HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HEYDON JJ

GUY EDWARD SWAIN APPELLANT

AND

WAVERLEY MUNICIPAL COUNCIL RESPONDENT

Swain v Waverley Municipal Council
[2005] HCA 4
9 February 2005
S619/2003

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 3 April 2003 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

P Menzies QC with D J S Jenkins for the appellant (instructed by Beston Macken McManis)

J R Sackar QC with M T McCulloch and S P W Glascott for the respondent (instructed by Phillips Fox)

CATCHWORDS

Swain v Waverley Municipal Council

Negligence – Standard of care – Breach – Swimmer injured by diving into sandbank while swimming between flags – Jury finding of negligence on part of Council – Whether finding reasonably open on evidence.

Appeals – Civil trial by jury – Function of appellate court – Appellate review of jury finding on issue of breach of duty of care.

Words and phrases – "risk", "obvious", "reasonably practicable alternative".

1 GLEESON CJ. Actions for damages for personal injury suffered by a plaintiff allegedly in consequence of the negligence of a defendant in the past were commonly tried before a judge and a civil jury, usually of four persons. In New South Wales, and in some other Australian jurisdictions, the use of civil juries in such cases has become less common. This appeal draws attention to the different considerations involved in appellate review of primary decision-making, according to whether the decision-maker is a judge or a jury.

2 In the common law system of civil justice, the issues between the parties are determined by the trial process. The system does not regard the trial as merely the first round in a contest destined to work its way through the judicial hierarchy until the litigants have exhausted either their resources or their possibilities of further appeal. Most decisions of trial courts are never the subject of appeal. When there is an appeal, the appellate court does not simply re-try the case. Depending on the nature of the appeal provided by statute, courts of appeal act according to established principles by which their functions are constrained. Those principles reflect the primacy of the trial process and the practical limitations upon the capacity of a court which does not itself hear the evidence justly to disturb an outcome at first instance. Trial by jury carries with it significant limitations of that kind.

3 At a trial by jury, the functions of judge and jury are clearly distinguished. The judge decides issues of law; the jury decides issues of fact. A judge, whether sitting alone or presiding at a jury trial, gives reasons for his or her decisions. An appellate court, having the benefit of a statement of a judge's reasons for a decision, may be well placed to identify error. Juries give no reasons for their decisions. Leaving to one side cases where a special verdict is taken, ordinarily a jury at a civil trial will simply announce a verdict for the plaintiff or the defendant and, where necessary, an award of damages. The jury will reach that verdict after receiving directions from the trial judge as to the relevant principles of law, and their relationship to the evidence in the case and the arguments of opposing counsel. Where unanimity is required, the jurors need be unanimous only in relation to the ultimate issue or issues presented to them for decision. So long as individual jurors act in accordance with the directions they are given, different jurors might be impressed by different parts of the evidence, or by different arguments of counsel. Jurors are instructed that they may take a selective approach to the evidence, and even to different parts of the evidence of a particular witness. They may arrive at their joint conclusion by different paths. There may be no single process of reasoning which accounts for a jury verdict.

4 In an action framed in negligence, the judge (if necessary) will decide, as a matter of law, whether the facts alleged by the plaintiff are capable of giving rise to a duty of care in the defendant towards the plaintiff. A legal issue of that kind is often capable of being decided on the pleadings. On the other hand, the alleged duty of care might depend upon contested facts that need to be resolved as part of the trial process. In order to be entitled to a verdict, the plaintiff will

need to establish a duty of care, conduct on the part of the defendant in breach of that duty (negligent conduct), and consequential damage.

5 In legal formulations of the duty and standard of care, the central concept is reasonableness. The duty is usually expressed in terms of protecting another against unreasonable risk of harm, or of some kind of harm; the standard of conduct necessary to discharge the duty is usually expressed in terms of what would be expected of a reasonable person, both as to foresight of the possibility of harm, and as to taking precautions against such harm. Life is risky. People do not expect, and are not entitled to expect, to live in a risk-free environment. The measure of careful behaviour is reasonableness, not elimination of risk. Where people are subject to a duty of care, they are to some extent their neighbours' keepers, but they are not their neighbours' insurers.

6 Where an action for damages for negligence is tried before a jury, the question whether the conduct of the defendant has been negligent, that is, whether it has departed from what reasonableness requires, is presented as a question of fact for the jury. The jury's decision will ordinarily involve both a resolution of disputed questions of primary fact and an application, to the facts as found, of the test of reasonableness. Depending upon the nature of the case, and the findings of primary fact, the application of the test of reasonableness might be straightforward, or it might involve a matter of judgment upon which minds may differ. Either way, it is a jury question. In 1845, in *Tobin v Murison*[1], the Privy Council identified a fundamental error of procedure in a Canadian trial where a jury was asked to find particular facts and then it was left to the judge to decide whether, on those facts, the defendant was negligent. Lord Brougham said[2]: "Negligence is a question of fact, not of law, and should have been disposed of by the Jury." Of course, it may be a complex question. To the extent to which it requires the application to disputed primary facts of a contestable standard of reasonable behaviour, it may require different kinds and levels of judgment.

7 The resolution of disputed issues of fact, including issues as to whether a defendant's conduct conforms to a requirement of reasonable care, by the verdict of a jury involves committing a decision to the collective and inscrutable judgment of a group of citizens, chosen randomly. The alternative is to commit the decision to a professional judge, who is obliged to give reasons for the decision. In one process the acceptability of the decision is based on the assumed collective wisdom of a number of representatives of the community, properly

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1 (1845) 5 Moo PC 110 [13 ER 431].

2 (1845) 5 Moo PC 110 at 126 [13 ER 431 at 438]. See also *Municipal Tramways Trust v Buckley* (1912) 14 CLR 731 at 738 per Isaacs J.

instructed as to their duties, deciding the facts, on the evidence, as a group. In the other process, the acceptability of the decision is based on the assumed professional knowledge and experience of the judge, and the cogency of the reasons given. In the administration of criminal justice in Australia, the former process is normal, at least in the case of serious offences. In the administration of civil justice, in New South Wales and some other jurisdictions, in recent years there has been a strong trend towards the latter process. Originally, there were no procedures for appealing against the verdict of a jury, reflecting what Barwick CJ described as "the basic inclination of the law towards early finality in litigation"[3]. He referred, in another case, to the move towards trial by judge alone in civil cases as an abandonment of "the singular advantage of the complete finality of the verdict of a properly instructed jury"[4]. In many areas, the law seeks to strike a balance between the interest of finality and the interest of exposing and correcting error. In a rights-conscious and litigious society, in which people are apt to demand reasons for any decision by which their rights are affected, the trend away from jury trial may be consistent with public sentiment. Even so, decision-making by the collective verdict of a group of citizens, rather than by the reasoned judgment of a professional judge, is a time-honoured and important part of our justice system. It also has the important collateral advantages of involving the public in the administration of justice, and of keeping the law in touch with community standards.

8 Although the question whether certain conduct is a departure from a requirement of reasonable care, notwithstanding its normative content, is treated as a question of fact for the jury, a related, but different, question is treated as a question of law. That is the question whether there is evidence on which a jury *could* reasonably be satisfied that the defendant has been negligent. To the extent to which the dispute in a particular case is about the objective features of a defendant's conduct, that will come down to a question whether there is any evidence from which a jury could reasonably reach a conclusion about those features. There may also be a dispute about what reasonableness requires in a given case. When a trial judge, or an appeal court, asks *as a matter of law* whether a judgment adverse to the defendant is reasonably open to a jury, the enquiry may be affected by the nature of the judgment required of the jury. A judgment about whether the evidence could support a certain finding of primary fact might require nothing more than attention to the detail of the evidence, and a consideration of its probative potential. A judgment about whether behaviour is reasonable might involve the application of a measure that is to be found, not in the evidence, but in the wisdom and experience of those who make the decision.

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3 *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1 at 8.

4 *Edwards v Noble* (1971) 125 CLR 296 at 302.

9 The present appeal provides an example of a case where the jury was required to engage in both kinds of decision-making. The facts are set out in the reasons of Gummow J, with which I agree. The appellant, the plaintiff, suffered serious injury as a result of diving into the surf at Bondi Beach. He said he was swimming between the flags. His case was that he struck his head or neck on a sand bank which was invisible to him, and which he could not reasonably have been expected to see, and that the conduct of the respondent Council, in the circumstances, involved a lack of reasonable care for his safety. The jurors had to decide disputed facts about the conduct of the appellant and the circumstances in which he was injured, they had to consider substantially undisputed facts about the conduct of the respondent, they had to take into account circumstances relating to other people for whose safety the respondent also had to be concerned, and then they had to make a judgment about the reasonableness of the respondent's conduct. The trial judge said to the jury:

> "You are the only judges of ... fact in the case. It is for you to decide what evidence you accept and what evidence you reject, what inferences you draw and what conclusions you come to by reference to the evidence and upon the principles of law that I will give you."

One of the conclusions to which the jurors had to come was whether, on the facts and in the circumstances found by them, the conduct of the respondent exhibited a failure to take reasonable care for the safety of the appellant.

10 The case of negligence relied upon by the appellant was summarised by the trial judge for the jury as follows:

> "[Counsel for the plaintiff] said that the plaintiff went into the water where he did for the reason that that was where the flags were. He was directed or guided to that place because he knew or believed, first of all, that it was where he was supposed to swim because that is how the set up on the beach was ... he thought he would be swimming in a place that was safe because he assumed – [counsel] suggested reasonably assumed – that the persons or the organisation, which had the care, control and management of the beach, namely the Waverley Council, would not place those flags in a position where a person could be as it were encouraged to do something which might be dangerous.
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> ...
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> [The plaintiff] ... suffered those injuries because the council set up of a system of having flags in the particular place where there was a sand bank, which was a disguised danger. They could have done a number of things. First thing, warn people of the existence of it. Secondly, look for somewhere else to place the flags. And, third, if there was not anywhere else then do something so people had a choice."

11 There was a dispute at trial about whether the appellant was between the flags when he was injured, or was outside the flags. There was ample evidence, including that of the appellant, upon which the jury could find that he was between the flags. The respondent having made an issue out of whether the appellant was outside the flags, the jury would be likely to have treated their conclusion that he was between the flags as a substantial point in his favour. Nevertheless, it was far from conclusive.

12 There was some debate before this Court as to what the flags might reasonably be taken to have signified to a person such as the appellant. On the day in question, surf conditions were calm. No one could seriously suggest that the beach should have been closed to surfers. Undoubtedly, the flags were there to give guidance (indeed, instruction) to people as to where they should bathe. As to precisely what they represented concerning safety, somewhat different views may have been open. Safety is not an absolute concept. No reasonable person would understand flags on a beach to indicate a complete absence of risk. People who use beaches are of all ages, all degrees of competence as swimmers, all sizes, and all standards of physical fitness. The evidence was that, for some people, such as children, or elderly or infirm swimmers, sand banks can be a safety feature rather than a hazard. Furthermore, as was pointed out in the Court of Appeal, flags are not placed in the water. No one could possibly think that it was safe to dive anywhere between the flags. That would be nonsense. It would not mean it was safe to dive at the water's edge. To say that the flags conveyed a representation that it was safe to swim or dive in a particular area requires consideration of the range of persons to whom the representation was made, and the conditions that might constitute a hazard to different classes of person. Swimming in the ocean is never entirely risk-free. For some people who are poor swimmers, the water itself may be a considerable hazard. For many people, swimming in water beyond a certain depth is dangerous, even if they are between the flags. For all people, diving in shallow water is risky. Flags do not indicate an absence of risk. Even so, considerations of comparative safety play an important part in where they are placed.

13 The respondent succeeded in persuading a majority in the Court of Appeal that, as a matter of law, there was no evidence upon which the jury could reasonably be satisfied that the conduct of the respondent Council exhibited a failure to exercise reasonable care for the safety of the appellant. That involved a finding, not that the jury's conclusion about reasonableness was wrong, but that it was not even open.

14 It was clearly open to the jury to accept the appellant's version of how he came to suffer his injury. That was that he was swimming between the flags, he was not affected by drink, the manner in which he dived, or attempted to dive, into the water was orthodox, and he struck a submerged obstacle in the form of a

sand bank which was not visible to him. The facts relating to the conduct of the respondent, so far as the evidence went, were uncontroversial. The condition of the surf, the location of the flags, the size and shape of the sand bank, and the number of people at the beach were not in dispute. There was, however, one matter that was not the subject of evidence. The appellant's case criticised the respondent for placing, or leaving, the flags in such a location that a submerged sand bank was in the path of swimmers intending to go any significant distance into the water. There was evidence that this was not unusual. There was also evidence that a sand bank (assuming it is stable) can provide security to some swimmers as well as a possible hazard to others. There was no evidence as to whether it would have been possible to move the flags so that the hazard was removed without compromising other aspects of safety. Witnesses spoke of general practice in relation to placing and moving flags at beaches, but no witness addressed that particular question. An employee of the respondent who was on duty at the beach that day gave evidence, but he did not assume responsibility for deciding whether or not to move the flags, or go into the question of the availability of possible alternative locations on the day.

15 The trial judge, in his summing-up to the jury, recorded the argument of the respondent's counsel in these terms:

> "The third [point] was that the plaintiff has to satisfy you that reasonable care required the council to do something differently on the day. That is, place the flags elsewhere or do something else. He said to you should the flags have been placed elsewhere? ... He said that the sand banks are the safest place to swim, and what was it that was dangerous?
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> Essentially he said it was an unexceptional day and the beach formation was unexceptional. It was a characteristic day. He described the size of the waves. He said that the plaintiff agreed that there are irregularities in the surf from time to time. He said a real possibility of a sand bar is a part of life and there must be gutters and they vary because the beach is dynamic. The beach has to be safest for children and infirm people ...
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> The way the flags were put was not unreasonable. ... The council has to take into account the needs of all bathers and must recognise the beach does move around, and that it is a place where people go because of the thrill and it does have its inherent dangers.
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> He said [that in] the exercise of reasonable care [in] the circumstances of the day it was appropriate to place the flags there. There were half metre waves. He said the plaintiff should have been capable of swimming out in front and the conditions were 'run of the mill'. He said that there was no evidence the area between the flags was dangerous.

People had been in and out during the day and he said it was obvious that he needed to go out further before he could dive."

16 When counsel for the respondent, in final address, invited the jury to consider whether the flags should have been placed elsewhere, it might have occurred to the jury that no witness, and in particular no witness for the respondent, had given evidence about that possibility. It was open to the jury to consider that the sand bank was a danger, although not one that was either unusual or such as necessarily to require the respondent either to prevent people from swimming near it or to give them a warning about it. Yet a possible point of view was that an assessment of the reasonableness of the respondent's conduct would involve a consideration of whether, by moving the flags, the danger could have been avoided without the creation of any countervailing problems. The argument of the respondent invited such a consideration. On that matter, the evidence was silent. As the trial judge's summary of the argument for the respondent shows, the approach of the respondent came down to the proposition that, regardless of conditions to either side of the flags, the sand bank did not constitute a sufficient danger to warrant moving, or even considering moving, the flags. Apparently, the jury did not accept that.

17 More than 200 years ago, Lord Mansfield said that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."[5] This basic principle of adversarial litigation is not a matter of esoteric legal knowledge; it accords with common sense and ordinary human experience. When the jurors in this case were asked to consider whether the flags should have been placed elsewhere, they may have thought that it was up to the respondent, rather than the appellant, to tell them what difficulty there would have been about moving the flags to avoid the sand bank, or to explain why nothing would have been gained by putting the flags in a different location. That is something they might reasonably have taken into account in making a judgment about the reasonableness of the conduct of the respondent.

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 quadruplegic 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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5 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

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.

20 The appeal should be allowed with costs. The judgment of the Court of Appeal should be set aside, and it should be ordered that the appeal to that Court be dismissed with costs.

21 McHUGH J. The issue in this appeal is whether there was any evidence on which a jury could find that the respondent, Waverley Municipal Council ("the Council"), was guilty of negligence that resulted in the appellant, Mr Guy Swain, suffering spinal injury while swimming at Bondi Beach.

22 In my opinion, there was no evidence upon which a jury could find that the Council was negligent. That is because, assuming that there was a reasonably foreseeable risk of injury to the appellant when he attempted to dive through a wave while swimming at the beach, he tendered no evidence that would have entitled the jury to find that there existed a reasonably practicable means of avoiding that risk. One reason why the appellant failed to prove a reasonably practicable alternative is that he failed to tender any evidence that his suggested alternative would not only have eliminated *that* risk of injury but would also not have exposed himself or other swimmers to similar or other risks. Before a case of negligence can be submitted to a jury for determination, there must be evidence upon which the jury can find:

(1) that the risk of injury to the plaintiff was reasonably foreseeable;

(2) that a reasonably practicable means of eliminating that risk existed; and

(3) that there was a causal connection between the defendant's failure to eliminate the risk of injury and the sustaining of the plaintiff's injury.

23 In the present case, it was probably open to the jury to find that, on this day, swimming or bodysurfing between the flags at Bondi Beach exposed the swimmer to a risk of injury that was reasonably foreseeable. The risk arose from the possibility that, if the swimmer dived through a wave in an area about 15-25 metres from the shore, the swimmer might strike an unseen sandbar[6]. I say that it was probably open to find that that risk was reasonably foreseeable because there was no evidence as to how long the risk had existed. For all that the evidence disclosed, the risk might have been confined to only a small part of the flagged area and might have existed only for a short period. If the risk had only recently arisen, the appellant would have had the difficulty at trial of showing that the Council should have known of the risk and taken immediate action to avoid it. Assuming, however, that there was a reasonably foreseeable risk of injury to the appellant, there was no evidence whatsoever that there was a

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6 Although the terms "sandbank" and "sandbar" were used interchangeably at the trial, Handley and Ipp JJA in the Court of Appeal distinguished the terms as follows: "Troughs or channels are created by the movement of water 'to the left and right across the sandbank'. The seaward edge of a channel is known as a sand bar." *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,784.

reasonably practicable means available to avoid it. There was no evidence that the risk was not also present at other parts of the beach outside the flagged area or that there were parts of the beach within the flagged area that did not have the same degree of risk. There was no evidence that other parts of the beach were free from other dangers associated with swimming and could have been safely used by swimmers including the appellant. Indeed, the fact that the flags directed bathers to swim between them strongly indicates that areas of the beach outside the flagged area were more dangerous than the part of the beach within the flagged area. Furthermore, in this Court the appellant accepted that reasonable care did not require the Council to warn him of the danger of striking the sandbar. And no-one, not even counsel for the appellant, suggests that, on this day with a calm surf running, a reasonably practicable alternative means of eliminating the risk would have been to close Bondi Beach or even the flagged area where he swam.

24 It is no answer to the above analysis to say that the Council, through its employed lifeguards, was in the better position to give evidence concerning the condition of other parts of the beach that day and whether they were safe for swimming. The law places the onus on the plaintiff to prove negligence. As part of that proof, the plaintiff must show that there was a reasonably practicable alternative available that would have eliminated a reasonably foreseeable risk of injury. In some cases, the plaintiff may satisfy that requirement by relying on common knowledge of alternative actions or precautions that would have eliminated the risk. However, common knowledge was not sufficient in this case to satisfy that requirement. It did not – could not – prove the conditions of the surf and the seabed at other parts of Bondi Beach on that day. What was required – and what was absent in this case – was evidence that other parts of the beach outside or even inside the flagged area did not expose swimmers to risks of injury. Once a plaintiff tenders some evidence of a reasonably practicable alternative, the failure of the defendant to tender evidence that the suggested alternative is not reasonably practicable is relevant in determining whether a verdict for the plaintiff was reasonable. But it does not eliminate the need for the plaintiff to tender some evidence that there existed a reasonably practicable alternative means of eliminating the risk of injury of the kind that the plaintiff suffered.

25 With great respect to those who hold the contrary view, I find it impossible to hold that the appellant tendered any evidence against the Council that, as a matter of law, was capable of proving that the Council was negligent.

Statement of the case

26 The appellant, Mr Guy Swain, became a quadriplegic when he dived into a sandbar while attempting to dive through a wave at Bondi Beach, Sydney, which is under the care, control and management of the respondent, Waverley Municipal Council. At the time, the beach was supervised by three lifeguards

employed by the Council. Subsequently, Mr Swain commenced an action in the Supreme Court of New South Wales against the Council, claiming damages for the breach of a duty of care that he claimed the Council owed him. He alleged that the Council had placed flags on the beach, that the flags had induced him to swim where he did and that the Council had failed to take reasonable care in positioning the flags. Alternatively, he alleged that the Council was negligent in failing to warn swimmers of the danger of the sandbar that caused his injury.

27 A judge and a jury of four tried the action. Before the trial commenced, the parties agreed on the amount of damages that reflected proper compensation for Mr Swain's injury. The jury found that the Council had been negligent, that Mr Swain was guilty of contributory negligence and that his negligence was 25% responsible for the injury that he suffered. As a result, the Supreme Court entered a verdict and judgment for Mr Swain in the sum of $3.75 million after reducing the agreed amount of damages by 25%.

28 The Council appealed to the New South Wales Court of Appeal on the ground that the verdict of negligence against the Council was against the evidence and the weight of the evidence. Later, the Council amended its notice of appeal to allege that there was no evidence of negligence on its part. The Court of Appeal set aside the verdict in favour of Mr Swain and entered a verdict and judgment in favour of the Council[7]. By majority (Handley and Ipp JJA, Spigelman CJ dissenting), the Court of Appeal held that there was no evidence upon which the jury could find that the Council was negligent in placing the flags where it did. The majority held that it was not open to the jury to find that the flags suggested that the patrolled swimming area between them was safe for diving[8]. In addition, the majority thought that the dangers associated with diving into the surf were so obvious that the jury could not find that the Council had breached its duty by its placement of the flags[9]. The majority also held that there was no evidence of any action that the Council could have taken in placing the flags that would have avoided injury to Mr Swain[10]. All judges of the Court of Appeal held that there was no evidence to support a verdict against the Council on the basis of its failure to warn that it was dangerous to dive in the surf because of the presence of sandbanks[11].

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7 *Swain* [2003] Aust Torts Rep ¶81-694.

8 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,786.

9 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,786.

10 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,786.

11 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,781 per Spigelman CJ, 63,785-63,786 per Handley and Ipp JJA.

29 Subsequently, this Court gave Mr Swain special leave to appeal against the orders of the Court of Appeal. The only issue in the appeal in this Court is whether the Court of Appeal erred in finding that there was no evidence that the Council was negligent in placing the flags where it did. Mr Swain has not challenged the unanimous finding of the Court of Appeal that there was no evidence the Council was negligent in failing to warn him of the danger of diving into or hitting the sandbar.

The power of the Court of Appeal to set aside the jury's verdict

30 Section 108(3) of the *Supreme Court Act* 1970 (NSW) empowers the Court of Appeal to direct a verdict in favour of the defendant where the defendant is "as a matter of law, entitled to a verdict in the proceedings". Ever since *Hampton Court Ltd v Crooks*[12], appellate courts in New South Wales have been empowered to set aside a jury's verdict on the ground that there was no evidence to support it, even though that objection was not taken at the trial. The issue in this appeal, therefore, is whether there was any evidence upon which the jury could reasonably find that the Council was negligent in placing the flags where it did.

31 As I pointed out in *Naxakis v Western General Hospital*[13], when a defendant submits that there is no evidence to go to the jury, the submission raises a question of law for the judge to decide. The question is not whether the quality of the evidence is such that a verdict for the plaintiff would be unreasonable or perverse. It is whether the plaintiff has adduced evidence that, if uncontradicted and accepted, would justify a verdict for the plaintiff. An appellate court may later be able to set aside a verdict for the plaintiff on the ground that the quality of the evidence is such that the verdict for the plaintiff was unreasonable or that it was against the weight of all the evidence in the case. But the question whether there is evidence that, as a matter of law, supports the verdict is more circumscribed.

32 Evidence that is sufficient as a matter of law to entitle the plaintiff to a verdict must be distinguished from the totality of the evidence and its quality. The common law draws a distinction between evidence that, as a matter of law, entitles the jury to find a verdict for the plaintiff and evidence that supports a verdict claimed to be unreasonable or against the weight of the evidence. In the former case, the court looks only at the evidence and the inferences most favourable to the plaintiff. In the latter case, the court not only looks at the

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12 (1957) 97 CLR 367.

13 (1999) 197 CLR 269 at 282 [40].

whole of the evidence but also examines its weight and quality in order to determine whether the verdict returned was reasonable or in accordance with the evidence[14]. Consequently, a plaintiff may tender evidence that, if accepted, is sufficient as a matter of law to constitute negligence but insufficient as a matter of fact to be regarded as reasonable by an appellate court. The evidence of the defendant may be so overwhelming or the quality of the plaintiff's evidence may be so weak that the verdict for the plaintiff cannot be regarded as reasonable, even though, as a matter of law, the evidence could justify a verdict for the plaintiff.

33 The much litigated case of *Hocking v Bell*[15] illustrates the difference between evidence sufficient to constitute negligence as a matter of law and evidence sufficient to justify a verdict claimed to be against the weight of the evidence or to be unreasonable. In *Hocking*, a jury found a verdict for the plaintiff in an action of negligence against a surgeon. The Full Court of the Supreme Court of New South Wales set aside the verdict on the ground that it was against the weight of the evidence and such as no reasonable jury could find. The Full Court ordered a new trial. In two subsequent trials, the juries could not agree. At a fourth trial, a jury again found a verdict for the plaintiff. The Full Court of the Supreme Court again set aside the verdict for the plaintiff. This time, however, by majority, it entered a verdict "as a matter of law" for the defendant. The minority judge, Roper J, also set aside the verdict. He held that there was evidence of negligence as a matter of law, but that as the verdict of the jury was against the weight of the evidence, the defendant could only obtain an order for a new trial[16]. By majority, this Court upheld the order of the Full Court[17]. In a further appeal, the Judicial Committee of the Privy Council reversed the decision of this Court[18]. It held[19] that the dissenting judgments of Latham CJ and Dixon J in this Court were correct in holding that, despite the overwhelming strength of the defendant's case[20], as a matter of law, the plaintiff had established a case of negligence.

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14 See *Hocking v Bell* (1945) 71 CLR 430 at 440-442, 444-445 per Latham CJ; *Naxakis* (1999) 197 CLR 269 at 282 [41], 284-285 [45] per McHugh J.

15 (1945) 71 CLR 430; (1947) 75 CLR 125.

16 *Hocking v Bell* (1944) 44 SR (NSW) 468 at 509.

17 *Hocking* (1945) 71 CLR 430.

18 *Hocking* (1947) 75 CLR 125.

19 *Hocking* (1947) 75 CLR 125 at 132.

20 Dixon J said:

(Footnote continues on next page)

34 In one situation, however, a jury's verdict may be set aside even though evidence tendered for the plaintiff, standing alone, supports a case of negligence against the defendant. That situation occurs when the plaintiff has to rely on an inference to make out a case of negligence and other evidence that is admitted to be true or cannot reasonably be disputed proves conclusively that the inference, favourable to the plaintiff, cannot be drawn[21]. Thus, what may appear to be a clear case of trespass to land will disappear once the defendant irrefutably proves lawful authority to enter the land[22]. In *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd*[23], for example, a receipt for wages signed by a negligent watchman appeared to establish that he was the paid employee of the defendant. However, evidence from the defendant conclusively established that the receipt showed "that the watchmen were thereby acknowledging that the defendant company had paid them, not on its own account but on account of the ship, for services rendered to the shipping company as ship watchmen."[24] Because that was so, the Full Court of the Supreme Court of New South Wales held that there was no evidence upon which the jury could find that the defendant was responsible for the negligence of the watchman. In *Hocking*, Latham CJ pointed out[25] that further evidence in such cases does not contradict the plaintiff's case, but rather supplements it, with the result that it makes unavailable the inference upon which the plaintiff relies.

> "During the course of this protracted litigation, the evidence has been examined by many judges, but I believe that it has produced the same impression upon the minds of all of them. There has not, I think, been one of them, who, if the responsibility of deciding the facts had rested with him and not with a jury, would not have found unhesitatingly that the defendant did not leave a piece of tubing in the wound in the plaintiff's neck. If I myself were a tribunal of fact I should feel much confidence in that conclusion."

Hocking (1945) 71 CLR 430 at 487.

21 *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd* (1941) 42 SR (NSW) 1 at 4 per Jordan CJ; *Hocking* (1945) 71 CLR 430 at 461 per Latham CJ; *Hocking* (1947) 75 CLR 125 at 131-132.

22 See, eg, *Hocking* (1947) 75 CLR 125 at 131-132.

23 (1941) 42 SR (NSW) 1.

24 *De Gioia* (1941) 42 SR (NSW) 1 at 7 per Jordan CJ.

25 (1945) 71 CLR 430 at 461.

35 Hence, in determining whether, as a matter of law, a jury could find that the defendant was negligent, the court – be it a trial judge or an appellate court – must consider all the evidence which, if accepted, could reasonably establish negligence. If the plaintiff has tendered such evidence, it is irrelevant in determining the question of law that the defendant has tendered evidence that contradicts the evidence of the plaintiff. It is also irrelevant that a witness for the plaintiff has given evidence that contradicts evidence of negligence upon which the plaintiff relies[26]. In both cases it is irrelevant because determining which evidence to accept or reject is the prerogative of the jury, not the court. Even when an appellate court sets aside a jury's verdict on the ground of unreasonableness, it does not accept or reject the evidence of witnesses. It merely says that it was unreasonable for the jury to accept or reject certain evidence and, at common law, sends the case back to the trial court to be determined by another jury[27].

36 Furthermore, it is the province of the jury to determine not only what evidence is acceptable but also the inferences that should be drawn from that evidence. If an inference upon which the plaintiff relies is "equally consistent" with an inference or inferences upon which the defendant relies, the jury cannot reasonably act on the inference upon which the plaintiff relies[28]. But the cases in which a court can say that two inferences are "equally consistent" are rare. This is particularly so where the inference is not one of fact but a conclusion incorporating a value judgment, such as the reasonable care element of negligence. As Isaacs J pointed out in *Cofield v Waterloo Case Co Ltd*[29] in the context of discussing whether causation was established:

> "A Court has always the function of saying whether a given result is 'consistent' with two or more suggested causes. But whether it is 'equally consistent' is dependent on complex considerations of human life and experience, and in all but the clearest cases – that is, where the Court can see that no jury applying their knowledge and experience as citizens reasonably could think otherwise – the question must be one for the determination of the jury."

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26 *Naxakis* (1999) 197 CLR 269 at 283-284 [42]-[43] per McHugh J.

27 In some jurisdictions, statutes or Rules of Court give an appellate court, which has set aside a jury verdict, power to determine the matter itself instead of ordering a new trial.

28 *Wakelin v London and South Western Railway Co* (1886) 12 App Cas 41 at 45 per Lord Halsbury LC.

29 (1924) 34 CLR 363 at 375.

37 Statements can also be found in the cases, for example, by Jordan CJ in *De Gioia*, to the effect that in determining whether, *as a matter of law*, there is evidence of negligence, the court may take into account that "some of the facts essential to the plaintiff's case are peculiarly within the knowledge of the defendant"[30]. In *Hampton Court Ltd*[31], Dixon CJ held that there was no evidence of negligence, but his judgment also appears implicitly to have endorsed this approach. His Honour said[32]:

> "But a plaintiff is not relieved of the necessity of offering some evidence of negligence by the fact that the material circumstances are peculiarly within the knowledge of the defendant; all that it means is that slight evidence may be enough unless explained away by the defendant and that the evidence should be weighed according to the power of the party to produce it".

38 With great respect to these great jurists, however, it is not legitimate to take into account on a "no evidence" submission that some of the facts essential to the plaintiff's case are peculiarly within the knowledge of the defendant. Either the facts relied upon by the plaintiff give rise to a reasonable inference of negligence or they do not. If the evidence tendered by the plaintiff cannot reasonably support an inference of negligence, it does not matter that the defendant has knowledge of facts that may have assisted the plaintiff's case. The plaintiff has simply failed to make out a case of negligence. If the evidence tendered does support a reasonable inference of negligence, the knowledge of the defendant is irrelevant because, as a matter of law, the plaintiff has established a prima facie case of negligence. Moreover, applying the knowledge-of-the-defendant doctrine leads to incongruous results, which seem to have been overlooked. It would mean that, at the end of the plaintiff's case, an application for a non-suit might succeed on the ground of insufficiency of evidence. At that stage, the defendant has not had an opportunity to tender evidence, so its conduct is irrelevant. On the other hand, an application for a verdict by direction in the same case when the evidence has closed might fail because the defendant has elected not to go into evidence or rebut the inference.

39 The proposition that "evidence should be weighed according to the power of the party to produce it, in accordance with the often repeated observation of Lord Mansfield in *Blatch v Archer*"[33] is not relevant in determining whether, as a

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30 (1941) 42 SR (NSW) 1 at 4.

31 (1957) 97 CLR 367.

32 *Hampton Court Ltd* (1957) 97 CLR 367 at 371.

33 *Hampton Court Ltd* (1957) 97 CLR 367 at 371-372 per Dixon CJ, citing *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

matter of law, there is evidence of negligence. It applies only where, although the evidence is sufficient as a matter of law, the defendant seeks to set aside the verdict on the ground of unreasonableness. The remarks of Lord Mansfield in *Blatch v Archer*[34] to which Dixon CJ referred were made in a motion for a new trial. Although the report does not say so, the ground for a new trial must have been that the verdict was against the weight of the evidence. The grounds that would support a motion for a new trial at common law were basically the same then as they are today: evidence wrongly admitted or rejected, misdirection by the trial judge or that the verdict was perverse or against the evidence or the weight of the evidence. The remarks of Lord Mansfield were not spoken in the context of an issue whether, as a matter of law, there was evidence to support the plaintiff's case. They should not be applied in that context.

The need for evidence of a reasonably practicable alternative

Evidence of the existence of an alternative

40 The plaintiff bears the legal and evidentiary burden of establishing a prima facie case of negligence[35]. To prove negligence, the plaintiff must be able to point to a reasonably practicable precaution or alternative course of conduct that could have avoided, or reduced the consequences of, the injury to the plaintiff[36]. The plaintiff does not establish a prima facie case simply by asserting that there "must be" a practicable alternative, and that it is for the defendant to provide evidence that no such alternative exists[37]. The plaintiff does not prove a case of negligence, for example, by proving the existence of the risk and then alleging that the defendant took no precautions to protect the plaintiff against that risk[38].

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34 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

35 *De Gioia* (1941) 42 SR (NSW) 1 at 3-4 per Jordan CJ.

36 *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362 at 364 per Dixon CJ, 369-370 per Taylor and Owen JJ; *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 319 per Windeyer J; *Kingshott v Goodyear Tyre & Rubber Co Australia Ltd (No 2)* (1987) 8 NSWLR 707 at 725 per McHugh JA.

37 *Neill* (1963) 108 CLR 362; *Vozza* (1964) 112 CLR 316.

38 *Kingshott* (1987) 8 NSWLR 707 at 727 per McHugh JA, referring to *Australian Iron & Steel Pty Ltd v Krstevski* (1973) 128 CLR 666 at 668 per Barwick CJ and Menzies J.

Evidence of the practicability of the alternative

41 The plaintiff must also provide at least *some* evidence from which the jury can find that the alternative is a practicable one that was reasonably open to the defendant[39]. Thus in *Vozza v Tooth & Co Ltd*[40], the plaintiff suggested two alternatives to obviate the risk of injury arising from the broken bottles he was required to handle, namely, the installation of a system for the mechanical handling of the bottles or the provision of thicker gloves. He did not describe the mechanical handling system in sufficient detail to enable the jury to contrast it with the defendant's manual handling system or to assess its advantages and disadvantages or to say whether or not it would have been practicable and reasonable to install it in the defendant's premises. He tendered evidence that more strongly reinforced gloves were available but there was no evidence that they would be suitable for the plaintiff's task. The defendant called an expert who said he could make a better glove (not an impenetrable glove). This Court held that there was insufficient evidence in relation to any of the alternatives suggested by the plaintiff to support a verdict for the plaintiff as a matter of law. The Court affirmed the decision of the Full Court of the Supreme Court of New South Wales to set aside the jury's verdict for the plaintiff and enter a verdict for the defendant.

42 Similarly, in *Neill v NSW Fresh Food and Ice Pty Ltd*[41], the plaintiff suggested that a handrail might have been placed inside a cylindrical milk container to minimise the risk of injury from slipping inside the container while the plaintiff cleaned it. Alternatively, he contended that the defendant employer could have provided "non-skid boots". The plaintiff provided no evidence of the practicability of either suggestion. This Court held that in the absence of expert evidence, it was merely "a matter of conjecture" whether the suggested precautions would have been practicable or not[42]. Accordingly, as the plaintiff had not established a prima facie case of negligence, the Court upheld the decision of the Full Court of the Supreme Court of New South Wales to set aside the jury's verdict for the plaintiff and enter a verdict for the defendant.

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39 *Neill* (1963) 108 CLR 362; *Vozza* (1964) 112 CLR 316.

40 (1964) 112 CLR 316.

41 (1963) 108 CLR 362.

42 *Neill* (1963) 108 CLR 362 at 365 per Kitto J.

43 Where the suggested alternative carries its own risks, the plaintiff must tender some evidence to support the practicability of that alternative[43]. Thus, the plaintiff may be required to describe an alternative system in sufficient detail to enable the jury to contrast it with the defendant's system, or to assess its advantages and disadvantages, or to say whether or not it would have been practicable and reasonable for the defendant to adopt it[44]. The plaintiff may also be required to provide some technical or expert evidence of the feasibility of the alternative, especially where the operation is complex and technical[45].

A matter of expert evidence or common knowledge and common sense

44 In some cases, common knowledge or common sense is all that is required to prove a reasonably practicable alternative[46]. In other words, the plaintiff may be able to discharge the evidentiary onus of establishing a practicable alternative without the benefit of technical or expert evidence. In *Maloney v Commissioner for Railways*[47], Barwick CJ said that evidence of the practicability of the proposed alternative course or safeguard "is essential except to the extent [that it is] within the common knowledge of the ordinary man." Similarly, in *Tressider v Austral Stevedoring and Lighterage Co Pty Ltd*[48], the New South Wales Court of Appeal said that in some cases:

> "[N]o more than common knowledge or common sense is necessary to enable a judge or jury to perceive the existence of a real risk of injury and

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43 See, eg, *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 at 193 per Lord Reid, 196 per Lord Tucker; *Neill* (1963) 108 CLR 362 at 365 per Kitto J; *Vozza* (1964) 112 CLR 316 at 319 per Windeyer J; *Krstevski* (1973) 128 CLR 666 at 669-670 per Barwick CJ and Menzies J.

44 See, eg, *Vozza* (1964) 112 CLR 316 at 319 per Windeyer J.

45 See, eg, *Krstevski* (1973) 128 CLR 666 at 680 per Mason J.

46 See, eg, *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18; *Tressider v Austral Stevedoring and Lighterage Co Pty Ltd* [1968] 1 NSWR 566 at 568; *Neill* (1963) 108 CLR 362 at 368 per Taylor and Owen JJ; *Maloney v Commissioner for Railways* (1978) 18 ALR 147 at 148 per Barwick CJ; *Colquhoun v Australian Iron and Steel Pty Ltd* (Unreported, New South Wales Court of Appeal, 15 November 1996, Mahoney P, Handley and Powell JJA).

47 (1978) 18 ALR 147 at 148.

48 [1968] 1 NSWR 566 at 568 per Herron CJ, Sugerman and Jacobs JJA agreeing.

to permit the tribunal of fact to say what reasonable and appropriate precautions might appropriately be taken to avoid it."

45 Where the case involves a technical or complex operation or service, however, it is likely that the plaintiff will not have a case to go to the jury without leading technical or expert evidence as to the existence and practicability of the suggested alternative. Where the issues involve "technical knowledge and experience"[49], the plaintiff must provide evidence as to what the defendant ought to have done. The question cannot be determined by the application of common knowledge, and a jury cannot decide the issue on the basis of its own ideas as to what the defendant ought to have done[50]. Thus, a mere allegation that a precaution is practicable is insufficient where the evaluation of whether or not the precaution is practicable involves issues of technical knowledge and experience[51].

46 In *Bressington v Commissioner for Railways (NSW)*[52], this Court held that there was no evidence of negligence in the absence of expert evidence as to the practicability of measures which the defendant could have undertaken to reduce the risk of injury to the plaintiff's deceased husband. The plaintiff's husband, a fireman employed by the Commissioner for Railways, was struck and killed by a van while crossing railway lines in his employer's shunting yard. While there was evidence that a system of stationing people at the stationary vans to warn others that the vans might suddenly move would have been a safe precaution to take, there was also evidence that this system would not be practicable. Latham CJ held that, where the issue of negligence involved issues of technical knowledge and experience, a jury acting on its own knowledge could not find negligence on the basis of its own ideas of what ought to be done[53]. His Honour said that the practicability of providing a system of warnings in a large railway shunting yard "is not a question to be determined in the light only of the common knowledge which is attributable to juries."[54]

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49 *Bressington v Commissioner for Railways (NSW)* (1947) 75 CLR 339 at 348 per Latham CJ.

50 *Urban Transit Authority (NSW) v Hargreaves* (1987) 6 MVR 65 at 72 per Clarke JA, citing *Bressington* (1947) 75 CLR 339 at 348 per Latham CJ.

51 *Bressington* (1947) 75 CLR 339 at 348 per Latham CJ.

52 (1947) 75 CLR 339.

53 *Bressington* (1947) 75 CLR 339 at 348.

54 *Bressington* (1947) 75 CLR 339 at 348. Another case where the defendant succeeded because of the plaintiff's failure to lead technical evidence of the practicability of the suggested measure to obviate the risk of injury is *Da Costa*

(Footnote continues on next page)

47 In *Maloney*, the plaintiff fell through the open door of a Sydney suburban train and suggested that automatic closing doors should have been fitted or some other system should have been provided to ensure that the doors were closed when the train was in motion. The plaintiff led no evidence that the installation of the suggested automatic closing doors was feasible or practicable. There was also no evidence about the feasibility of providing and installing such doors in circumstances which included the continued operation of the Sydney suburban train service. This Court held that in the absence of evidence, among other things, as to the practicability of the precautions proposed, no tribunal of fact could reach a conclusion on the reasonableness of the defendant's conduct. The reasonable practicability of the proposed alternative of installing automatic closing doors was not a matter within common knowledge in those days.

48 In *Carlyle v Commissioner for Railways*[55], however, the Full Court of the Supreme Court of New South Wales held that the jury could use common knowledge to determine whether a risk of injury to railway employees could have been obviated by the provision of warning bells with markedly different tones. *Carlyle* concerned the death of a railway porter, who was struck and killed by a train as it passed through the station where he worked. Although there was an alarm system to warn of approaching trains, which used different bell tones for each train line, the tones were not easy to distinguish and cut out when the train was quite close to the station. The plaintiff, the railway porter's wife, suggested that the risk of injury could have been obviated by the provision of bells with markedly different tones, and there was evidence that it was reasonably practicable to provide for different tones in the bells. Maxwell J, who gave the leading judgment in the Full Court, held that the jury could use its own knowledge to determine whether the plaintiff's alternative system was reasonably practicable. His Honour said[56]:

> "An examination of the system does reveal, I think, that the common knowledge of mankind would enable a jury to say at least that it was

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v Australian Iron & Steel Pty Ltd (1978) 20 ALR 257. In that case there was "a total absence of evidence of any kind" on the matter of the safety and practicability of the suggested alternative: at 266 per Mason J. As the practicability of the suggested alternative could not be assessed on the basis of common sense or common knowledge – in other words, expert evidence was required – the absence of such expert evidence meant that the verdict for the plaintiff could not stand. This Court ordered a new trial.

55 (1954) 54 SR (NSW) 238.

56 *Carlyle* (1954) 54 SR (NSW) 238 at 243.

> practicable to have a bell on each platform either in the place where at present installed on one only and, as well, within the office of each platform where the porter was from time to time obliged to be. This suggestion, which is part of the plaintiff's case, is not so confined to the technical field as to require that it should be the subject of expert evidence. The same considerations apply also to provision for marked distinction in the tones of the bell's warning in respect of the up-line and the down-line. If this is correct then there was evidence for the jury of negligence on the part of the defendant Commissioner related to the accident."

49 Another example of a case that did not require expert evidence is *City of Richmond v Delmo*[57]. However, it is a case of the use of common sense rather than common knowledge and experience. In *Delmo*, the plaintiff's car was struck by a golf ball that passed through a fence on the defendant's golf course. The plaintiff suggested that the risk of damage could have been avoided by using a different type of fencing. There was evidence that the fence was a typical cyclone wire mesh fence with an interlocking pattern of wire strands. Smith J held that the inference was open that, if the wire fencing could be manufactured in an interlocking pattern, it could be manufactured in other patterns, including a pattern with smaller openings. The defendant did not lead evidence to suggest that this was not possible.

50 In *General Cleaning Contractors Ltd v Christmas*, Lord Reid said[58] that a plaintiff is generally required to put forward some alternative that can be tested by evidence, but that this might not be necessary in a "clear" case. In that case, the plaintiff window cleaner fell from the sill on which he was working when the sash of the window that he was gripping moved. The plaintiff led some evidence about alternative systems of work, such as the use of safety belts and hooks or ladders. There was very little evidence about the practicability of these alternatives. Lord Tucker said[59] that "in some cases there may be precautions which are so obvious that no evidence is required on the subject". He went on to say, however, that in cases where there is a system in general use, it is[60]:

> "eminently desirable … that it should be clearly established by evidence that some other and safer system is reasonably practicable and that its

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57 Unreported, Supreme Court of Victoria, 13 November 1992, Smith J.

58 [1953] AC 180 at 193.

59 *Christmas* [1953] AC 180 at 198.

60 *Christmas* [1953] AC 180 at 198.

> adoption would have obviated the particular accident which has occasioned damage to the plaintiff."

The House of Lords held that this case fell into the former category.

51 In *Dixon v Cementation Co Ltd*[61], Devlin LJ appeared to accept that in some cases the plaintiff may discharge the evidentiary burden simply by saying: "If this is dangerous, then there must be some other way of doing it that can be found by a prudent employer and it is not for me to devise that way or to say what it is." With great respect to one of the greatest judges of the 20th century, that statement is wrong. In *Australian Iron & Steel Pty Ltd v Krstevski*[62], Barwick CJ and Menzies J sought to explain it as depending on a finding that the employers could have altered a system which they knew or ought to have known was unsafe. But this is not the natural meaning of what Devlin LJ said. His statement is contrary to basic principle, and it should not be followed.

The material facts

52 Mr Swain sustained his injury at about 4.30pm on 7 November 1997, which was a fine but overcast day. About 2,500 persons were at Bondi Beach that afternoon. About 3,500 persons attended that beach that day. The surf was light, the swell size in the afternoon being only 0.5 metres. Flags, designating the patrolled swimming area, had been placed in the sand at about 6am by a lifeguard employed by the Council. They were in the same place when Mr Swain was injured. The flags may have been 100 metres apart but were probably closer than that. High tide of 1.5 metres occurred at approximately 2pm. Low tide that morning was at 7.30am and was about 0.6 metres.

53 Mr Swain arrived at the beach at about 3pm with two friends, Mr Earl Wilson and Ms Kathryn Galvin. Mr Wilson and Mr Swain drank some beer. Some time before 4.30pm Mr Wilson went into the surf between the flags. He gave evidence that there was a "normal ... downward slope" in the seabed. He said that, about 15-20 metres from the shore, he took a slight step down, took "three or four" steps and "kicked a sandbar." In the evidence, the terms "sandbar" and "sandbank" were used interchangeably. Just before the sandbar, the water was about waist deep. Mr Wilson said, "[W]hen I stepped over it, I was at a depth of up to my knees." He said that "it was quite a big step" and that he:

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61 [1960] 1 WLR 746 at 748; [1960] 3 All ER 417 at 419.

62 (1973) 128 CLR 666 at 668.

> "got a bit of a surprise because it was quite a big step and I hadn't been used to such conditions, so I, you know, I did notice it and think, ooh, that's a bit dangerous, because I was thinking of diving when I got to waist-deep, as you do, thinking that it's safe."

After he returned to the beach, Mr Swain and Ms Galvin went into the water. Ms Galvin said that there was a "ditch or hollow in the water" just before the sandbank. She stumbled forward on the sandbank and the water became "shallow again without a doubt." At that stage, she said that Mr Swain was about a metre to the right of her.

54 Mr Swain was the last of the three to enter the water. He was 24 years of age and a very experienced surfer. As an 11 or 12 year old, he had taken a Learn to Surf course. He was familiar with rips, able to identify them and knew that they were dangerous. He knew that the safest areas to swim were areas without rips. He had dived under waves many times before. He knew that rocks or other dangers might be under the water. He was aware of the presence of sandbanks in surfing and swimming areas, particularly at North Curl Curl Beach where he had frequently surfed. Asked to define a sandbank, he said: "[Y]ou have this wall of sand that is sticking up from the base of the sand or the bottom of the ocean." He was familiar with the phenomenon of waves breaking on a sandbank, washing over the sandbank and then running out to sea. He was also aware that, where the waves break close to the shore, there is froth from the surf and scour from the sand as it is dragged back to where the waves break. He also accepted that the water tends to be shallower over the sandbank and that it is "deeper again closer to the shore". He agreed that the "slightly deeper area in front of the sand bank is where you have the water going off to the sides and finding its way out towards the rip area and is being fed out to sea". When surfing, he usually used a surfboard. He said that he avoided surfing over sandbanks because inconsistency in water depth meant "the waves aren't always the best over the sand bank." He had been to Bondi Beach more than 10 times before. Only on one occasion had he used a surfboard at Bondi.

55 Handley and Ipp JJA inferred from Mr Swain's evidence that:

- "He knew there were likely to be channels and sandbars in sandbanks."[63]
- "There might be irregularities on a sandbank closer to the shore."[64]
- "The irregularities include channels and sandbars."[65]

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63 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,784.

64 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,785.

- "Waves break as they hit the sandbank and the water usually gets deeper where a channel has formed closer to the shore."[66]

- "Inshore from the channel, the water becomes shallower again."[67]

56 Mr Swain said that he went into the surf between the flags, waded about 15 metres through the water and then dived through an oncoming wave. He said that he swam between the flags because he thought "it was safe and a [patrolled] area." The surf was "quite calm". He could not see the sand beneath his feet as he waded out. At the point where he dived, the water was about waist deep. Ms Galvin was about 18 metres ahead of him. He had no idea of the depth of the water in front of him but agreed that it must have been shallow enough for the wave to break. When he dived, the wave was 0.5 to 1 metre away. After diving, his next awareness was an inability to move and a lot of pain.

Evidence about the uniformity of channels and sandbars

57 Mr Jeffrey Williams was called as an expert witness in Mr Swain's case. Mr Williams was a senior ocean lifeguard and beach and surf education officer for the Sutherland Shire Council. He testified that a beach is generally "one large sandbar" that "is dissected by the channels." The typical formation is "a sandbar, a rip, a sandbar, a rip, in that formation." Rip tide currents form the channels. The water is gathered at the shore-line and creates the easiest flow of water back out to sea, which results in the formation of a channel and a sandbar. The feeder system for the channels starts "where the waves gather then they travel either side and join up to a rip … to either side." The channel then goes out to sea. Mr Williams gave uncontradicted evidence that:

- There is always a channel where the rips are, but the channel "depends on the passiveness of the ocean."

- The two channels that go out to sea are generally joined by another channel, which results in a U-shape formation.

- It is inevitable that there is "guttering", that is, a channel, in the inshore area of a sandbank.

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65 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,785.

66 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,785.

67 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,785.

- The dimensions of the channel, that is, the depth and width of the channel, are not uniform; rather, the channel is "a fluctuating entity determined by the concentration of water or the tidal influence."

- During the course of any day on the beach, the channels "may move or they may stay the same" depending on the circumstances. Such circumstances include the wave direction and the size of the waves, the tidal influence, wind, currents and the availability of the sand. These circumstances affect the formation of the beach, including the formation of channels and sandbars and, by implication, the movement of channels during the course of the day.

- The direction from which the wave comes determines the actual formation of the sandbank and the location of the channels or rips. Wind alters the direction and flow of the wave. The strength of the water flow and the concentration of the water determine the size of the sandbank and the size of the channels.

- The tidal influence that affects the formation of channels is the difference between the mean high water and the mean low water. The more extreme the swing between the mean high water and the mean low water, the greater the differences in the relative current flow between the rips or channels and the sandbank area.

- If there is a rip tide flowing out and there is a strong current, the sandbar typically becomes isolated and surrounded by the current on either side.

- Every part of the beach seaward of the shoreline contains natural hazards.

58 Mr Williams was unable to say as a general proposition that the further the sand goes out, the more likely there is to be a gradual change in the depth.

59 The trial judge summarised Mr Williams' evidence about the factors that influence conditions and sand structure at a beach as follows[68]:

> "[Mr Williams] said the conditions of the surf and the effect of the winds and tide and currents are potential hazards. He identified the hazards as wind, currents, occurrence of channels, and the actual formation of the beach. He said that the formation of the beach was generally affected by the wave direction, the size of the waves, and what he described as the total influence. This dictates the construction of the beach on the day. He

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68 *Swain v Waverley Municipal Council*, Supreme Court of New South Wales, Trial Transcript, 13 May 2002 at 13-15 per Taylor AJ.

> said the wind alters the direction and flow of the wave. He said the varying effect which the movement of the waves make on the formation of the beach and the direction the waves come from nominates the actual sand bank formation and the location of channels and what people normally describe as rips. He said the tidal influence can be a strong factor on the size of waves and the formation of channels. He said that the strength of the water flow and the concentration of the water create the channels as areas of sand are relocated. He said the rip tide currents occur because the direction of a wave coming on the beach gathers at the shore line. It was unable to be stored so [the] natural process is for the water to find its own level so it creates the easiest flow of water back to the sea. That results in the formation of a channel and also a sand bar. He says you would expect the sand bar with a strong current to become isolated by a surrounding current on either side. Generally a beach is one large sand bar and is dissected by the channels. So you will generally find the sand bar rip in that formation. The dimension and depth of the channel is variable and fluctuates as determined by the concentration of water or the tidal influence. The channels do move depending on the circumstances on the day. They may stay the same."

Evidence about the conditions at Bondi Beach on the day of the accident

Waves

60 Mr Harry Nightingale, a lifeguard employed by the Council who was on duty at Bondi Beach on the day, testified that on that day the surf conditions were "[v]ery small" and that there was "[n]ext to no surf". The lifeguards' daily report gave the measurement of the waves from the crest to the base of the face of the wave as approximately half a metre. Mr Swain said that the waves were about two feet from the crest of the wave to the base of the wave on the ocean side. All witnesses said that the surf was light.

Current and rips

61 Mr Wilson testified that he had been swept to the south of the flags while swimming. This indicates the existence of a current or rip in that direction. A reasonable jury could draw the inference that the current or rip extended from the area between the flags to the waters outside (to the south) of the flagged area.

The channel and sandbar

62 One of the many difficulties of the case is that there was no detailed evidence concerning the length, breadth, height or direction of the sandbank. There was no evidence whether the sandbank was parallel to the beach or ran diagonally or was crescent shaped. There was no evidence whether the height of the sandbank was uniform through its length and breadth or whether it sloped in

any particular direction. However, Mr Wilson said that, after he stepped on to the sandbar, "I continued walking, where it dropped off again and I dove [sic] in and breast-stroked out." Nor was there any detailed evidence concerning the length, width or depth of the channel on the shore-side of the sandbank. For all that the evidence reveals, the ditch or hollow of which Ms Galvin spoke may have been a hole only a few metres wide. I have already referred to what Mr Wilson and Ms Galvin said about the sandbar and the conditions leading to it. Mr Wilson also said that, before he kicked the sandbar, he did not see anything that indicated its presence.

63 Mr Wilson gave the following evidence about the variation in the depth of the water:

> "Q. What do you call a slight step down; from about knee deep to waist deep?
>
> A. No, it wasn't that great. That's why I said it was above – higher than the knee before the trench. …
>
> Q. What you indicated is the water about a third of the way up your thigh above the knee?
>
> A. Yes.
>
> Q. And then waist deep to about your crotch level or maybe a little bit higher?
>
> A. Yes."

64 Ms Galvin said that "there was a definite sort of ditch or hollow in the water because I fell down. And as I kept moving forward I stood up and it was shallow again without a doubt." She said that when she stood up and moved forward, she "noticed that it got really shallow again straightaway afterwards." She said that the ditch was deep enough "to make me actually lose my balance and fall over", and "[b]efore the ditch it was just shallow water." Ms Galvin was unable to say how shallow the water was, but it was "shallow enough to be jogging in." She said that Mr Swain dived at the point where she stumbled, and that he was about a metre or two away from her. In that respect, her evidence is inconsistent with that of Mr Swain.

65 Mr Swain said that the water was "[a]bout waist depth, maybe a little bit higher than waist depth" or a little bit above his navel when he commenced his dive. He agreed under cross-examination that there was "quite a deal of frothing, surging surf in front of the wave", which "would suggest … that some distance in front of [him] the water was shallow enough to cause the wave to break".

66 As Spigelman CJ in the Court of Appeal noted, evidence from Mr Wilson and Ms Galvin showed the existence of a sandbar and no evidence contradicted it[69]. Mr Wilson estimated the variation in the depth of the water as being somewhat less than from waist deep to knee deep. Ms Galvin could not estimate the height of the variation in the depth of the water, but said that after the "ditch" the water "got really shallow again straightaway". The Council led no evidence concerning the sand structure beneath the water at the relevant time[70].

Placement of the flags

General beach conditions which affect placement of the flags

67 Mr Williams testified as to the beach conditions that a prudent lifeguard takes into account when deciding where to position the flags on the beach. He said that, before positioning flags on a beach, the lifeguard should take into account the "condition of the surf and the effect of the wind and tide and currents, potential hazards." He identified the types of "potential hazards". He said: "Wind can be a hazard, current can be a hazard, the occurrence of currents and channels and the actual formation of the beach." He also said that channels and sandbars can present a hazard, as can the trough that is created. The hazard presented by the trough is that "the circumstance is that it's a variable depth and people aren't familiar with that circumstance."

68 Mr Williams said that "[g]enerally flags are erected and placed on sandbanks." By "on" he meant on the beach adjacent to the sandbanks. He agreed that flags are placed there because that is generally regarded as the safest place to swim. He agreed that the person responsible for placing the flags has to make a judgment about the conditions on the day. As Spigelman CJ observed, Mr Williams also agreed that:

> "[A]n area with a 'shallow trough' could be an ideal spot for young children, but added:
>
> > '... well, depending on the circumstance on the day, the trough could be the biggest hazard on the day.'"[71]

69 In cross-examination, Mr Nightingale said that "channels for sure are dangerous positions for swimmers." Mr Nightingale gave evidence about how a

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69 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,771.

70 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,770 per Spigelman CJ.

71 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,773.

prudent lifeguard identified the conditions of the beach, including potentially dangerous conditions. He said that he identified dangerous positions for swimmers "visually by colour checks". In cross-examination he said:

> "I do it visually by colour checks. That is the way I do it. Dark green, to me, signifies deep water. And more oftentimes than not there is a current in the deep water. That is the first thing that I looked at on the beach; that is the first thing I would see. And then I would be drawn to that position and to check it out to see if there is a current running out or whether it's a still piece of ocean."

70 He agreed that "[s]ometimes a deep hole would be a safe place to swim as long as there is not a current et cetera, et cetera." However, he agreed that this would depend on whether he perceived the deep hole to be a danger or not.

71 There was therefore evidence that it was generally accepted practice to place the flags opposite a sandbank, although the beach conditions on the day ultimately determine where the flags are placed.

Placement of the flags at Bondi Beach on the day

72 There were two sets of flags at Bondi Beach that day, one at the North Bondi end and one – the set where Mr Swain was – in the centre of the beach. Mr Nightingale said that the southern end of the beach was "a more dangerous part of the beach usually." The area from south of the centre part of the beach "to the south end is allocated to board riding." Mr Swain also said that the "surf is bigger at the south than the north." Mr Sean Tagg, who in November 1997 had been a lifesaver for eight years, agreed that it would be fair to rate North Bondi "4", South Bondi "7" and the middle part varying between "4" and "6" on a scale of 1 to 10 of the dangerousness of the conditions at the beach, where "1" represented the safest conditions. However, none of the witnesses was asked about the conditions of the surf or the seabed at the North Bondi and South Bondi ends on this particular day or how they compared with the conditions at the centre of the beach.

73 The Council did not call the person who placed the flags on the day of the accident. Mr Nightingale said that, during the course of the day there was no change in conditions at the beach which required the flags to be moved: "I could definitely tell you now there was no change in the beach conditions." Mr Nightingale was not asked about the channel in front of the sandbank, that is, whether he was aware of it on the day. He was merely asked about his capacity to determine the existence of a channel. Nor was he asked whether there were any "holes" in the inshore area that day. He was asked in cross-examination whether he would take action if he found that there were "deep holes, for example, near the shore". His answer was that "it depends on how deep is deep."

He said that "[s]ometimes, a deep hole would be a safe place to swim as long as there is not a current".

74 Mr Williams was not asked to express any view as to whether the Council should or should not have placed the flags where they were on the day. Neither Mr Williams nor Mr Nightingale was asked whether the particular sandbar present on the day was an unusual or usual occurrence for the seabed. In the state of the evidence, that was not surprising.

75 Accordingly, the evidence entitled the jury to find that, at a beach such as Bondi, a channel or channels with variable depth and width commonly existed. Sandbanks were also part of the typical formation of the beach. "Guttering", that is, a channel on the inshore side of a sandbank, was inevitable. There was also evidence that the position and dimensions of the channels and the location and size of the sandbanks depended on the conditions prevalent on the day, such as the direction and size of the waves, the tidal influence, wind, currents and the availability of the sand. It was therefore open to the jury to infer – whether favourably to Mr Swain is another matter – that, at a beach such as Bondi, the location and size of the sandbanks and the position, depth and width of the channels were not uniform. It was also open to the jury to find that the current flowing in the channel also varied from day to day and during the course of the day. In addition, there was evidence that there were risks to swimmers associated with sandbanks, but there were much greater risks associated with rips.

76 Given the state of the evidence, however, it was not open to the jury to make any reasonably precise findings concerning the length, breadth, height, level or direction of the sandbank in question or the channels in front of and surrounding it. All that the jury could reasonably find on the evidence was that there was a sandbank in the centre flagged area of Bondi Beach, that on its inshore side there was a channel and that, in the area where Mr Swain, Mr Wilson and Ms Galvin swam, the water just before the channel was about a metre deep, the channel itself was about 40 centimetres deeper, and the top of the sandbar was about 60 centimetres above the bottom of the channel[72].

Reasonably foreseeable risk of injury and reasonably practicable alternatives

77 Counsel for Mr Swain submitted that there was evidence that the flags were placed in front of a hazard, namely, the channel and the sandbar. He submitted further that it did not matter that the flags were placed where such flags are generally erected, that is, opposite a sandbank. He contended that, in the circumstances, the flags were placed in a position where there was a hazard to

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72 See *Swain* [2003] Aust Torts Rep ¶81-694 at 63,785 per Handley and Ipp JJA.

Mr Swain of which he was not aware and where the Council (through Mr Nightingale) would or ought to have been aware of that hazard. Counsel argued that Mr Swain had discharged his evidentiary burden by demonstrating that it was apparent that "by a simple manoeuvre, that is, moving the flags, the problem [the hazard] may be resolved."

78 Counsel for Mr Swain also submitted that the identification of the risk was a matter of common sense and that the appropriate precautions to take to avoid the risk were also a matter of common sense[73]. He argued that this was not a case that required technical expertise (that is, which required the plaintiff to call an expert to testify concerning reasonably practicable alternatives). Rather, once Mr Swain demonstrated that the place where the flags were located was a hazard and that there existed an alternative that obviated or minimised the risk to Mr Swain, the evidentiary onus then passed to the Council to adduce evidence that such an alternative was not feasible. It could have done that, for example, by showing that there was no safer place to locate the flags. As a result of the Council's failure to do this, there was sufficient evidence – the circumstance of the hazard presented by the channel and the sandbar and the suggestion that the flags could have been moved – on which the jury could have found breach of duty by the Council.

Did the sandbar and the channel present a reasonably foreseeable risk of injury?

79 The question whether the presence of the sandbar and the channel gave rise to a reasonably foreseeable risk of injury for legal purposes is a difficult one. It is true, of course, that there existed a risk that a swimmer might dive into the sandbar and sustain injury. In that sense, the injury that Mr Swain sustained was foreseeable. But reasonable foreseeability in the law of negligence is not a simple question of the likelihood that an event will occur and cause harm. It is not a mere question of fact or prediction. The adjective "reasonable" indicates that "reasonable foreseeability" is a "fact-value complex"[74]. Inherent in the notion of "reasonable foreseeability" are questions of fairness, policy, practicality, proportion, expense and justice. One of the reasons that the law of negligence now faces a crisis is because, for too long under the influence of the Judicial Committee's advice in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* ("*The Wagon Mound (No 2)*")[75], common lawyers have equated reasonable foreseeability with physical possibility. In the result, since

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73 Citing *Neill* (1963) 108 CLR 362 at 368 per Taylor and Owen JJ.

74 See Stone, *Precedent and Law*, (1985) at 256; *Tame v New South Wales* (2002) 211 CLR 317 at 355 [105] per McHugh J.

75 [1967] 1 AC 617 especially at 643-644.

that time the common law has imposed obligations on persons that are often unreal and out of step with the way that ordinary people behave. It was not always that way. In the first edition of his great work, *The Law of Torts*, Professor Fleming pointed out[76]:

> "Almost any activity is fraught with some degree of danger to others but, if the existence of a remote possibility of harm were sufficient to attract the quality of negligence, most human action would be inhibited. Inevitably, therefore, a person is only required to guard against those risks which society recognizes as sufficiently great to demand precaution. The risk must be unreasonable, before he can be expected to subordinate his own ends to the interests of other."

80 This statement was an accurate statement of the rationale of the law of negligence until the decision of the Privy Council in *The Wagon Mound (No 2)*. If the common law doctrine of negligence is to survive, the philosophy behind Professor Fleming's summary has to be resurrected[77]. In my opinion, therefore, before any issue of reasonable practicability arises, there must be a risk of injury to the plaintiff that is so significant that it is reasonable to require the defendant to examine the need for a precaution to eliminate it. Only when such a risk is present is it necessary to consider issues of reasonably practicable alternatives. It is no longer accurate to say that a defendant is obliged to guard against any risk that is not far-fetched or fanciful. That pernicious principle has done such damage to the utility of the common law doctrine of negligence that it is now on the verge of legislative extinction in many jurisdictions. It will survive only if the common law now sets its face against the principles expounded in *The Wagon Mound (No 2)* and the cases that have faithfully followed it.

81 Once it is seen that the term "reasonable" is not an empty vessel that adds nothing to the notion of foreseeability, the question of reasonable foreseeability of risk in the present case is one of great difficulty.

82 There was no evidence that the prevailing conditions on the day were unusual or such that any channels or sandbanks formed on that day could have been unusual. There was no evidence about the probable effect of the tides on the beach conditions that day. There was also no direct evidence about whether the sandbank and channel in question were unusual. No-one asked Mr Williams whether some sandbanks are unusual and, if so, what the features of an unusual sandbank are. There was evidence that the channels would vary each day,

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76 Fleming, *The Law of Torts*, (1957) at 131-132.

77 See my discussion of the need to do so in *Tame* (2002) 211 CLR 317 at 351-357 [96]-[108].

depending on the movement of the rip tide current and other prevailing conditions.

83 The evidence given by Mr Williams concerning the formation of beaches generally permitted a reasonable jury to draw the inference that on Bondi Beach a channel with variable depth commonly existed. The evidence of Mr Wilson and Ms Galvin showed that it existed on that day. There was little evidence about the dimensions of the sandbank or the channel in question. There was no evidence that the sandbank or the channel in question changed *significantly* during the course of the day, although it would seem likely that at least small changes to parts of the sandbank and the channel were constantly occurring. Mr Williams agreed that it was inevitable, given the movement of water, that there would be a relocation of sand in the area on the inshore side of the sandbank. Consequently, the depth and width of the channel may have changed considerably during the course of the day. However, Mr Nightingale said that, although during the course of the day the beach conditions can change, it does not happen "all the time". Moreover, he said that "there was no change in the beach conditions" on that day. Accordingly, I think it was open to the jury to infer from the evidence that the beach conditions did not change during the course of the day and that the general structure of the channel and sandbar in question did not alter greatly during the day. On that view, the sandbank and the channel that were present at 4.30pm on that day had been present in the same general form for the entire day.

84 It is another question, however, whether the particular area where Mr Swain swam had been in the same condition for the entire day. For all that the evidence discloses, the particular area may have been more of a hole than part of a channel of uniform width and depth. Just as channels "may move or they may stay the same" depending on the circumstances, so "holes" may be created or disappear during the course of the day. Wave direction and the size of waves, the tidal influence, wind, currents and the availability of the sand affect the formation of channels and sandbars. Mr Williams' evidence seems to imply that the depth and width of channels will also change during the course of the day. Ms Galvin's evidence is indicative of there being a sudden "hole". She spoke of a "ditch or hollow in the water" just before the sandbank. She stumbled forward on the sandbank and the water became "shallow again without a doubt". In contrast, Mr Wilson said that there was a "normal ... downward slope" in the seabed and that when he reached the channel, which was a slight step down, he took "three or four" steps and "kicked a sandbar." His evidence is inconsistent with there being a sudden hollow or ditch in the place where he swam.

85 For Mr Swain, the most favourable view of the evidence, therefore, was that, between 15 and 25 metres from the shore, there was a ditch or hollow, as Ms Galvin called it, in the shore-side channel that was a few steps wide. On the seaward side of the channel was a sandbank. There was no evidence as to whether the channel and sandbank were unusual. From the shore to the ditch or

hollow, the water gradually got deeper until it was about waist deep or a little deeper at the edge of the hollow. Handley and Ipp JJA found that the channel was a "few steps" wide and that the "top of the sandbar was about 60 centimetres or about two feet above the bottom of the channel."[78] Waves were breaking on the sandbank and coming towards those who were approaching the sandbank from the beachside. They were "about 2-foot waves". The sandbank and the channel with its ditch or hollow were within the flagged area. Mr Nightingale said:

> "The flags are – indicates to people a reference where they can swim safely. If they stay between the flags, ideally they should come to no harm. It's safe swimming."

86 The scene so described or scenes very similar to it must have occurred many thousands of times on many beaches in Australia since bodysurfing became a popular pastime about a century ago. Many hundreds of thousands – probably millions – of people must have bodysurfed under conditions broadly similar to those present in this case. And a great many of them must have dived through oncoming waves that had broken on a sandbank. The evidence in this case does not reveal whether such apparently benign conditions have led to injury in the past. Such evidence would throw much light on the issues in this case, particularly the reasonable foreseeability issue. In the absence of evidence about what has happened in the past, that issue can be determined only by reference to the very sparse evidence placed before the jury. As a result, the question is whether, on a day when the surf was "quite calm", the Council should reasonably have foreseen that the presence of the sandbar, about 20-25 metres from the shore, covered with water about knee-deep and about 60 centimetres high, presented a reasonably foreseeable risk of injury to the 2,500 swimmers present at Bondi that afternoon. In particular, should the Council have reasonably foreseen that its flags might mislead a swimmer into thinking that he or she could "flat dive" through any wave coming off the sandbank without fear of injury?

87 Spigelman CJ found that[79]:

> "[N]o person attending an Australian beach could fail to know that there are sudden variations in the sand level under water. The formation of the ocean floor at the edge of the water is subject to continuous movement of currents and the pounding of waves which causes undulation in the sand formation that can, sometimes, become quite steep."

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78 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,785.

79 *Swain* [2003] Aust Torts Rep ¶81-694 at 63,779.

Mr Swain himself conceded that "when you go to the beach in those first 10 or so metres of the water, you can get irregularities."

88 If the top of the sandbank had been only 30 centimetres above the ocean floor, it seems impossible to conclude that it presented a reasonably foreseeable risk of injury to swimmers that required the Council to consider what it should do to protect them from injury. It would be well within the class of "irregularities" in the ocean floor that swimmers must reasonably expect and tolerate. "Safe swimming" is not a guarantee of safety. It does not mean that those swimming between the flags can do what they like and have no need to keep a lookout for dangers. It does not mean that they can dive – even make flat dives – in shallow water. It does not mean that they need not worry about being struck by other swimmers or loose floats or bodyboards.

89 Does it make a difference that the top of the sandbank was not 30 centimetres above the ocean floor but 60 centimetres above it? If I had to decide that question as a matter of fact, I would unhesitatingly find that it made no difference. After all, the presence of the sandbank was readily apparent. Not only would experienced swimmers and surfers know of its existence from the breaking waves above it, but, as the evidence of Mr Wilson and Ms Galvin showed, the water depth on the seaward side of the channel, that is, on the sandbank, was only knee deep. That pointed irresistibly to the existence of a sandbank. To find in those circumstances that the Council should have reasonably foreseen a risk of injury to swimmers would impose an unreasonable burden on it. Such a finding would require the Council and its employees to consider taking action in respect of a risk that would seldom eventuate and about which swimmers would or should have been aware.

90 However, the question for decision in this Court is not one of fact but of law. Could a reasonable jury find that reasonable care required the Council to consider whether part of a sandbank, 60 centimetres high and covered by about 60 centimetres of water, posed a risk to a swimmer making a flat dive into an oncoming wave that had broken on the sandbank? I think they could. Even if the area containing the hollow or ditch was not representative of the sandbank and channel generally, the jury could conclude that, because the conditions had not changed much that day, it had been in that condition for much of the day. Hence, the lifeguards should have been aware of the risk associated with it even if the ditch or hollow was no more than a few steps wide. In so holding, I have not overlooked Mr Swain's evidence that he could not see the ocean floor and that broken waves were coming off the sandbank and no doubt obscuring the visibility of the ocean floor. Importantly, the jury might also think that, although the risk to swimmers was most unlikely to eventuate, if it did, its consequences could be so grave that reasonable care required the risk to be eliminated if it was reasonably practicable to do so.

91 Accordingly, because a reasonably foreseeable risk of injury to swimmers such as Mr Swain existed, it was open to the jury to find that reasonable care required the Council to take a reasonably practicable precaution, if one existed, to eliminate or reduce the risk. As I have indicated, Mr Swain had the onus of tendering evidence to prove that such a precaution existed.

Reasonably practicable alternatives

92 Mr Swain contended that the risk of injury to him could have been avoided by relocating the flags. The learned trial judge told the jury[80]: "Essentially, the plaintiff says the danger should or could have been avoided, could reasonably have been avoided by moving the flags."

Relocating the flags

93 Mr Nightingale gave the following evidence about the placement and repositioning of the flags:

> "We set up at six but during the course of the day we are always observing the beach, of course, and at times situations change; you might have a wind change, a swell starts to come up and what was a safe area might have to be minimised or moved. So we basically – apart from watching for people in trouble we are waiting to reassess the situation.
>
> ... I think basically all we can do is – what we could do is pick out something that is a danger. If we pick out or see a situation that is a threat, doesn't matter to whoever it is."

94 Mr Nightingale was not asked why he did not move the flags that day.

95 Mr Williams said that what happens to channels during the course of the day is a factor that a prudent lifeguard supervising the beach would take into account. He agreed that, if there was a variation in the channel, it could affect the steps, if any, that the lifeguard might take, for example, in relation to the flags. Mr Nightingale also agreed that, if there was a strong current running out, a prudent lifeguard might consider whether or not the conditions were so dangerous that a warning sign, such as a "no swimming" sign, would need to be placed. He said that whether a prudent lifeguard would take any action if there were a deep hole near the shore would depend on whether the deep hole was perceived to be a danger. The depth of the hole and the existence of any current would affect whether the hole was perceived to be a danger.

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80 *Swain*, Supreme Court of New South Wales, Trial Transcript, 10 May 2002 at 9 per Taylor AJ.

96 Mr Williams was not asked whether the general practice to place flags opposite a sandbank would have been general practice at both 6am and 5pm or when the tide was flowing in or running out. In other words, he was not asked to identify the general practice at different times of the day and whether such general practice would vary according to the times of day or the movement of the tides.

Was there a safer place to put the flags or should the flags have been removed?

97 The fundamental difficulty in the way of Mr Swain's case is that there was no evidence that the areas to the north or south of the flagged centre area were safer than the flagged area. Nor was there any evidence that a portion of the flagged area did not have as high a risk of injury from the sandbank, rips and guttering as existed at the point where Mr Swain suffered his injury. Mr Nightingale was not asked whether there was a safer place to put the flags. Indeed, there was no direct evidence about whether there was a safer place to put the flags. The very fact that the flags were placed where they were points strongly to the conclusion that the areas to the north and to the south of the flagged centre area were more dangerous than the area between the flags. Moreover, there was no evidence about the *conditions* to the north or to the south of the flagged area where Mr Swain swam. Nor was there any evidence about the *conditions* of the flagged area other than what can be accepted or inferred from the evidence of Mr Swain, Mr Wilson and Ms Galvin. Hence, there was no evidence whether the channel and sandbank between the flags ran along the whole length of the beach. However, it seems unlikely that they did so. The evidence indicated that, on a beach such as Bondi, the typical formation of the beach would have been a rip, a sandbar, a rip, a sandbar. A jury could infer – although it does not help Mr Swain's case – that there would have been other rips and other sandbars along the beach on the day in the formation of a rip, a sandbar, a rip, a sandbar. In light of the evidence about the variable dimensions and locations of channels and sandbars, no inference could be drawn about the locations or dimensions of any other channels and/or sandbars at Bondi on the day. There was, as I have indicated, evidence that the North Bondi area was marginally safer than the area in the centre of the beach. There was also evidence that the South Bondi area was more dangerous than the centre area. And there was evidence that a beach such as Bondi typically consists of a series of channels and sandbanks and that the channels and sandbanks vary from day to day and during the course of the day. A reasonable jury could infer from this evidence that the location and dimensions of channels and sandbars are not uniform, that there probably would have been other channels and sandbanks outside the flagged area, and that the dimensions of these channels and sandbanks would vary. But it would be sheer speculation to infer from any of this general evidence that the sandbanks and inevitable channels to the north and south of the flagged area would not have exposed swimmers to the same, similar or other risks of injury as the centre area did. No inference could reasonably be

drawn that the channels and sandbanks outside the flagged area in the centre of the beach would have been any smaller or would have exposed swimmers to a lower risk of injury than the channel and sandbank where the accident occurred. Nor could any inference be drawn that, within the flagged area, there was an area where swimmers could swim without running risks of injury. Just as no inference could be drawn that the "ditch or hollow" extended uniformly along the whole of the channel in the flagged area, no inference could be drawn that it did not so extend.

98 As I have indicated, a plaintiff is required to identify an alternative means of eliminating a risk and to provide evidence that the alternative is indeed a practicable one. The plaintiff may be required to lead more evidence (or perhaps technical or expert evidence) as to an alternative and the feasibility of that alternative where the defendant has followed a generally accepted practice – which the Council had in this case. The plaintiff is also required to adduce technical or expert evidence concerning the practicability of the alternative unless it is one where common knowledge or common sense is all that is required to prove the reasonably practicable alternative. However, this was not a case where the jury could use its common knowledge or experience to find that the flags could be moved to another area of the beach because there was no evidence concerning the conditions of the surf and the seabed at other parts of the beach on that day.

99 As a result, Mr Swain's evidence did not disclose whether it would have been reasonably practicable to move the flags from that part of Bondi Beach on the day to another part of the beach. As the cases show, where a suggested alternative carries its own risks, the plaintiff is required to provide evidence that these alternatives would have been practicable. Moving the flags would have carried its own risks to the safety of swimmers. Mr Swain did not suggest that the beach itself should have been closed or even that the flagged area in the centre of the beach should have been closed. Nothing short of expert evidence to that effect could have enabled the jury to find that closing the beach or its centre area was the only reasonably practicable way of responding to risks arising from the size and shape of the sandbank that caused Mr Swain's injury.

100 Counsel for Mr Swain boldly contended that he did not need to tender evidence that there was a reasonably practicable precaution that would reduce or eliminate the risk of injury to Mr Swain. He contended that Mr Swain was "entitled to succeed if we can demonstrate that it is apparent that by a simple manoeuvre, that is, moving the flags, the problem may be resolved." He argued that it was then "for the [Council] to deal with that by coming along and saying, 'Could not do it', and that did not happen." This submission reverses the onus of proof in a negligence case. It could not be accepted without overruling *Vozza*[81]

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81 (1964) 112 CLR 316.

and *Neill*[82] to mention but two cases in this Court. In *Vozza*, the plaintiff suggested two alternatives to obviate the risk of injury: the installation of a system for the mechanical handling of the bottles and the provision of thicker gloves. This Court held that, in the absence of evidence that either suggestion was reasonably practicable, there was no evidence of negligence. In *Neill*, the plaintiff suggested that a handrail might have been placed inside a milk container to minimise the risk of injury from slipping or that the employer could have provided "non-skid boots". The plaintiff provided no evidence of the practicability of either suggestion. This Court held that, in the absence of expert evidence that the suggested precautions were practicable, his claim failed. Similarly, in this case Mr Swain alleges that the risk could have been avoided by moving the flags. But he led no evidence that it was reasonably practicable to move the flags to some other place on the beach.

101 Counsel for Mr Swain also relied on the decision of this Court in *Nelson v John Lysaght (Australia) Ltd*[83] to support his submission that he had discharged the onus of proving reasonable practicability. But that case does not assist Mr Swain's case. In *Nelson*, the plaintiff was injured as a result of a system of work that required him to walk backwards to carry out a task. About a month after his accident, a new system was installed that made it unnecessary for a workman to walk backwards to carry out the task. It was hardly surprising that this Court, reversing the decision of the Court of Appeal of the Supreme Court of New South Wales, held that there was evidence of a reasonably practicable alternative system that would have eliminated or minimised the risk of injury to the plaintiff. As Gibbs J said[84]:

> "Even on that assumption [ie, that a bar had been installed as part of a remodelling of the plant] the [plaintiff] has shown that it was practicable to provide a new method of doing the work that would eliminate or minimize the risk, because such a new method has in fact been put into operation."

102 *Nelson* would have relevance in this case if Mr Swain had proved that, after his injury, the Council had adopted a new method of guarding against the risk of injury from the presence of sandbanks. No such proof was offered. *Nelson* does not assist Mr Swain.

103 What was required for Mr Swain to succeed in this case was evidence – which almost certainly would have had to be expert evidence – that the

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82 (1963) 108 CLR 362.

83 (1975) 132 CLR 201.

84 *Nelson* (1975) 132 CLR 201 at 214.

conditions at some part of the beach to the north or south of or even in a section of the centre flagged area were such that the risk of injury from the sandbank, rips and guttering was much lower than the risk existing at the point where Mr Swain suffered his injury. No such evidence was led.

104 In my opinion, there was no evidence upon which the jury could reasonably find that the Council was guilty of negligence and, as a result, caused Mr Swain's injury.

Order

105 The appeal must be dismissed with costs.

106 GUMMOW J. The appellant, Mr Guy Swain, suffered spinal injury while entering the surf at Bondi Beach in 1997. He is now a quadriplegic. The respondent, Waverley Municipal Council ("the Council"), is the local council having the care, control and management of that beach.

107 In this Court the appellant seeks the correction of what he submits was the impermissible interference by the New South Wales Court of Appeal (Handley and Ipp JJA; Spigelman CJ dissenting)[85] with a jury verdict in his favour. The Court of Appeal set aside the verdict and entered a verdict and judgment for the Council[86].

108 The appeal is to be resolved by the application of established principles and no novel point of law is urged by the appellant. Counsel for the appellant relied in general terms upon what he said were the well-known propositions in *Wyong Shire Council v Shirt*[87]. Counsel for the respondent fought the appeal on grounds which did not seek to gainsay *Shirt*. In particular, no application was made for leave to re-open *Shirt*, a step that would be required by *Evda Nominees Pty Ltd v Victoria*[88]. *Shirt* has stood for some 25 years and must have been applied across the country on numerous occasions and supplied the understanding of the law on which many cases were settled.

109 *Shirt* considered what had been said by the Privy Council in *The Wagon Mound [No 2]*[89], an appeal taken directly from the judgment of Walsh J in the Supreme Court of New South Wales. It is the treatment of *The Wagon Mound [No 2]* in *Shirt* which represents the law. In deciding the present appeal, to speculate whether what was said by the Privy Council and adopted by this Court in *Shirt* took the law around a wrong turning and introduced "deleterious foreign matter into the waters of the common law" in which the courts "have no more than riparian rights"[90] would be inappropriate.

110 It should be added immediately that this is not a case in which this Court is required to determine the extent of the duty of care of municipal authorities to swimmers who use beaches in their local government areas. Nor will this appeal

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85 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694.

86 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,787.

87 (1980) 146 CLR 40.

88 (1984) 154 CLR 311.

89 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617.

90 The words are those of Kitto J in *Rootes v Shelton* (1967) 116 CLR 383 at 387.

determine in general terms what is required of local authorities in exercising reasonable care for the safety of beach-goers[91]. The issue in this case is narrower; simply put, it is whether the Court of Appeal correctly applied settled principle in setting aside the jury's verdict.

The facts

111 On Friday, 7 November 1997, Mr Swain went to Bondi with a friend, Ms Kathryn Galvin, and her flatmate, Mr Earl Wilson. Mr Swain was then aged 24. The evidence was that the conditions that day were calm, with next to no surf.

112 The party arrived at Bondi in the afternoon some time around 3.00 pm. Mr Swain and Mr Wilson went to get a "long neck", or 750 ml bottle, of beer each from a nearby shop. Mr Swain, Ms Galvin and Mr Wilson then sat on the grass opposite the beach for about an hour and a half, during which time Mr Swain and Mr Wilson consumed this beer.

113 Mr Wilson decided to go for a swim. He left the grassed area and went down onto the beach, entering the surf between the red and yellow flags. Mr Swain and Ms Galvin remained on the grass. Mr Wilson gave evidence that he had waded out about 15 or 20 metres at which point he "kicked a sandbar". Mr Wilson said that the water was waist deep immediately before the sandbar, but that it was only knee deep above the sandbar. Mr Wilson also gave evidence to the effect that the sandbar was "a bit of a surprise because it was quite a big step" and that he remembered thinking it "a bit dangerous" at the time. He claimed that he had been thinking of diving into the surf before he hit the sandbar.

114 Later, Ms Galvin and Mr Swain also decided to go for a swim. Ms Galvin entered the water first, with Mr Swain about 20 metres behind her. By that time, Mr Wilson had finished his swim and was back on the beach. Ms Galvin gave evidence that as she made her way out into the surf she "fell into a ditch in the water" which was sufficiently deep to make her lose her balance and fall over. She also said the water became "really shallow again straightaway" after the ditch.

115 As Mr Swain entered the water, he found that it "gradually got deeper" the farther he went out. He said that he waded out about 15 metres, at which point the water was around waist deep. At that point, he could not see the sand

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91 cf *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Tomlinson v Congleton Borough Council* [2004] 1 AC 46.

beneath him. A wave started coming towards him and Mr Swain decided to "dive through it". The next sensation he felt was "not being able to move".

The trial

116 In 2000, Mr Swain instituted an action in tort in the Supreme Court of New South Wales alleging that his injuries were caused by the negligence of the Council. Specifically, Mr Swain alleged that he had sustained his injuries when he dived into a sandbar as he made his way out into the surf. The particulars of negligence alleged at trial were that the red and yellow flags erected by the Council induced Mr Swain to swim where he did, and that the Council had failed to take reasonable care in positioning the flags ("the flag placement issue"), or in failing to warn swimmers of the sandbar through the use of warning signs ("the failure to warn issue").

117 The action was tried by Taylor AJ and a jury of four. The trial proceeded before a jury on the requisition of the Council and pursuant to the provisions of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act"), as it then stood[92]. Taylor AJ directed the jury on the question whether the Council owed a duty of care to Mr Swain. His Honour instructed the jury that, as a matter of law, the Council did have a duty to beach-goers by reason of its care, control and management of the beach. The duty was to take reasonable care of the safety of those citizens using the beach. That direction was not challenged at trial, nor has it subsequently been called into question, in either the Court of Appeal or this Court.

118 The jury found the Council liable, and found contributory negligence of 25 per cent on the part of Mr Swain. This finding of contributory negligence has not been challenged in the Court of Appeal or this Court. The parties had agreed on the quantum of damages prior to the trial. Taylor AJ therefore adjusted the agreed figure to account for the degree of contributory negligence found by the jury and entered a verdict for Mr Swain in the sum of $3.75 million.

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92 At the time and subject to ss 87 and 88 which are not presently relevant, s 86 of the Supreme Court Act provided that a party had a right to have issues of fact tried by a jury in proceedings on a common law claim, conditioned only upon the filing of a requisition for jury and the payment of the prescribed fee. Following the amendments made by the *Courts Legislation Amendment (Civil Juries) Act* 2001 (NSW), s 85 now provides that trials are to proceed without juries, unless a party requests that the trial be conducted by jury and unless the Court is satisfied that "the interests of justice require a trial by jury in the proceedings".

The Court of Appeal decision

119 The Council appealed to the Court of Appeal on the grounds that there was no evidence capable of sustaining the jury's findings or, alternatively, that in its totality the evidence preponderated so strongly against the verdict that reasonable jurors could not have reached it. This latter ground failed in the Court of Appeal and has not been revived by the Council in this Court.

120 While no distinction was drawn at trial between the flag placement issue and the failure to warn issue[93], the Court of Appeal approached these alleged breaches separately. The Court of Appeal unanimously accepted that there was no evidence to support a verdict against the Council on the failure to warn issue[94]; however, by majority (Handley and Ipp JJA; Spigelman CJ dissenting), the Court accepted that there was likewise no evidence to support such a verdict on the flag placement issue[95]. The Court of Appeal thus allowed the appeal and ordered that the verdict for Mr Swain be set aside and that, in lieu thereof, verdict and judgment be entered for the Council.

121 The reasoning of the majority in the Court of Appeal upon the flag placement issue appears to have been based on three propositions. First, that there was no evidence upon which the jury could conclude that the flags conveyed that the designated area is one in which it is safe to dive. Secondly, that the dangers of diving into the surf were so obvious that there was no evidence upon which the jury could conclude that the Council had breached its duty of care towards Mr Swain. Finally, that there was no evidence to suggest that the Council could have taken any course of action with respect to the placement of the flags that would have avoided injury to Mr Swain[96].

The appeal to this Court

122 In this Court, the only challenge by Mr Swain is to the Court of Appeal's decision in relation to the flag placement issue. The failure to warn claim has not been re-agitated. Therefore there is no occasion to express any opinion as to whether the Court of Appeal's conclusions on that issue are correct. In order to

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93 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,773.

94 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,781, 63,785-63,786

95 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,782-63,783.

96 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,785-63,786.

succeed at trial, it was not necessary for Mr Swain to make good both the flag placement claim *and* the failure to warn claim. The appeal to the Court of Appeal should have been dismissed if there was sufficient evidence to support either claim.

123 Did the majority in the Court of Appeal err when it concluded that there was no evidence upon which a reasonable jury could have found that the Council was in breach of its duty in the placement of the flags? That question should be answered "yes" for the reasons that follow.

The relevant principles

124 The live issues at the trial, which were reflected in the directions given to the jury by Taylor AJ, were whether the appellant in fact had been swimming between the flags, whether he was injured in fact by making the low dive (which issue included alleged impairment of his judgment or recollection by the effects of alcohol or drug-taking the previous night), and the alternative action the Council could have taken on the day to avoid the injury to the appellant.

125 The Council's contention that there was no evidence to support a verdict on the flag placement issue was not raised at trial. It was first raised in an amendment to the grounds of appeal in the Court of Appeal. However, *Hampton Court Ltd v Crooks*[97] is authority in this Court that a party may raise a "no evidence" objection on appeal notwithstanding that no such objection was taken at trial, provided that the objection is one which, if taken at trial, would have been fatal to the appellant's case.

126 The criteria applicable under the Supreme Court Act for the disposition of appeals in jury actions differ from those for non-jury actions. The distinction was explained by McHugh J in *Puntoriero v Water Administration Ministerial Corporation*[98]. The criteria reflect the circumstance that, from the decision of a judge sitting without a jury, the reasoning process for the decision should be apparent from reasons provided by the judge and thus available for appellate analysis.

127 In setting aside the verdict in favour of Mr Swain, the Court of Appeal was proceeding under ss 102 and 108 of the Supreme Court Act. Section 102 confers jurisdiction on the Court of Appeal in any application for the setting

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97 (1957) 97 CLR 367.

98 (1999) 199 CLR 575 at 586 [25]-[27]. See also the discussion of *Latimer v AEC Ltd* [1953] AC 643 in Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 42-43.

aside of a verdict or judgment following a jury trial. Section 108 relevantly provides:

> "(1) This section applies to an appeal to the Court of Appeal in proceedings in the Court in which there has been a trial with a jury.
>
> …
>
> (3) Where it appears to the Court of Appeal that upon the evidence the plaintiff or the defendant is, *as a matter of law*, entitled to a verdict in the proceedings or on any cause of action, issue or claim for relief in the proceedings, the Court of Appeal may direct a verdict and give judgment accordingly." (emphasis added)

The relief the Council obtained in the Court of Appeal was an order substituting the trial verdict and judgment for a verdict and judgment in its favour under s 108(3). Such an order was only available if the Council was entitled to a verdict "as a matter of law".

128 Both parties accepted that, in assessing whether the Council was entitled to a verdict "as a matter of law", the relevant principles are those laid down by the Privy Council in *Hocking v Bell*[99], and by this Court in *Naxakis v Western General Hospital*[100]. In the latter case, McHugh J and Kirby J each traced the development of these principles from their formulation by the common law courts in England to their modern expressions[101].

129 The principles have been variously formulated in the modern cases. In *Hocking*, the Privy Council[102] approved the formulation adopted by Latham CJ in dissent in this Court[103]. Latham CJ had held that, provided "there is evidence upon which a jury could reasonably find for the plaintiff" and that such evidence is not "so negligible in character as to amount only to a scintilla", a defendant will not be entitled to a verdict "as a matter of law", and an appellate court will have no basis for disturbing the verdict of the jury.

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99 (1947) 75 CLR 125.

100 (1999) 197 CLR 269.

101 (1999) 197 CLR 269 at 281-282 [39], 288-291 [55]-[60].

102 (1947) 75 CLR 125 at 130-131.

103 *Hocking v Bell* (1945) 71 CLR 430 at 441-442.

130 This formulation differs in its terms from that adopted by Jordan CJ in the Supreme Court of New South Wales in the earlier case of *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd*[104]. In a passage which was approved by Latham CJ in *Hocking*[105], and by Gleeson CJ and Callinan J in *Naxakis*[106], Jordan CJ said that[107]:

> "if the stage is reached that a *prima facie* case has been made out [by the plaintiff], the question whether the jury should accept that case, or should accept rebutting evidence called for the defendant, is one for them, no matter how overwhelming the rebutting evidence may be".

131 The formulation by Latham CJ is apt where the submission on appeal is that there was no evidence upon which a jury could have been satisfied of a specific and ultimate issue of fact. In *Hocking* itself, that issue was whether, after performing a thyroidectomy on the plaintiff, the defendant surgeon had left in the plaintiff's neck a portion of a rubber drainage tube which later passed through the tonsil and into her mouth. The appeal was determined by the Privy Council by asking whether there was evidence not so negligible in character as to amount only to a scintilla upon which the jury reasonably could have found that the plaintiff had made out her case.

132 Where, as in the present litigation, the allegation is that the respondent had failed to take reasonable care in one or more ways (here represented by the flag placement issue, and the failure to warn issue), some jurors may have accepted the appellant's case on one issue, some on another. Their verdict is inscrutable. In such a situation, the formulation by Jordan CJ in *De Gioia*[108] better encompasses the permissible range of choice open to the jury where a prima facie case has been made out.

What the flag placement represented

133 It remains to be considered whether these principles support the intervention of the Court of Appeal in the present case.

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104 (1941) 42 SR (NSW) 1.

105 (1945) 71 CLR 430 at 442.

106 (1999) 197 CLR 269 at 271 [1], 309 [117]. See also at 281-283 [39]-[42] per McHugh J.

107 (1941) 42 SR (NSW) 1 at 5.

108 (1941) 42 SR (NSW) 1 at 3-5.

134 There was evidence before the jury that the red and yellow flags designate a zone in which it is safe to swim. Mr Harry Nightingale, one of the Council's lifeguards who was on duty on the day of the accident gave evidence that the presence of the flags:

> "indicates to people a reference where they can swim safely. If they stay between the flags, ideally they should come to no harm. It's safe swimming."

This evidence was consistent with Mr Swain's evidence that he had swum between the flags because it was "safe and a patrolled area".

135 In the Court of Appeal, the majority said that, while they accepted that the placement of the flags acted as an express indication that bathing between the flags was reasonably safe, the flags did not indicate that it was reasonably safe to dive[109]:

> "The flags are there to designate swimming areas and to indicate to people where they can swim safely. They do not indicate that it is safe to dive anywhere between them. They do not indicate, for example, that it is safe to dive at the water's edge, or that it is safe to dive into a channel. The flags were not intended to convey, and did not convey, any indication to persons in the water of the condition of the sand floor or the depth of water immediately in front of them."

136 While this conclusion may have been open to the jury on the evidence, it was not the only reasonable conclusion open to the jury. Spigelman CJ properly stressed in his dissenting judgment that it was open to the jury to conclude that the flags not only represented that it was safe to bathe, but also that it was safe to engage in the ordinary activities of surf-swimming or body surfing, which may include some forms of diving[110].

137 However, even accepting that the distinction drawn by the majority between swimming and diving is correct, it does not follow that this precluded the jury from finding that the Council had failed in the exercise of its duty of care. It was open to the jury to conclude that, in placing the flags, the Council should have exercised reasonable care to prevent injury to persons who misunderstood what the flags represented[111]. A person who owes a duty of care must take account of the possibility that one or more of the persons to whom the

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109 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,786.

110 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,781.

111 See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48.

duty is owed might fail to take proper care for his or her own safety[112]. So much was recognised by Taylor AJ in his summation to the jury:

> "Obviously, by using your common sense, you can take into account in assessing the standard of care expected of the reasonable Council, the possibility of the inadvertent or careless conduct on the part of the bathers."

In the circumstances of this case, it was open to the jury to conclude that reasonable care required the Council, in placing the flags, to consider the possibility that an inadvertent or careless bather would assume that the flags indicated that it was both safe to swim and safe to dive.

138 That does not mean that the Council was required to guard against far-fetched or fanciful risks[113]. It is for that reason that the majority in the Court of Appeal was correct when it noted that the jury could not properly conclude that the flags represented that it was safe to dive at the water's edge[114]. That said, it was here open to the jury to conclude that, whilst it may have been foolhardy for Mr Swain to attempt to dive where he did, the standard of care required of the Council extended to taking steps to take account of the possibility of such behaviour.

The hazards were "obvious"

139 The second ground upon which the majority in the Court of Appeal concluded that there was no evidence to support a finding of breach on the flag placement issue was that the hazard posed by the sandbar was both notorious and "obvious". The suggestion was not that the danger was so obvious as to negative the existence of a duty of care, but that, in light of the obviousness of the hazard, there was insufficient evidence to satisfy a jury that the Council had breached its duty[115]. In support of this contention, the majority placed reliance upon[116] the decision of the Full Court of the Supreme Court of Western Australia (Ipp, Wallwork and Parker JJ) in what was said to be the factually similar case of *Prast v Town of Cottesloe*[117]. That was an action tried by a judge sitting alone.

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112 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 431.

113 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 431.

114 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,786.

115 cf *Tomlinson v Congleton Borough Council* [2004] 1 AC 64.

116 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,786.

117 (2000) 22 WAR 474.

The Full Court there drew a distinction between cases in which the plaintiff was injured by diving into a concealed obstacle, such as *Nagle v Rottnest Island Authority*[118], and those "body surfing" cases where the risk is obvious and inherent[119].

140 It is clear that, in assessing the standard of reasonable care required of a local authority, the obviousness of the risk is a factor to be considered in determining the standard of reasonable care[120]. However, whether or not a risk is obvious is a question of fact[121]. It is for this reason that the Court of Appeal's reliance on *Prast* is misconceived. As with all other considerations relating to the question of breach, previous cases carry no precedential value on the question of whether a risk is obvious[122].

141 In *Jolley v Sutton London Borough Council*, Lord Steyn observed[123]:

> "[I]n this corner of the law the results of decided cases are inevitably very fact-sensitive. Both counsel nevertheless at times invited your Lordships to compare the facts of the present case with the facts of other decided cases. That is a sterile exercise. Precedent is a valuable stabilising influence in our legal system. But, comparing the facts of and outcomes of cases in this branch of the law is a misuse of the only proper use of precedent, viz, to identify the relevant rule to apply to the facts as found."

To this should be added that this is particularly so where an appellate court is reviewing the decision of a jury, as the evidence upon which the jury relied cannot always be identified with any certainty.

142 Furthermore, in determining an issue of breach of duty, the circumstance that a risk is obvious is only one factor to be weighed and is not conclusive[124]. A

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118 (1993) 177 CLR 423.

119 (2000) 22 WAR 474 at 481-483.

120 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 456 [56], 481 [131], 489 [157]; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 503-504 [144].

121 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 491 [164]-[165].

122 *Bus v Sydney County Council* (1989) 167 CLR 78 at 88-89.

123 [2000] 1 WLR 1082 at 1089; [2000] 3 All ER 409 at 416.

124 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 474 [45].

duty of care may extend to preventing injuries that result from the "inadvertence and inattention" of plaintiffs to obvious risks[125]. It was for the jury to determine whether the risk was obvious, and it was open to them to infer from the evidence of Mr Swain, Mr Wilson and Ms Galvin that the channel and sandbar were unexpected and concealed hazards.

143 Moreover, nothing turns on the observation by the majority in the Court of Appeal that[126]:

> "[t]here was no evidence that the conditions of the channel and sandbar within the flags that afternoon where the [appellant] was injured were materially different from those encountered there on previous hours, days, weeks, months or years, or that they were unusual or more dangerous than those which would be encountered on other surfing beaches in Australia."

Mr Swain did not need to satisfy the jury that the risks posed by the channel or sandbar were unusual or unique to establish a case to go to the jury. So much is clear from *Nagle* where the particular hazard was a submerged rock that sat adjacent to a flat wave platform from which the plaintiff dived – a hazard that was no doubt common in such areas, and which presumably had existed for some time. If a hazard is common or longstanding, that may be a factor from which a jury could infer that the risk was obvious. Again, however, it may not be unreasonable for the jury to reject that inference.

The placement of the flags

144 Finally, the majority in the Court of Appeal concluded that there was no evidence that could sustain a finding of negligence on the part of the Council in the placement of the flags because the appropriate place for the flags was opposite a sandbank. In their Honours' view[127]:

> "It was therefore normal, if not inevitable, that there would be a channel and therefore a sandbar in the swimming area between the flags."

145 That conclusion appears to have been based on evidence by the respondent's expert witness, Mr Jeffrey Williams. Mr Williams was then a senior ocean lifeguard and a beach surf education officer for the Sutherland Shire Council, and had been a professional ocean lifeguard since 1978. In cross-examination, Mr Williams gave evidence that flags are generally erected on the

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125 *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 342.

126 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,785.

127 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,786.

beach directly in front of the sandbanks. The reason for this is that sandbanks are often shallower and because, depending on the day, the current on a sandbank tends to be less strong than the movement in the rips either side of the sandbank.

146 Nevertheless, there also was material before the jury upon which it could reasonably conclude that, on the day in question, the Council had failed to exercise reasonable care in positioning the flags in front of the sandbar. In his evidence in chief, Mr Williams had said that both channels and sandbars present potential hazards for swimmers. The hazard created by a channel was said to be that it created a trough of variable depth that "people aren't familiar with". He repeated this evidence in cross-examination accepting that, although it may be safest on some occasions to set up flags opposite a sandbar, on others the trough created by a sandbank "could be the biggest hazard on the day". Another witness called by the Council, Mr Nightingale, likewise said that troughs or channels could be dangerous for swimmers. Mr Nightingale is a lifeguard employed by the Council and was on duty at Bondi on 7 November 1997.

147 There also was evidence which suggested that the Council was in a position to locate and to deal with such hazards when they arose. Mr Nightingale said that he could visually identify channels because sections of deep water appear dark green, while sandbanks are "yellowy". He said that he also could generally identify sandbars from his position in the demountable lifeguard's shed (which was being used instead of the observation tower at the time), and that he was able to tell whether the flags needed to be moved from that position.

148 Mr Nightingale's evidence that he could visually identify sandbars is to be contrasted with the evidence of Mr Swain, Mr Wilson and Ms Galvin, all of whom claimed that they saw no indication of the hazard prior to actually stumbling across it. Their evidence was consistent with Mr Williams' contention that troughs can be hazards because they are something with which people are not generally familiar. It was open to the jury to conclude that the sandbar was a hazard which would have been known to the Council, but one which was not apparent to people in the position of Mr Swain.

149 There also was evidence to suggest that the appropriate response to such a hazard would be to reposition the flags. Mr Williams said that the location of the flags is generally made after an assessment of the prevailing conditions. He said that the wind, current, channels and "the actual formation of the beach" all could constitute hazards of which the prudent lifeguard would take account in positioning the flags. Specifically, Mr Williams said that the channels on the beach may change over the course of the day and that such changes may require the flags to be moved. Mr Nightingale gave similar evidence and suggested that part of his work was to reposition the flags when conditions changed so much that what had been a safe area in which to swim became unsafe.

150 Mr Nightingale was not involved in placing the flags on the day of the accident. That was done at 6.00 am, before he commenced his shift. The flags were not moved all day. It was open to the jury to infer that Mr Nightingale and the other lifeguards failed to respond to a known hazard by moving the flags. The Court of Appeal's contention that there was no evidence capable of sustaining a finding of negligence on the part of the Council in the placement of the flags cannot be maintained.

Onus of proof with respect to reasonably practicable alternatives

151 An issue arose in this Court as to which party had borne the onus to establish the existence or non-existence of a reasonably practicable alternative to the placement of the flags in their location at the time of the accident. This issue arose partly from the assertion of the majority in the Court of Appeal that "[m]oving the flags along the beach in front of another part of the same sandbank or another sandbank would not have protected the [appellant] from a channel and its sandbar"[128].

152 Neither party led any evidence as to the formation of the beach outside the flags on 7 November 1997. Nor did either party ask Mr Nightingale why he did not move the flags. There was no evidence to suggest that the particular sandbar stretched the length of the beach. The closest any witness came to such evidence was an observation by Mr Williams that "generally a beach is one large sandbar" dissected by a series of channels. That comment was not made with specific reference to the conditions prevailing at Bondi on the day of the accident, nor did it necessitate the conclusion that there was no more suitable location for the flags at that time.

153 While the plaintiff bears the ultimate burden of proving that his or her injuries could have been avoided by some reasonably practicable alternative course of conduct available to the defendant[129], in some cases, the evidentiary burden which has come to rest upon the defendant may prove decisive of the outcome.

154 In *Nelson v John Lysaght (Australia) Ltd*[130], it was held by this Court that upon the evidence the jury had been entitled to find that the system of work in

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128 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,786.

129 *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362 at 364-365, 365, 368-371; *Australian Iron & Steel Pty Ltd v Krstevski* (1973) 128 CLR 666 at 668-670; *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201 at 214.

130 (1975) 132 CLR 201.

force where the plaintiff was injured exposed him to a clear risk of injury. The onus lay upon the plaintiff to prove that it was unreasonable of the defendant not to take a suggested precaution, which it had later adopted. However, Gibbs J pointed out[131]:

> "[W]hen the [defendant], which must have had full knowledge of the nature, cost and practical consequences of the new installation, gave no evidence, and by its counsel asked no questions, to suggest that it was inordinately expensive or in any other way disadvantageous, the jury was entitled to infer at the very least that the advantages of the method which the [defendant] has since adopted were not outweighed by any disadvantages."

155 Here, also, the Council, as indicated above, led no evidence and asked no questions upon critical matters. The Council's witness, Mr Nightingale, was the person well placed to give evidence upon these matters. It was open to the jury to infer, for example, that the Council could have moved the flags. In the circumstances of the trial, the Council had carried at least an evidentiary onus to lead evidence that no reasonably practicable alternative course of conduct was open to it[132].

Conclusion

156 In its essence, the reasoning of the majority in the Court of Appeal leads to no more than the conclusion that a verdict for the Council was the preferable outcome on the evidence before the jury. That is an insufficient basis for holding that the Council was entitled to a verdict "as a matter of law" under s 108(3) of the Supreme Court Act.

Orders

157 The appeal should be allowed with costs. The orders of the Court of Appeal entered on 27 May 2003 should be set aside and, in lieu thereof, it should be ordered that the appeal to that Court be dismissed.

158 The grounds upon which the Council succeeded in the Court of Appeal were only added by amendment on the day of the hearing. For that reason, the

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131 (1975) 132 CLR 201 at 214-215.

132 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 585 [180]. See also *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362 at 368-369.

Court of Appeal made no orders as to costs in that appeal[133]. As Mr Swain now succeeds in upholding the verdict of the jury, the Council should pay Mr Swain's costs in the appeal to the Court of Appeal.

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133 *Waverley Municipal Council v Swain* [2003] Aust Torts Rep ¶81-694 at 63,786-63,787.

159 KIRBY J. This appeal concerns the application of the principles governing the appellate disturbance of a judgment entered following a jury's verdict in a trial of an action for damages for negligence. The appeal comes from a divided decision of the New South Wales Court of Appeal[134].

160 This appeal is not so much one concerned with the negligence liability of local government authorities for the placement of safety flags on patrolled surfing beaches. It is one about the respect accorded by the law to jury verdicts and the severe difficulty presented to those who receive them and then seek to overturn them.

161 This Court is twice separated from the merits of the case. The primary responsibility for deciding those merits belonged, at trial, to the jury, summoned to resolve the factual differences between the parties. The secondary obligation, to consider complaints about the outcome of the trial, lay with the Court of Appeal. This Court's duty is neither to perform the functions of the jury nor to perform *de novo* the appellate obligations of the Court of Appeal. It must consider whether any error has been shown on the part of the Court of Appeal warranting the correction of that Court's judgment and the restoration of the jury's verdict.

The trial, verdicts and appellate issue

162 Mr Guy Swain (the appellant) received injuries to his cervical spine on 7 November 1997. The injuries occurred at Bondi Beach. That beach, comprising a long stretch of sand facing the Pacific Ocean, is one of the most popular in Sydney. It falls within the local government area of the Waverley Municipal Council ("the Council"), the respondent to this appeal. As a result of his spinal injury, the appellant was rendered quadriplegic. In the Supreme Court of New South Wales he sued the Council in an action framed in negligence. A civil jury was summoned to try the action.

163 The trial took place over six days in May 2002. The quantification of the appellant's damage was agreed between the parties[135]. The factual issues for the jury's decision were confined to whether the appellant had proved that his injuries were caused by negligence on the part of the Council; whether, if so, the Council had proved contributory negligence on the part of the appellant; and if so, to what extent (expressed as a percentage). The jury returned verdicts of

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134 *Waverley Municipal Council v Swain* [2003] Aust Torts Reports ¶81-694.

135 Following the jury's verdict, and having regard to the agreed damages and for contributory negligence found by the jury, judgment was entered by the trial judge in favour of the appellant in the sum of $3.75 million.

negligence and contributory negligence. They found the latter at 25 per cent on the part of the appellant.

164 Following the entry of judgment in favour of the appellant, in terms of the jury's verdicts, the Council appealed. Originally, the only ground of appeal was one complaining that the verdict of negligence was against the evidence and the weight of the evidence. However, on the return of the appeal before the Court of Appeal, the Council sought, and was granted, leave to argue that there was no evidence to sustain the conclusions necessary to the verdict in favour of the appellant. Alternatively, the Council pressed the complaint that the verdict was against the evidence on the basis that the overwhelming preponderance of the evidence at trial indicated that the appellant had received his injuries whilst swimming outside the area of the beach designated by flags. That factual issue had loomed large in the trial and it did so again on appeal. However, most of the arguments before the Court of Appeal were addressed to the "no evidence" ground. As it was the only ground ultimately argued before this Court, it is essential to examine the evidence given before the jury on that point[136].

The state of the evidence

165 Many of the basic facts concerning the events leading to the appellant's injury were not contested. Bondi Beach is patrolled by lifeguards employed by the Council. On 7 November 1997, the day began in the normal way with the placement of flags on the beach, not far from the beach pavilion, indicating the patrolled area. The weather was fine but overcast. The patrol record suggests that between 1,500 and 2,500 people attended the beach that afternoon. A high tide of 1.5 metres occurred at 2 pm. Until the appellant's injury, it was an uneventful day for the lifeguards on duty, one of whom was Mr Harry Nightingale.

166 The appellant was a young man aged 24 years. He was an experienced surfer and normally surfed at North Curl Curl Beach. He had been to Bondi Beach on at least ten occasions. On the day of his injury, he travelled to the beach with two friends, Ms Galvin and Mr Wilson. The appellant acknowledged that he was familiar with rips in the surf, and how to spot them. He had dived under waves many times. He was fairly familiar with the pattern of waves breaking on a sandbank. He appreciated that there were a number of judgments that he had to exercise in deciding whether and when to dive, including how deeply to dive whilst still remaining safe. He acknowledged that every time he

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136 In this Court, the Council filed a notice of contention asserting (ground 1) that "the finding that the appellant swam between the flags and was injured there was against the weight of the evidence". That ground was expressly withdrawn before the hearing of this appeal.

dived into the surf before his injury he had made his own assessment on whether or not it was safe to do so.

167 Following the arrival of the appellant and his friends at the beach sometime between 2.45pm and 3.30pm, Mr Wilson and the appellant drank approximately three quarters of a litre of beer each. After about an hour or an hour and a half, Mr Wilson proceeded to the water for a swim. He said that he swam between the flags, but that when he came out of the water, the surf had pushed him outside the flag area. According to Mr Wilson, about 15 to 20 metres from the shore, he encountered a sandbank that made the water appreciably shallower. He said that the water went out "like normal ... on a downward slope" and then he "kicked a sandbar". The water, that had earlier been at waist height, then reached only to his knees. Mr Wilson did not mention this feature to the appellant or to Ms Galvin as he returned to the beach. Ms Galvin and the appellant passed him on their way to the water.

168 The appellant and Mr Wilson said that Ms Galvin proceeded in front of the appellant. Ms Galvin too encountered the sandbank. She described it as "a definite sort of ditch or hollow in the water because I fell down. And as I kept moving forward I stood up and it was shallow again without a doubt". Ms Galvin did not dive in the water. She explained that she had never been good at swimming nor able to dive properly. Ms Galvin said that when she fell, the appellant was about a metre or two metres to the right of her[137]. She pressed forward and later looked around to see the appellant "still in the shallows". She wondered why he had not come with her. However, by this time, the appellant had suffered his injury.

169 The appellant gave evidence (supported by the evidence of Mr Wilson) that he had entered the water between the flags. He said that he had waded into the water in the normal way. About 15 metres from the beach, he saw a wave coming and decided to dive through it. The water was waist deep or a little higher. He described the dive that he executed as one "through the wave". The next thing he felt was an inability to move and a lot of pain. He was immobile, floating face downwards. Eventually, he was rescued, Mr Wilson helping to take him to the beach. An ambulance was summoned just before 5 pm. Mr Wilson and Ms Galvin stayed with the appellant, greatly upset by his predicament, until a helicopter took him away to hospital. There, his spinal injury was confirmed.

170 Contemporaneous records were tendered in the trial. The ambulance report contained a history:

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137 The evidence of the appellant was that he was about 20 metres behind Ms Galvin.

"[Male person] was running in shallow water dived under wave [and] hit head on sand. [Patient] brought to shore by friends."

171 The history taken from the appellant on admission to the hospital was:

"I entered the water within the area indicated by the flags and proceeded to wade out through the surf towards [Ms Galvin] who was further out in the surf.

Whilst the surf was not very rough I reached a point where I needed to dive through a breaker.

I next remember rolling around in the surf unable to move any part of my body."

172 It was not put to Ms Galvin that she had said to the ambulance personnel that the appellant ran and dived under a wave. This omission was the more curious because Mr Sean Tagg, a member of the Bondi Surf Lifesaving Club, gave evidence that he had spoken to Ms Galvin on the beach, after the appellant had been dragged from the water. He attributed to her the statement that the appellant "had ran and dove [sic] into the shallow water". The appellant's counsel objected to Mr Tagg giving this evidence, pointing out that it had not been put to Ms Galvin during cross-examination. However, Mr Tagg's evidence was allowed and was received before the jury.

173 The appellant's own version, on admission to hospital, was consistent with his assertion at the trial that his injury occurred when he executed a flat dive *through* a wave at a time when the surf was relatively calm. He claimed that he did not execute the dive as he ran through the surf.

174 Much of the evidence at the trial concerned the Council's contention that the appellant, when injured, had been swimming outside the flags. Certainly, he was dragged out of the surf outside and to the south of the flagged area. This fact and Ms Galvin's equivocal testimony on the point, together with available inferences, raised an argument about whether the point of impact was between, or outside, the patrolled area. If it was outside that area, the Council would have had a powerful case that it had no legal responsibility to the appellant. However, the appellant and Mr Wilson were adamant on the point. Clearly, it was open to the jury to accept the appellant's evidence on this issue[138]. Upon the withdrawal of the notice of contention in this Court, the contest concerning the place where the appellant was injured, and whether it had been between the flags, must be taken to have been resolved in the appellant's favour.

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138 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,769 [41]-[47] per Spigelman CJ, 63,782-63,783 [145] per Handley and Ipp JJA.

175 Three other factual issues were the subject of lively contest at the trial. One of them concerned the appellant's consumption of intoxicants. This was presented by the Council as a possible cause of an unsafe dive. Like the issue of whether the appellant was injured in the patrolled area, it can now be put to one side.

176 The appellant acknowledged that on the evening before the day of his injury, he, and Ms Galvin, had each consumed a tablet of Ecstasy. He also acknowledged drinking a quantity of beer before entering the water. Questions addressed to the appellant sought to suggest that this intake may have contributed to the unsafe diving manoeuvre that he had allegedly undertaken. It was presented as an explanation supporting the hypothesis that he had dived in shallow water *under* the wave, thereby coming into contact with the ocean floor.

177 The appellant denied being adversely affected by his consumption. He said that he had slept overnight after taking the Ecstasy tablet, and that he had not felt any "residual effect" the next day. The amount of beer consumed, as described, was small. The appellant said he drank the beer over approximately one to one and a half hours before entering the water. Clearly, it was open to the jury to reject the suggestion that the appellant's conduct and manoeuvre had been influenced in any way by the consumption either of Ecstasy or alcohol. Likewise, it was open to the jury to reject any suggestion that such consumption had caused him to forget, or mistake, his manoeuvre or to describe it inaccurately as a dive through a wave into an unseen sandbank, rather than as a dive executed whilst running through shallow water.

178 This left two other issues of fact contested at the trial. One concerned the suggestion advanced for the appellant that the Council was negligent for failing to put in place warning signs to alert bathers like himself about the hidden danger or risk of diving in the course of body-surfing because of the particular land formation of the beach. This ground of negligence was unanimously rejected by the Court of Appeal as unavailable[139]. It was held that there was no proper basis on which the jury could determine that reasonable conduct on the part of the Council required the provision of such warning signs. That Court had particular regard to the appellant's acknowledged experience in, and awareness of, the risks of swimming and surfing, and specifically of the existence of sandbanks in the ocean. The Court of Appeal's conclusion was correct in this regard. The case based upon the lack of warning signs was so unreasonable as to be untenable. Prudently, in this Court, the appellant did not challenge the Court of Appeal's conclusion on this issue.

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139 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,781 [126] per Spigelman CJ, 63,785-63,786 [173] per Handley and Ipp JJA.

179 The foregoing confined the ambit of the factual contest to the imputed conclusion of the jury that the Council was negligent in the placement and maintenance of the flags in the position they were in at the time the appellant entered the water before he was injured. As this was the essential point on which the Court of Appeal divided, it is necessary to refer to still more evidence concerning it.

180 The appellant said that he had entered the water "between the flags" because he "believed it was safe and a paroled [sic] area". He stated that he would not have swum there if he had believed that the area was not safe. He was aware of no obvious danger in the water. He said that he could not see the sand beneath his feet as he was wading out into the surf.

181 Whilst the latter evidence is relevant, it is not conclusive as to the purpose, function and effect of the flags, which was for the jury to assess. Nor does it indicate what it was reasonable to expect the Council and its employees to do with respect to those flags. Upon these issues, two witnesses gave evidence. One, Mr Jeffrey Williams, was called in the appellant's case. He was a professional senior ocean lifeguard and surf and beach education officer for the Sutherland Shire Council (a local government body which, like the Council in this appeal, has responsibility for coastline beaches in Sydney attracting large numbers of surfers). The other relevant witness was Mr Harry Nightingale, a lifeguard employed by the Council at the time of the appellant's injury. He was called in the Council's case. He gave evidence of his involvement in providing assistance to the appellant after his injury and before removal from the beach. But he was also asked questions concerning the role of lifeguards and the facilities available to them to protect persons entering the water at the beach.

182 Mr Williams explained that the placement of flags on a beach by lifeguards was made after consideration of the prevailing conditions. The function of the flags, such as were in position on the day of the appellant's injury, was to designate "ocean beach swimming areas". According to Mr Williams, the exact points of placement were determined by the conditions of the surf and the effect of wind, tide and currents as well as potential hazards. Amongst the hazards mentioned by the witness were the currents of the water, the appearance of channels ("rips") and "the actual formation of the beach". Wave direction and size can affect sandbank and rip formation. The width and depth of rips were described by Mr Williams as "fluctuating" entities "determined by the concentration of water or the tidal influence". Depending on the circumstances, they could move or stay the same throughout the day.

183 Mr Williams went on:

> "Q: Now, so far as the lifeguard observer is concerned who may have control and supervision of the beach, is what happened to the

channels during the course of the day, is that something which a prudent lifeguard would take into account?

A: I believe so, yes.

Q: And if there is some variation in the channels, could that affect what steps, if any, the lifeguard might take, for example, with the flags?

A: Yes.

Q: And do the channels themselves present a hazard?

A: Yes.

Q: And can a sandbar present a hazard?

A: Yes.

Q: And what hazard does a channel present and what hazard does a sandbar present?

A: Well the – generally where there is a channel in respect to an inshore channel, or the outgoing rip tide, the inshore channel would present a hazard to small children, that would be a determining circumstance. And also the trough that's created presents a hazard.

Q: And what's the hazard that's presented by the trough that's created?

A: Well, the circumstance is that it's a variable depth and people aren't familiar with that circumstance."

184 In cross-examination, Mr Williams agreed that, in assessing the appropriate position to place the flags, the person "on the spot" had to make a judgment about the conditions on the day. He conceded that it was difficult to second-guess that person's assessment years afterwards. But he would not be pressed into agreement that the distance between the flags was controlled by the number of persons attending the beach. He insisted that the governing determinant was the safety of the situation so far as swimmers were concerned.

185 Mr Williams was cross-examined concerning the placement of flags opposite sandbanks:

"Q: People generally concerned, such as you, with beach safety take the view that generally bathing on sandbanks is the safest place to bathe?

A: Generally flags are erected and placed on sandbanks.

HIS HONOUR: Q: Could you say that again?

A: Generally flags are erected or placed adjacent to sandbanks.

COUNSEL: Q: What do you mean 'adjacent to'?

A: Well, the flags are not placed in the water, they are placed on the beach and then they designate that area in the water.

…

Q: On the sandbank, the water tends to be more shallow?

A: Yes.

….

Q: In placing the flags, a person concerned with beach safety also has to take into account that the people who may attend the beach may be very inexperienced swimmers?

A: Yes.

….

Q: And it's a characteristic, isn't it, that depending upon the conditions, the water that comes in on the sandbank through the action of the surf has got to get out to the sea again?

A: That's right.

Q: And characteristically you find some movement to the left and right across the sandbank where the flags are placed?

A: Yes.

Q: … [T]here is inevitably going to be a channel there, or some kind of channel?

A: Yes.

Q: And it's all a matter of judgment for the person on the spot as to what the degree of depth of the channels or gutters is as to whether or not they are safe or not?

A: Yes."

186 Mr Nightingale had not himself placed the flags in position on 7 November 1997. That had occurred before his shift began. The flags were not

moved from their original position before the appellant was injured. At the relevant times, the beach conditions included virtually no surf. Mr Nightingale agreed that the flags were set up to indicate a place where bathers could swim safely, and ideally they should come to no harm there. He accepted that he and the other lifeguard on duty had a relevant advantage over surfers. The lifeguards could view the beach from an elevated position whenever they were not patrolling. According to his evidence, lifeguards concentrate on beach conditions, such as wind change and surf swell that could cause danger to swimmers. Lifeguards, apart from watching swimmers, wait, "to reassess the situation".

187 Curiously, Mr Nightingale was not asked by the legal representative of the Council why he had not moved the flags before the appellant's injury. But in cross-examination he was asked:

> "Q: If there was uncalm water, a variation in the depth such that there was, as it were, a hidden sandbank, you wouldn't be able to see that?
>
> A: I wouldn't be able to?
>
> Q: Yes; you would not be able to, would you?
>
> A: Yes.
>
> Q: Just have a look … at exhibit 7. Is that the sort of view one would have of the water where you were seated or standing?
>
> A: We'll [sic], it's a picture, it's flat. Like you can't see into the water, that's what I'm trying to say. And with … photos, you don't get an accurate reproduction of gradients and colour, that's how they look. I can see a sandbank because it's yellowy. And a deeper water would be signified by darker green. ... Well, I can see where a sandbank is because this wave's breaking. I can see a sandbar here at the front."

188 There was no specific evidence concerning the systems (if any) adopted by other councils or their lifeguards in the placement of flags. The Council did not lead Mr Nightingale (or any other witness) to give evidence concerning the location and width of the sandbank into which the appellant dived or any immediate post-accident investigation of the condition of the ocean floor in or near that place. This was so, although Mr Nightingale insisted that, from his elevated lookout position, a sandbank and adjacent trough would have been visible, being "under a transparent medium which is the ocean". Such was the state of the evidence that was left to the jury.

A large measure of common ground

189 In this Court, a large measure of common ground between the parties narrowed the legal and factual issues for determination.

190 First, it was common ground that the Council was responsible, in accordance with the law of negligence, for the safety of a person such as the appellant. It was conceded at the trial that the Council owed the appellant a duty of care. That duty did not extend to ensuring that the appellant was not injured in his use of Bondi Beach. It was confined to exercising reasonable care in all the circumstances to protect a person such as the appellant from unnecessary risk of injury[140]. The trial judge so directed the jury. Neither in this, nor in any other respect, was there a request for redirection at trial nor any complaint in this Court, or the Court of Appeal, concerning the judge's summing up[141].

191 In retrospect, the judge's directions might have given the jury more assistance on the considerations that they could take into account in deciding what it was reasonable to expect a body such as the Council to do in protecting the safety of the large numbers of persons who visit this and other beaches around the coastline of Australia. For example, attention might have been drawn to considerations such as the magnitude of risks, the likelihood of the occurrence of risks, the expense and difficulty of responding to every possible risk in an effective way and the potentially conflicting considerations to be given weight[142]. However, such directions were not sought at trial nor were they argued on appeal. They can therefore be disregarded.

192 Substantially, the trial judge left the issue of negligence to the jury in very general terms. His summing up reminded them, accurately, of the principal arguments on the facts advanced for the parties. Given the way the trial was conducted and the issues in the appeal, no complaint could be made about the duty issue involved in the claim of negligence. In effect, the contest left the issues to be decided by the jury (apart from contributory negligence) as the breach of duty and causation of damage[143].

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140 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 429-430; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 453-454 [47]-[49], 458 [65]-[66], 460-461 [74]-[76], 478-479 [123], 486 [145].

141 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,772 [66]-[68].

142 See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 46-48; *Romeo* (1998) 192 CLR 431 at 462 [81], 481-482 [130]-[132], 490-491 [163]-[164].

143 See *Swain* [2003] Aust Torts Reports ¶81-694 at 63,772 [68].

193 Secondly, as has been said, three major factual issues that consumed much time at the trial must now be taken as resolved. Thus, the appellant now accepts that the complaint at trial concerning the absence of a warning sign to notify him of the hidden dangers of a channel and an elevated sandbank is not reasonably arguable. In the state of this Court's authority, that was a proper concession[144]. For the Council, it was likewise accepted that the contest at trial over where precisely the accident had occurred could no longer be pressed. Clearly, on that issue and also on whether the appellant had been affected by the consumption of Ecstasy or alcohol, the jury's verdict must be taken as resolving those arguments adversely to the Council. These too were proper concessions, made on the Council's part.

194 In the context of the trial, the concession about the place where the injury occurred was an important one. An examination of the record shows that this was the principal forensic point that the Council had argued. It had the benefit of evidence to support its arguments. One gets an impression from the transcript that the Council put the weight of its case at trial on the resolution of this factual issue. Having lost that point, as it obviously did, it was forensically on the back-foot in arguing against the principal case advanced for the appellant, namely the safety of the placement of the flags.

195 Thirdly, it was virtually common ground between the witnesses called on both sides that the position of the flags, on a public beach such as Bondi, signified to a person such as the appellant that he could swim safely between the flags. Mr Nightingale gave evidence to that effect[145]. The appellant asserted that this was his expectation. Mr Williams significantly clarified the safety which the flags indicated and of which he was speaking. This was the safety of "ocean beach swimming". In the nature of things, such swimming is not identical to that involved in the controlled situation of public swimming baths. Such facilities exist, including near Bondi in the Council's area of responsibility. But the beach flags speak of the conditions of *ocean* swimming. This involves activities in addition to swimming as such. It extends to safe physical interaction with waves and, to some degree at least, passing through the waves, including by a movement such as a "flat" dive of the kind described by the appellant. Certainly, it was open to an Australian jury, familiar with the popular recreation of ocean swimming and surfing, to interpret the message that the flags in position on the day of the appellant's injuries communicated in this way.

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144 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 472-474 [37]-[45], 509 [159]; cf 484 [80]-[81], 499-501 [126]-[131].

145 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,773-63,774 [80].

196 Fourthly, it was also common ground that no provision under the statute by which the Council is established, nor any subordinate legislation made by it, was relevant to the outcome of the proceedings. None was pleaded by the appellant. None was asserted by the Council. The case therefore fell to be decided exclusively as a matter of common law liability. It must be decided as the common law stood before the enactment of more recent amendments to legislation in New South Wales designed to reduce liability for injuries arising from recreational activities[146].

The limits on appellate disturbance of jury verdicts

197 There was further common ground concerning the principles that govern the disturbance by the Court of Appeal of the judgment that followed the jury's verdict and the role of this Court in performing its function.

198 First, it was accepted that the case was one where the Court of Appeal was not conducting a "rehearing" of the kind that occurs in an appeal from a judgment following a trial by judge alone. In such cases, the appellate court's powers to reconsider factual conclusions reached at trial are controlled by legislation[147]. They are wider than in the case of a judgment following a jury's verdict. Because the trial judge must give reasons for a decision, an appeal in such a case affords an appellant greater scope to identify errors of fact or law and to seek appellate correction. There remain constraints[148]. However, the ambit of appellate review is obviously enlarged by the availability of reasons.

199 Necessarily, because a jury does not give reasons, different rules govern appeals that follow jury verdicts. In consequence, those rules are governed by different legislative provisions. In the case of an appeal to the Court of Appeal following proceedings conducted with a jury, the powers of that Court are afforded by the *Supreme Court Act* 1970 (NSW), ss 102 and 108[149]. Relevantly

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146 *Civil Liability Act* 2002 (NSW), ss 5J, 5K, 5L.

147 In the case of the New South Wales Court of Appeal: *Supreme Court Act* 1970 (NSW), s 75A. See *Fox v Percy* (2003) 214 CLR 118 at 124-126 [20]-[23], 164-166 [146]-[148].

148 See eg *Warren v Coombes* (1979) 142 CLR 531 at 550-552; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178-179; *Devries v Australian National Railways Commission* (1993) 177 CLR 472; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306; 160 ALR 588; *Fox* (2003) 214 CLR 118.

149 See *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 586 [26], 592-593 [51]-[52].

to this case, the Council sought to defend the setting aside of the verdict and the judgment[150] on the basis expressed in s 108(3) of the *Supreme Court Act*. That provision states[151]:

> "Where it appears to the Court of Appeal that upon the evidence the plaintiff or the defendant is, as a matter of law, entitled to a verdict in the proceedings or on any cause of action, issue or claim for relief in the proceedings, the Court of Appeal may direct a verdict and give judgment accordingly."

200 Secondly, by the time the proceedings reached this Court, the only relief that the Council sought was that which it had obtained by the orders of the Court of Appeal. Relevantly, this was the order setting aside the verdict and judgment at trial and substituting judgment in favour of the Council. Neither by its notice of contention, nor in argument, did the Council seek to revive a claim to a retrial based on the alternative way in which it had claimed relief in the Court of Appeal, namely that the verdict was against the evidence.

201 The Council maintained that it was entitled to judgment as a matter of law on the basis that there was "no evidence" to support the jury's verdict, and hence the judgment that followed it. This "no evidence" ground was one which was available to the Council to argue at trial following the close of the appellant's case. In the event, the Council did not move the trial judge for a verdict by direction in its favour. However, it was common ground, correctly so, that the omission to seek a directed verdict at trial did not deprive the party complaining of the right to do so on appeal. Either there is such evidence or there is not. In many cases, it is prudent to receive the jury's verdict[152]. Not uncommonly, where a judge might conclude that there was "no evidence", the jury is of like opinion and returns a verdict against the party concerned. The majority of the Court of Appeal in this case upheld the "no evidence" submission, notwithstanding the omission of the Council to press the point at trial.

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150 *Supreme Court Act*, s 102(a).

151 See *Swain* [2003] Aust Torts Reports ¶81-694 at 63,765 [10]. This provision is adapted from the *Supreme Court Procedure Act* 1900 (NSW), s 7, considered by this Court in *Hocking v Bell* (1945) 71 CLR 430 at 441-442, 486-487.

152 *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 290 [59]. See also *Jones v Dunkel* (1959) 101 CLR 298, which was such a case, although the trial was held (by majority) to be flawed by the erroneous direction on the inference favourable to the plaintiff by reason of the unexplained failure of the defendant to call a witness.

202 Thirdly, there was no issue or argument concerning the jury's decisions on the issue of contributory negligence. The findings on that issue and the deduction of 25 per cent can be explained on the footing that, although the jury found the Council negligent, it concluded that in diving as he did in waist-deep water the appellant had failed to take proper care of his own safety. There is no inconsistency between the verdicts returned by the jury. None was suggested.

203 Fourthly, the parties accepted that the principles applicable to the "no evidence" ground were those stated in the reasons of this Court in *Hocking v Bell*[153] and *Naxakis v Western General Hospital*[154]. As was pointed out in *Ryder v Wombwell*[155], and affirmed in *Naxakis*[156], the assertion that there is "no evidence" does not mean that the party claiming relief on this ground must show that there "is literally no evidence". The question is whether there is no evidence "that ought reasonably to satisfy the jury that the fact sought to be proved is established"[157]. This is a question of law to be decided by judges, initially (if raised there) by the trial judge and, if not, on appeal. It is not the same question as whether the verdict complained of is against the weight of evidence and in that sense unreasonable or perverse[158].

204 The approach to be taken where matters of this kind are argued is established by the cases that were decided in large numbers when civil jury trials were more common in Australia and England than they are today. In calling a witness to give evidence, a party is entitled to rely on all, or a part, even a small part, of the evidence of that witness[159]. Likewise, the jury is not bound to believe any witness, or combination or preponderance of the evidence of witnesses. It is for the jury to determine what evidence is worthy of belief and what is not[160].

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153 (1945) 71 CLR 430 at 442-444.

154 (1999) 197 CLR 269.

155 (1868) LR 4 Ex 32 at 39 per Willes J.

156 (1999) 197 CLR 269 at 281-282 [39], 288 [57].

157 *Ryder v Wombwell* (1868) LR 4 Ex 32 at 39 per Willes J.

158 *Naxakis* (1999) 197 CLR 269 at 282 [40] per McHugh J.

159 *Naxakis* (1999) 197 CLR 269 at 282-283 [41] referring to *Dublin, Wicklow, and Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 at 1168 per Lord Hatherley; *Barker v Charley* [1962] SR (NSW) 296 at 303-304; *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666 at 669; 9 ALR 437 at 450 per Murphy J.

160 *Bell* (1945) 71 CLR 430 at 443.

Juries are trusted to resolve the contradictions and inconsistencies in the evidence[161].

205 Judges considering a "no evidence" submission attribute to a jury *prima facie* reasonableness in finding facts and drawing inferences from those facts[162] and also bringing to bear upon that function their experience and "ordinary sense and fairness"[163]. Where a "no evidence" argument is advanced, the issue is never whether the judge concerned would draw the inferences and make the findings involved[164]. It is not whether that judge thinks that the case made for a party is probable or improbable[165]. It is whether, accepting to the full the evidence (or parts of the evidence) most favourable to the party concerned, as a matter of law, the jury might reasonably return a verdict on that evidence in favour of that party[166]. If there is evidence that reaches this standard, no amount of contradictory evidence, even if it be overwhelming, warrants the withdrawal of a civil case from the jury[167] or the setting aside of a verdict taken from such a jury by action of an appellate court[168].

206 The strong inclination evident in the foregoing authorities towards receiving the jury's verdict, and respecting it once it is given, derives from the long experience of the law that has taught the general wisdom and reasonableness of the verdicts of civil juries[169]. Indeed, in recent years, such jury verdicts have sometimes served as a corrective to the approach of judges as tribunals of fact. That is why, now, it is not uncommon for defendants rather than plaintiffs to

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161 *Naxakis* (1999) 197 CLR 269 at 283 [42].

162 *Naxakis* (1999) 197 CLR 269 at 289 [58], referring to Glass, McHugh and Douglas, *The Liability of Employers*, 2nd ed (1979) at 206.

163 *Bridges v Directors of North London Railway Co* (1874) LR 7 HL 213 at 236 per Brett J.

164 *Bell* (1945) 71 CLR 430 at 498-501.

165 Morison, "The Quantum of Proof in Relation to Motions for Non-Suit and Verdicts by Direction", in Glass (ed), *Seminars on Evidence*, (1970) 22 at 23.

166 *Bell* (1945) 71 CLR 430 at 498-501.

167 *Slattery* (1878) 3 App Cas 1155 at 1168.

168 *Bell* (1945) 71 CLR 430 at 440-441, 497; *Leotta* (1976) 50 ALJR 666 at 669; 9 ALR 437 at 450.

169 See *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 507 [81].

summon juries where they remain legally available[170]. It is the history of jury trial and the absence of reasons for jury verdicts that explain the strong rule of restraint evident in the foregoing principles.

207 Fifthly, where an appeal from an intermediate appellate court is before this Court, the intermediate court has completed its function. This Court does not simply re-exercise the powers of the intermediate court. At least, it does not do so without the finding of error on the part of the intermediate court. Where the intermediate court has set aside a judgment, including one based on a jury's verdict, this Court will not disturb the outcome simply because its members would themselves have reached a different result[171]. As was explained by Gibbs J in *Precision Plastics Pty Ltd v Demir*[172]:

> "We must decide whether they were in error in being so satisfied. In reaching our conclusion we should … give due weight to the views of … the Court of Appeal … we should not proceed as though we were sitting in their places and they had never spoken."

208 The rule of judicial restraint upon appellate disturbance of judgments based on jury verdicts is not an absolute or mechanical one. Being a rule devised by judges to afford a limited opportunity for appellate interference with jury verdicts, it must be exercised having regard to the features of the particular case[173]. Judgment is inherent in the application of the test expressed in terms of a conclusion that there is no evidence "that ought reasonably to satisfy the jury that the fact sought to be proved is established"[174].

209 The law books are full of cases in which appellate courts have divided over the application of the foregoing test to the evidence given in a particular trial[175]. *Hocking v Bell* is a vivid illustration of such divided opinions[176]. There

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170 *Naxakis* (1999) 197 CLR 269 at 290-291 [60].

171 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879-880 [65]; 179 ALR 321 at 336-338.

172 (1975) 132 CLR 362 at 370.

173 *Liftronic* (2001) 75 ALJR 867 at 879-880 [65]; 179 ALR 321 at 336-338.

174 *Ryder* (1868) LR 4 Ex 32 at 39 per Willes J. See also *Jewell v Parr* (1853) 13 CB 909 at 916 [138 ER 1460 at 1463]; *Metropolitan Railway Co v Jackson* (1877) 3 App Cas 193 at 207 per Lord Blackburn; *Bressington v Commissioner for Railways (NSW)* (1947) 75 CLR 339 at 353 per Dixon J.

175 *Naxakis* (1999) 197 CLR 269 at 291-292 [64].

are many other illustrations[177]. It is timely to repeat the warning given by Evatt J in *Davis v Bunn*[178] about the fallacy of reasoning that can arise in applying these principles:

> "The judge himself does not consider the defendant's conduct unreasonable in the circumstances, therefore no other person should consider it unreasonable, therefore any person who thinks it unreasonable is an unreasonable person."

210 Whilst avoiding this fallacy, it remains for the intermediate appellate court to discharge functions of the kind conferred in this case by the court's constituent statute[179]. So long as there is no error of principle or reasoning in the performance of this function, this Court should not disturb the judgment that has been entered by the intermediate court of appeal. On the other hand, where error is demonstrated this Court is authorised by the circumstances, and may be required, to perform its own constitutional function.

Errors on the part of the Court of Appeal

211 Approaching this appeal with the foregoing considerations in mind, can it be said that error has been shown on the part of the Court of Appeal to justify the intervention of this Court?

212 The ultimate point of division between the majority judges (Handley and Ipp JJA) and the dissenting judge (Spigelman CJ) is rather confined[180]. As the majority said, they agreed with Spigelman CJ on all matters other than on the question of the breach of the Council's duty by the placement of flags on the beach. The majority were of the view that there was no evidence of negligence in that respect. It was on that footing alone that they allowed the appeal[181].

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176 *Bell* (1945) 71 CLR 430 per Rich, Starke and McTiernan JJ; Latham CJ and Dixon J dissenting; reversed by the Privy Council in *Hocking v Bell* (1947) 75 CLR 125.

177 For example *Luxton v Vines* (1952) 85 CLR 352; *Holloway v McFeeters* (1956) 94 CLR 470.

178 (1936) 56 CLR 246 at 265-266.

179 *Supreme Court Act*, s 108(3).

180 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,782-63,783 [145].

181 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,782-63,783 [145].

213 Clearly, the majority were correct in rejecting the respondent's submission that, for the appellant to succeed on this ground, it was necessary for the Council to demonstrate that there was "literally" no evidence to support the finding of the jury[182]. This is not, and has never been, the law of Australia. That fact was put beyond any residual doubt by this Court's decision in *Naxakis*[183]. Indeed, the assertion to the contrary would be to make the law even stricter than the now overthrown "scintilla doctrine". Therefore, it is not enough to show that there is a mere scintilla of evidence favouring a party. The "no evidence" ground, as it is currently named, bears little relationship to the concept which it is intended to signify. More properly, it should be called the "no reasonable evidence" ground. That is how I mean the expression to be understood. It remains to decide whether the evidence that has been proved is such that it could reasonably satisfy the jury that the contested fact is established.

214 Allowing that there is no error to this point in the reasoning of the majority of the Court of Appeal, there follow three errors of analysis that warrant, when read together, an order by this Court allowing the appeal.

215 The first is, of itself, a relatively trivial one. But it is indicative of a flaw that is more serious. At an important passage in their reasoning, the majority state that it is "necessary to distinguish between a 'sandbank' and a 'sandbar'", and declare that the "seaward edge of a channel is known as a sandbar"[184]. They then proceed even to correct the evidence given by the appellant, substituting "sandbanks" for "sandbars" as used by him in his testimony. This approach to the evidence of the witnesses does not conform to the governing authorities that have been cited concerning the approach which the appellate court must take to the evidence adduced in a jury trial. The question on appeal in a case of this kind is not how the appellate court reads the evidence (still less how it corrects it). It is how it was open to the jury to consider the evidence, accepting that evidence at its most favourable from the point of view of the party in favour of whom the jury's verdict was entered.

216 Mr Williams, the experienced ocean lifeguard and beach education officer, gave evidence contrary to the factual analysis of the majority judges:

> "Q: Now [the appellant's counsel] asked you a number of questions where he used the expression 'sandbank' and then he used the expression 'sandbar'; remember that?

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182 See *Swain* [2003] Aust Torts Reports ¶81-694 at 63,783 [146].

183 (1999) 197 CLR 269 at 281-282 [39]-[40], 288 [55]-[57].

184 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,784 [156].

A: Yes.

Q: Did you have any understanding when he was asking you those questions of the distinction between the two concepts?

A: Well, they're two terms used to describe the same entity, to me.

Q: So the members of the jury should understand that despite [this] use of two different words, you understood them to mean the same thing?

A: Generally, yes."

217 In the face of this evidence, it was clearly open to the jury to draw no distinction whatever between a "sandbank" and a "sandbar". To the extent that, for their factual analysis, the majority judges in the Court of Appeal thought that such a distinction was "necessary", as they put it[185], it was a mistake and one that does not comply with the proper legal approach. Indeed, despite endorsing Spigelman CJ's citation of the applicable authorities, it suggests the adoption of an approach that did not undertake the task of the appellate court as those authorities required. In effect, the Court of Appeal was performing the function much more familiar to it in its everyday work of reviewing decisions about the facts found at trial as expressed in the reasons of judges. It was reconsidering and re-evaluating the evidence in that way. It was not doing so in the more limited and strict way necessary where a judgment under consideration has followed a jury's verdict.

218 Secondly, confirmation that this was the approach adopted by the majority in the Court of Appeal may be found in the passages in the majority's reasons where they cite a decision in which Ipp JA had earlier participated. This was *Prast v Town of Cottesloe*[186]. His Honour had there referred to the distinction between the inherent risks of body-surfing and the risks in "diving" cases, such as *Nagle v Rottnest Island Authority*[187], where there were held to be hidden dangers which created a duty to warn. This citation is followed, in turn, by a passage of reasoning which, with great respect, can only be understood as expressing an evaluation of particular facts by the members of the majority in the Court of Appeal for themselves. Their Honours state[188]:

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185 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,784 [156].

186 (2000) 22 WAR 474 at 481-483.

187 (1993) 177 CLR 423.

188 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,786 [178].

> "The risks of channels and sandbars, such as those that caused the respondent's injury, close to the shore, are also well-known and can only be avoided by not diving or diving with care. When one dives into a wave over a channel close to the shore there is an inherent and well-known risk of encountering a sandbar. Although a broken wave may obscure a channel and sandbar this does not mislead a swimmer who has surfed before. A sensible swimmer in that situation will either not dive into a wave or will make a shallow dive with little force and arms extended for protection. The dangers of doing otherwise are obvious."

219 Allowance must be made for the proper function of the appellate court in reviewing the evidence proved in a jury trial in order to decide whether there is no evidence that ought reasonably to have satisfied the jury that the matter in issue is established. Nevertheless, the starting point in the foregoing reasoning was incorrect. No analysis is undertaken of the evidence that was before the jury favourable to the appellant. Nor is there a measurement of such evidence against the limited circumstances in which the appellate court is permitted to intervene in such a case. Although the applicable test, expressed by Willes J in *Ryder*[189] was cited in the majority reasons[190], what followed reads as their Honours' own evaluation of the facts and not a consideration of the appellant's case at its highest *and then* scrutiny of whether *that case* was sufficiently reasonable to satisfy the jury and to sustain *their* verdict.

220 Thirdly, the foregoing points of criticism emerge in still sharper relief when the majority's reasons are contrasted with those of Spigelman CJ. Thus, the majority state that[191]:

> "The flags are there to designate swimming areas and to indicate to people where they can swim safely. They do not indicate that it is safe to dive anywhere between them. They do not indicate, for example, that it is safe to dive at the water's edge, or that it is safe to dive into a channel. The flags were not intended to convey, and did not convey, any indication to persons in the water of the condition of the sand floor or the depth of water immediately in front of them.
>
> The respondent said he went in between the flags because he 'believed it was safe and a patrolled area' and if he had not thought it was safe he 'wouldn't have swum there'. He said 'you swim in between the

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189 (1868) LR 4 Ex 32 at 38-39.

190 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,783 [147].

191 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,786 [175]-[176].

> flags'. In fact it was safe to swim there. He did not say, knowing he was between the flags, that he thought for that reason it was safe to dive as and where he did. His evidence of reliance was directed, not to the flags which were on the shore, but to the warning signs which were not."

221 Once again, with respect, the analysis by the majority constitutes an explanation by them of what *they* considered the flags, put in place by the Council's employees, signified. That was not the correct approach. The issue is how *the jury* could have understood the information conveyed by the position of the flags, not how appellate judges interpreted them.

222 If regard is paid to the evidence that the jury had before them from Mr Williams, it was open to the jury to conclude that the safety indicated by the flags was the safety relevant to "ocean swimming". It was also open to the jury to conclude that this encompassed a number of activities, and included body-surfing. It was open to the jury to decide that the flags were put in place to indicate to persons such as the appellant that it was safe for him to body-surf in the designated area. It would likewise have been open to the jury to conclude that the flags signified the assessment of the Council's lifeguards on duty that, so long as the bather remained within the space marked out, no special warning or caution was being signified to the public. In the words of Mr Nightingale, if "they stay between the flags, ideally they should come to no harm. *It's safe swimming*" (emphasis added).

223 It was in this way that Spigelman CJ, in his reasons[192], approached the issue for resolution. Repeatedly, by reference to the detailed evidence, his Honour considered not his own assessment but what it was open to the jury to find, looking at the evidence in the way required, namely as that evidence was reviewed most favourably to the appellant.

224 The steps in Spigelman CJ's reasoning on this point are clear. The Council's accepted duty of care with respect to the beach extended to the placement of the flags and the provision of warnings of any hazards relevant to the inducement (which it was open to the jury to infer the flags otherwise provided) that people could safely enter the water between them[193]. His Honour noted that the Council did not adduce evidence about what its officers had in fact done or considered with respect to the placement of the flags on the day of the appellant's injury. Mr Nightingale said that there had been no change in the conditions of the beach during the day[194]. However, it was open to the jury to

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192 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,781-63,782 [133]-[140].

193 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,782 [140].

194 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,781 [133].

conclude that this was unconvincing evidence because Mr Nightingale would have been unaware of the original conditions when the flags were first put in position hours before he commenced duty. Another inference that the jury might have accepted was that the initial placement of the flags was incorrect. Certainly, the jury could properly conclude that lifeguards, including Mr Nightingale, were in a good position to see the general contours of sandbanks, channels and troughs within the water from their elevated vantage point. Yet no evidence was called for the Council to indicate that the flags on that day were shifted by specific reference to movements in the ocean floor creating an unexpected hazard for ocean swimming.

225 In particular, the Council, which called Mr Nightingale to give evidence, failed to ask him why, on the day of the appellant's injury, the flags had not been shifted. By inference, he could have answered that question. It is true, that the appellant, as the plaintiff in the action, bore the legal onus throughout the trial of adducing evidence sufficient to discharge his burden of proof[195]. However, in the context of the trial, it was unreasonable to expect the appellant, on the blind, to have asked Mr Nightingale such a question. It was for the jury to draw inferences from the facts proved at the trial. Inferences (representing something more than mere conjecture[196]) may be drawn by a jury from the omission of a party with the interest to do so to ask such an obvious question[197]. The Council had the interest to ask the question. Similarly, it had the interest to cross-examine Ms Galvin over her alleged statement to Mr Tagg concerning the way the appellant's injury had occurred. Neither of these steps was undertaken.

226 Where such forensic omissions happen, it is open to a jury to conclude that the failure to elicit the apparently relevant evidence, or to press the relevant point, has occurred for good reason. They might conclude that it was a simple mistake or oversight. But in a case of such importance, the Council having called Mr Nightingale to give evidence, it was open to the jury to decide that he was never asked to meet directly the case being advanced for the appellant, concerning the shifting of the safety flags which was within his authority and responsibility, because his answer would not help the Council's case. Thus, the jury could properly have decided that, forensically, the omission in questioning was deliberate, occurring for some reason consistent with the appellant's assertions.

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195 See reasons of Handley and Ipp JJA, *Swain* [2003] Aust Torts Reports ¶81-694 at 63,783 [149].

196 *Holloway* (1956) 94 CLR 470 at 480; *Naxakis* (1999) 197 CLR 269 at 289 [58].

197 See *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201 at 214-215 per Gibbs J; *Chappel v Hart* (1998) 195 CLR 232 at 247-248 [34] per McHugh J.

227 Two witnesses (Mr Wilson and Ms Galvin) gave evidence strongly suggestive of the presence of a sudden trough that Mr Wilson described and that caused Ms Galvin to fall over in the water. It was open to the jury to conclude that, from his elevated position, Mr Nightingale could have seen that trough and the sandbank formed next to it, if he had been paying due attention. It was Mr Nightingale after all who had said:

> "I can see a sandbank because it's yellowy. And a deeper water would be signified by darker green."

228 Once this course of reasoning was accepted by the jury (as was their entitlement) it was but a small step for them to conclude that the Council had failed to take reasonable care for the safety of the appellant as a person using the beach and that this failure had caused (in the sense of contributed to) his injury. Thus, the jury may have concluded that, although the lifeguards on duty could see the contours of troughs and channels and sandbanks, on this day they paid no adequate attention to them, or that they noticed them, but decided to place the flags adjacent to the sandbank regardless. Given the description of the features of the sandbank and trough in the evidence of Mr Wilson and Ms Galvin, the jury must have concluded that the appearance of each was plain to attentive lifeguards viewing the beach from their vantage point. In the particular circumstances, it was a hazard. lt should have been drawn to the notice of bathers and their safety protected by the shifting of the flags to a point beyond the trough adjacent to the sandbank. Visually, this would have been clear to the lifeguards. But it was open to the jury to accept that it was invisible to the appellant.

229 Against this reasoning, powerful contrary arguments existed that supported the Council's case on the positioning of the flags. According to the evidence, sand levels on the ocean floor often vary, especially near the shore. They are in a constant state of change. They create channels, troughs and dangers of varying degrees. The beach in question is very popular, attended by large numbers of people and on the day of the appellant's injury the water was calm and the conditions unremarkable. All of this was also known to the appellant and he tendered no evidence of different practices on different beaches, whether in Sydney or elsewhere. Moreover, the appellant's own expert witness, Mr Williams, gave evidence that it was usual to place flags opposite sandbanks precisely because, in general, the shallower water above a sandbank near the beach gave protection to children, the aged, the infirm and inexperienced swimmers. On this basis, there was certainly plenty of evidence available to the jury on the basis of which they would have been entitled to reject the appellant's case. Such a rejection would have been reasonable and in no way irrational or unexpected. However, that is not the question presented by this appeal.

230 What the jury made of the evidence was, within very large boundaries, a matter for them. It was so, as long as they acted within the ultimate legal

requirement of reasonableness as established in the cases. They were not obliged to accept the Council's evidence or argument. They were entitled to conclude that the lifeguards on duty had the capacity to perceive a trough adjacent to a sandbank. They could then conclude that this represented a hazard on the particular day that misled the appellant as to the water's depth and contours and caused his injury. Yet, the lifeguards on duty had failed to shift the flags to a position where that hazard was not present. And they gave no evidence, although they had every reason to do so if it had been the case, that there was no safer place for the flags than that maintained by them throughout the fateful day.

231 The dissenting opinion in the Court of Appeal approached the issue in the appeal in the legally correct way. Because the correct approach was taken, it is unsurprising that the correct conclusion was reached by Spigelman CJ. History shows that the verdicts of juries on safety questions have sometimes reflected the commonsense of ordinary citizens which experts and established practice have occasionally neglected. The notion that lifeguards on duty on a popular public beach should be vigilant throughout the day for troughs and emerging sandbanks presenting particular dangers to ocean swimmers, and attentive to shifting the flags as required by such changes, is not one offensive to rationality and reasonableness. It may not be a conclusion that every judge would draw in the present case. But once such a conclusion was reached by the jury, the resulting verdict must be upheld by an appellate court save for the very limited circumstances where such a court is authorised by law to set it aside.

Conclusion and orders

232 In some ways, the jury's verdict in this case was a surprising one. However, as the dissenting judge said in the Court below, too much should not be read into it[198]. No jury verdict (nor appellate decision reconsidering it) enjoys the authority of precedent that belongs to a reasoned decision of a judge upheld by the judicial process[199]. Of necessity, a jury's verdict speaks enigmatically. It gives neither reasons nor explanations. It gives nothing more than the jury's ultimate decision on the mass of evidence in the particular case.

233 In the present case much may have turned on the primary forensic battleground which the Council chose and upon which it obviously failed (swimming outside the flags). It would not have been surprising if that issue had

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198 *Swain* [2003] Aust Torts Reports ¶81-694 at 63,782 [142]-[143].

199 Indeed all such judgments are in any case merely decisions confined to their facts. They do not establish principles of law: *Joslyn v Berryman* (2003) 214 CLR 552 at 602 [158] per Hayne J.

distracted the jury's attention from the truly separate issues of reasonableness of conduct in the case.

234 This case was not one where there was "no evidence" to support the appellant's claim of negligent breach of duty causing him damage. There was evidence. I am not convinced that the jury's conclusion was such that no jury performing their functions properly could reasonably have been satisfied of the facts necessary to sustain the verdict in favour of the appellant. Accordingly, the jury's verdict, and the judgment that followed it, must be restored.

235 The appeal should be allowed with costs. The judgment of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In place thereof, it should be ordered that the appeal to that Court be dismissed with costs.

236 HEYDON J. I agree with McHugh J that the appeal should be dismissed with costs on the ground that there was no evidence that would have entitled the jury to find that there existed a reasonably practicable means of avoiding the risk of the injury which the plaintiff suffered. However, in my opinion, applying existing principle, the factual question whether it was reasonably foreseeable that there was a risk of injury to the plaintiff of the kind he suffered in the circumstances should also be answered in the negative. I do not agree with McHugh J that it was open to a reasonable jury to find that the risk was reasonably foreseeable in this case[200].

237 I would reserve for later consideration, if necessary, the question whether, in determining as a matter of law that there is evidence of negligence, a court may take into account the circumstance that some of the facts essential to the plaintiff's case are peculiarly within the defendant's knowledge[201]. The present was not a case where a plaintiff had advanced some evidence from which inferences could be drawn that there was a reasonably practicable alternative, and where the failure of a defendant who was in a position to call evidence rebutting those inferences to do so enabled the inferences to be drawn more strongly. It was instead a case in which, by the end of the trial, there was no evidence from which it could be inferred that there was a reasonably practicable alternative.

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200 cf reasons of McHugh J at [90].

201 cf reasons of McHugh J at [37]-[39]; reasons of Gummow J at [154]-[155].