

ROADS AND TRAFFIC AUTHORITY OF NSW v DEDERER & ANOR
(S122/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 5 October 2006

Date of grant of special leave: 2 March 2007

On 31 December 1998, Philip Dederer, the first respondent, dived off the Forster/Tuncurry bridge and was rendered a paraplegic. He was fourteen years old at the time.

The general area is a busy tourist destination attracting families and children. For many years young people, particularly in the summer months, frequently jumped and (less often) dived off the bridge into the estuary below. Philip had spent holidays in the area since he was a very small boy. He had frequently observed children and adults jump and dive off the bridge.

The bridge had two flat central horizontal railings beneath a flat top railing. Philip was able to use the two central railings to step onto the flat top railing. At first, he planned to jump off the bridge but at the last moment, on impulse, he decided to dive and used the flat top railing as a platform. He dived off the bridge at a point that was about nine metres from the surface of the water. He dived into approximately two metres of water, struck his head on a sandbar, and was rendered paraplegic.

There were pictograph signs on or at the approaches to the bridge prohibiting diving and signs in words prohibiting climbing on the bridge. Prior to diving, Philip saw and understood these signs but ignored them.

There was evidence that the appellant, Roads and Traffic Authority ("the RTA") had been aware of people frequently jumping off the bridge and in 1990 had conferred with police to attempt to prevent this. However, attempts to enforce the prohibition against jumping proved futile. The response of the RTA and the second respondent, Great Lakes Shire Council ("the Council") was to replace existing pictorial signs with the "No Diving" pictographs in 1995, but these had virtually no effect. The Council, but not the RTA, admitted that it knew that the practice of people jumping off the bridge was continuing.

Philip brought a claim against the RTA and the Council for damages for personal injury. In relation to the RTA, he argued that it failed to conduct an adequate risk assessment in relation to the bridge, failed to provide appropriate warning signs as opposed to prohibition signs, failed to modify the railing which could have prevented him from diving from the bridge, and failed to provide a net outside the railing to prevent diving.

The trial judge, Dunford J, upheld Philip's claim and decided that both the RTA and the Council were negligent. He further held that Philip had been guilty of contributory negligence and apportioned his share of responsibility for his own injury at 25 per cent. As between the RTA and the Council, his

Honour found that the RTA was 80 per cent responsible for the first respondent's damages and the Council was 20 per cent responsible. The parties had agreed on the quantum of damages.

The RTA and the Council appealed against the findings of negligence and apportionment made by the trial judge.

The Court of Appeal (Handley, Ipp and Tobias JJA) by majority, dismissed the substantive appeal of the RTA and made an adjustment to the apportionment of damages. Handley JA, dissenting, found that the primary judge's finding that the appellant was aware of the continuing practice of diving from the bridge was contrary to the evidence. Furthermore, the absence of any recorded injury in the 39 years before Philip's accident demonstrated that the common practice of jumping off the bridge was not unsafe.

The first respondent cross-appeals, subject to the grant of special leave, from:

- those parts of the judgment of the New South Wales Court of Appeal given on 5 October 2006 which allowed the appellant's appeal to that Court and held that the first respondent was guilty of being contributorily negligent to the extent of 50% in lieu of 25% contributory negligence found by the trial judge; and
- the decision of that Court of 29 November 2006 refusing an order that the appellant pay the costs that the first respondent was ordered to pay to Great Lakes Shire Council.

The grounds of appeal include:

- The majority of the New South Wales Court of Appeal erred in holding that the appellant breached its duty of care by failing to respond to an alleged knowledge of habitual diving head first from the Foster/Tuncurry bridge when there was no evidence of any such knowledge.
- The majority of the New South Wales Court of Appeal erred when applying *Wyong Shire Council v Shirt* (1980) 146 CLR 40 in holding that the placement of "No Diving" pictogram signs and "Fishing from and Climbing on bridge prohibited" word signs on the bridge were an inadequate response to the risk in the following respects (including):
 - failing to apply a test of reasonable foresight at a time before the first respondent's accident;
 - failing to give sufficient weight to the trial judge's findings that the first respondent saw the signs, understood the signs, deliberately disregarded the signs, knew the depth of water was variable, knew that jumping from heights could cause injury and part of the thrill of diving was the risk.