR 44.

Relevantly, in a joint judgment Justices McHugh, Gummow, Hayne and Heydon confirmed that questions of breach of duty require the application of the *Shirt* principles, adding:

> "But to begin the inquiry by focusing only upon questions of breach of duty invites error. It invites error because the assumption that is made about the content of the duty of care may fail to take fundamental aspects of the relationship between the parties into account."[12]

Their Honours concluded that the application of the *Shirt* principles demonstrated that the risk of psychiatric injury to Ms Koehler was not reasonably foreseeable to the employer.

Vairy v Wyong Shire Council

Later in 2005, Justice Hayne emphasised the danger of applying the *Shirt* calculus with hindsight in *Vairy v Wyong Shire Council*.[13] This was another of those finely balanced, difficult cases where almost equal numbers of judges found for the plaintiff and defendant over the trial and appellate process. You will recall that Mr Vairy became a tetraplegic after diving into the sea from a high platform and sued the Council in negligence. The trial judge found for him but reduced the damages by 25 per cent for his contributory negligence. By majority the Court of Appeal allowed the Council's appeal, finding that the risk of injury was so obvious that the Council did not breach its duty. The High Court upheld the decision of the Court of Appeal by a 4:3 majority. Relevantly Justice Hayne said:

> "If, instead of looking forward, the so-called *Shirt* calculus is undertaken looking back on what is known to have happened, the tort of negligence becomes separated from standards of reasonableness. It becomes separated because, in every case where the cost of taking alleviating action at the particular place where the plaintiff was injured is markedly less than the consequences of a risk coming to pass, it is well nigh

[12] Above, [19].
[13] (2005) 223 CLR 422.

> inevitable that the defendant would be found to have acted without reasonable care if alleviating action was not taken. And this would be so no matter how diffuse the risk was…"[14]

State of New South Wales v Fahy

In 2007 in *State of New South Wales v Fahy*[15] the High Court was squarely invited by the defendant to reconsider the *Shirt* calculus, particularly after the legislative changes following the Ipp Report. Ms Fahy, a police constable, and her colleague were called to an armed robbery. A video store proprietor was stabbed and sought assistance at the nearby medical centre. Ms Fahy was left with the doctor to care for the blood-covered victim. She tried to stop the profuse bleeding. Her colleague did not enter the treatment room and a senior officer looked in but immediately left. Ms Fahy sued her employer, alleging that its conduct had been unreasonable in leaving her in a traumatic situation without the support of a colleague, causing her to suffer post-traumatic stress disorder. She claimed her employer had breached its duty of care in failing to take reasonable care for her safety. The majority, (Justices Gummow, Hayne, Callinan and Heydon, Chief Justice Gleeson and Justices Kirby and Crennan dissenting) allowed the appeal and found for the employer.

Only the joint judgment of Justices Callinan and Heydon directly criticised the *Shirt* principles. Their Honours noted it was not strictly necessary to decide whether *Shirt* should be reopened and overruled,[16] but in any case made obiter statements strongly critical of the *Shirt* calculus, preferring the test adopted by Justice Walsh in *The Wagon Mound (No 2)* at

[14] Above, [128].
[15] (2007) 232 CLR 486.
[16] Above, [213].

first instance, namely, that a foreseeable risk is one that is significant enough in a practical sense.[17]

Chief Justice Gleeson noted that on occasions, judges "appear to have forgotten that the response of prudent and reasonable people to many of life's hazards is to do nothing … 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 Mason J's judgment."[18]

In another joint judgment, Justices Gummow and Hayne stated:

> "…no persuasive argument was mounted in this case for the view that *Shirt* should now be reconsidered. 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* 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. Further … 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

[17] Above, [216] – [227].
[18] Above, [7].

> legislation enacted on this subject points away from the desirability of restating the common law."[19]

Justice Kirby also considered it was neither timely, appropriate nor desirable to re-express the common law of Australia in this respect.[20] Noting that "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,"[21] his Honour unequivocally concluded that it correctly states the law.[22]

Roads and Traffic Authority of New South Wales v Dederer

If confirmation be needed after the majority's strong statements in *Fahy*, later that year the High Court again approved the *Shirt* calculus in *Dederer*.[23] The 14 year old Mr Dederer dived from a bridge across a river, struck a submerged sand bank and suffered a serious spinal injury. He brought an action against both the Roads and Traffic Authority (RTA) and the Council in negligence. The trial judge found for him but reduced the damages by 25 per cent for contributory negligence and apportioned the damages between the RTA (80%) and the Council (20%). The New South Wales Court of Appeal held that the Council was not liable because of new provisions in the *Civil Liability Act*; dismissed the RTA's appeal; but increased Mr Dederer's contributory negligence to 50 per cent. Both the RTA and Mr Dederer appealed to the High Court. The majority (Justices Gummow, Heydon and Callinan, Chief Justice Gleeson and Justice Kirby dissenting) allowed the RTA's appeal and dismissed Mr Dederer's cross-appeal.

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[19] Above, [78] – [79] (footnotes omitted).
[20] Above, [118] – [133].
[21] Above, [121].
[22] Above, [129].
[23] *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330.

Justice Gummow, with whom Justice Heydon agreed, considered that the trial judge and the majority in the Court of Appeal impermissibly reasoned that, "if a warning is given, and if the conduct against which that warning is directed continues notwithstanding the warning, then the party who gave the warning is shown to have been negligent by reason of the warning having failed. Quite apart from its inconsistency with the scope of the RTA's duty of care, this reasoning erroneously [short-circuited] the inquiry into breach of duty… required by *Shirt*."[24] The New South Wales Court of Appeal erred by focussing in retrospect on the failure of the RTA to prevent Mr Dederer's dive. They should have asked what, in prospect, the exercise of reasonable care would require in response to a foreseeable risk of injury.[25] After citing the *Shirt* calculus and noting the High Court's reaffirmation of it in *New South Wales v Fahy*, Justice Gummow added: "What *Shirt* requires is a contextual and balanced assessment of the reasonable response to a foreseeable risk. Ultimately, the criterion is reasonableness, not some more stringent requirement of prevention."[26] The RTA did not breach its duty of care. Though grave, the risk faced by Mr Dederer was of a very low probability, and a reasonable response to that risk did not demand the measures suggested by him.[27] This was not a case where the RTA did nothing in response to a foreseeable risk. It had erected warning signs prohibiting the very conduct engaged in by Mr Dederer. That was a reasonable response and the law demands no more and no less.[28]

Some Academic Studies

This brief overview of relevant High Court cases since *Shirt* establishes that the *Shirt* calculus remains central to the common law of negligence and suggests that whether its principled

[24] Above, [55].
[25] Above, [66].
[26] Above, [69].
[27] Above, [78].
[28] Above, [79].

application by judges favours a plaintiff or defendant will not only turn on the facts of each case but to some extent on the world view of each judge.

The renowned Professor Harold Luntz has noted a turnaround at the end of 1999 in the decisions of the High Court of Australia which, until then, previously tended to favour plaintiffs. He found that, in the period from 1987 when Sir Anthony Mason became Chief Justice until the end of 1999, there were 40 cases before the High Court dealing with liability or damages for personal injury. Of these, 32 (80%) resulted in decisions that favoured plaintiffs and only 8 (20%) favoured defendants. By contrast, in 2000, the High Court heard 8 such cases but only 25 per cent were decided in favour of the plaintiff with the balance being decided in favour of the defendant. In the ensuing two and a half years, the pro-defendant trend continued. Of the 22 personal injuries cases heard by the High Court in that period, 8 (36%) were decided in favour of the plaintiff and 14 (64%) in favour of the defendant.[29] Professor Luntz predicted the trend to continue.

He seems to have been right. University of Technology Sydney academics, Pamela Stewart and Anita Stuhmcke, examined negligence cases decided by the High Court from 2000 to 2011.[30] They found that adult males (53%) were parties more often than the combined number of women (30%) and children (17%).[31] This raised the possibility that women and children may be disadvantaged in obtaining access to justice[32] but that is not relevant to today's address. Their study showed that from 2000 to 2011, defendants were successful in

[29] Harold Luntz, "Turning Points in the Law of Torts in the Last 30 Years" *Insurance Law Journal*, 2003, Vol 15: 1 - 23, 23.
[30] Pamela Stewart and Anita Stuhmcke, "Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond" *Melbourne University Law Review*, 2014, Vol 38: 151 - 197.
[31] Above, 172 - 173.
[32] Above, 154.

64 per cent of High Court negligence cases.[33] The authors predicted that the legislation resulting from the Ipp Report would perpetuate these unequal success rates of plaintiffs in High Court appeals.

The Ipp Report and Subsequent Legislative Changes

This brings me to the *Civil Liability Act* 2003 (Qld) and the background to it. Justice McHugh did seem to capture the mood of many with his comments in *Tame* in 2002 to which I have referred. That year, Prime Minister John Howard established a Panel of Eminent Persons chaired by The Honourable David Ipp. The opening statement of the Panel's terms of reference was:

> "The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum damages arising from personal injury and death."

The Panel's report, presented in September 2002, came to be known as the Ipp Report. The Panel reported, relevant to the *Shirt* principles, that courts seemed to be in danger of ignoring the process of balancing the four elements of the negligence calculus identified in *Shirt* by tending to treat a decision that a risk was foreseeable and not far-fetched, as conclusive of negligence if the defendant failed to take steps to avoid it, rather than going through the balancing process set out in the second stage of the calculus.

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[33] Above, 153 - 154, 181.

As you know, many of the Ipp Report's recommendations together with other changes were included in subsequent legislation throughout Australia, including Queensland's *Civil Liability Act*. Justice Ipp, however, has subsequently labelled aspects of the laws resulting from his Report as "inconsistent, unbalanced and unfair to injured people"[34] and has observed that some "statutory barriers that plaintiffs now face are inordinately high".[35]

The *Shirt* calculus is basically enshrined in s 9 of the Queensland Act, with some tinkers. The phrase "not far-fetched" has become "not insignificant". The phrase "cost and difficultly of taking precautions" has become "the burden of taking precautions". And the phrase "any other conflicting responsibilities" has become "the social utility of the activity that creates the risk of harm". I and others[36] have expressed doubt as to whether these fine distinctions have altered, in practical terms, the *Shirt* calculus as explained in subsequent High Court cases.

In 2007 I expressed the tentative view, extra-curially that the *Civil Liability Act* would not significantly affect the outcome of many cases as to liability for those who can access their common law rights.[37] The Chief Justice of Western Australia, the Honourable Wayne Martin AC, in 2011 also stated extra-curially that it is "cogently arguable that despite the fanfare which has attended the enactment of the legislation [following the Ipp Report], in many areas

[34] Justice David Ipp, "The Politics, Purpose and Reform of the Law of Negligence" (Paper presented at the Conference of the Australian Insurance Law Association, Noosa, 17 May 2007) cited in Pamela Stewart and Anita Stuhmcke, "Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond" *Melbourne University Law Review*, 2014, Vol 38: 151 - 197, 189.
[35] Justice D A Ipp, "The Metamorphosis of Slip and Fall" (2007) 29 *Australian Bar Review* 150, 150 cited in Pamela Stewart and Anita Stuhmcke, "Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond" *Melbourne University Law Review*, 2014, Vol 38: 151 - 197, 189.
[36] Barbara McDonald, "Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia" *Sydney Law Review*, 2005, Vol 27(3): 443 - 482.
[37] Justice M McMurdo AC, Speech delivered to the Beach Safety and the Law National Summit, 8 November 2007, "Legal Considerations for Beach Safety: In Defence of the Reasonableness of the Law", 7.

its impact is difficult to detect."[38] After all, the academic studies and my earlier overview of the High Court cases considering, refining and developing the *Shirt* principles suggest a tendency towards a narrower application of the calculus, more often in favour of defendants than in the past.

Recent Applications of *Shirt* in the Queensland Court of Appeal

Despite Queensland's *Civil Liability Act*, counsel and courts continue to refer to the *Shirt* calculus rather than s 9 in conducting and determining negligence cases. Let me share some recent examples in the Queensland Court of Appeal.

Smith v Body Corporate for Professional Suites Community Title Scheme 14487

The *Shirt* principles were considered by the Queensland Court of Appeal in 2013 in *Smith v Body Corporate for Professional Suites Community Title Scheme 14487*.[39] Ms Smith fell through a glass panel near the ground floor entrance of an office building and suffered severe lacerations. She had been drinking heavily at a nearby bar and was unsteady on her feet. Whilst looking for her swipe card to enter the building to take a lift to the car park, she stumbled into the glass which broke into large shards, injuring her. She brought an action against the body corporate claiming damages for negligence. The glass was six millimetre thick and complied with relevant standards in 1971 when it was built. Revised standards in 1994 required the glass to be safety or laminated glass but did not require the replacement of glass compliant at the time it was installed. If the glass was replaced, however, it had to comply with the 1994 standard. The body corporate did not conduct a safety audit of the glass between 1971 and the time of the accident. In about 2000 the defendant employed architects to upgrade the building, including the entrance where the accident occurred. Safety

[38] Chief Justice Wayne Martin AC, Speech delivered to the Australian Insurance Law Association Conference, 19 October 2011, "The Pendulum Swings -The Civil Liability Act: Impact and Effect", 21.
[39] [2013] QCA 80.

issues were not covered in the architects' report and the resulting renovation used the existing glass.

The primary judge dismissed Ms Smith's claim, finding that the body corporate was not negligent in failing to conduct a glass safety audit. In the Court of Appeal the majority (Justices Fraser and Fryberg, with me dissenting) said of the *Shirt* calculus[40] that it was necessary to apply this "uncontroversial test for liability in negligence in the context of the relevant statutory provisions and the particular facts and circumstances revealed by the evidence."[41] In doing so, their Honours concluded that Ms Smith did not prove the defendant acted unreasonably by failing to organise a safety audit of the glass panels by an appropriately qualified expert and thereafter replacing the existing glass with safety glass.[42] My application of the *Shirt* calculus reached the contrary conclusion.[43] I regret to say an application for special leave to appeal to the High Court of Australia was refused.

Suncorp Staff Pty Ltd v Larkin

The Queensland Court of Appeal also relied on the *Shirt* calculus in 2013 in *Suncorp Staff Pty Ltd v Larkin*.[44] Mr Larkin was employed in the defendant's call centre. He struck his knee on the metal handle of a cupboard under a workbench and suffered a soft tissue injury, with a resultant pain syndrome and psychological injuries. He sued the defendant for breaching its duty of care. The trial judge found, applying the *Shirt* calculus, that many employees had used the work bench without injury but the risk of injury was nevertheless obvious. There was more than a slight chance of injury. His Honour found for Mr Larkin and awarded damages of $245,000. The Court of Appeal (Justices Holmes, Muir and

[40] Above, [42].
[41] Above, [48].
[42] Above, [55].
[43] Above [19] - [23].
[44] [2013] QCA 281.

Philippides) unanimously allowed the appeal. Although the injury occurred well after the *Civil Liability Act* became operative, this Court's discussion of the defendant's duty of care centred on the *Shirt* calculus[45] and Justice Hayne's warning in *Vairy* to avoid the advantage of hindsight and to instead look forward "from a time before the accident" in order to give "due weight" to "consideration of the magnitude of the risk and the degree of probability of its occurrence".[46] The Court concluded that the trial judge erred in equating "the possibility that part of an employee's body may come into contact with the door handle with an obvious risk of injury" and reasoned, by reference to Mr Larkin's injury, that such an injury may well be substantial.[47] Although the cost of taking remedial action in respect of the door handles was modest, the likelihood of an employee being injured by them was particularly low, as was the risk that any injury inflicted would be serious.[48] Applying the *Shirt* calculus, a reasonable employer would not have changed the handles or taken other remedial action.[49]

Some Recent Cases

You will recall my summary of High Court cases from 2000 to 2011 and the analysis undertaken by Professor Luntz, Pamela Stewart and Anita Stuhmcke which suggested that during that period the High Court more commonly found for defendants than plaintiffs. I will conclude with a brief discussion of some recent negligence cases since these academic reviews, two in the High Court and two in the Queensland Court of Appeal, even though none turned directly on the *Shirt* calculus.

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[45] Above, [22].
[46] *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 461 - 462.
[47] *Suncorp Staff Pty Ltd v Larkin* [2013] QCA 281, [28].
[48] Above, [32].
[49] Above, [35].

Strong v Woolworths

The first, the 2012 case of *Strong v Woolworths*,[50] is not supportive of the High Court anti-plaintiff hypothesis put forward by the academics but it may be the exception proving the rule.

Ms Strong was an amputee, and is therefore a heartening example of a woman with a disability obtaining access to justice through lawyers like you. She walked with the aid of crutches. She was injured in Woolworths' premises when she slipped on a greasy potato chip. She successfully sued Woolworths and was awarded over $580,000 in damages. The New South Wales Court of Appeal allowed the appeal, finding that she had failed to establish on the balance of probabilities that Woolworths' negligence caused the fall. The majority in the High Court (Chief Justice French, and Justices Gummow, Crennan and Bell, with only Justice Heydon dissenting) allowed the appeal and found in favour of Ms Strong. Reasonable care, their Honours found, required inspection and removal of slipping hazards at intervals of no more than 20 minutes in the area of the centre where Ms Strong fell which was adjacent to the food court.[51]

Comcare v PVYW

On the other hand, the 2013 case of *Comcare v PVYW*[52] supports the trend identified by the academics in their review. The plaintiff, whose name was anonymised for reasons you will soon appreciate, was a federal government employee. She travelled to a New South Wales country town in the course of her employment. Her employer booked her into a motel room where she later had sexual intercourse with an acquaintance. She was injured when a glass light fitting above her bed was pulled from its mount by either the plaintiff or her

[50] (2012) 246 CLR 182.
[51] Above, [38].
[52] (2013) 250 CLR 246.

acquaintance. The fitting struck her causing injuries to her nose and mouth and she sought compensation from Comcare, the federal government's workplace safety body.[53] The defendant does not seem to have suggested that she was engaged in a dangerous activity! The sole question was whether her injuries arose "in the course of" her employment. Comcare initially accepted her claim but later revoked its decision. The Comcare decision was upheld by the Administrative Appeal Tribunal. The Federal Court, however, allowed the appeal, finding that the injury was suffered in the course of her employment. The Full Court of the Federal Court dismissed the appeal from that decision.

The majority of the High Court (Chief Justice French, Justices Hayne, Crennan and Kiefel, with Justices Bell and Gageler dissenting) applying *Hatzimanolis v ANI Corporation Ltd*[54] found:

> "that for an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs. Moreover it is an unstated but obvious purpose of *Hatzimanolis* to create a connection between the injury, the circumstances in which it occurred and the employment itself. It achieves that connection by the fact of the employer's inducement or encouragement. Thus, where the circumstances of the injury involve the employee engaging in an activity, the question will be whether the employer induced or encouraged the employee to do so."[55]

On the facts of this case, the creative advocate could use those principles to advance some interesting arguments, perhaps best left to your imagination!

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[53] Above, [1].
[54] (1992) 173 CLR 473, 482 - 485.
[55] (2013) 250 CLR 246, [35] – [36].

State of Queensland v Kelly

Even more recently and closer to home, in the 2014 case, *State of Queensland v Kelly*[56] Mr Kelly ran down a sand dune and fell into Lake Wabby on Fraser Island, sustaining injuries which left him a partial tetraplegic. He passed two signs warning of the dangers associated with the lake and sand dunes. The trial judge found Mr Kelly tripped as he ran down the dune and fell into the lake. The act of running down the sand dune and tripping was not an obvious risk under s 13 *Civil Liability Act* and the appellant was negligent. His Honour found for Mr Kelly but discounted the damages by 15 per cent for contributory negligence.

On appeal, the central issue was whether the risk of serious injury from running down the sand dune into the lake was an obvious risk under s 13. In dismissing the appeal, the Court distinguished this case on its facts from those where a plaintiff engaged in dangerous activity, ignoring clear and unequivocal signage. The risk in this case was not an obvious one under s 13. The signs erected did not effectively communicate the risk which materialised so as to make that risk obvious to a reasonable person in Mr Kelly's position.[57] The signs did not clearly communicate that the risk of running down the sand hill and jumping into the lake was as high as the evidence established it was.[58] A reasonable person in Mr Kelly's position would readily have concluded that running down the sand dunes towards the lake may have involved the risk of a injury such as a sprain or bruising, but not the risk of very serious injury inherent from that activity.[59] As the signs stated that running down the sand dune was dangerous, the respondent unreasonably failed to take precautions against the risk so that the finding against him of contributory negligence was properly made.[60]

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[56] [2014] QCA 27.
[57] Above, [41].
[58] Above, [47].
[59] Above, [48].
[60] Above, [50].

There has been no application for special leave to appeal to the High Court.

Mules v Ferguson

And finally I mention a decision of the Court of Appeal handed down only last week, *Mules v Ferguson*[61]. Ms Mules, a 43 year old woman consulted her doctor about neck pain. She was suffering from undiagnosed cryptococcal meningitis which ultimately left her blind, deaf and with other grievous disabilities. She brought an action in negligence against the doctor claiming that the doctor did not undertake a proper examination or make proper enquiries about Ms Mules' reported symptoms so as to exclude cryptococcal meningitis. She contended that had the doctor acted competently, she would have referred Ms Mules for tests and treatment so that the disease was diagnosed and treated before her grievous injuries arose.

After an 11 day trial, the primary judge in a careful judgment, assessed Ms Mules' damages at $6.7million but dismissed her claim. His Honour found the doctor failed to act with reasonable care in not physically examining Ms Mules' neck and enquiring about the progress of her previously recorded symptoms. His Honour nevertheless concluded the breach did not cause her injuries and that the doctor's conduct was not unlawful because of s 22 *Civil Liability Act*. In Ms Mules' favour the judge found that had the doctor referred Ms Mules to a specialist she would have attended the specialist and been diagnosed and treated, preventing her grievous injuries. By majority (Justice Boddice and me, with Justice Applegarth dissenting) the Court of Appeal gave judgment for Ms Mules, overturning the judge's finding on causation and s 22. I apprehend there may be a special leave application. This difficult case may join that list I mentioned earlier, where different judges can

[61] [2015] QCA 5.

reasonably reach different conclusions, in conscientiously applying legal principles to the facts.

Conclusion

After almost 35 years, trial and appellate courts continue to refer to and apply Justice Mason's *Shirt* calculus, despite criticisms, explanations and refinements over the years, and despite the tinkering in s 9 *Civil Liability Act*. Professor Luntz, Ms Stewart and Ms Stuhmcke have demonstrated a tendency in recent decades for the High Court of Australia to find against plaintiffs more often than in their favour. That trend was apparent before the Australia wide legislative changes following the Ipp Report. It will be interesting to read future academic studies concerning High Court trends in this area. But the High Court's decision in *Strong v Woolworths* makes clear that it will not hesitate to find in favour of plaintiffs where this is warranted by application of established principle to the properly found facts. The recent cases to which I have referred also demonstrate that the same can be said of the Queensland Court of Appeal. For practitioners preparing cases concerning reasonable foreseeability, the *Shirt* calculus, applied not with hindsight but before the time of the injury, will remain your guiding light.

And all judges, whether trial or appellate, should be astute in the application of the *Shirt* calculus, as constrained by relevant legislation, to clearly articulate in their reasoning the specific factors in each individual case which determine whether a plaintiff's injury was reasonably foreseeable.

The plaintiffs' *Shirt* may have become comfortable, even a little worn and frayed, but it remains a classic, vintage, must-have piece, and is wearing exceptionally well after 35 years.