SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Gary Nigel Roberts v Westpac Banking Corporation**
Citation:	**[2016] ACTCA 68**
Hearing Dates:	1–2 August 2016
Decision Date:	13 December 2016
Reasons Date:	13 December 2016
Before:	Murrell CJ, Burns and Gilmour JJ
Decision:	1. The appeal be dismissed. 2. The appellant pay the respondent's costs to be taxed if not agreed.
Catchwords:	**NEGLIGENCE** – DUTY OF CARE – Whether bank owes a duty to customers to protect them from the actions of criminal third parties – where primary judge found no duty owed – appeal dismissed.
Legislation Cited:	*Civil Law (Wrongs) Act 2002* (ACT) ss 40, 42, 43, 45, 45(1) *Civil Liability Act 2002* (NSW) ss 5D, 5D(1) *Liquor Act 1982* (NSW)
Cases Cited:	*Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 *Agar v Hyde* [2000] HCA 41; 201 CLR 552 *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479 *Beale v Government Insurance Office of NSW* [1997] 48 NSWLR 430 *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* [1976] HCA 65; 136 CLR 529 *Caltex Refineries (QLD) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649 *Chomentowski v Red Garter Restaurant Ltd* (1970) 92 WN (NSW) 1070 *Chordas v Bryant (Wellington) Pty Ltd* (1988) 20 FCR 91 *Coca Cola Amatil (NSW) Pty Ltd v Pareezer* [2006] NSWCA 45; (2006) Aust Torts Reports 81-834 *Club Italia (Geelong) Inc v Ritchie* [2001] VSCA 180; 3 VR 447 *Dansar Pty Ltd v Byron Shire Council* [2014] NSWCA 364; 89 NSWLR 1 *Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45; 10 ACTLR 1 *Fox v Percy* [2003] HCA 22; 214 CLR 118 *Fraser v State Transport Authority* (1985) 39 SASR 57

Ex Parte Powter; Re Powter (1945) 46 SR (NSW) 1
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; 211 CLR 540
Hunter and New England Local Health District v McKenna [2014] HCA 44; 253 CLR 270
Karatjas v Deakin University [2012] VSCA 53; 35 VR 355
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; 243 CLR 361
Mifsud v Campbell (1991) 21 NSWLR 725
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61; 205 CLR 254
PAB Security Pty Ltd v Mahina [2009] NSWCA 125
Perre v Apand Pty Ltd [1999] HCA 36; 198 CLR 180
Public Transport Corporation v Sartori [1997] 1 VR 168
Roads and Traffic Authority of New South Wales v Dederer [2007] HCA 42; 234 CLR 330
Robinson Helicopter Company v McDermott [2016] HCA 22; 90 ALJR 679
Smith v Leurs [1945] HCA 27; 70 CLR 256
South Tweed Heads Rugby League Football Club Limited v Cole [2002] NSWCA 205; 55 NSWLR 113
Strong v Woolworths Ltd [2012] HCA 5; 246 CLR 182
Sullivan Ltd v Moody [2001] HCA 59; 207 CLR 562
TAB Ltd v Atlis [2004] NSWCA 322
TAB Ltd v Beaman [2006] NSWCA 345
Vairy v Wyong Shire Council [2005] HCA 62; 223 CLR 422

Parties: Gary Nigel Roberts (Appellant)

Westpac Banking Corporation (Respondent)

Representation: **Counsel**

Mr D Campbell SC with Mr A Muller (Appellant)

Mr V Higgs SC with Ms V Thomas (Respondent)

Solicitors

Slater and Gordon (Appellant)

Wotton Kearney Insurance Lawyers (Respondent)

File Number: ACTCA 58 of 2015

Decision under appeal:

Court/Tribunal:	Supreme Court of the ACT
Before:	Ashford AJ
Date of Decision:	7 December 2015
Case Title:	Roberts v Westpac
Citation:	[2015] ACTSC 397

MURRELL CJ:

1. The appellant appealed against the dismissal of his claim against the respondent bank for damages associated with a post traumatic stress disorder that he sustained when,

as a bank customer, he was present during an armed robbery of the bank. In the course of the robbery, the robber directed a bank employee "Don't press the button. I'll fucking kill (the appellant)", but she did not "hear" the direction and activated pop-up screens. The robber fired a shot into the air which (at least, in part) caused the appellant to develop a post-traumatic stress disorder.

2. The appellant argued that the respondent bank owed a duty to customers who were on the bank's premises to take reasonable care to protect them against the foreseeable risk of harm posed by the criminal behaviour of a bank robber who has gained entry to the bank. The appellant contended that the exercise of reasonable care required that bank staff be trained that, once they were "engaged" with a bank robber, the instructions of the bank robber must always (or, at least, almost always) be followed. Had such training been given and followed, the appellant would not have suffered a post traumatic stress disorder.

3. The relevant facts, findings of the primary judge and legal principles are set out in the judgment of Burns and Gilmour JJ. I too would dismiss the appeal. I agree with their Honours' reasons for finding that the primary judge's reasons were not inadequate. Otherwise, my reasons for dismissing the appeal are more limited than those of their Honours.

Miscellaneous appeal grounds concerning the bank employee's evidence

4. The appellant complained that the primary judge should have rejected the evidence of the bank employee, that she had been trained about how to deal with a bank robbery, because the evidence about training was "hearsay".

5. This complaint is without merit; the evidence was direct evidence, not hearsay.

6. Next, the appellant said that the primary judge erred in finding that the appellant did not hear the bank robber's threat to injure the appellant.

7. The employee gave evidence that she had been trained about "giving in" to the demands of a robber and had been instructed that pop-up screens could be activated if it seemed safe to do so. She complied with that training. Before activating the pop-up screens, she assessed that it was safe to do so. She perceived (incorrectly) that the robber's gun was pointed at her work colleague (rather than the appellant) and she did not activate the screens until her colleague had crouched down behind the counter. She heard the robber's instruction that she should not "(press) the button" but she did not "hear" the associated threat to kill the appellant if she activated the screens.

8. The primary judge was entitled to accept the employee's evidence that she did not "hear" the robber's threat to shoot the appellant if the screens were activated. There was evidence before the primary judge of a well-known phenomenon of "auditory exclusion." Further, it is common sense that a person's perceptions may be inaccurate when they are subjected to urgent and serious threat.

Duty of care

9. The appellant contested the primary judge's conclusion that the bank did not owe a duty to the appellant to take reasonable care to avoid the foreseeable risk of injury associated with the unpredictable criminal conduct of a robber.

10. I find it unnecessary to decide whether and in what circumstances a bank may owe a duty to customers who are on the bank's premises to take reasonable care to protect them against the risk of injury posed by the criminal behaviour of a robber who is present inside the bank.

11. I will assume that such a duty existed in the circumstances of the present case. Further, I will assume that the content (or scope) of the duty included training bank employees about how to deal with robbers for the purpose of minimising the risk of physical and psychological injury to themselves, fellow employees and bank customers.

12. Nevertheless, the appellant's claim must fail because, as the primary judge found, the appellant established neither breach of such a duty nor causation.

Breach of duty

13. The primary judge was entitled to find that the appellant had failed to establish a breach of any duty to train.

14. In relation to the scope of any duty to train, on the evidence it was not open to find that training about harm minimisation should have been to the effect that employees must always follow the directions of a bank robber. Neither expert advocated for an inviolable rule. Although the experts disagreed about the extent to which bank employees should have the discretion to engage pop-up screens, they agreed that there must be some discretion.

15. It cannot sensibly be argued that a robber's instruction that pop-up screens not be engaged should be followed regardless of the circumstances. As Burns and Gilmour JJ observed, the instruction for which the appellant contended is impractical and unreasonable and may have resulted in a breach of the bank's duty to its employees.

16. Even the appellant did not argue for an inviolable rule. Rather, it was submitted that the training should have been to "almost always" comply with a robber's instructions. However, the appellant failed to clearly articulate the exceptions to the "almost always" rule and failed to establish that the subject circumstances were not among those exceptions.

17. The case of *Coca Cola Amatil (NSW) Pty Ltd v Pareezer* [2006] NSWCA 45; (2006) Aust Torts Reports 81-834 (*Coca Cola*) involved a claim by a worker that the proprietor of vending machines had breached its duty of care by failing to provide a safe system for him to restock the machines, as a result of which he was assaulted and injured. At [3], Mason P observed that, in a case of breach by omission, a plaintiff must clearly identify what should have been done and prove that it was unreasonable in the circumstances not to do it; it is not merely a case of positing, with the benefit of hindsight, that something more could have been done.

18. In essence, the appellant contended that "something more" should have been done by way of training, but did not convincingly articulate that "something more".

19. The primary judge's finding that the bank did not breach any duty to train was correct.

Causation

20. The primary judge was also right to reject the appellant's argument that, if the employee had been trained that she must always (or almost always) comply with all

directions of a bank robber, she would not have activated the pop-up screens, the gun would not have been fired and the injury would not have been sustained.

21. Causation is established by proving that a negligent omission materially contributed to the injury sustained; that the negligently omitted conduct would probably have made a difference: *Coca Cola* per Mason P at [6].

22. In this case, the employee conceded that she was a "rule follower". But it cannot be inferred that a "rule follower" will remember and follow rules when she is under enormous emotional pressure because she believes that her life and those of others are endangered. The instinct to protect oneself and one's colleagues is strong. Further, as the employee did not "hear" the threat against the appellant's life associated with the instruction not to activate the screens, the instruction would have carried less force. The proposition that, had the employee received "proper" training, then she would have behaved differently was not even put to the employee.

23. The evidence did not establish the likelihood that, had she been "properly" trained, the employee would have reacted differently, causing the robber to behave differently, and thereby avoiding injury to the appellant.

24. The appeal should be dismissed.

I certify that the preceding twenty-four [24] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Chief Justice Murrell.

Associate:

Date: 13 December 2016

BURNS AND GILMOUR JJ:

25. The appellant was a customer of the respondent bank, Westpac. He developed post-traumatic stress disorder as a result of his being caught up in an attempted armed robbery at Westpac's branch at Fyshwick in the Australian Capital Territory in February 2010.

26. He appeals from the dismissal of his claim for damages. Particularly, he appeals from the finding that Westpac did not owe him any relevant duty of care. He had contended that Westpac, as occupier of the bank premises, owed him a duty to take reasonable care not to increase the risk of harm to him, as a bank customer lawfully on the premises, from the actions of an armed criminal attempting a robbery there. The relevant precautions said to be necessary against the risk of such harm was for Westpac to properly train its staff including, importantly, training that staff must always obey an offender's instructions during the course of the robbery.

27. We would, for the reasons which follow, dismiss the appeal.

The facts

28. Most of the facts found by the primary judge, other than in one aspect, are not controversial.

29. On 1 February 2010, at around 1:00 pm, the appellant went to the Fyshwick branch of Westpac to bank a cheque. He filled in a deposit slip and then stood in line waiting to be served by a teller. He went to the counter. A female teller was serving him. He briefly noticed something flick past his right side. He heard a male behind him yelling, "Put the money in the bag. Put the money in the bag."

30. Initially, he thought this was a joke. He then realised it was a robbery. The teller stood back slightly. The appellant placed his hands on the counter. He turned his head to the right. He saw a tall man, armed with a gun, wearing a black balaclava. The appellant's perception was that the gun was pointed at himself not the teller. He was frightened of being shot before he got down on the ground, and whilst he was on the ground and in fear of his life he heard the offender say, "I'll fucking shoot him. Put the money in the bag. Don't press the button. I'll fucking kill him". The appellant said, "Please don't shoot me. I've got two kids." He believed he was going to die.

31. The appellant said to the teller, "Please give him the fucking money, please give him the fucking money." He said to the offender, "Look, mate, I'm just getting down on the floor." The offender said, "Put the money in the bag, I'll fucking kill him."

32. Other customers, by this time, were lying down on the floor.

33. The next thing he heard was the bang of the security shutters going up and the offender saying, "I fucking warned you," and then a shot was fired and the offender ran out of the bank.

34. The appellant thought he had been killed. Nonetheless, he got up and ran after the offender to see where he was going.

35. The appellant returned and remonstrated with some of the bank staff as to who had pressed the button and why they had done so when the offender had threatened to kill him.

36. The teller who operated the button which controlled the metal security screen was GS. It was her first day at that branch as a graduate local business banker. At around 12 midday, she was asked to help out in the teller's box. There were four teller positions in that branch, and at the time of the attempted robbery she and another lady, BL, were working as tellers.

37. GS was in teller position 1, to the right of BL, who was in position 3 or 4. She noticed the offender in front of the fourth box furthest from her, closer to BL at the third box. The offender had a shotgun and was wearing a balaclava. She recalled him yelling, "Don't push the button."

38. She said she and BL froze. BL said she was "terrified and frozen". BL looked at GS who nodded her head at BL to indicate to her to give the offender what he wanted. She did this as she had been trained before BL and because she had been there when BL was trained. GS said she had received training in October 2009 when she began working for Westpac. She described the training as having been given by someone called "Elide". She said Elide had told her the bank was covered in the case of a robbery and that she could give in to the demands of the offender. She was also told that there was a security button, and if she felt it was safe enough to push it, she could do that.

39. The appellant complained about the admission of this evidence as to training. The complaint is without substance as we will explain later.

40. BL, in response to the prompt from GS to do so, proceeded to put money in the bag the offender had put through the window. She then pushed the bag towards the offender, who pushed it back saying, "Next box!". GS thought the gun was pointed at BL mostly. She did not recall anything said by the offender involving any threats as to what he would do if the money was not handed over.

41. When the offender pushed the money bag back GS was in the process of crouching, BL said to her that the offender wanted more money. BL then moved toward the teller position beside GS and in doing so crouched down. GS, at that point, decided it was safe enough to press the security screen button as BL was no longer directly in front of the offender and the gun and she was not therefore as exposed. Accordingly, she pressed the button and the security screen went up.

42. Earlier, when all the commotion began, GS had observed a mobile phone on the bench where the screen would drop if activated and she pushed that phone away. This was done by her after she heard the offender talk about not pressing the button.

43. A number of other bank employees gave evidence which the primary judge found was consistent with the evidence of the appellant to the effect that the offender had demanded money from the tellers and had threatened to shoot the appellant if the security screen was activated.

44. GS and BL said they did not hear such threats being made. The primary judge made a finding that GS did not hear the offender threatening the appellant. This finding is challenged.

The conclusion of the primary judge

45. The primary judge concluded, in effect, that Westpac did not owe a duty to the appellant to take reasonable care to avoid foreseeable risk of injury to him from the criminal actions of another. This conclusion was primarily based on her Honour's finding that Westpac had no control over an armed robber's conduct which was unpredictable. This reflected apparent reliance upon the decision of the High Court in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; 205 CLR 254 (*Modbury*).

46. The primary judge implicitly rejected that the scope of any duty owed to the appellant by Westpac required it to train its staff as to how to respond in the event of an armed robbery. Her Honour, in so finding, acknowledged the expert evidence and the content of training manuals which counselled the importance of compliance with an offenders demands and the avoidance of action which might antagonise an offender. In any event, the primary judge concluded that such training could never predict how staff would react during a robbery nor how any other person would react and that there must be some discretion vested in staff in such a tense situation.

Grounds of appeal

47. The grounds of appeal as amended are as follows:

(a) Her Honour failed to give any or any sufficient reasons for finding that GS did not perceive a threat to the plaintiff in the circumstances of the robbery. Such a finding was against the evidence or the weight of the evidence.

(b) Her Honour erred in finding that the perception of such a threat equated to the hearing of a direct oral threat concerning the plaintiff.

(c) Her Honour failed to address adequately or at all the plaintiff's contention that the duty of the defendant included a duty not to increase the risk of harm to persons who were lawfully on the defendant's premises.

(d) Her Honour erred in failing to find that a duty of care was owed to Mr Roberts by Westpac in the circumstances as found by her, as ought to have been found by her, or at all.

(e) Her Honour erred in finding that GS's conduct was impacted by psychological damage she suffered as a result of the robbery when there was no evidence of such damage.

(f) Her Honour erred in finding that there was no breach of the duty owed by the defendant to the plaintiff in circumstances where:

(i) the evidence demonstrated the existence of an actual threat to the plaintiff (and others);

(ii) the activation of the screens, contrary to the instruction of the robber, materially increased the threat to the plaintiff; and

(iii) the activation of the screens in the circumstances was contrary to good practice, and contrary to the defendant's own systems for the management of an armed robbery threat.

(g) Her Honour erred in allowing GS to give hearsay evidence of a conversation engaged in by her with a person identified only as "Elaide" or "Elide", and her Honour thereafter misused that evidence when determining whether any breach of duty, particularly that concerning any training provided by the respondent to her, had been established.

Grounds (c) and (d) - Duty of care

48. The appellant's articulation of the asserted duty and its scope, first before the primary judge, and then before this Court, was somewhat ambulatory.

49. The appellant's further amended statement of claim pleaded the duty was:

(a) to take all reasonable precautions for the plaintiff's safety whilst he remained lawfully on the premises during its trading hours; and

(b) to take reasonable measures to safeguard the plaintiff from the foreseeable risk of harm from conduct of others on the premises.

50. It appears that, at least in closing submissions, the duty was framed as one to exercise reasonable care for the safety of persons lawfully on Westpac's premises and that the scope of the duty was that it was incumbent upon Westpac, as occupier, to take

reasonable steps not to act so as to increase the risk of harm to others, including customers, in the course of an attempted armed robbery by taking the positive action of activating the fly up security screen. The primary judge was clearly aware that this was the scope of the duty which the appellant proposed. What constituted the exercise of reasonable care was the proper training of its staff and in particular, training them always to obey the instruction of an armed offender in the course of a robbery at the bank's premises.

51. Before this Court, in effect, the scope of the duty was said to be one on the part of Westpac to take reasonable care not to invite an adverse response from the offender or not to take any step to endanger customers who were lawfully on the bank's premises. It was said that this was the formulation whether the duty was described as one to behave so as to minimise the danger arising or a duty not to behave so as to increase the danger arising from the presence of the offender on the premises.

52. It is well settled that an occupier of land owes a duty of care to a lawful entrant to take reasonable care to avoid a foreseeable risk of harm to that person: *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479.

53. In *Modbury* a plaintiff suffered serious injuries when assaulted by three men in a car park at a shopping centre where he worked. He claimed that the landlord of the shopping centre was negligent in failing to leave the car park lights on. The High Court, by majority, held that the landlord owed no duty to the plaintiff to prevent injury to him from random and unpredictable criminal conduct of third parties, even if that conduct was reasonably foreseeable. Gleeson CJ drew a distinction between the control and knowledge which was the basis of an occupier's liability concerning the physical state of land and their absence in an occupier when considering the possibility of criminal behaviour on the land by a stranger: [29].

54. The appellant contends that her Honour's reliance on *Modbury* was misplaced and that her error was to consider the question of duty by reference to one sole circumstance, namely the intervention by, and control of, a third party, rather than evaluating the content or scope of any duty found to exist, by reference to all of the circumstances which were multifactorial.

55. The appellant also complains that the primary judge gave no consideration to the relationship of banker and customer subsisting between Westpac and the appellant.

56. The submission, in effect, was that the primary judge mischaracterised the appellant's case which was one that was distinguishable from what was considered in *Modbury.*

57. The appellant's fundamental proposition is that it was not Westpac's capacity to control the robber which should have been considered but rather the control exercisable by Westpac over its employees whose conduct during the attempted robbery could impact the conduct of an offender.

58. A number of general observations as to legal principles may be made at the outset when considering a case such as this. Ordinarily the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk: *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [81] per McHugh J. A duty of care does not require the prevention of harm; it requires the taking of reasonable care: *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 at [18]. Consideration of the factual matrix in which harm

occurs is relevant to the determination of the existence and scope of the duty of care: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [118]. However, whether there is such a duty is a different enquiry from the question whether there has been a breach. Furthermore, whether there is a duty is a question of law which is determined at a higher level of abstraction than the factual question of breach: *Wyong Shire Council* at [71].

59. The courts have identified a number of factors or salient features that are relevant in determining both the existence and the scope of a duty of care.

60. A non-exhaustive list of such salient features was collected in *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649 by Allsop P (as he then was) (Simpson J agreeing) at [103]. The concept of 'salient features' was employed by Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* [1976] HCA 65; 136 CLR 529 at 575–7. Gummow J adopted this analysis in *Perre v Apand Pty Limited* (1999) 198 CLR 180 at [201]: see also *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [20] per French CJ and Gummow J. The appellant looked to almost all of those identified by Allsop P in support of his contentions as to the existence and scope of the duty asserted by him.

61. Thus the appellant submits that:

    (1) He was vulnerable to harm, and especially so from Westpac's intervening conduct, and he had no capacity to protect himself.

    (2) He had to rely totally on Westpac, even telling its staff to give the offender the money.

    (3) By intervening in the way it did, Westpac assumed a measure of responsibility for the resulting events.

    (4) Proximity was established and in a very direct sense.

    (5) The relationship between the appellant and Westpac, whilst that of occupier and lawful entrant, was also one of banker and customer.

    (6) The activity undertaken by Westpac involving as it did the handling and dealing in potentially large sums of money was of a nature that could reasonably be expected to expose its customers and staff to a risk of injury from offenders.

    (7) The nature or degree of the hazard or danger liable to be caused both by Westpac's activity as a banker, and by reason of its conduct in intervening during a robbery was potentially grave.

    (8) Westpac had (or ought to have had) knowledge that its conduct would or could cause harm to the appellant.

    (9) No question of indeterminacy of liability arises for consideration.

    (10) Obedience would have averted the harm to the appellant.

    (11) No question of autonomy or the pursuit of private rights arises.

    (12) There are no other conflicting duties arising, unlike the position in cases such as *Sullivan v Moody* [2001] HCA 59; 207 CLR 562.

(13) Beyond the *Civil Law (Wrongs) Act 2002* (ACT) there are no matters of consistency with statutory provisions that can arise for consideration.

(14) No question of conformance or coherence can arise.

(15) Additionally, when assessing the total relationship between Westpac and the appellant dictates of fairness and justice favour the imposition of a duty.

62. Accepting that there is no check list, we will nonetheless consider those relied upon by the appellant and will combine some for that purpose. What features may be particularly important will depend upon the nature of the case. In this case, the feature of the extent of Westpac's control, if any, over an offender, coming onto its premises is, in my opinion, the dominant one. The primary judge was correct to approach the case in that way.

Control

63. Whether or not an alleged tortfeasor was able to "control" the circumstances leading to the harm is an important determinant of the existence of a duty of care. What is required is control in a legal or practical sense over the relevant risk of harm: *Agar v Hyde* [2000] HCA 41; 201 CLR 552 at [81] per Gaudron, McHugh, Gummow and Hayne JJ.

64. The relevant risk of harm in this case arose as a direct result of criminal conduct of a third party. It is exceptional to find in law a duty to control another's actions to prevent harm to strangers: *Modbury* at [20] per Gleeson CJ citing *Smith v Leurs* [1945] HCA 27; 70 CLR 256 at 262 per Dixon J. Such conduct is by nature generally unpredictable and irrational and absent some special relationship, the general rule is that the law will not impose a duty to prevent harm to another from criminal conduct of a third party, even if the risk of such harm is foreseeable: *Modbury* at [29] per Gleeson CJ, [113] per Hayne J and [136] per Callinan J.

65. Dr Zalewski, the appellant's security expert**,** acknowledged the unpredictability of an armed offender during the course of a robbery as a real consideration in working out a response. He acknowledged that there could never be any guarantee that an offender, such as the one in the present case, would act in any particular way. He agreed that one can only deal in general terms with the events when looking at these situations prospectively. This, whilst the evidence of a security expert, is rather self-evident as a matter of common sense.

66. Gleeson CJ observed at [26] of *Modbury* that there are circumstances where, because of the relationship between two parties, one has a duty to take reasonable care to protect the other from the criminal behaviour of third parties despite that behaviour being random and unpredictable. Such relationships, it was said, might include employer and employee, or school and pupil.

67. These are exceptional cases and a duty has been imposed where the person with the duty has had power to assert legal or practical control over that third party.

68. In *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420, it was held that the proprietor of licensed premises owed customers a duty to take reasonable care to prevent injury to them from the violent, quarrelsome or disorderly conduct of other persons. This conclusion depended particularly upon the liquor harm minimisation provisions of the *Liquor Act 1982* (NSW). Other provisions of the Act required a

licensee to refuse to admit to licensed premises, or to turn out, any person who was then violent, quarrelsome or disorderly. Thus, the statutory obligations upon the licensee informed the content of the duty.

69. There are other similar examples where intermediate appeal courts have recognised that the operator of a venue, such as a hotel or nightclub, owes a duty to patrons to take reasonable care that they are not injured by the violent or unruly behaviour of other patrons: *Chordas v Bryant (Wellington) Pty Ltd* (1988) 20 FCR 91; *Club Italia (Geelong) Inc v Ritchie* [2001] VSCA 180; 3 VR 447; *South Tweed Heads Rugby League Football Club Ltd v Cole* [2002] NSWCA 205; 55 NSWLR 113.

70. As we mentioned, the control feature to which the appellant points is not Westpac's capacity to control the armed offender directly, but rather its capacity to control its employees and thereby to exert control over the offender.

71. Hayne J in *Modbury* considered the question of control over a criminal at [109]:

> If the appellant owed the first respondent a relevant duty of care, it was to take *whatever* steps were reasonable in all the circumstances to hinder or prevent *any* criminal conduct of third persons which injured the first respondent or *any* person lawfully on the premises. But the acts of those third parties resulted from the choices which they made. Moreover, they were choices which were, as I have said, not necessarily dictated by reason or prudential considerations. It was therefore, a duty to take reasonable steps to attempt to affect the conduct of persons whom it had no power to control. No such duty has been or should be recognised.
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> (emphasis in original)

72. The position as Gleeson CJ observed in *Modbury* at [26] is that it may well be different where the relationship is one of employer and employee. Hayne J also made observations as to this and other relationships focused on the factual question of control at [110]–[111]:

> 110 Some emphasis was given in oral argument to the proposition that an employer may owe an employee a duty to take reasonable care to prevent the employee being robbed. If that is so, however, it is because the employer can prevent the employee going in harm's way (147). The employer has the capacity to control the situation by controlling the employee and the system of work that is followed. The duty which the employer breaks in such a case is not a duty to control the conduct of others. It is a duty to provide a safe system of work and ensure that reasonable care is taken (148).
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> 111 In those cases where a duty to control the conduct of a third party has been held to exist, the party who owed the duty has had power to assert control over that third party. *A gaoler* may owe a prisoner a duty to take reasonable care to prevent assault by fellow prisoners. If that is so, it is because the gaoler can assert authority over those other prisoners (149). Similarly, *a parent* may be liable to another for the misconduct of a child because the parent is expected to be able to control the child (150).
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> (emphasis added)

73. In *Karatjas v Deakin University* [2012] VCSA 53, Deakin University was held to have owed a duty to a woman, who was an employee of an independent cleaning contractor engaged by Deakin, to ensure that there was a safe system of work for her. In particular this was so in directing where the contractor's employees parked their cars and the route they were to take between the car park and the work premises.

74. The woman suffered injuries when she was attacked by a would-be thief as she walked, after work, to the car park. She had been walking along a temporary poorly lit route, rather than the usual well-lit path. This resulted from Deakin blocking the latter path for a temporary purpose. Deakin was held to have breached its duty to the woman although she was not its employee. The imposition of the duty proceeded from the fact of control which Deakin exercised over that part of the system of work in determining where the contractor's employees should be encouraged to park their cars and the paths that should be made available for passage from there to the workplace. Deakin owed her a duty to take reasonable care for her personal safety in that area where it was reasonably foreseeable that persons might be attacked.

75. Westpac, by contrast, had no control over the offender. The appellant acknowledged this. Yet the appellant submits that Westpac owed him a duty not to take any action which would increase the risk of harm to him, and that this duty was breached when GS, as a result of Westpac's failure to properly train her, activated the security screen at a time when the attempted robbery was under way. Such a duty, if owed, could be complied with or breached, only by Westpac staff. The question then is whether in the circumstances of an attempted armed robbery, Westpac exercised practical control over the conduct of its staff in such a circumstance by implementing a training regime which required staff always to obey an offender's instructions. The primary judge rejected this, correctly in our opinion.

76. Westpac did not have any indirect practical control over the offender by its control over its staff, in this case GS, as to how they *must* respond when confronted by an armed offender.

77. The inability to control the conduct of an armed offender in this indirect way is an unassailable obstacle to the imposition of such a duty. A party in the position of Westpac has no capacity to fulfil it. Westpac necessarily acts through its staff. They are not casual bystanders in such circumstances. They too will likely be impacted and some will themselves potentially be victims of a violent crime. They too are vulnerable to harm both of a psychological and physical nature. Their capacity in the course of an attempted armed robbery to act or not act in a particular way so as not to increase the risk of harm to customers of the bank will generally, viewed prospectively, be unknown. Their conduct during an attempted armed robbery is not within the practical control of an employer such as Westpac. The variation in the responses of staff involved in such a frightening episode was recognised by Dr Zalewski. He acknowledged that the incidence of post-traumatic stress disorder in staff involved in such violent crimes is well known.

78. We will deal further with the issue of training when considering breach of duty.

Reliance, assumption of responsibility and vulnerability

79. Whilst the appellant may have had an expectation that Westpac would have measures in place to respond to a robbery, this was "no more than a reasonable expectation of members of the public": *Dansar Pty Ltd v Byron Shire Council* [2014] NSWCA 364; 89 NSWLR 1. It is not reliance of a type that would lead to the imposition of a duty of care of the kind contended for by the appellant.

80. There was no assumption of responsibility by Westpac to protect the appellant from harm. Westpac did have the capacity to put in place procedures and physical protections, such as screens, which might impact on the safety of customers in the

event of a robbery. This does not mean that it assumed responsibility or an obligation to care for the protection of customers in its bank premises from harm from third parties: *Modbury* at [23] per Gleeson CJ.

81. Often, reliance and assumption of responsibility are but indicators of a plaintiff's vulnerability to harm from the defendant's conduct and it is the concept of vulnerability rather than these evidential indicators which is the relevant criterion for determining whether a duty of care exists: *Perre v Apand* per McHugh J at [125]. Here there was no relevant conduct of Westpac to which the appellant was vulnerable.

82. Plainly, the appellant was vulnerable to the risk of violent crime as were other customers and Westpac's staff. This generalised vulnerability is not of a kind so as to warrant imposing a duty of care with the scope for which the appellant contends.

The nature of the activity undertaken by the respondent and respondent's knowledge

83. The relationship of banker and customer, does not, contrary to the appellant's submission**,** create a special relationship giving rise to the duty of care for which the appellant argues. The appellant's colourful submission that the nature of Westpac's activity lured robbers to its bank premises does not alter this conclusion.

84. Westpac's business is one of banking. An attempted armed robbery at one of its branches was foreseeable. It was not, however, a daily incident of its business any more than any other business which involves regular significant cash transactions.

85. Westpac knew of the possibility of robbery attempts as evidenced by its manuals, procedures and its installation of the security screen. The evidence was not that robberies were common-place either generally within the banking sector in Australia, or with Westpac or at this particular branch.

86. By contrast, in *Adeels*, the defendant operated licensed premises, a business the ordinary incident of which had the potential for alcohol abuse and anti-social behaviour by its patrons. The very nature of the business involved its customers potentially creating the relevant risk of harm.

87. The normal activities undertaken by Westpac in its business of banking do not have this inherent quality.

88. Another illustration is afforded by *TAB Ltd v Atlis* [2004] NSWCA 322*.* There it was held that the TAB owed a duty of reasonable care to patrons who came to its premises to place bets. The scope of the duty extended to the taking of reasonable measures to control rowdy and dangerous patrons whose activities had the potential to threaten the safety of other patrons. The relevant TAB staff member had spoken to the men whose conduct was the immediate cause of the injury, and realised that their activities on the TAB's premises constituted a risk of injury to the other patrons. This knowledge, in particular, was significant to the imposition of the duty to take reasonable steps to prevent injury to other TAB patrons from the activities of those two men.

89. Ipp JA (Beazley JA agreeing), in so concluding, referred at [35] to what he had said (Heydon JA and Santow JA agreeing) in *South Tweed Heads Rugby League Football Club Limited* at 137 [152]:

> "[The general duty on the part of the occupier to take reasonable care to avoid a foreseeable risk of injury to the entrant] ordinarily concerns risk of injury from the condition

> of the premises, but this is not an inevitable limitation on the scope of the duty. If, to the knowledge of the occupier, *activities conducted on the premises bring about a risk of injury to the entrant,* the circumstances may give rise to a duty of care wide enough to encompass a duty to take reasonable care to avoid a foreseeable risk of injury arising from those activities: *Canterbury Municipal Council v Taylor* [2002] NSWCA 24. Typically, the foreseeable risk of injury in such a case is the risk of physical injury directly caused by the known activities on the premises." (Emphasis added).

90. Westpac, here, had no such operative knowledge. The risk of harm was not brought about by the banking activities ordinarily carried on in its premises. To the contrary, the risk was occasioned by the unexpected and extraordinary, albeit foreseeable, activity, not of a customer, but of an armed criminal.

Conflicting duties

91. This feature is another important consideration militating against the imposition of a duty of care.

92. Westpac had both common law and statutory obligations to protect the safety of its employees including to take reasonable care to protect its own employees from physical harm as a result of the criminal conduct of a third party. *TAB Ltd v Beaman* [2006] NSWCA 345 is such a case. The TAB was found to have breached its duty of care by failing to provide a bullet-proof screen to protect its employees: see also *Chomentowski v Red Garter Restaurant Ltd* (1970) 92 WN (NSW) 1070 (*Chomentowski*); *Public Transport Corportion v Sartori* [1997] 1 VR 168; *Fraser v State Transport Authority* (1985) 39 SASR 57; *PAB Security Pty Ltd v Mahina* [2009] NSWCA 125.

93. In *Chomentowski,* Sugerman P acknowledged that, whilst the employer was unable to control the activities of members of the criminal class, the employer was able to avoid exposing the plaintiff to their consequences.

94. This case is no different. Westpac arguably owed a duty to its employees to take reasonable steps to protect them, in the course of their employment from the actions of a criminal. Such a duty might well conflict with any supposed such duty to protect its customers. For example, an allegation of breach of duty might have been made by one of the tellers if there had been no screens or where they had been installed, whether by training or instruction, Westpac had prevented staff from activating them for their own protection in order to protect customers. Indeed that is the very kind of circumstance that might have occurred in this case.

95. Such conflicting duties are irreconcilable: see eg *Hunter and New England Local Health District v McKenna* [2014] HCA 44; 253 CLR 270 at [29]. Compliance with a duty to customers might put members of its staff at risk: see eg *Electro Optic Systems Pty Ltd v State of New South Wales* [2014] ACTCA 45; 10 ACTLR 1 at [340]. The foreseeability of such a conflict occurring in the circumstances of an attempted armed robbery at Westpac premises was acknowledged by Dr Zalewski. Where a suggested duty of care would give rise to conflicting obligations that will ordinarily be a reason for denying that the duty exists: *Sullivan v Moody* at 582 [60]. This is such a case.

Conclusion

96. That the risk of harm to a customer during the course of an attempted armed robbery was foreseeable is not sufficient of itself to impose upon Westpac, as the occupier of

the bank premises, a duty to take reasonable care not to increase the risk of harm to a customer from the criminal behaviour of a third party.

97. The salient features, on the particular facts of this case, which we have discussed, are antithetical to the imposition of any such duty as asserted by the appellant. The primary judge was correct to so find. No appealable error has been established.

Grounds (a), (b), and (e) - Factual challenges

98. Whether it be put on the basis of lack of proper training by Westpac or a failure by GS to comply with training, an important fact, in either case, is the finding of the primary judge that, relevantly, GS did not hear the offender's threats to shoot the appellant if the button which activates the security screen was pressed.

99. The appellant argues, in effect, under grounds (a), (b) and (e) that this finding was not open.

100. We will consider this challenge although it is not crucial to the appeal. The appellant contends that Westpac failed to properly train GS as to how to conduct herself during an armed robbery and in particular failed to train her always to obey the offender's instructions. Whether she heard the offender threaten to kill the appellant or not does not dispose of the appellant's case on this ground because GS, as the primary judge found, did hear the offender give instructions not to push the button which activated the security screen. This instruction was not followed by GS. We will return to this later when considering causation.

101. The appellant correctly observed that, with some little variation, the evidence of the appellant and other customers was that the offender demanded money from BL and had stated words to the effect "Don't activate the screens or I'll shoot him (the appellant)".

102. The appellant submits that the findings as to what other witnesses heard demonstrates that the offender was clearly audible, was speaking loudly and was able to be heard by those in the banking chamber, behind the counter, and from the more remotely located offices.

103. The appellant referred to several particular findings of the primary judge variously that:

    (1) GS did not recall anything said by the offender about giving him the money or any threats by him if the money wasn't handed over.

    (2) "The evidence of the two tellers was that they did not hear the words spoken by the offender about threats being made about the plaintiff."

    (3) GS "said in her evidence she did not hear" any threat to shoot the appellant.

    (4) "I accept [GS] did not hear the offender threatening the plaintiff (appellant)."

    (5) "As I have stated I accept [GS] did not hear the offender's threats directed to the plaintiff (appellant)."

104. The appellant submits that these findings were not open and that, in effect, the substance of the evidence of GS was that she did not *remember* any threats being made against any customers which did not warrant the conclusion reached, that she had not *heard* the threat. Rather, the appellant submits, the inference that most

reasonably arises from all her evidence is that when asked more than five and a half years later her recall was imperfect.

105. We reject this challenge.

106. GS was asked during her evidence-in-chief whether she remembered any threats being made if the money was not handed over, and her answer was "no". Then this exchange occurred:

> [MR HIGGS]: ... “Do you remember any threats being made against the customers?”
>
> [GS] “No”.

107. She referred in her evidence to "the robber yelling" and remembered "that he was yelling 'don't push the button' at the beginning", but did not remember any threats being made against the customers. BL's evidence was to similar effect.

108. It was, in my opinion, well open to the primary judge to infer from this evidence that GS did not hear any threats being made to the appellant. That she gave evidence answering “no” to the question “Do you remember any threats being made against the customers?” does not necessarily or probably mean that she must have heard the threat because others heard it and that because of the passage of time she could no longer recall it.

109. Both GS and BL made statements to the police on the day of the robbery. These each and in combination support the finding. They do not refer to any threats made by the offender to or concerning the appellant. It is accepted by Westpac that the police statement of each recorded, in substance, answers given to questions asked by the police. That this is so does not affect the conclusion. GS's statement to the police includes a description of the barrel of the gun pointing towards BL, and she describes the offender “yelling saying 'Don't press the button, don't press the button.” She then stated:

> We were both crouching behind the desk at this point and I thought we were safe enough to press the security button so I pressed it and the security screen went up.

110. BL's statement to the police was also that the gun was pointing at her.

111. The unchallenged evidence of GS was that she gave a full and accurate account of what she then recalled about the incident when she gave a statement to the police.

112. It was not put to GS in cross-examination that she had in fact heard the threat made by the offender to the appellant but had simply, with the passage of time, forgotten.

113. That GS’s and BL’s evidence on this issue is different to the evidence of other witnesses was capable of being reconciled. Mr Smith, a security consultant called by Westpac, noted that an armed robbery event was an extremely stressful situation, which may result in the onset of auditory exclusion. Dr Zalewski also agreed that auditory exclusion is a well-known, indeed common, phenomenon.

114. There was a clear evidentiary basis for the primary judge to conclude that this *may* have been why GS did not hear the threat concerning the appellant. It was not a definitive finding that GS had suffered psychological damage which had impacted her conduct (ground (e)). It was not the only factor. The primary judge concluded that the general noise and shouting may also have contributed to her not hearing the threat.

115. The primary judge considered the totality of the evidence and her Honour's conclusion, relevantly, that GS did not hear the offender threatening the appellant, was a finding that was reasonably open on this evidence.

116. This finding of fact has not been demonstrated to be wrong by "incontrovertible facts or uncontested testimony", is "glaringly improbable" or "contrary to compelling inferences": *Robinson Helicopter Company v McDermott* [2016] HCA 22; 90 ALJR 679; *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [28]–[29].

Grounds (f) and (g) - Breach of Duty

117. We will assume for this limited purpose that Westpac, contrary to our conclusion that the primary judge was not in error in finding there to be no relevant duty, did owe the appellant a duty to take reasonable steps not to act so as to increase the risk of harm to its customers from the actions of an armed offender at the bank's premises. This is the content of the duty for which the appellant contended.

118. Ground (f) contends that the learned trial judge erred in finding that there was no breach of duty owed by the defendant "in circumstances" where:

    (a) The evidence demonstrated the existence of an actual threat to the appellant (and others);

    (b) The activation of the screens, contrary to the instruction of the offender materially increased the threat to the appellant; and

    (c) The activation of the screens in the circumstances was contrary to good practice, and contrary to the respondent's own systems for the management of an armed robbery threat.

119. This seems to be in support of its argument that the activation of the security screen was a breach of duty, directly, by Westpac, and not vicariously. We will proceed on that basis.

120. Breach requires the correct identification of the relevant risk of harm: *Dederer* at [18], and as Gummow J there observed, this has not been altered by the *Civil Liability Act 2002* (NSW), which does not define or prescribe duty for the purposes of the law of negligence. So too is the position with respect to the *Civil Law (Wrongs) Act 2002* (ACT).

121. Accordingly, to resolve the question of breach, the Court must apply to the alleged acts or omissions the principles set out in ss 42 and 43 of the *Civil Law (Wrongs) Act 2002* (ACT). Sections 42 and 43 provide:

> **42 Standard of care**
>
> For deciding whether a person (the defendant) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.
>
> **43 Precautions against risk – general principles**
>
> (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.

(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):

(a) the probability that the harm would happen if precautions were not taken;

(b) the likely seriousness of the harm;

(c) the burden of taking precautions to avoid the risk of harm;

(d) the social utility of the activity creating the risk of harm.

Risk of harm

122. For each alleged breach, it is first necessary to identify the relevant "risk of harm". By virtue of s 40 of the *Civil Law (Wrongs) Act*, in the context of the present case, the relevant risk of harm is the risk of personal injury resulting from acts of a third party attempting to rob Westpac bank premises.

123. The appellant contends that the "risk", one which was foreseeable and not insignificant, was the risk that Westpac staff when faced with a robbery may act in a way that would increase the risk of serious injury to those then present on the premises.

124. This submission mischaracterised the relevant risk. The risk that Westpac staff might increase the risk of harm to customers by their actions during an attempted armed robbery is not a relevant risk of harm for the purposes of s 43.

Precautions - training

125. As for Westpac's asserted direct liability, the appellant argues, in effect, that the precautions which, for the purposes of s 43, Westpac ought to have taken, required it to properly instruct its staff and instil in them how to respond when confronted by an armed offender. Such measures were described by the appellant as being simple measures and that it was no answer to the failures it identified for Westpac to point to some kind of unfettered, independently derived, discretion in employees as to how they should respond in any given situation.

126. The primary instruction which it contended ought to have been given, was that its staff should at all times obey the offender. This has only to be stated to see that it is impractical and unreasonable.

127. No doubt advice can be given to employees of a bank or any other business with cash on its premises, as to how generally to respond in the case of a violent robbery. This, at least arguably, may form part of Westpac's statutory and common law duties to its employees to provide a safe place and a safe system of work. However, failure to do

so does not translate to a breach of duty to its customers of the kind contended for by the appellant in the particular circumstances of this case.

128. The content of ground (f)(iii), that the activation of the screens in the circumstances was contrary to good practice and contrary to Westpac's own systems for the management of an armed robbery, seems at odds with the asserted breach if it be a breach of a duty owed by Westpac directly.

129. Nonetheless, submissions as to a failure to train were made by the appellant and we will treat it as a live issue in the appeal. The appellant's case was that GS should have been trained always to obey an offender's instructions and that, had this occurred, GS would have obeyed the offender's instruction not to push the button activating the security screen.

130. However, we will first consider a complaint going to asserted inadequacy of reasons.

131. The appellant complained in submissions and obliquely, possibly, in the grounds of appeal, that the primary judge failed to engage sufficiently with the expert evidence as to how staff ought to be trained to conduct themselves in the event of an armed robbery. This is without substance. The primary judge referred sufficiently to that part of the appellant's case, albeit briefly, which asserted that the critical instruction to be given to staff was that they obey the offender's directions, a proposition found variously in the literature, including the Work-Cover Manual as well as material from the Australian Federal Police. Her Honour referred also to the evidence of expert witnesses which was to like effect.

132. However, the primary judge concluded that failure to give such training was not a breach of the duty acknowledged to have been owed to the appellant stating at [111]–[113]:

> 111. It is foreseeable as in the event of an armed robbery in a bank those involved as customers or staff may suffer psychological damage, and this clearly occurred not only to the plaintiff but also to [BL] and [GS] and to other customers. All the training manuals tendered and referred to by the security experts emphasise compliance with the offender's demands, and staff are directed to hand over money and avoid any conduct such as sudden movement to antagonise an offender.
>
> 112. However, training can never predict how the staff will react during a robbery, nor indeed, how any other person will react. A robbery is unpredictable. The defendant had no knowledge or forewarning. Clearly, risks are minimised if certain procedures, including handing over money, are followed, but there must be some discretion vested in staff in such a tense situation. [GS] thought it safe to press the button, and consequently did so.
>
> 113. I do not find there was a breach of the duty owed by the defendant to the plaintiff and I find there was no duty to prevent harm from criminal activity by a third party. I am satisfied the bank took reasonable steps to hinder the robber, but could never control the actions of the offender. It was foreseeable there could be a robber, but this does not satisfy the duty.

133. It is unnecessary for a judge to refer to all evidence led in proceedings or to indicate which of it is accepted or rejected: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 per Samuels JA. Nor is it necessary for reasons to be lengthy or elaborate: *Ex Parte Powter; Re Powter* (1945) 46 SR (NSW) 1 at 5. No mechanical formula can be given

in determining what reasons are required: *Beale v Government Insurance Office of NSW* [1997] 48 NSWLR 430 at 443 per Meagher JA.

134. The primary judge's reasons referred to the critical aspect of training relied upon by the appellant as well as to the literature adduced in evidence which supported this. Her Honour also described the practical shortcomings of expecting compliance with such training by bank staff caught up in an attempted robbery with its sudden unexpected occurrence and attended by such unpredictability, including the unpredictability of how staff would react in such circumstances. Then, her Honour reached a conclusion of law, referrable to her findings of fact, that there was no breach of duty. This conclusion was the product of a reasoned rejection of the assertion that fulfilment of the accepted duty of taking reasonable care to avoid harm to its customers on its premises involved training staff always to obey an offender's instructions.

135. The reasons given were adequate.

136. Turning now to the argument that the primary judge ought to have found that Westpac was in breach of duty by failing to train GS properly, the appellant contends that GS required "primary instruction as to obedience" and that, based on the evidence of Dr Zalewski, once engagement with the offender had occurred, "obedience was mandated". No discretion is to be left to the employee.

137. Dr Zalewski, in cross-examination, did not maintain his opinion that an inflexible rule should apply. He agreed that "you can't just have a standard policy that says well, no matter what, we won't up the screen and no matter what we won't activate them". He volunteered that it would be "ridiculous" to suggest a blanket rule that the screens not be activated in all cases more than 4 seconds after entry. He noted that the literature would never prescribe when an organisation should activate a screen, because that would depend on the circumstances of each individual organisation, based on that organisation's own risk assessment. His evidence does not support a conclusion that a reasonable person in the position of Westpac, as part of taking precautions against a risk of harm, would have trained its staff to act in this inflexible manner and which left no room for the individual discretion of staff members. He accepted an incalculable variety of different circumstances that can arise with respect to any particular robbery. The risks, he agreed, are different from location to location and from robbery to robbery, and there is no way to predict what the robber is going to do.

138. Ultimately, Dr Zalewski accepted the need to preserve some discretion. Mr Smith, Westpac's security consultant, was of the same opinion. He also explained that the fact that an offender was "engaged" with bank staff at the counter did not mean that the security screen should not be activated. This, he said, was because, once activated, the offender will shift their focus from obtaining the cash to not being apprehended.

139. The precaution contended for here, that staff should be trained always to obey an offender's instructions, is not, in my opinion, one that a reasonable person, in this case Westpac, would have taken. Indeed, such an inflexible instruction to staff, who are themselves likely victims of harm in an attempted robbery, would likely be a breach of the bank's duty to those staff, should compliance with that instruction be causative of their harm. No breach arises from a failure to take this precaution. The primary judge was correct in so finding.

The hearsay objection

140. GS gave evidence of some training she had received. The admission of this evidence, over objection, is challenged under ground (g) on the basis that it constitutes hearsay. It is not strictly necessary to consider this in light of my conclusion that Westpac would not be in breach of the assumed duty by failing to train its staff in the way contended for by the appellant.

141. In any event, we would not uphold this ground. The evidence in question was elicited as follows in chief.

142. GS gave the following evidence:

> [MR HIGGS]: ... Had you had any training? --- *Yes I had training*.
>
> When did you have the training? ---*At the beginning when I started. I think I started in October 2009.*
>
> And do you remember who gave you that training? --- *Yes, Elaide.*
>
> Sorry? ---*Her name was Elide.*
>
> …
>
> [MR HIGGS]: ... And that I've asked you about training that you received that you told us about, some in about October I think you said, and you've given us the name of this lady. That's the Christian name of the lady. It's not a full name?--- *Yes.*
>
> I asked you what was said, if anything, in respect of what it is you did?--- *In regards to the training?*
>
> Yes, what did she say to you? ---*She said that the bank is covered in the case that you are being robbed and that you can give into the demands to the robber but that there is also a security button if you feel it's safe enough to press you can also do that.*
>
> [MR HIGGS]: When you decided to press the button you were about to, in response to that question, you said yes and you were going to explain, you wanted to add some extra in relation to that. Do you recall that? --- *I think in the moment that I do remember my training in that the money could be handed over and you didn't have to press the button but if you did that it was safe enough to do so you can press it. And because Amani wasn't standing up fully exposed to the gunman and she was crouched next to me I felt it was safe enough to press it and it was just a moment. I was scared but, you know, it was just- it seemed like the opportunity to do so since she wasn't so exposed.*
>
> (emphasis added)

143. The evidence was relevant to GS's state of mind. She understood that she could (not "must") give in to an offender's demands and that she could press the security button to activate the screens if she thought it safe to do so. This was inconsistent with the training obligation for which the appellant argued and which allowed no discretion to disobey an offender's instructions, assuming that they were heard. This was relevant to the question at trial, assuming some obligation to train, whether there was any negligence involved in Westpac failing to properly train GS.

Causation

144. It is unnecessary, in light of my conclusion that no relevant duty was owed, or, if owed was not breached, to consider the question of causation. Causation is raised in the notice of contention but only in the event that this Court were to find that there was a relevant duty owed by Westpac to the appellant and which Westpac breached. Nonetheless we will consider it.

145. Section 45 of the *Civil Law (Wrongs) Act 2002* (ACT) provides for the determination of factual causation in a claim for damages in the Australian Capital Territory.

146. Section 5D of the *Civil Liability Act 2002* (NSW), which is an analogue of s 45, is a statutory statement of the 'but for' test of causation: *Adeels* at [55]. In *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [20], the majority held that under the first element in s 5D(1), factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm, that is, a condition that must be present for the occurrence of the harm. So too is the position under s 45(1) of the *Civil Law (Wrongs) Act.*

147. Even assuming that Westpac was in breach of the assumed duty by failing to train GS to always obey an offender's instructions, this does not establish causation of the harm suffered by the appellant.

148. GS, as the primary judge concluded, did not hear the threat although she did hear him demand that the (security) button not be pushed. This latter instruction she disobeyed.

149. It was incumbent on the appellant to establish, on the balance of probabilities, that if GS had been properly instructed she would have obeyed the offender's instruction not to push the button.

150. The appellant sought to support this necessary fact by inference relying upon GS's evidence that she was a "rule follower". The primary judge did not deal with this question. Such general evidence would, in my opinion, be insufficient to establish factual causation. It cannot be inferred from this fact that GS, in obedience to such training would not have activated the security screen in the circumstances in which she found herself. She was frightened and scared that she might be hurt and particularly scared that BL might be hurt. She apprehended that the gun was pointed at BL most of the time.

151. The characterisation by senior counsel for the appellant of GS's activation of the security screen as a "conscious and considered decision to actively intervene in the manner she did", if intended to support an inference that she was calm and cool in the epicentre of this attempted armed robbery, is misplaced.

152. Her action was deliberate. Nonetheless, the primary judge concluded that there was no doubt GS was extremely traumatised by the events in the bank, and she was concerned for the safety of BL and for herself.

153. The proposition that, had she been trained always to obey an offender, she would not have activated the security screen, was not put to GS by senior counsel for the appellant at the trial.

154. Factual causation was not established.

Damages

155. Such issue as there was in relation to damages has been resolved between the parties.

Conclusion and orders

156. We would for these reasons dismiss the appeal. The appellant must pay Westpac's costs.

I certify that the preceding one hundred and fifty-six [156] numbered paragraphs are a true copy of the Reasons for Judgment of their Honours Justices Burns and Gilmour.

Associate:

Date: 25 July 2017