AN UPDATE ON THE LAW OF NEGLIGENCE

IN PERSONAL INJURY CASES

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Public Liability

Public bodies charged with management of crown lands for the enjoyment of members of the public, such as the Victorian Department of Sustainability and Environment, will often formulate a Management Plan, which charges, typically, a specific Trust with management of the Park for the benefit of Victorians. Amongst its tasks is a requirement to take precautions for the safety of park users. Such a responsibility is in any event imposed on such a body by the common law: **Romeo v NT Conservation Commission**.[1] There have been a number of cases in the High Court of Australia wrestling with the extent of public authorities' liability for serious injuries sustained by, typically, young people while engaged in activities in public areas, especially when diving into pools, rivers and the sea.[2]

The landmark case was that of **Nagle v Rottnest Island Authority**.[3] Here the Court held that the authority was liable in circumstances where it had attracted visitors to the island, and as part of the package encouraged swimming at a waterhole. Mr Nagle was injured when he dived into the waterhole and struck his head on a submerged rock, not visible from above. Given that the Authority was inviting people to the island, over which it had the management and control, it therefore owed a duty to take reasonable action to guard against foreseeable risk of injury. The Court considered that such reasonable action would have been a sign warning of the risk of diving, and prohibiting diving altogether at that spot. In the circumstances, the Court accepted that the plaintiff would likely have heeded such a warning.

Subsequently, the Court dealt with the **Romeo** appeal . In 1987, when aged 15, she had attended at a coastal park managed by the defendant. At one point on a reserve variously estimated at between 2 and 8 kms in length, the defendant had graded a dirt road and formed a parking area near a cliff which was popular with people wanting to watch the tropical sunsets, on the outskirts of Darwin. The plaintiff gathered with friends at this car park and adjacent grassy area, where they consumed some liquor into the evening. Later, she and her girl friend were found lying injured on the beach, some 6.5 metres below the cliff face, having obviously fallen but neither having any idea what had happened. It was inferred that, in their inebriated state they must have mistaken a washaway leading to the edge as a path and walked over it, although it was clear to "an alert and sober person" that it was not a path, and that it led to the unfenced edge of the cliff. The Court by a 5-2 majority rejected her appeal against the dismissal of her claim by the trial judge and the NT Court of Appeal.

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1 (1998) 192 CLR 431.

2 *RTA v Dederer* (2007) 234 CLR 330; *Wyong Shire Council v Vairy* (2005) 223 CLR 422; *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Berrigan Shire v Ballerini* (2005) 13 VR 111.

3 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

In Romeo's case, the majority accepted that the defendant, having the management and control of this coastal reserve for the benefit of visitors, owed a duty of care to such visitors "to take reasonable steps to prevent a foreseeable risk becoming an actuality ([per Toohey and Gummow JJ at [54]). However, their Honours emphasised that it was a ***duty to take reasonable care, but not to ensure no one suffered injury by ignoring an obvious risk*** [51]. They stated that there was a risk only if someone ignored the obvious. [53] Kirby J. pointed out that there had been no previous reports of falls or injuries in the area, but that it was reasonably foreseeable that a person affected by alcohol *might* fall over the cliff. However, his Honour held that an entrant was only entitled to expect a measure of care appropriate to the nature of the land and the relationship between the entrant and the authority. The authority as occupier was entitled to assume that entrants would take reasonable care for their own safety.[123] Applying the principles in Shirt's case[4], it was not every foreseeable risk that had to be guarded against, **only those posed by users exercising reasonable care for their own safety**. [128]

The minority in Romeo (McHugh and Gaudron JJ) had argued that not all the cliff face needed to be fenced, just the section where she fell, given that there was a car park and gathering area nearby, as well as what might look to the unwary like a path leading over the edge. However, the majority judges said that, before the injury, looking prospectively and not with hindsight, there were in fact many similar promontories in the reserve. The authority had no way of knowing she would walk over this one, and to require all the headland to be fenced would be an unreasonable response to a very small risk that was only likely to eventuate if a person was not acting reasonably with a view to their own protection. Further, it would conflict with a desire on the part of many people to have their coastline maintained as far as reasonably possible in its pristine natural state. [5]

Accordingly, the majority in Romeo ruled that the authority had not breached the duty of care it owed to her.

Although, as indicated earlier, there have been many cases testing the limits of liability in these public negligence cases, the principles were perhaps most thoroughly examined in the 2007 case of **RTA v Dederer**.[6] There, a bridge had been constructed in 1959 between two NSW towns across an estuary. Management was shared between the local council and the Roads & Traffic Authority (and its predecessor). From early in its history, the flat rail of the bridge had been a popular point for young people to jump, and sometimes dive, into the water below. There was no record of any injury in all that time. At times the local council became concerned about the practice of jumping and diving from the bridge, largely because of the risk of a person hitting a boat below, but perhaps also because the depth of the water below the bridge could vary with the tides and winds. Signs had been erected prohibiting diving and fishing from the bridge, without any explanation on them as to why. At times council officers and police attempted to apprehend or at least stop people jumping, but the jumpers flouted their authority, jumping anyway and swimming out of reach.

On a fateful day in December, 1998, Mr Dederer, then aged 15, having jumped safely from the bridge on several occasions, mounted the platform rail again, but this time dived. He fractured his spine, as the water was not as deep as he had expected. He sued the RTA originally, then, when RTA

[4] *Wyong Shire v Shirt* (1980) 146 CLR 40
[5] *Romeo* per Kirby J at [130]; per Toohey and Gummow JJ at [56].
[6] RTA v Dederer (2007) 234 CLR 330

later joined the council as a third party, he in turn joined the Council as a defendant. Between the time when he commenced his action against the RTA solely, and when he felt obliged to join the council, the Civil Liability Act 2002 (NSW) was passed. Ultimately, the significance of this was that the Court of Appeal ruled that the Council was exempted from liability by the 2002 Act. However, the Act did not exempt RTA as the action had commenced before the passing of the Act.

At trial before Dunford J. the plaintiff succeeded against both defendants, but was found to be 25% contributorily negligent. In the Court of Appeal, by a 2-1 majority, his verdict against the RTA was upheld, that against the council was overturned, and his contributory negligence was increased to 50%. The RTA appealed to the High Court, and succeeded 3-2 in having its appeal allowed, and the verdict quashed, so that the plaintiff totally failed.

All judges proceeded on the basis that the RTA owed the defendant a duty of reasonable care. They concluded that RTA was at least aware of people jumping, and perhaps should have realised that some dived, or were likely to be so tempted by the flat, wide top of the bridge railing, which formed an enticing jumping-off platform, and were encouraged by horizontal rails which made it easy to climb onto the platform. Given the variability of the water depth below, it was considered to be a risky undertaking to at least dive from the bridge, and some risk was also attached to jumping due to the uncertain water depth.

The trial judge, the majority in the Court of Appeal, and Gleeson CJ and Kirby J, the minority in the High Court, considered that merely erecting signs prohibiting diving was an inadequate response to the foreseeable risk. Had the signs been more specific in warning about the shallow and varying depth, and had the authority constructed a triangular strip on the top of the rail so that it was no longer flat and wide but uncomfortable to stand on, they thought it likely Mr Dederer would have been deterred from mounting the rail and diving, and so have avoided his injury. Additionally, had there not been horizontal railings but vertical "swimming pool-type" fencing which did not offer ready footholds, this would have acted as an additional deterrent to his climbing to the top rail.

In contrast, the majority judges in the High Court rejected this analysis, saying it was unlikely another sign would have deterred the confident youth, pointing with some derision to the differing attempts by the trial judge, and then the Court of Appeal majority, to settle on the precise wording that would have been required, citing this as a classic case of using hindsight rather than reasonable foresight. They further concluded that the triangular top was unlikely to have deterred the daring youth, and being tall and athletic, he could easily have surmounted vertical fencing to reach the top rail. As well as all of this, the majority judges in the High Court ruled that, looking at the *Shirt* calculus in a realistic and practical light, the authority in formulating a reasonable response to the foreseeable risk, was not required to go further than erecting the signs forbidding diving. Gummow J emphasised that "the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road was safe for 'users exercising reasonable care for their own safety', referring to Brodie,[7] and "the exercise of reasonable care is always sufficient to exculpate a defendant in an action in negligence" [50]. "Such an obligation to **exercise reasonable care must be contrasted with an obligation to prevent harm occurring to others. The former, not the latter is the law.**"[51] His Honour noted that the trial judge and Court of Appeal majority had focussed on the failure of the existing signs to prevent diving, which, he said, "confus(ed) the

[7] *Brodie v Singleton Shire Council (2001) 206 CLR 512; [2001] HCA 29*

question of whether the RTA failed to prevent the risk-taking conduct with the separate question of whether it exercised reasonable care." [54] Again, "what *Shirt* requires is a contextual and balanced assessment of the reasonable response to a foreseeable risk. Ultimately, the question is reasonableness, not some more stringent requirement of prevention."[69]

In the same vein, Callinan J said, "A defendant is not an insurer. Defendants are not under absolute duties to prevent injury, or indeed even to take all such measures as might make it less likely to occur. They are obliged only to make such responses as can be seen to be reasonable in the circumstances. A proper balancing exercise which takes all of the relevant circumstances into account leads inescapably to the conclusion that the appellant, in responding to a risk that had not been realised for forty years, by erecting the pictograph signs (prohibiting diving) acted reasonably and adequately." [278] His Honour objected to the characterisation of construction of a bridge which had served its purpose of carrying traffic for many years, and had been constructed in accordance with the standards of the time, as an "allurement" simply because rebellious youths misused it in defiance of authority. [277]

In **Berrigan Shire Council v Ballerini**[8] the Victorian Court of Appeal upheld a verdict for the plaintiff where he had dived off a naturally occurring log jutting out over a popular swimming hole in the centre of Barooga Township. The local council had maintained park facilities around the hole, which was extensively used by locals. It was held thereby to owe a duty of reasonable care, which necessitated signs warning users of the danger of diving from the log into the waterhole, because of the risk of the water depth changing with conditions. Had such a sign been erected, the Court concluded, the sensible young plaintiff would probably have regarded it and tested the water depth before diving. Thus, here there were no signs at all, so it **was not a question of failure to prevent harm, rather a failure to take reasonable care.** The High Court refused leave to appeal.[9]

In **Vairy v Wyong SC**[10] , the plaintiff dived from a 1.5m rock platform into the sea, which was probably about 1.5m deep at that point. He suffered tetraplegia as a result of striking the sea floor. He had not dived from this platform before, but had seen many others do so on that day and on earlier days. Some 18 years earlier another person had suffered a spinal injury there. A number of responsible people had warned publicly of the dangers of the practice, yet the Council erected no warning or prohibitory signs. The trial judge found for the plaintiff on the basis of this failure to warn, however the Court of Appeal reversed this finding, and the High Court by a 4:3 majority, dismissed the plaintiff's appeal. The majority held that, despite the "obviousness" of the risk of injury when diving into the sea at this point, nevertheless there were numerous places within the council's jurisdiction where a similar risk might be found, and there are always risks when swimming in the sea. The foreseeable risk in this case was low, and did not warrant a requirement that the Council erect warning signs as part of its reasonable response [155-161]. ***The Council had in no way promoted this rock platform as a suitable place to jump or dive into the water.***

In **Mulligan v Coffs Harbour CC**[11] the plaintiff simply dived into the creek from within the water, and struck his head on a sand bar, causing quadriplegia. He failed at all levels, and unanimously in the

[8] (2005) 13 VR 111
[9] http://www.austlii.edu.au/au/cases/cth/HCATrans/2005/1047.html
[10] (1998) 192 CLR 431
[11] (2005) 223 CLR 486.

High Court. There was nothing about the circumstances of the creek that set it apart from other creeks and waterways, creating any need for the Council to warn of the inherent and usual dangers of diving into shallow water, not from a height. No warning sign was needed.

The plaintiff in **Swain v Waverley SC**[12], while swimming between the flags at Manly surf beach in Sydney, dived into a wave, struck a sandbar, and was rendered a quadriplegic. He sued the Council for placing the flags in a position where there was a hidden danger by way of this sandbar, and/or failing to warn him of its presence. At trial the jury found for him. The Court of Appeal reversed that verdict, saying there was no evidence that the council was negligent, and placing the flags did not carry a representation that the sea was safe. The High Court held that, this being a jury not judge-alone trial, while reasonable minds might differ on whether the Council was negligent, nevertheless there was evidence on which the jury could have found negligence, and therefore the Court of Appeal had no jurisdiction to overturn the verdict.

Specifically, as the Council did not call any evidence to say that placing the flags elsewhere would not have made any difference, it was a bold call for the Council, in the face of a quadriplegic plaintiff, to rely on such an argument without evidence. The case was finely balanced. As Gleeson, CJ summed it up:

> [18] Given a finding that the appellant was swimming between the flags, the argument for the respondent was that the sand bank was not really a danger, or at least not such a danger as could have affected a decision about where to place the flags. Faced with a quadriplegic plaintiff, and a jury, that was a strong line to take in the absence of any evidence to show that moving the flags would not have made a material difference, or improved overall safety.
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> [19] Many judges, and many juries, might have accepted the respondent's argument. Some people, applying their standards of reasonableness, might have reflected that variable water depths are as much a feature of the surf as variable wave heights, that diving into waist-deep water without knowing what lies ahead is obviously risky, just as catching and riding a wave to shore is risky, and for much the same reason, and that, if the conduct of the respondent in this case constituted negligence, the only prudent course for councils to take would be to prohibit surfing altogether. To my mind, those are powerful considerations. However, under the procedure that was adopted at this trial, the assessment of the reasonableness of the respondent's conduct was committed to the verdict of a jury. The question for an appellate court is whether it was reasonably open to the jury to make an assessment unfavourable to the respondent, not whether the appellate court agrees with it. The Court of Appeal should have answered that question in the affirmative.

Conclusion

Lord Atkin's formulation in *Donoghue v Stevenson*[13] of the basis for a duty of care being that

> "You must take reasonable care to avoid acts or omissions that you can reasonably foresee would be likely to injure your neighbour ...[i.e.] persons who are so closely and directly

[12] (2005) 220 CLR 517
[13] [1932] AC 562 at 580

> affected by my act that I ought reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

has been subsequently refined to the principle that "prima facie a duty of care arises on the part of a defendant to a plaintiff when there exists between them a sufficient relationship of proximity, such that a reasonable man in the defendant's position would foresee that carelessness on his part may be likely to cause damage to the plaintiff."[14]

Therefore, an authority having the management and control of land for the benefit of visitors, owes a duty of care to such visitors to take reasonable steps to prevent a foreseeable risk becoming an actuality. However, it is a ***duty to take reasonable care, but not to ensure no one suffered injury by ignoring an obvious risk.*** It is not an insurer, and is obliged only to make such responses as can be seen to be reasonable in the circumstances.

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[14] Wyong Shire Council v Shirt (1980) 146 CLR 40 at 44 per Mason, CJ.