PARTIES:	DILLON, Peter Grant
	v
	AYRES, John & Ors
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	SUPREME COURT (NT)
FILE NO:	439 of 1984
DELIVERED:	Darwin 14 January 1993
HEARING DATES:	2, 3, 4 November 1992
JUDGMENT OF:	Martin J.

CATCHWORDS:

Negligence - Aircraft accidents - Accidental deployment of parachute inside aircraft - Duty of care owed to untrained observer - Inadequacy of supervision - Qualified instructor to accompany untrained person on aircraft -

Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 441, applied
Hargrave v Goldburn (1963) 110 CLR 40 at 66, applied
Smith v Leurs (1945) 70 CLR 256 at 262, applied
Dorset Yacht Co v The Home Office (1970) AC, applied

Negligence - Contributory negligence - Aircraft accidents - Accidental deployment of parachute inside aircraft - Plaintiff an untrained observer - Dangerous position adopted by plaintiff contrary to instructions -

Law Reform (Miscellaneous Provisions) Act, s16 -

March v Stramare (E and MH) Pty Ltd (1991) 171 CLR 506 at 513, applied
Grant v Southern Shipping Co Ltd (1948) AC 549, applied
Bus v Sydney County Council (1989) 167 CLR 78 at 90, applied

Negligence - Statutes, regulations etc - Admissibility and effect in actions for negligence - Breach of statutory duty may be evidence of negligence at common law -

Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 459, applied

Negligence - Essentials of action for negligence - Proximity and duty of care - Assumption of responsibility by defendant - Duty owed to untrained observer on parachute flight - Responsibility assumed by Parachute Club, members and pilot -

Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 441, applied
Hargrave v Goldburn (1963) 110 CLR 40 at 66, applied
Smith v Leurs (1945) 70 CLR 256 at 262, applied
Dorset Yacht Co v The Home Office (1970) AC, applied

Negligence - Apportionment of responsibility and damages - Aircraft accidents - Accidental deployment of parachute inside aircraft - Apportionment of responsibility as between Parachuting Club, members and pilot of aircraft - Primary responsibility that of Club -

REPRESENTATION:

Counsel:

Plaintiff: T Coulehan
Defendants: J Ayres & CSH Brentnell for self

Solicitors:

Plaintiff: NTLAC
Defendants: -

Judgment category classification:
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 439 of 1984

BETWEEN:

PETER GRANT DILLON
Plaintiff

AND:

JOHN AYRES
First Defendant

AND:

MURRAY BOLTON
Second Defendant

AND:

RAYLENE KERR
Third Defendant

AND:

JOHN CROCKER
Fourth Defendant

AND:

BRIAN J EATHER
Fifth Defendant

AND:

ALICE SPRINGS SKYDIVERS INCORPORATED
Sixth Defendant

AND:

CHARLES SAMUEL HUDSON BRENTNELL
Seventh Defendant

CORAM: MARTIN J.

REASONS FOR JUDGMENT

(Delivered 14 January 1993)

On 21 November 1982, at Alice Springs, the plaintiff was a passenger in a Cessna aircraft. Whilst the plane was airborne he was dragged through an open doorway of the plane by a parachute which deployed from the rig which he was wearing on his back. His body came into contact with part of the tail of the aircraft and he thereby suffered injury. The parachute carried him to the ground. The only question presently for determination is the liability of the defendants or any of them, and as between them, for the plaintiff's loss.

Although more will be said about each of the defendant's in what follows, it is convenient to identify the capacity in which each of the defendants is sued at this stage.

The first defendant, John Ayres, was at the relevant time filling the position of Drop Zone Safety Officer. He appeared in person upon the hearing.

The second defendant, Murray Bolton, was the pilot of the aircraft and he did not appear upon the hearing. He gave evidence in the plaintiff's case.

The third defendant, Raylene Kerr, was a member of the sixth defendant, a parachutist with some experience, who was travelling in the aircraft as a parachutist and jumped from it immediately prior to the incident involving the plaintiff. She did not appear upon the hearing.

The fourth defendant, John Crocker, was also a member of the sixth defendant, a less experienced parachutist than the third defendant, but nevertheless had been travelling in the aircraft and parachuted from it immediately prior to the incident involving the plaintiff. He did not appear at the hearing.

The fifth defendant, Brian Eather, was the owner of the aircraft and a member of the sixth defendant. He was represented at the commencement and during part of the hearing, but during the course of the proceedings settlement was reached as between him and the plaintiff and his counsel withdrew.

The sixth defendant, Alice Springs Skydivers Incorporated, is an association incorporated in the Northern Territory and through which the parachuting activities were conducted. It did not appear upon the hearing.

The seventh defendant, Charles Samuel Hudson Brentnell, was a member of the sixth defendant, was a friend of the plaintiff and an experienced parachutist who

introduced him to the activity on the day in question. He initiated the arrangements whereby the plaintiff was taken on board the aircraft. He appeared in person at the hearing.

The plaintiff had no experience whatsoever with parachutes or parachuting prior to the incident, but had evinced an interest in the activity to Mr Brentnell. Knowing it was standard practice to take a prospective parachutist upon an observation flight, he suggested to the plaintiff that he might be able to organise that at some time. On the day in question he suggested the plaintiff go with him and meet some of the people involved. They went to the drop zone and there were some parachuting operations under way. Mr Brentnell saw the "sortie board" and noticed there was a position available on the aircraft for a later flight. Ms Kerr and Mr Crocker already had their names down, and Mr Brentnell added his. That left one position vacant on the aircraft on that flight, and Mr Brentnell invited the plaintiff to take up that place. Mr Ayres was, in his own words, the Jump Master, the person who had been trained to brief, dispatch and debrief students. He was training under the supervision of the Club's chief instructor, Mr Ellis, who had been at the zone earlier in the day. Mr Brentnell sought and obtained Mr Ayres approval to the plaintiff going on the flight as an observer. Mr Brentnell and Ms Kerr then planned their forthcoming jump from the aircraft. They were to jump together in a "two-

way". Mr Crocker, who was a less experienced parachutist, was to do a particular training jump on his own.

Apart from the pilot, it is clear that there was no room for anyone else on the aircraft once the plaintiff accepted the opportunity to take the place on it. Whilst the others were planning their jumps on the ground, Mr Ayres spoke to the plaintiff. He explained to him that although it was unlikely, he may have to leave the aircraft and instructed him as to how to open the parachute which he would be wearing. He was instructed to grasp the reserve ripcord in his right hand and place his left hand on top of it, to then "exit the aircraft" and as soon as he was clear of it to pull the ripcord straight down with the right hand extended out as far as he could to ensure that the pins had been released from the back of the parachute rig. The evidence is that Mr Ayres also told the plaintiff that whilst he was in the aircraft he was to keep the ripcord protected with his right arm over it so that nothing could be snagged on it, and he said that the plaintiff appeared to understand the instructions that he was being given. He was wearing the parachute rig while the instruction was being given and demonstrated to Mr Ayres his understanding of his instructions.

The particular rig being worn by the plaintiff contained both a main parachute and a reserve parachute, the latter on top of the former, each contained in a bag. The

opening to the reserve parachute bag is secured by pins. On the parachute harness and at about the position of the left breast there is what was described as a "D-ring" located inside a leather pouch with an elasticised opening. On the parachutist grasping and pulling the ring in the method described by Mr Ayres, it emerges from the pouch and its connecting wire causes the pins to come out of the covering over the opening of the bag in which the parachute is contained. A spring then automatically flies out of the bag pulling the parachute with it.

Mr Brentnell's evidence was that once Mr Ayres had finished his instruction to the plaintiff, he was asked if he would show the plaintiff how he should lie in the aeroplane and he agreed to do so. Along with Ms Kerr and Mr Crocker, Mr Brentnell and the plaintiff went to the aircraft where the pilot, Mr Bolton, was waiting. A routine procedure of each checking the others pins and other aspects of their rig was undertaken. Both Mr Brentnell and Ms Kerr paid attention to the plaintiff's rig, and, that finished, they then went to the aircraft. It was a Cessna 182, a smallish light aeroplane. Looking forward, the seat on the left is for the pilot, and when parachuting is being undertaken, the seat immediately to the pilot's right is removed. To the rear there is room for two passenger seats, but again, for parachuting operations, they are also removed. The front right hand seat sits on metal rails which enable it to be slid backwards and forwards. They are

fixed to the floor of the aircraft and are less than the width of a five cent piece in height. The rails do not extend the full length of the aircraft, but at their rear end cease at a point forward of the rear of the door opening. They stand above the floor of the aircraft. On this particular aircraft there is depicted in the photographs what appears to be masking tape in the vicinity of the rails which, in the view of one of the witnesses, was affixed to hold down the carpet. It did not cover the rails. When the aircraft is used for parachuting, the right hand door is removed.

Mr Brentnell described how the plaintiff was to take up his position at the tapered aft end of the aircraft, Mr Crocker on the left hand side behind the pilot's seat, Ms Kerr alongside him, and Mr Brentnell was to take up a position where the right hand seat had been. The plan was that he would jump first with Ms Kerr following almost immediately behind, whereupon the plaintiff was to go to the window of the aircraft and watch them descend. At about that time Mr Crocker was to move from behind the pilot's seat to the opening on the right hand side and commence his descent ten seconds after Ms Kerr. According to Mr Brentnell, he instructed the plaintiff that after he and Ms Kerr had left the aircraft and Mr Crocker had gone to the right hand side, the plaintiff was to move forward, take up a position behind the pilot's seat and watch Mr Crocker jump. The instructions given by Mr Brentnell to the

plaintiff were that after Mr Crocker had jumped he was to lie on his stomach with his legs straight behind him and his arms directly underneath his chest along the inside of the fuselage of the plane, but so that he could move his head just out of the door so as to get a feel of the wind in his face and could look out to see where the parachutists were. There is no reason to doubt the sworn evidence given by Mr Brentnell as to the instructions which he gave to the plaintiff, the relevantly important parts of it being that he was to lie inside the fuselage with his arms underneath his chest and with his head just out of the doorway. Mr Brentnell assured himself that the plaintiff understood his instructions. It is immediately obvious that, according to the plan, once Mr Crocker had jumped there would be no one in the aircraft who could properly supervise the plaintiff as he moved from behind the pilot's seat on the left over to the right hand side and took up his observing position. The pilot, of course, would be busy piloting. The three parachutists and the plaintiff boarded the aircraft, took up the planned positions, proceeded to fly with Mr Bolton, as pilot, to the designated height and place, whereupon the three parachutists jumped in accordance with the plan.

Mr Bolton gave evidence in the plaintiff's case. He was a pilot who regularly flew the aircraft for the benefit of the parachutists. He was not paid for his services. He had only parachuted once and that was some ten

years prior to this incident. He had been flying the aircraft for the Club and the parachutists since August 1982, and said he had flown "quite a number" of operations. He had flown a number of sorties during the morning and commenced flying again at about 4pm, this particular incident taking place on the second afternoon flight. He recalled that whilst he was refuelling and preparing the aircraft he overheard a briefing of the plaintiff by Mr Brentnell. He recalled only that on take off the plaintiff was instructed to take up a position furthest away from the door, and after the parachutists had jumped, he could move to the door, lie on the floor and look out, and then prior to landing, move back to the rear of the aircraft. He did not recall precisely what Mr Brentnell told the plaintiff as to taking up his position on the floor to observe the descending parachutists.

The last of the parachutists, Mr Crocker, jumped at a height of about ten thousand feet and Mr Bolton recalled the plaintiff then coming forward, and he saw him lie, quite sensibly Mr Bolton thought, with his right hand on the step rail just outside the aircraft and his left hand on the framework of the pilot's seat. He was lying on his chest with his right shoulder clear of the open doorway. There are photographs and sketches depicting what Mr Bolton was describing and they show the plaintiff with his head and shoulders beyond the rear of the door opening, with his right arm outside the aeroplane grasping something, a

portion of his head slightly outside, his left hand grasping the frame. It was clear enough from the photographs (exhibit P3 photographs 9 and 10) that if the plaintiff was lying in the position described by Mr Bolton part of the parachute harness containing the D-ring was at least in proximity to the rail nearest to the pilot's seat. In the words of Mr Bolton "he certainly was lying near them, but I could not say whether he was lying on them". He was aware that the rails had not been covered.

Whilst the plaintiff was in that position Mr Bolton commenced the descent, flying in gentle circles allowing the plaintiff to observe the parachutists to the fullest extent. When Mr Bolton was preparing to land the aircraft he tapped the plaintiff on the arm or shoulder and indicated that he was to sit at the back of the aircraft for landing. Mr Bolton thought that the aircraft was then between 500 feet and 1,000 feet above the ground, still descending, the tail being higher than the front. Mr Bolton described what happened in the following words: "I think he just nodded at me, or something. But he then - he then proceeded to sit up, sort of like a push-up, I suppose, for want of a better word, and he was at that - when he was on his knees, about to move back, that I observed a chute go out the door". He was unable to recall whether the plaintiff was then on his knees with his back straight, but said that he would have been moving backwards, but certainly not positioned at the rear of the aircraft. According to Mr

Bolton, before the parachute came out, the plaintiff's right shoulder was aft of the door frame by a reasonable distance - "sort of half way between the door frame and the rear of the aircraft". He saw the flash of the parachute going out the door, probably level with the plaintiff's chest or middle part of his body, the plaintiff still being on his knees. Mr Bolton made a grab for the parachute, but failed, and when he turned around he saw the plaintiff very quickly dragged forwards out the door, after which he heard a large thumping noise which it would appear on the whole of the evidence was the sound of the plaintiff's body striking the tail. The tail of the plane was damaged, but the pilot was able to make a safe landing prior to which he had communicated with the control tower at the airport and advised what had happened. The plaintiff was quickly found and it was noted that he had suffered severe injuries to his head at least.

The incident was investigated by Mr Downing, who was at the time an investigator working in the Bureau of Air Safety Investigation in the Department of Aviation. He gave evidence by way of a description of the aircraft and the damage to it which he had observed. Apart from the seat belt provided for the pilot, there were no other seat belts or other means of restraining a person in the cabin, but there were hard points or very secure points to which the rear row of seats had been bolted which could easily be adapted to provide for restraint. His experience did not

enable him to give any further evidence on that question. In his opinion, the shape of the rails were such that at the end there was a gap under which something could be hooked, that is, at the rear end of the rails. He interviewed both Mr Ayres and Mr Brentnell and his evidence of what they had to say to him was largely consistent with the evidence they gave on oath before the Court. Mr Ayres told Mr Downing that there were no restraints fitted in the particular aircraft, but that he had jumped in other places both in Australia and in the United States and had never had restraints fitted. However, it is not clear whether Mr Ayres was there speaking of restraints in relation to inexperienced observers as opposed to experienced parachutists. He told Mr Downing that he did not brief the plaintiff on what to do in the event of an accidental deployment of a parachute, but that the usual briefing is that in that event the person wearing the parachute is to grab it and sit on it if he can, or if the parachute goes out the door to jump after it. If another person's parachute is seen to accidentally deploy within the aircraft, then the instruction is to push the person out. According to Mr Ayres, in his statement to Mr Downing, it is not necessary for a supervisor to remain in an aircraft with an observer, the pilot being responsible. In his statement to Mr Downing, Mr Brentnell did not describe in any detail the instructions he had given to the plaintiff as to his lying in the aircraft and watching the parachutists. He also told Mr Downing that he had not given the plaintiff any

instructions as to what he was to do if the parachute accidentally deployed and went out the door.

The plaintiff also called Arthur Colin Holt, who has had extensive experience in parachuting, including some three and a half thousand descents, and working as a chief instructor with appropriate licences. At the time of giving his evidence Mr Holt was Chairman of the Instructors' Panel in Victoria, which Panel conducts examinations for parachute instructors for the Australian Parachute Federation. He was able to give evidence that in 1982 the Australian Parachute Federation was the civilian body governing parachuting throughout Australia. It was recognised by the Department of Aviation as the body which regulated the sport. The Federation had at that time an Operational Manual which was considered to be a model which could be adopted or not by parachute clubs. If not adopted, the manual used by a club is required to be approved by the Department. There was some attack upon Mr Holt's recollection as to the document which he produced having been that in operation at the time of this accident, but on the balance of probabilities it is shown that it was. Further, the sixth defendant by its defence admitted that one of its objects was to maintain a reputation of safety and compliance with APF (Australian Parachute Federation) and DOA (Department of Aviation) Regulations. Although Mr Holt gained much of his experience in Victoria, the value of the manual is not restricted to that jurisdiction. It was that of the Australian Parachute

Federation, an organisation recognised nationally, and on the pleadings it seems that the sixth defendant adopted it. Neither Mr Brentnell nor Mr Ayres had any specific knowledge of the contents of those regulations, although the association of which they were members, and under whose auspices they were operating did. In addition to the regulations formulated by the Federation, there were also Air Navigation Orders issued by the Department of Aviation in relation to parachuting. There is some overlap in the subject matter dealt with in the regulations and the orders. No part of the plaintiff's claim is framed upon a breach of statutory duty such as might be imposed by the Air Navigation Orders, but a breach of such a duty may by itself give rise to a separate cause of action, and also be evidence of negligence in common law, per Mason J. in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at p459. Breach of the model regulations, though not having statutory force, also provides evidence of negligence at common law.

By definition in the Air Navigation Orders, a parachutist is a person who is the holder of a parachutist's certificate issued under those orders and includes a student parachutist. A student parachutist is a person who holds the appropriate certificate under the orders. The plaintiff did not fall within either of those definitions, but nevertheless those orders are a helpful guide as to standards to be adopted by and in relation to a person in a

position of the plaintiff, that is, a person riding in an aircraft set up for parachuting, who was wearing a parachute and who had absolutely no experience as a parachutist. It is provided in paragraph 4.2 that the pilot in command of the aircraft from which a parachute descent is made and each parachutist shall ensure that there is no risk of any part of the aircraft becoming fouled by the parachutists or their equipment and at paragraph 4.3, it is provided that where a parachutist is not provided with a seat of an approved type in an aircraft, he shall be provided with a position in the aircraft where he can be safely seated and he shall occupy this position during take- off and landing, flight at a height less than 1,000 feet above terrain, and in turbulent conditions. Approved single point restraints in an aircraft, or where single point restraints are not fitted, seat belts adjusted to ensure adequate restraint, shall be worn by each parachutist at the times listed in paragraph 4.3 (paragraph 4.4). The Air Navigation Orders dealing with conduct of parachute training, require, in paragraph 4.1, that parachute training operations shall only be conducted under the supervision of a Chief Parachute Instructor and in accordance with the Parachute Training Operations Manual. A student parachutist shall not be permitted to observe parachute descents from an aircraft in flight on which the student parachutist is a passenger unless he has received from a parachute instructor the pre-flight instructions specified in the Manual. The Federation Parachute Training Operations Manual at paragraph 3.2.3 provides that student

parachutists making observation flights will be accompanied in the aircraft by an instructor and that the instructor will only exit the aircraft after ensuring the student parachutist making the flight is secured by a seat belt or single point restraint. The importance of the security of the reserve ripcord handle in its pocket is emphasised in paragraph 3.4.1 which requires, that amongst many other things, it be checked by an instructor or jump master immediately prior to a student parachutist emplaning. Other matters which arise in this case are also emphasised in other parts of the manual to do with the training of student parachutists. For example, part of the lesson to do with familiarisation with the aircraft at paragraph 3.9.6 deals with the pre-jump safety check of the aircraft, including reference to "single point restraints fitted - explain use of"; "protection of reserve ripcord at all times". In lesson 10 at paragraph 3.9.10 dealing with emergency procedures is the passage:

> "Canopy open in the aircraft. Protection of reserve will avoid this.
>
> i. If a canopy enters the slipstream - follow it immediately.
>
> ii. If your canopy appears out of the pack contain it, notify the instructor and continue to contain it until the aircraft has landed.

Furthermore, in section 7 of the manual "Additional Operational Procedures" at paragraph 7.4 is the heading "Preparation of Aircraft for Parachuting" which

requires the Drop Zone Safety Officer to ensure that the aircraft to be used is of a suitable type and properly prepared, including "Seat belts or single point restraints are fitted"; "Any projections likely to snag equipment are removed or taped over" and there is a cross reference at 7.5.1 of the Manual to 4.2 of the Air Navigation Orders. Beyond general references to positions of safety, there is nothing provided to the Court in the Air Navigation Orders or the Regulations dealing with the position which might be taken up by a person with the status of the plaintiff whilst observing parachutists who have left the aeroplane.

It appears that Mr Ayres was what was called a "Jump Master" who had been trained to brief, dispatch and debrief students under the supervision of the Chief Instructor of the sixth defendant. He did not claim to hold any certification for such a position and there was no evidence that anybody else involved on the day this incident occurred held any formal qualifications in relation to training. Amongst the Air Navigation Orders is that relating to the examination and certification of parachute instructors providing, inter alia, in paragraph 2.1 that a person shall not act as a parachute instructor unless he is the holder of a parachute instructor certificate, of which there are a number of grades; experience and completion of a course of instruction is required before certification. Although the sixth defendant engaged in the training of people in the sport of parachuting, Mr Ayres had done it on

a number of occasions, there was no evidence that any of those who accepted the responsibility of instructing the plaintiff had any of the qualifications required under the Air Navigation Orders. Of course, as Mr Holt said, there can be no justification for down grading the safety procedures because the person being taken aloft as an observer had not happened to have enrolled with the Federation and the Club as a student. As to the person filling the role of Drop Zone Safety Officer, Mr Holt said that he would normally be the Chief Instructor or the instructor nominated by the Chief Instructor and would be responsible for making sure that a person in the position of the plaintiff is briefed correctly. Mr Holt would expect an instructor would accompany an untrained person on an aircraft.

Mr Holt drew attention to the complexities of parachuting and the multitude of problems that can occur, and said that normally an instructor should be on the aircraft, as it says in the Operations Manual, "To make sure the person, the observer or the student, was seated and secure away from the door prior to leaving the aircraft to avoid any - any possibility of anything going wrong", including the accidental deployment of one or other of the parachutes being worn. As to accidental deployment of a parachute in an aircraft, the standard procedure, according to Mr Holt, would be for some other person to smother it, but that if the parachute went out the door, the standard

procedure is to follow it out as quickly as possible, failing which the wearer would be dragged out of the aircraft as happened in this case. It was acknowledged by Mr Holt, however, that for any person whether well trained or not, it would be unlikely that such a person could voluntarily leap from the aircraft to follow a parachute which had been accidentally deployed in time to avoid being dragged out the door and running the risk of colliding with part of the plane. Mr Holt also drew attention to another feature of the case which is that once a parachute goes out of the aircraft it is a matter of a second or two before the wearer is outside. That assumes that the wearer is not restrained. If the wearer of the accidentally deployed parachute which has gone out of the aeroplane is restrained inside the aircraft then there is a very real risk that the pilot will lose control. During the course of the evidence it appeared that it was not the general practice, certainly not at Alice Springs, for those engaged in parachuting to comply with the orders and regulations concerning the provision and use of restraints. That is a debate into which it is not necessary to enter in this case.

The position adopted by the plaintiff at the doorway after the last of the parachutists had jumped was not one which would be normal in the operations conducted by Mr Holt. The possibility of a person lying on the floor with his head around the corner of the door did not concern Mr Holt if there was an instructor on board who could get

him away from the door. What was of concern was that if he were left on his own Mr Holt was unsure as to how far he might allow his head or body to go outside the doorway. Furthermore, there would be no one to monitor what such a person might do when he or she had to get away from the door and take up a position for landing. He would not advocate that a person such as the plaintiff lie on the floor. Asked as to the appropriate procedure in relation to the plaintiff, Mr Holt said that if he was conducting the operation he would have had an instructor on board who would have hold of the parachute harness on the plaintiff as he moved on his knees close to the door so that he could see the parachutists depart the plane, the instructor would then move him back and sit him down behind the pilot seat facing the rear of the aircraft, and remain with the plaintiff until the aircraft landed. Mr Holt did not see any problem with an instructor also parachuting from the aircraft so long as the person in the position of the plaintiff had been safely seated behind the pilot. So long as the person in the position of the plaintiff was secure, Mr Holt could not see any difficulty with the instructor then leaving. In the case of the operations conducted by Mr Holt, however, the instructor remains at all times.

As to the pilot, Mr Holt was of the view that once he became aware that the plaintiff had taken up his position on the floor in the manner described, it would have been prudent to move him away from the doorway as soon as

possible. The longer the plaintiff remained in that position the prospect of his moving around or catching the parachute harness on something was increased, and if the aircraft struck turbulence, then the greater was the risk. Mr Holt would exonerate the pilot from any responsibility towards the plaintiff arising from the plaintiff taking up his position on the floor, since at the time the plaintiff was doing that, the pilot was very busy flying the aircraft immediately following the parachutists jumping out. However, Mr Holt thought that the longer the plaintiff was allowed to remain in that position, the greater the risk of something untoward happening arising from the plaintiff's moving about or as a result of turbulence, and the pilot should have asked him to remove himself from that position. That was possible bearing in mind the proximity of the plaintiff to the pilot at that time, but beyond telling the plaintiff what to do, the pilot was powerless to do anything else about it.

Being accurately informed as to the position taken up by the plaintiff after the parachutists had jumped out; that at a later time the pilot had indicated to him that he was to leave the doorway and return to the rear of the aircraft, and that as he was rising the reserve parachute accidentally deployed and went out the open doorway, Mr Holt was asked for his opinion as to the cause for the accidental deployment of the parachute. He replied that he had examined the particular aircraft and had "gone over the

whole operation" in accordance with what was understood to have been the scenario. There were a number of possibilities in his mind. One was that the handle was snagged on some part of the aircraft, possibly the rails upon which the passenger seat had rested, or more likely, in his opinion, the handle may have been dislodged prior to or whilst the plaintiff was making his way to the door, and that the plaintiff had accidentally put his hands on it when he came to move upwards and away from the floor thus deploying the reserve parachute. Mr Holt could not be certain either way, but he was more inclined to believe that the reserve handle had been dislodged prior to the plaintiff's moving, although he was unable to say when that may have happened. It could have been when he moved from his position at the rear of the aircraft towards the front, it could have caught on something, perhaps the equipment worn by one of the other parachutists, or it could have caught on the floor as the plaintiff was moving sideways from the rear of the pilot's seat to the right hand side open doorway. Mr Holt thought it would be difficult, though not impossible, for the handle to have been snagged on the rails. From his experience Mr Holt said that normally the handle would be pulled ten or twelve inches before the parachute would be deployed and that would require a force of between ten and twenty pounds. If it was standard operating procedure for people to lay on the floor adjacent to the rails, Mr Holt was of the view that they should have been covered with carpet or a foam type of mattress to make

it more comfortable and safe, the rails were something upon which any part of the parachute equipment could be caught "even if it was a one in a thousand chance I would have covered it over". Mr Holt appears to have agreed with the practice of not restraining even untrained persons wearing parachutes within the aircraft, but would have done so had such a person not been wearing a parachute. On the evidence, including the photographs, it is unlikely that the rails snagged the D-ring and held it whilst the plaintiff moved over a distance of ten to twelve inches. There is no evidence that once the plaintiff had taken up his position on the floor with the D-ring in proximity to the end of the rail he had moved forward on his chest for such a distance so as to have the ring held by the end of the rail and the ripcord extended. If the plaintiff had moved backwards with his chest on the floor, then there does not appear to have been any way in which the rail could have snagged and held the D-ring, nor does the evidence show a probability that if the plaintiff had moved his chest upwards from the floor, the ring would have caught on the rail in such a way as to its being held and causing the ripcord to be operated. There is the possibility that the ring fell over the end of the rail, and that when the plaintiff moved to his right to position his head and shoulder closer to or even out of the aircraft to obtain a better view, the rail held the ring, but there is no evidence upon which that set of circumstances could be raised to a probability.

What can be shown is that the reserve parachute deployed inside the aircraft and that can only happen if the pins which secure the opening to the parachute container have been removed. Given the circumstances of this case, that could only have happened if they were pulled out by operation of the ripcord which is activated by a pulling motion on the ring normally located in the pouch at about the left breast position. Mr Holt's opinion going to the ring having come out of its pouch for reasons unknown, but then being held by the plaintiff's left hand as he pushed the upper part of his body up from the floor, is most likely and probable. Cross-examined by Mr Brentnell, Mr Holt assessed the risk of people being dragged out of aircraft as a result of accidental deployment of a parachute as being very low. In re-examination Mr Holt again took the opportunity to emphasise that the plaintiff would have been in a far safer position if he had been kneeling near the doorway than if he had been laying on the floor because of all the activation devices being on the plaintiff's chest, if he was kneeling they are not in contact with anything, but if he was laying on the floor and moving around there would be more chance of something untoward accidentally happening.

Mr Holt's evidence is accepted. He was well qualified to give it, he understood what had happened on this particular occasion, his reasoning and opinions were plausible. He gave his evidence in a straight forward

manner and did his best to assist the Court. His credibility was not in issue.

The plaintiff suffered his injuries and loss as a result of his body coming into contact with the tail of the aeroplane consequent upon his being dragged from the open doorway by a reserve parachute which he was wearing which had deployed inside the aircraft. For it to deploy the D-ring on the harness in proximity to the plaintiff's left breast was required to have been pulled. Of the only scenarios advanced as to how that came to happen, it is more probable that the ring came to be under the plaintiff's left hand as he pushed the upper part of his body off the floor of the aircraft with a view to taking up another position in preparation for landing. The plaintiff had been lying on the front of his body with his chest on the floor of the aircraft contrary to the instructions he had been given. He suffered damage as a result partly of his own fault and of that of other persons and the damages recoverable by him are to be reduced to such an extent as it is thought just and equitable having regard to his share in the responsibility for the damage (*Law Reform (Miscellaneous Provisions) Act* s16).

The deployment of the parachute inside the aircraft could easily have been avoided, not only if the plaintiff had followed the instructions he was given, but also if there was a person on board the aircraft who was

responsible to see that he obeyed the instruction and was in a safe position prior to the aircraft landing. This particular operation was conducted contrary to the Air Navigation Orders, the Manual, and commonsense. A risk of a parachute accidentally deploying inside an aircraft, though slight, is nevertheless acknowledged as being real and carrying very serious consequences. Parachutists check each others rig to ensure security of the pins which hold the parachute in its bag. If a parachute does come out of its packing in an aircraft, the procedure is to attempt to smother it, and if that cannot be done and it flies out the door, for the wearer to immediately go after it. In practice, people who are wearing parachutes in aircraft with open doors are not restrained because if the parachute accidentally deploys and goes out the door, then the time taken to get out of the restraint and follow it out of the aircraft may be such as to place the aircraft, its pilot and the other passengers at peril. Orders and regulations which are intended to ensure that a ripcord will not be accidentally pulled whilst the parachutist is within the aircraft further demonstrate the likelihood of accidental deployment of a parachute. The design features whereby the ring attached to the ripcord is secured inside a pouch so that it does not hang free and be liable to be snagged or accidentally pulled in some way, points directly in the same direction. The fact that such occurrences may be rare demonstrates that where the rules, regulations, orders and commonsense practices are adopted, the likelihood of

accidental deployment of a parachute inside an aircraft is greatly diminished. The risk of such an untoward happening must be greatest when the parachute is being worn by inexperienced persons such as the plaintiff.

The plaintiff being left practically unattended was the greatest contributing factor to his loss. The nature of the instructions that he was given as to the position to be adopted to observe the others on descent from the aircraft, and the procedure followed by Mr Holt in the operations with which he is familiar, demonstrate that an experienced person acting responsibly towards the plaintiff in the circumstances would have intervened so that he did not adopt the position on the floor such as he did, would have supervised the plaintiff's movements within the aircraft so as to minimise the risk of accidental deployment of the parachute, and would have been in a position to direct and ensure that the plaintiff took up a safe position for landing once his observations were completed.

In his answers to interrogatories, the pilot acknowledged that his prime duties included that of piloting the aircraft from take-off to the altitude nominated for parachute drop, positioning of the aircraft for the drop, holding the aircraft in position during the parachute jump and the exit of the parachutists and to pilot the aircraft in descent and land. He deposed that Mr Brentnell had informed him immediately prior to the flight that the

plaintiff would be on board the aircraft as an observer. According to Mr Brentnell, in his answers to interrogatories, he and Ms Kerr gave the parachute rig being worn by the plaintiff a final pin check and showed him how to ride in the aircraft.

The plaintiff was so incapacitated by his injuries as to be unable to give any evidence as to the incident. He has no recollection of it.

In *March v Stramare (E and MH) Pty Ltd* (1991) 171 CLR 506 Mason CJ. at p513 adopted what was said by Lord du Parcq in *Grant v Southern Shipping Co Limited* (1948) AC 549 that "There is abundant authority for the proposition that the mere fact that a subsequent act of negligence has been the immediate cause of disaster does not exonerate the original offender". That proposition is as equally applicable to a plaintiff's own negligence as it is to concurrent and successive causes of damage on the part of defendants.

At pages 514 and 515, with support from ample authority, His honour reaffirmed that it is for the plaintiff to establish that his or her injuries are "caused or materially contributed to" by the defendant's wrongful conduct, that causal connection is established if it appears that the plaintiff would not have sustained his or her injuries had the defendant not been negligent. The common

law tradition is that what was the cause of a particular occurrence is a question of fact which "must be determined by applying commonsense to the facts of each particular case". At p520, Dean J. referred to what was pointed out in *Bus v Sydney County Council* (1989) 167 CLR 78 at p90: "The law has progressed" in recent years "by placing an increased emphasis upon the relevance of the possibility of negligence or inadvertence on the part of the person to whom a duty of care is owed".

In deciding in this case whether the necessary relationship of proximity existed between the plaintiff and any of the defendants, and the scope of the duty which such a relationship created, it has been necessary to examine closely all the circumstances disclosed by the evidence to throw light on the nature of the relationship between those parties (see Gibb CJ. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 441). Although, as Gibb CJ. put it at p443, "That as a general rule a failure to act is not negligent unless there is a duty to act, that duty may arise because of the conduct of the defendant or it may be created by statute", see also Brennan J. at p478. At p502 Dean J. discusses the fundamental distinction between a failure to act and positive action: "The common law imposes no prima facie general duty to rescue, safeguard or warn another from or of reasonably foreseeable loss or injury or to take reasonable care to ensure that another does not sustain such loss or injury", per Windeyer J. *Hargrave v Goldburn* (1963)

110 CLR 40 at p66. That being so, reasonable foreseeability of a likelihood that such loss or injury will be sustained in the absence of any positive action to avoid it, does not of itself suffice to establish such proximity of relationship as will give rise to a prima facie duty on one party to take reasonable care to secure avoidance of a reasonably foreseeable but independently created risk of injury to the other. The categories of a case in which such proximity a relationship will be found to exist are properly to be seen as special or "exceptional" per Dixon J. *Smith v Leurs* (1945) 70 CLR 256 at p262 and in *Dorset Yacht Co v The Home Office* (1970) AC at pages 1038-1039, 1045-1046, 1055 and 1060. Apart from those cases where the circumstances disclose an assumption of a particular obligation to take such action, or if a particular relationship in which such an obligation is implicit, they are largely confined to cases involving reliance by one party upon care being taken by the other in the discharge or performance of statutory powers, duties or functions or of powers, duties or functions arising from or involved in the holding of an office or the possession or occupation of property". Earlier at pages 497 and 498 his Honour, in discussing the requirement of proximity as an element of negligence, said: "It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have

known of that reliance".

Amongst the objects of the sixth defendant as set forth in its constitution were those of encouraging the development of the sport of parachuting and skydiving in the Northern Territory, assisting parachutists in the interests of the sport and maintaining a reputation of safety and compliance with the Australian Parachute Federation and Department of Aviation Regulations. If not express, it was certainly implicit that the sixth defendant assumed the responsibility of taking care to avoid or prevent injury to those interested in taking up parachuting and engaged in the sport of parachuting, and it cannot be doubted that the plaintiff relied upon such care being taken. He placed himself in the care of those who, on this particular day, were carrying out the parachuting operations. They knew that he was totally inexperienced. Mr Ayres, Mr Bolton, Ms Kerr and Mr Brentnell assumed a degree of that responsibility. There is no evidence that Mr Crocker assumed any degree of responsibility for the plaintiff nor that the plaintiff was in any degree reliant upon him. It was the duty of the others to ensure that when the plaintiff went aboard the aircraft wearing a parachute for an observation flight that that flight was planned so that a suitably experienced person remained with him at all times until he was properly secured in a safe place within the aircraft after completing his observations. Mr Ayres should not have permitted the flight to proceed without that

precaution. Mr Bolton should not have piloted the aircraft without ensuring the safety of his passenger, the plaintiff, by that means. Ms Kerr and Mr Brentnell should not have stopped short of ensuring that that safety precaution was taken. If one of them was suitably experienced or qualified to take on the role of caring for the plaintiff then one of them should have done so, but if neither of them were so experienced or qualified then they ought not to have accepted or assumed any degree of responsibility for his safety at all. It is not possible to make any meaningful distinction between the first, second, third and seventh defendants as to the degree of their respective responsibility. They all failed in different ways to ensure the one thing which would have avoided the plaintiff's loss, that is, adequate and proper supervision of him at all times on the aircraft until he was safely positioned so as to avoid the risk of the D-ring on the ripcord to the reserve parachute being pulled.

The sixth defendant is liable as well. It failed in its duty by not ensuring that all of those engaged in the sport under its auspices were aware of the necessity to take care of an inexperienced observer in the manner prescribed and as dictated by commonsense and to implement the proper procedure. There is no evidence of any direction or instructions specifically given by it. Mr Ellis, who was described as the Chief Instructor, was not called by any party. The primary responsibility to ensure that proper

care was taken of the plaintiff rested upon the sixth defendant.

The first, second, third, sixth and seventh defendants are liable to the plaintiff for the damage sustained by him in this incident. The damages recoverable in respect of that damage shall be reduced to the extent of 30% being the amount thought just and equitable having regard to the plaintiff's share in the responsibility for the damage. In case it should arise, it would be just and equitable to divide responsibility between the liable defendants to the extent of the damages to be borne by them as to 40% to the sixth defendant and 60% equally as between the first, second, third and seventh defendants.

Order that all the defendants, with the exception of the fourth and fifth, pay the plaintiff's costs.