HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

ERNEST VAIRY APPELLANT

AND

WYONG SHIRE COUNCIL RESPONDENT

Vairy v Wyong Shire Council [2005] HCA 62
21 October 2005
S493/2004

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

P C B Semmler QC with L T Grey for the appellant (instructed by Carroll & O'Dea)

B W Walker SC with D F Villa for the respondent (instructed by Minter Ellison)

CATCHWORDS

Vairy v Wyong Shire Council

Torts – Negligence – Duty of care – Breach of duty – Foreseeability of risk of injury – Local authority – Power of care, control and management of natural reserve – Person suffered injury when diving into a body of water – Whether a reasonable local authority would have erected signs warning against the dangers of diving – Relevance of obviousness of risk to questions of duty and breach.

Local Government Act 1919 (NSW).
Ordinance No 52 under the *Local Government Act* 1919 (NSW), cll 8, 29(a)-(b).

1 GLEESON CJ AND KIRBY J. This appeal was heard together with *Mulligan v Coffs Harbour City Council*[1]. Both cases were actions for damages for negligence brought by young men who suffered serious injury in consequence of diving or plunging into water and striking their heads or necks on the sand below. Both plaintiffs sued public authorities, complaining of a failure to warn of the risk which materialised. In each case, the trial judge accepted that the plaintiff was owed a duty to take reasonable care to protect him from unnecessary risk of physical harm. In the present case, the trial judge (Bell J) held that there had been a breach of that duty, although she reduced the damages substantially on account of contributory negligence. In the case of *Mulligan*, the trial judge (Whealy J) held that there had been no breach of duty.

2 The issue of breach of duty in an action framed in negligence is one of fact, although its resolution involves the application of normative standards[2]. The central question concerns the reasonableness of the defendant's behaviour. It is understandable that, in a search for consistency, comparisons with similar cases will be made. However, as Lord Steyn said in *Jolley v Sutton London Borough Council*[3], decided cases in this area are fact-sensitive, and it is a sterile exercise, involving a misuse of precedent, to seek the solution to one case in decisions on the facts in other cases.

3 The proper use of precedent is to identify the legal principles to apply to facts as found. Decided cases may give guidance in identifying the issues to be resolved, and the correct legal approach to the resolution of those issues. But a conclusion that reasonableness required a warning sign of a certain kind in one place is not authority for a conclusion about the need for a similar warning sign in another place. The decision of this Court in *Nagle v Rottnest Island Authority*[4] is not authority for the proposition that the coastline of Australia should be ringed with signs warning of the danger of invisible rocks. That was a decision about the legal principles relevant to the existence of a duty of care. The majority also held that the primary judge had been correct to find a breach of duty. That was a conclusion of fact, turning upon the circumstances of the particular case. The decision in *Nagle* did not establish that reasonableness requires a warning sign in all places where there are submerged rocks, any more than the decision in

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1 [2005] HCA 63.

2 *Swain v Waverley Municipal Council* (2005) 79 ALJR 565 at 567 [6]; 213 ALR 249 at 251.

3 [2000] 1 WLR 1082 at 1089; [2000] 3 All ER 409 at 416, cited in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 at 55 [18].

4 (1993) 177 CLR 423.

Romeo v Conservation Commission (NT)[5] established that reasonableness never requires a warning sign at the top of a cliff.

4 Where this Court upholds, or overrules, a decision of a trial judge or an intermediate court of appeal about whether a particular defendant has or has not behaved reasonably, the reasons given for the Court's decision may provide guidance as to the relevant legal principles, if those principles are in doubt, but the ultimate factual judgment will depend upon the evidence and circumstances in the particular case. In these two cases, there was no legal inconsistency between the decisions of Bell J and Whealy J. They came to different conclusions on the facts. There was no material difference in their respective views of the law. As will appear, in each case we would uphold the decision of the trial judge.

5 Both cases involve the tortious liability of public authorities responsible for the areas in which the diving accidents occurred. They were areas of recreational land, open to the general public. Many forms of outdoor recreation involve a risk of physical injury. In some cases, while the risk of injury may be small, the consequences may be severe. Swimming is a popular recreational activity along the Australian coast. It involves certain risks, and sometimes results in injury, or even death. The level of risk varies according to the locality, the conditions at any given time, and the capabilities of the swimmers. Short of prohibiting swimming altogether, public authorities cannot eliminate risk. A general prohibition in a given locality may be a gross and inappropriate interference with the public's right to enjoy healthy recreation. Swimmers often enter the water by diving, or plunging head-first. This, also, is risky. Diving into water that is too shallow, or diving too deeply into water in which only a shallow dive is safe, can have catastrophic results. Again, short of a total prohibition, it is impossible to eliminate such risks; and no one suggests that swimmers should be prohibited generally from entering the water head-first.

6 In each case, the breach of duty alleged was a failure to warn. A defendant's duty of care is owed to an individual plaintiff, but it is a duty to do what is reasonable in all the circumstances. The fact that a defendant is a public authority with the responsibility of managing large areas of recreational land may be a circumstance material to a judgment about the reasonableness of its conduct. As Brennan J pointed out in *Nagle*[6], the duty owed to the plaintiff is, in the ordinary case, owed to him or her as a member of the public. The nature of the premises, and the right of public access, will have an important bearing on what

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5 (1998) 192 CLR 431.

6 (1993) 177 CLR 423 at 435-441.

reasonableness requires by way of a response to risks associated with the use and enjoyment of the land.

7 Warning signs only serve a purpose if they are likely to inform a person of something that the person does not already know, or to draw attention to something that the person might have overlooked or forgotten. The obviousness of a danger can be important in deciding whether a warning is required. Furthermore, a conclusion that a public authority, acting reasonably, ought to have given a warning ordinarily requires a fairly clear idea of the content of the warning, considered in the context of all the potential risks facing an entrant upon the land in question. When a person encounters a particular hazard, suffers injury, and then claims that he or she should have been warned, it may be necessary to ask: why should that particular hazard have been singled out[7]? If a public authority, having the control and management of a large area of land open to the public for recreational purposes, were to set out to warn entrants of all hazards, regardless of how obvious they were, and regardless of any reasonable expectation that people would take reasonable care for their own safety, then signs would be either so general, or so numerous, as to be practically ineffective. If the owner of a ski resort set up warning signs at every place where someone who failed to take reasonable care might suffer harm, the greatest risk associated with downhill skiing would be that of being impaled on a warning sign.

8 Observation confirms that, in this community, it is accepted that there may be some circumstances in which reasonableness requires public authorities to warn of hazards associated with recreational activities on land controlled by those authorities. Most risky recreational activities, however, are not the subject of warning signs. It is impossible to state comprehensively, or by a single formula, the circumstances in which reasonableness requires a warning. The question is not answered by comparing the cost of a warning sign with the seriousness of possible harm to an injured person. Often, the answer will be influenced by the obviousness of the danger, the expectation that persons will take reasonable care for their own safety, and a consideration of the range of hazards naturally involved in recreational pursuits.

9 The facts of this case are set out in the reasons of Callinan and Heydon JJ. As has been noted, Bell J found that there had been a breach of duty[8]. The Court

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7 *Commissioner of Main Roads v Jones* (2005) 79 ALJR 1104; 215 ALR 418.

8 *Vairy v Wyong Shire Council* (2002) 129 LGERA 10.

of Appeal was divided on the point[9]. Beazley JA agreed with the decision of Bell J. The majority (Mason P and Tobias JA) took a different view.

10 In addressing the central question of fact in this particular case, we do not find it helpful to characterise the danger confronting the appellant at the level of diving into water of unknown depth. Such a practice, described in that general fashion, is always risky. There are, however, degrees of risk, and some risk of that kind exists every time a swimmer enters water head-first without knowing exactly how deep it is. Even if a swimmer knows the depth of water exactly, there are few people who could calculate with any accuracy the risk involved in diving or plunging into it. Most people who plunge head-first into the surf are taking some degree of risk and, if the risk materialises, the consequences may be devastating.

11 The appellant dived into the sea from a rocky platform, close to a popular surfing beach. There were various levels in the rock formation. The appellant dived from a height of about 1.5 metres above water level. The trial judge could not find the exact depth of the water into which he dived, but at a nearby location from which he was recovered the depth of water was also about 1.5 metres. Diving from a height of 1.5 metres into water of approximately the same depth is very dangerous, depending, perhaps, on the angle of the dive. Yet the evidence shows that, on the day in question, many other people, with apparent safety, were doing what the appellant did. Diving from the rock platform was a popular activity that had been going on for years. The appellant, a competent swimmer who was familiar with the locality, knew that. The trial judge found that the appellant assumed that it was safe to dive from the rock platform because, on the day of his injury, and many times previously, he had seen people doing so. He did not attempt to assess the depth of the water into which he dived. He simply followed common practice. He said of the rock platform that it was "the place to go, to dive in or to jump in or whatever".

12 The very practice which reassured the appellant was, as the respondent knew, a practice that had alarmed others. Members of the local surf life saving club had often warned people of the dangers of jumping or diving off the rock platform, sometimes going to the platform by boat in order to do so. In 1978, a young man who dived from the highest part of the platform became a quadriplegic. The incident received wide publicity in the area. A local newspaper reported that the beach inspector intended to recommend to the respondent the placing of a "danger" sign on the platform. From one point of

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9 *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* (2004) Aust Torts Reports ¶81-754.

view, the most surprising feature of the evidence in the case was that so few serious injuries had resulted from diving from the rock platform over the years.

13 At the trial, the respondent pressed Bell J with the argument that the respondent was responsible for about 27 kilometres of coastline, and that it was unreasonable to expect warning signs to be erected on every outcrop of rock from which someone could dive into the ocean. However, she accepted the evidence of a local government engineer that the rock platform adjoining Soldiers Beach was "most unusual", both in its formation and in its ready accessibility to members of the public attending a popular surfing beach. She also found as a fact that the respondent knew or ought to have known that there could, from day to day, be significant variations in the depth of water adjacent to the rock platform and that, in that respect, the respondent "was armed with knowledge that the [appellant] did not have concerning the danger of diving from the rock platform." She said: "The [respondent] was aware that members of the public commonly dived from the rock platform and that this activity was a dangerous one." The popularity of the activity in a sense increased the danger because it created a misleading appearance of safety. The trial judge concluded that the respondent should have erected signs prohibiting diving from the rock platform. Alternatively, she found that, at the least, the respondent was required to erect signs warning of the danger of diving from the rock platform.

14 The appellant said that, if diving from the rock platform had been prohibited by the respondent and a sign to that effect had been erected, he would not have dived. He also said that if a warning sign, that it was dangerous to dive from that location, had been erected he would not have done so. Bell J accepted that the erection of a sign that served to bring the risk of diving from the rock platform to the appellant's attention would probably have led the appellant not to run that risk. She gave reasons for this conclusion, particular to the case. The conclusion was one of fact dependent, in part, on an assessment of the appellant.

15 Like Beazley JA in the Court of Appeal, we find no error in Bell J's reasoning on what was essentially a matter of factual judgment, and we see no reason to interfere with her ultimate conclusion. There being no appealable error on the part of the primary judge, the majority of the Court of Appeal erred in disturbing Bell J's conclusions and the orders giving them effect.

16 We would allow the appeal with costs, set aside the orders of the Court of Appeal, and in their place order that the appeal to that Court be dismissed with costs.

17 McHUGH J. Wyong Shire Council is a public authority vested with the statutory care, control and management of the land on which there is a rock platform from which the appellant dived into the Pacific Ocean and was injured. The issue in this appeal is whether, in all the circumstances of the case, the Council breached the duty of care that it owed to the appellant when it failed to warn him of the risk of injury associated with diving in that area. The Supreme Court of New South Wales (Bell J) held that the Council had breached its duty by failing to give that warning and that the breach was causally connected with the injury that the appellant sustained. The Supreme Court entered a verdict for the appellant and awarded him a substantial sum of damages. The Court of Appeal of the Supreme Court reversed the decision of the trial judge and entered a verdict for the Council.

18 In my opinion, the trial judge correctly held that the Council had breached the duty that it owed to the appellant. The area where the appellant dived was one where many people dived. Diving in that area was fraught with the risk of serious injury to divers. The Council knew of the risk and, in any event, ought to have known that it existed. The large number of people that used the area for diving increased the probability that, sooner or later, the risk of striking the ocean floor would result in serious injury to one or more divers. So far as the evidence revealed, no other area under the Council's control exposed divers to as high a probability of injury occurring as did this particular area. Erecting a warning sign was a simple precaution that, on the trial judge's findings of fact, would have avoided the catastrophic injuries suffered by the appellant.

19 The Court of Appeal erred in finding that the risk of injury was so obvious that the Council was not negligent in failing to erect a warning sign. Seldom will the obviousness of a risk created or permitted by a defendant who owes a duty of care require no action by that party. Ordinarily, when the obviousness of a risk requires no action, the magnitude and likelihood of the risk will be so insignificant and so expensive or inconvenient to avoid that reasonable care requires neither the risk's elimination nor a warning concerning its propensity. Hence, the Court of Appeal erred in finding that the Council did not breach the duty of care that it owed to the appellant. It follows that the appeal must be allowed and the appellant's verdict restored.

The duty of care

20 At the trial and in this Court, the Council correctly conceded that "as a public authority vested with statutory care, control and management of public land [it] owed a duty to take reasonable care" to safeguard the appellant from physical harm. When a person such as the appellant lawfully enters an area that a public authority controls and manages as an exercise of statutory power, the public authority has a legal obligation to take reasonable care to protect that

person from physical injury[10]. What is required to discharge that duty depends on all the circumstances of the particular case.

21 As the argument of the Council accepted, the issue in the appeal was not the existence of a duty of care but whether the Council had breached that duty. That was a question of fact. And, like all questions of fact that a court determines, it is resolved within its own parameters without comparing the facts of the case to the categories of facts in other cases. However, at times during the argument, statements were made which seemed, probably unconsciously, to confuse breach of duty with the existence of duty.

22 Jurisprudentially, a duty of care is a notional pattern of conduct[11]. It arises in the context of a relationship between individuals and "imposes upon one a legal obligation for the benefit of the other ... to deal with particular conduct in terms of a legal standard of what is required to meet the obligation."[12] Today, duty is an essential element of the tort of negligence[13]. Yet it was not recognised as such until well into the 19th century. Sir Percy Winfield has traced the history of the rise of duty as an integer of the tort of negligence[14], and it is unnecessary to repeat it. It was the decision of the English Court of Appeal in *Heaven v Pender*[15] that finally ensured that the concept of duty would be an element of the tort of negligence. There, Brett MR (as Lord Esher then was) said[16]:

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10 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Swain v Waverley Municipal Council* (2005) 79 ALJR 565; 213 ALR 249.

11 Dias, "The Duty Problem in Negligence", (1955) *Cambridge Law Journal* 198 at 202.

12 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 356.

13 Some academic writers have maintained that the issue of duty is superfluous and that the factors relevant to it can be adequately dealt with under the issues of causation and carelessness (negligence). See, eg, Green, "The Duty Problem in Negligence Cases", (1928) 28 *Columbia Law Review* 1014 at 1028-1029; Winfield, "Duty in Tortious Negligence", (1934) 34 *Columbia Law Review* 41 at 61-64; Buckland, "The Duty To Take Care", (1935) 51 *Law Quarterly Review* 637 at 644; Stone, *The Province and Function of Law*, (1946) at 181-182; *Atiyah's Accidents, Compensation and the Law*, 6th ed (1999) at 58.

14 "Duty in Tortious Negligence", (1934) 34 *Columbia Law Review* 41.

15 (1883) 11 QBD 503.

16 (1883) 11 QBD 503 at 507.

> "But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question."

23 Ten years later in *Le Lievre v Gould*[17], Lord Esher MR reaffirmed the need to establish a duty of care when he said:

> "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence ... A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

24 Forty years later, the speech of Lord Atkin in *Donoghue v Stevenson*[18] finally put beyond doubt the necessity for the existence of a duty in the tort of negligence:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

25 As these quotations indicate, the duty in negligence is generally described as a duty to take reasonable care. In some areas of the law of negligence, however, the duty is expressed in more limited and specific terms. Until the decision of this Court in *Zaluzna*[19], for example, the duty owed to entrants upon privately owned land varied according to the category of the entrants. They were classified as invitees, licensees and trespassers. Similarly, the duty in respect of negligent statements is more specific and limited than a simple duty to take reasonable care in all the circumstances of the case. In negligence cases involving physical injury, however, the duty is always expressed in terms of

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17 [1893] 1 QB 491 at 497.

18 [1932] AC 562 at 580. The dissenting speeches of Lord Buckmaster and Lord Tomlin show that the need for a duty outside contract and certain defined situations was a live issue as late as 1932. Lord Buckmaster said (at 576) of *Heaven v Pender* that it "should be buried so securely that [its] perturbed spirits shall no longer vex the law."

19 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

reasonable care. As Prosser and Keeton have pointed out, "the duty is always the same – to conform to the legal standard of reasonable conduct in the light of the apparent risk."[20]

26 As a result, the duty owed by motorists to other users of the highway, for example, is expressed in terms of the duty to take reasonable care for the safety of other users of the highway having regard to all the circumstances of the case. The duty is not subdivided into categories such as a duty to keep a proper lookout or sound a warning or to keep a safe distance away from the car in front. In the particular circumstances of the case, failure to do one or more of these things may constitute a breach of the duty to take reasonable care. But they are not themselves legal duties for the purpose of the law of negligence. If they were, a trial judge would be bound to direct a jury in the circumstances of a particular case that the defendant had a duty to keep a proper lookout or sound his or her horn, as the case may be. Given such a direction, the only question for the jury would be whether or not a motorist had complied with the duty specified by the judge. But it is the jury, not the judge, that determines whether reasonable care required the motorist to keep a proper lookout or to sound the horn.

27 The present case fell within the familiar category of cases where the plaintiff was a member of a class of persons to whom the defendant had a duty – according to a body of common law precedent – to take reasonable care for the safety of members of that class. Teachers and students[21], doctors and patients[22], occupier and entrant[23], employer and employee[24], jailer and prisoner[25] are examples of established categories of cases in which the common law imposes a duty on the former class of person to take care of the latter. Similarly, public authorities and lawful entrants on land under the control of those authorities are another category[26]. But this categorisation of relationships that attract a duty of care is irrelevant to the issue of breach of the standard of care that the duty

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20 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 356.

21 *Geyer v Downs* (1977) 138 CLR 91.

22 *Rogers v Whitaker* (1992) 175 CLR 479.

23 *Zaluzna* (1987) 162 CLR 479.

24 *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301.

25 *Howard v Jarvis* (1958) 98 CLR 177.

26 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Swain v Waverley Municipal Council* (2005) 79 ALJR 565; 213 ALR 249.

demands. While the principles laid down in *Wyong Shire Council v Shirt*[27] continue to state the common law of Australia, the standard of care that discharges the duty of reasonable care is determined according to the well-known formula set out in the judgment of Mason J in that case.

28 In a case concerned with negligently inflicted physical injury, the most assistance that a judge can draw from legal precedent when determining whether a defendant has breached a duty of care is the basic and general principle that the duty that the defendant owed the plaintiff was a duty to take *reasonable* care. Since *Perre v Apand Pty Ltd*[28] and the rejection of "proximity" as a doctrine, this Court has accepted that the concept of reasonableness cannot be factorised further into any other statements of principle. Judicial attempts to specify the content of a duty of care are destined to be as fruitless as attempts to specify the full set of values to which the reasonable traveller on the Bondi bus subscribes. Both attempts are bound to lead to error because the standard of reasonableness – and reasonable care – depends upon the facts of each case. There are a range of factors – I referred to some of them in *Perre v Apand*[29] – that determine when the common law will impose on a defendant a duty to take reasonable care for the safety of a plaintiff. But there are no factors other than the *Shirt* formula by which the common law defines the standard of reasonable care required in a particular case. That is an evaluative task for the tribunal of fact – assuming that there is some evidence on which the tribunal of fact could find negligence.

29 As I have already indicated, at times during the present appeal and the appeal of *Mulligan v Coffs Harbour City Council*[30] heard at the same time, the argument for various parties did not keep the issues of duty and breach distinct. The arguments were often clouded by reference to phrases such as "the scope and content of duty" and "duty to warn". Judges and lawyers often use such phrases. When they are understood as commensurate with the standard of care required to discharge the defendant's duty of reasonable care, they cause no harm. But often enough they are used as if they themselves define or were the duty, or part of it. Using them creates the risk that they will be treated as stating legal propositions and convert what is a question of fact into a question of law. Hence, their use invites error in analysis, particularly the analysis of judicial precedents.

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27 (1980) 146 CLR 40 at 47-48.

28 (1999) 198 CLR 180 at 194 [10], 202 [41], 233-235 [142]-[145], 304 [341].

29 (1999) 198 CLR 180 at 231 [133].

30 [2005] HCA 63.

30 During the argument, the risk of error surfaced in a number of ways but nowhere more sharply than in the analysis of *Nagle*[31]. Except in so far as that case recognised "that the Board was under a general duty of care at common law to take reasonable care to avoid foreseeable risks of injury to visitors lawfully visiting the Reserve"[32], it involved nothing more than a question of fact. It is not a precedent in favour of the appellant or anybody else except Mr Nagle. It lays down no principle of law other than that the Board had a duty to take reasonable care for lawful visitors on its Reserve. It is a binding authority in so far as it affirms that bodies such as the Board owe a duty to take reasonable care for the safety of lawful visitors on land under their control. The Court also upheld[33] the trial judge's "finding that the failure to warn of the danger of diving from the eastern rock ledge into the Basin due to the presence of rocks was a breach of the [Board's] general duty of care." But that finding and the Court's upholding of it were questions of fact and bind no one. Given a similar case, the most junior judicial officer may disregard its reasoning, if the officer disagrees with it. As Barwick CJ pointed out in *Conkey & Sons Ltd v Miller*[34], "a statement by an eminent judge ... is entitled to respect by those who have themselves to decide a question of fact upon the evidence of the case before them. But its persuasion rises no higher: and certainly does not bind in point of precedent."

31 The common law has no need to – and does not – categorise the cases in which the defendant was held to have breached a standard of care. It is unlikely that "diving cases" will ever constitute such a category. The common law categorises cases – for the purposes of ascertaining the circumstances in which a defendant owes the plaintiff a duty of care – according to the *relationship* between plaintiff and defendant and not the *activity* that caused the plaintiff harm. In cases where the defendant is a public authority, the act of diving is not apt to place the diver in a relationship with the defendant. It is not the act of diving, but the act of entering onto the land that the respondent had a statutory power to control and manage, that made the appellant a member of a class to whom, in accordance with precedent, the Council owed a duty to take reasonable care. Thus, in determining whether the Council breached the standard of care that it owed to the appellant, references to other diving cases – like this Court's decision in *Nagle* – are not decisive. Their reasoning is "entitled to respect" and may be useful. But that is all. The appellant's reliance on *Nagle* was misplaced.

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

32 (1993) 177 CLR 423 at 429-430.

33 (1993) 177 CLR 423 at 432.

34 (1977) 51 ALJR 583 at 585; 16 ALR 479 at 485.

32 Equally misplaced was the analysis by the majority judges in the Court of Appeal of a large number of diving cases decided by courts in this country and the United States. Those cases turned on their own facts. They provided no assistance in determining the issue *of fact* in the present proceedings – whether on the evidence in this case the Council should have erected a sign warning of the danger of diving from the rock platform at Soldiers Beach.

The Council breached its duty

33 No one reading the evidence in this case and examining the photographic exhibits could doubt that diving from the rock platform adjoining Soldiers Beach gave rise to a serious risk of injury that was reasonably foreseeable. As long ago as 1978, Mr Errol von Sanden dived from the platform, struck the ocean bed and was rendered tetraplegic. The General Manager of the Council knew of Mr von Sanden's accident and the place and circumstances in which it occurred. Indeed it was a matter of common knowledge within the Council. The section from which Mr von Sanden dived was known as the "high rock" area. It was between 3.36 metres and 2.24 metres higher than the section from which the appellant dived, which was 1 to 1.5 metres above the surface of the water[35]. No doubt the risk of injury in diving from the high rock area was greater than that involved in diving from the lower section. But the risk of diving from the lower section was still significant. Mr John Edwards, who was the Beach Inspector at Soldiers Beach in 1978, testified that over the years much sand had accumulated around the platform and that the water was shallower than it once was. Two expert witnesses testified that it could be dangerous to dive from the platform because the height of the seabed changed from time to time. They favoured prohibiting diving or at least erecting a sign telling divers to beware of shallow water when diving.

34 A few days after Mr von Sanden's accident, a local newspaper reported that Mr Edwards was intending to recommend to the Council that it place a "Danger: No Diving" sign at Soldiers Point. No sign was erected. But the evidence established that, from time to time, members of the Soldiers Beach Surf Lifesaving Club often told intending jumpers and divers not to jump or dive at this spot.

35 The Council's General Manager knew that many people visited the platform and that on weekends, especially, young people would jump and dive from the platform. The General Manager said he had seen as many as 10 to 15 young people, perhaps even more, jumping and diving from the platform on particular days. Another witness said that, during the summer holidays, up to 30 people would be jumping and diving from the rock platform.

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35 (2004) Aust Torts Reports ¶81-754 at 65,869 [36].

36 Upon this evidence, the learned trial judge correctly found that the Council breached the duty that it owed to the appellant.

37 In determining what was a reasonable response by the Council to the perceived danger at Soldiers Point, a tribunal of fact had to take into account other competing responsibilities of the Council[36]. But the existence of other dangers at other places within the Shire that arguably required the institution of precautions did not itself automatically displace the Council's responsibility to deal with particular dangers at particular places. Situations may sometimes occur where, in an area under the control of the defendant, the totality of the magnitude of each risk of injury and the probability of its occurrence are outweighed by the expense or inconvenience of taking precautions to reduce or eliminate the totality of those risks. But each case depends on its own facts and circumstances, and the existence of other risks and competing obligations is not an automatic gateway to negligence immunity. One relevant circumstance in a case like the present is that the public authority usually has statutory powers that enable it to prohibit or regulate activity in particular locations.

38 Hence, given the evidence in this case, it is no answer to the appellant's claim to contend that the boundaries of Wyong Shire include a coastline of about 27 kilometres with other potential hazards. There may or may not have been other areas along the coastline or within the Shire that were dangerous to swimmers or divers – the Council led no evidence that there were. Given the known danger of diving from this platform and the large number of people using it, then, this contention of the Council borders on the irrelevant. What it overlooks is that the probability of a risk causing injury increases with the number of persons coming into contact with the risk. At Soldiers Beach, there were a large number of divers using the rock platform on a regular basis. There was no evidence as to particular dangers in other areas of the Shire. Nor, even more importantly, was there any evidence as to the number of persons exposed to those dangers, if they existed.

39 In any event, whatever other dangers may be present to swimmers and others in other areas of the Shire, one may be pardoned for thinking that there would be few, if any, areas where there was a higher chance of an injury occurring to divers than at Soldiers Point. The numbers using the platform for diving and jumping make that thought inevitable. Indeed, in the absence of evidence to the contrary, the risk of an injury occurring at Soldiers Point was probably hundreds of times greater than at isolated spots along the coastline or within the Shire. There may have been more dangerous places in the Shire. But in the absence of evidence concerning their user, it would be speculation to

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36 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 460 [75].

conclude that they required attention equal to, or more urgently than, the proven probability of injury occurring at Soldiers Point.

40 The learned trial judge held that a reasonable response to the risk of injury was the erection of a warning sign. Whether a warning sign is a reasonable response to a perceived risk of harm depends on a number of factors. They include the nature and obviousness of the risk, the probability of its occurrence, the age and maturity of those exposed to it, the actual or imputed knowledge of those persons and the likelihood that the warning will be effective to eliminate or reduce the harm resulting from the risk. Most importantly, they include the likelihood that inadvertence, familiarity with the area or constant exposure to the risk will make those coming into contact with the risk careless for their safety. It follows that I cannot accept that Lord Hoffmann's statement in *Tomlinson v Congleton Borough Council*[37], that "[a] duty to protect against obvious risks ... exists only in cases in which there is no genuine and informed choice", accurately represents the common law of Australia.

41 In the present case, the evidence established that, despite the danger lurking below the seductive waters lapping the rock formation that contained the platform, many young people dived from the platform into the ocean, either oblivious to or reckless of the risk. From time to time, lifesavers warned them of the risk of injury. Some continued to dive and jump despite the warning. But nothing in the evidence suggests that the lifesavers were at or near the platform day after day warning of the risk. To those not aware of the risk of their heads or necks striking the ocean floor *at this spot*, the continual stream of diving without incident must have made diving from the platform seem no more dangerous than diving from a three metre springboard in a standard Olympic-sized pool. It is one thing to know that diving into water of unknown depth may cause injury. But a different area is reached where large numbers are known to dive into water without apparent harm. If the water does contain a risk of injury, its apparent safety will make it a trap for the unwary. When such a situation arises it is almost always imperative for the controller of the land to warn swimmers of the danger.

42 Given the reaction of some divers to the warnings of lifesavers, a warning sign may not have deterred all. But at the least it must have made many stop and think of what might happen to them. The trial judge found that it would have deterred the appellant. Given that the Council, the authority that controlled this land, permitted diving to continue at this spot, despite its knowledge of the dangers, reasonable care required that it give a warning to those who did not have the Council's knowledge or who had become desensitised to the risk.

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37 [2004] 1 AC 46 at 85 [46].

43 In finding that the Council had not breached its duty, the majority judges in the Court of Appeal emphasised the obviousness of the risk. Giving the majority judgment, Tobias JA said[38]:

> "In my opinion, this knowledge (or assumed knowledge) on the part of the [Council] is neutralised by the fact that [the appellant was] aware that the water into which [he was] diving was not only of variable depth but also of unknown depth. It was those factors, as I have said, which made the risk of injury from diving into such water, obvious. As such, in the present circumstances, a reasonable response from the [Council] did not require a duty to warn. The duty of care owed to the [appellant] was not breached by the failure of [the Council] to give any warning: the giving of a warning was not within the scope of [its] duty of care."

44 With great respect to the learned judges in the majority, this passage appears to betray a fundamental misunderstanding of this branch of the law of negligence in its application to diving cases. It appears to be based on the premise that, where a risk from diving is obvious, the defendant has no duty to warn of it even when the defendant knows of the risk. It is true that earlier in his judgment Tobias JA recognised that "[o]n a given set of facts it could be the case that a warning may not go far enough to satisfy the duty." His Honour said that "[p]erhaps in a given entrant-occupier case a prohibition upon entry, or a class of entrants such as children, may be the minimum action necessary to discharge the duty."[39] His Honour had also said that "this is not to say that in every case where an obvious danger presents itself there can never be a duty to warn."[40] However, the block quotation set out in the previous paragraph appears to suggest that, where prohibition is not an issue, the obviousness of the risk negates the need for a warning in a diving case.

45 Leaving aside cases of *volenti*, however, it is not the law that a defendant has no duty to take reasonable care for the safety of the plaintiff or that no warning is required if the risk of injury is, or ought to be, obvious to the plaintiff. The logical consequence of such a proposition would be that, except in those cases where the danger was unknown to or unobservable by the plaintiff, the defendant would not be required to take any action to eliminate the most dangerous risk of injury. In most cases, the greater the danger, the more obvious is the risk of injury.

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38 *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* (2004) Aust Torts Reports ¶81-754 at 65,900 [206].

39 (2004) Aust Torts Reports ¶81-754 at 65,894 [171].

40 (2004) Aust Torts Reports ¶81-754 at 65,900 [202].

46 Discharge of the defendant's duty requires the defendant *to eliminate* a risk – whether or not it is obvious – whenever it would be unreasonable not to do so. That proposition applies in all cases of alleged negligence including diving cases. The obviousness of the risk goes to the issue of the plaintiff's contributory negligence, rarely to the discharge of the defendant's duty. In the vast majority of – maybe all – cases, obviousness of the risk is relevant to the discharge of the defendant's duty only where the taking of precautions, other than giving a warning, is not a reasonably practicable alternative for the defendant. As I have indicated, whether a warning is a reasonable response to a perceived risk of harm depends on a number of factors. In a small number of cases, the obviousness of a risk may not require a warning. But ordinarily that will be because the magnitude and likelihood of the risk are both so insignificant and so relatively expensive or inconvenient to avoid that reasonable care requires neither the elimination, nor a warning concerning the propensity, of the risk. Exceptionally, there may also be cases where the risk is so well known and so likely to be present in the minds of those who are likely to come into contact with it that a defendant does not act unreasonably in failing to warn of it.

47 The risk of injury in the present case was not insignificant. Nor was its likelihood of occurrence so small that a reasonable person in the position of the Council could reasonably ignore it. Nor was erecting a sign an expensive or inconvenient course of action to impose on the Council. To fail to erect a warning sign was an unreasonable response to a risk known to the Council but which may not at times – in some cases at any time – be known to entrants on the Council's land. The majority judges in the Court of Appeal erred in finding that the risk of injury was so obvious that the Council did not breach the duty of care that it owed to the appellant.

48 The majority judges in the Court of Appeal also found that Bell J had erred in holding that it was relevant that the appellant had been misled, by others diving safely, into believing that the depth of water was sufficient to allow safe diving. Tobias JA said[41]:

> "the fact that ... other people to [the appellant's] observation ... had dived safely on other occasions did not neutralise or otherwise detract from the obvious risk of diving into water of unknown depth particularly where each was aware that the water depth was variable, that that variability related (at least in part) to the condition of the seabed ... and that [he] well knew that it was dangerous to dive into water of variable depth. In such factual circumstances the reasonable response to the exercise of the

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41 (2004) Aust Torts Reports ¶81-754 at 65,901 [209].

> [Council's] duty of care did not require the erection of a warning sign or signs."

49 With great respect to both Bell J and the majority judges in the Court of Appeal, the belief of the appellant was irrelevant to what was required to discharge the Council's duty of care. That has to be determined by looking at the situation before the accident, not after. This was not a case where a positive act of the defendant had misled the plaintiff. Such a representation gives rise to a different duty than that owed to the ordinary entrant on land. Moreover, the above passage in the Court of Appeal judgment discloses two errors. First, whether or not the appellant was misled by others diving safely goes to the issue of contributory negligence not to the discharge of the defendant's duty. It is true that *the fact* that people have been safely diving in this area is relevant to the discharge of duty. But that is because the Council knew or ought to have known that entrants to the land may be misled by the apparent safety of the platform as a diving area. It is therefore relevant to what the Council ought to have done to eliminate or reduce the risk of injury to *entrants generally* on the Council's land. Second, the passage proceeds on the erroneous assumption, to which I have already referred, that the obviousness of the risk eliminates the need for a defendant to give a warning.

50 In another passage, Tobias JA also placed some weight on the "inherent danger" involved in what the appellant did. His Honour said[42] that "where the dive is to be undertaken in an environment where the depth of water is subject to change at short notice and without reasonable warning, then the danger (individual circumstances depending) will generally be an inherent danger." His Honour went on to say that if the danger is both obvious and inherent, then it may add weight to the claim that the reasonable response was to do nothing. His Honour said[43] that "[t]he reason for such a response is that no amount of due care through warning could have removed the danger". But to speak of inherent risks or dangers is to invite error. It is reminiscent of the argument that held the field in employer's negligence cases about 40 years ago – that there were inherent risks in certain forms of employment that prevented an employee succeeding in a negligence action. But the only risks or dangers that are inherent in activities are those that cannot be avoided by the exercise of reasonable care. Describing an activity as inherently dangerous records the result of the application of the *Shirt* formula. It is of no assistance whatever to characterise an activity as inherently dangerous or risky before one determines whether it could have been avoided by the exercise of reasonable care. Moreover, where a risk of injury can not be eliminated by other reasonable measures it will ordinarily call for a warning. In

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42 (2004) Aust Torts Reports ¶81-754 at 65,893 [167].

43 (2004) Aust Torts Reports ¶81-754 at 65,893 [168].

medical negligence cases, for example, the patient will generally need to be warned against the "inherent risks" of the procedure[44]. That is to say, where there is an "inherent danger" in the correct sense of that term, a warning will usually be required.

51 The trial judge correctly held that the Council breached the duty that it owed to the appellant. The Court of Appeal erred in setting aside the appellant's verdict.

Order

52 The appeal should be allowed.

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44 cf *Rogers v Whitaker* (1992) 175 CLR 479; *Chappel v Hart* (1998) 195 CLR 232.

53 GUMMOW J. This appeal and that in *Mulligan v Coffs Harbour City Council*[45] were heard consecutively. What is said in these reasons to some degree informs the reasons in *Mulligan*. The facts in both cases are detailed by Hayne J and Callinan and Heydon JJ. The circumstance disclosed by those facts that opposed to public authorities are "vulnerable victims" unlikely to have protection from insurance against the risk of serious injury in recreational pursuits, should not skew consideration of the legal issues.

54 Both appeals concern serious injury sustained by plaintiffs engaged in the dangerous recreational or sporting activity of diving into water, the South Pacific Ocean in the case of Mr Vairy and a creek not far from the sea in the case of Mr Mulligan. The care, control and management of areas adjacent to the site of the injuries was vested by or pursuant to statute in the defendant or, in the case of *Mulligan*, one or more of the defendants. The plaintiffs alleged a failure by the defendants sufficiently or at all to warn them of the hazards involved. There was much debate in submissions as to the form an adequate warning would have taken. In the *Vairy* appeal, these and other factual matters were emphasised in a fashion which tended (as appears to have happened at trial and in the Court of Appeal) to telescope secondary questions of breach with the primary questions of duty of care and its content.

55 Something further should be said at this stage respecting the somewhat confused state in which the issues in *Vairy* came to this Court and were argued here. The plaintiff lost in the Court of Appeal the verdict recovered at trial before Bell J. The leading judgment of Tobias JA placed great weight upon the significance of the notion of obviousness of risk as destructive of the plaintiff's case. In his appeal to this Court, the plaintiff complained of this as displaying error in principle. This point also was stressed in the submissions to this Court in *Mulligan*. From a reading of the reasons of Tobias JA, there is room for debate as to how determinative of the outcome that weight was. But, in any event, I agree with Hayne J, for the reasons he gives, that reference to a risk being "obvious" cannot be used as a concept necessarily determinative of questions of breach of duty or, I would add, of questions of the existence and content of duty itself.

The significance of *Nagle v Rottnest Island Authority*[46]

56 The defendant ("the Council"), perhaps anticipating in this Court that view of the notion of obviousness of risk, sought to trim its sails accordingly. It stated in its written submissions that the first issue was whether its duty of care required

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45 [2005] HCA 63.

46 (1993) 177 CLR 423.

it to warn the plaintiff against conduct involving a risk of injury presented by natural features of the site of injury. Both at trial and in the Court of Appeal, there had been much discussion of *Nagle*[47]. There, in a "diving case", the plaintiff had succeeded. That might be thought to pose a hurdle for the Council. In argument the Council dealt with that by confession and avoidance. No attempt was made to seek leave to re-open *Nagle*. Rather, counsel fixed upon those passages in the joint judgment appearing under the heading "*Breach of duty*"[48] and correctly identified the outcome in favour of Mr Nagle as an answer to a jury question of no precedential value. That left on one side and bypassed the significance, if any, of the earlier finding in *Nagle*, again favourable to the plaintiff, respecting the existence and content of a duty of care. In this way the Council sought to fix the battle ground on the present appeal on the application of the so-called *Shirt* calculus[49].

57 Any apprehension respecting the present force of the holding in *Nagle* respecting duty of care was exaggerated. It is important to note that *Nagle* was decided whilst the "proximity" requirement was the doctrine of this Court. The trial in *Nagle* had been conducted on that basis. In concluding that the parties were in a relationship of proximity, the trial judge had attached importance to the activities of the defendant Authority in fostering attendance of swimmers at the site of the accident, known as the Basin, by promoting attendance there and providing facilities[50]. Mason CJ, Deane, Dawson and Gaudron JJ did likewise. By encouraging the public to swim in the Basin, the defendant brought itself under a duty of care to those who swam there, and that duty "*would naturally require* that they be warned of foreseeable risks of injury associated with the activity so encouraged"[51] (emphasis added). In substance, the present plaintiff sought to bring his case within those words.

The duty of care

58 The essential issue on the *Vairy* appeal was the content of the duty of care, namely, the alleged requirement of a warning or a prohibition by the Council. But this re-emerged as part of the *Shirt* calculus, without the Council expressly seeking to re-locate it at its place of origin. It will be necessary to return later in these reasons to the question whether in those circumstances the Council can rely

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47 (1993) 177 CLR 423.

48 (1993) 177 CLR 423 at 431.

49 *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631; affd (1980) 146 CLR 40.

50 (1993) 177 CLR 423 at 427.

51 (1993) 177 CLR 423 at 430.

upon any favourable consideration of the content of the duty of care. In *Mulligan* these other considerations do not arise. The trial judge in *Mulligan* made an express finding that "the obligation to warn the plaintiff about the risk of diving in the creek due to its variable depth did not fall within the scope of the duty of care imposed upon each of the defendants"[52]. But it is convenient to begin consideration of the appeal in *Vairy* by looking to the question of duty of care.

59 In *Graham Barclay Oysters Pty Ltd v Ryan*[53], Gleeson CJ observed that, if it is not possible to identify the content of an asserted duty of care, this may cast doubt upon the existence of the duty. An example is provided by *Agar v Hyde*[54]. In *Romeo v Conservation Commission (NT)*, Kirby J remarked[55]:

> "It is one thing to hold that a person owes a duty of care of some kind to another. But the critical question is commonly the measure or scope of that duty. The failure to distinguish these concepts can only lead to confusion."

60 The determination of the existence and content of a duty is not assisted by looking first to the damage sustained by the plaintiff and the alleged want of care in that regard by the defendant[56]. There is a particular danger in doing so in a case such as the present. The focus on consideration of the issue of breach necessarily is upon the fate that befell the particular plaintiff. In that sense analysis is retrospective rather than prospective.

61 In his reasons in this appeal, Hayne J explains why an examination of the causes of an accident that has occurred does not assist, and may confuse, in the assessment of what the reasonable person ought to have done to discharge the anterior duty of care. Moreover, an assessment of what ought to have been done, but was not done, critical to the breach issue, too easily is transmuted into an answer to the question of what if anything had to be done, a duty of care issue.

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52 (2003) Aust Torts Reports ¶81-696 at 63,875.

53 (2002) 211 CLR 540 at 555 [8]. Gleeson CJ had spoken to similar effect in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [5].

54 (2000) 201 CLR 552 at 578-582 [70]-[83].

55 (1998) 192 CLR 431 at 478 [122].

56 cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 290 [105]; *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at 367 [158].

62 Whether in the given circumstances there exists a duty of care in negligence is a question of law. After all, *Donoghue v Stevenson*[57] itself was decided upon a demurrer type procedure used in Scotland. Of course, the existence of some or all of those "given circumstances" may depend upon issues of fact to be tried by the jury[58].

63 In many well-settled areas of the law of negligence, the existence of a duty of care presents no challenge. After *Donoghue v Stevenson* it was accepted that manufacturers of mass produced goods intended for human consumption owed a duty of care to ultimate consumers. Other examples of particular categories of relationship include motor vehicle accident cases and cases of physical injury to workers where there is an unsafe system of work. Likewise, as indicated by *Tepko Pty Ltd v Water Board*[59], the special circumstances that call into existence a duty of care in utterance by way of information or advice can be articulated. But "diving cases" are not yet a discrete category. *Nagle* did not make them so.

64 In a case such as the action brought by Mr Vairy, if the primary issue of the content of the duty of care is masked by a vague generalisation, the jury questions associated with breach tend to control the formulation of the legal criterion against which the allegation of breach is to be measured. While it is true that the trials giving rise to this appeal and to that in *Mulligan* were by judge alone, the day yet has to arrive where juries have been removed in all Australian jurisdictions in which these actions are tried. *Swain v Waverley Municipal Council*[60] is a recent reminder of the different considerations that apply in appellate review of the two forms of trial adjudication. In any event, whilst the distinction between duty and breach is most clearly understood in the context of trial by jury, preservation of the separation of the conceptually distinct issues of duty and breach is, as this appeal shows, of general importance[61].

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57 [1932] AC 562.

58 *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 501-502; *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 221; *Rootes v Shelton* (1967) 116 CLR 383 at 388.

59 (2001) 206 CLR 1 at 16-17 [47], 22-23 [73]-[75].

60 (2005) 79 ALJR 565; 213 ALR 249.

61 See Derrington, "Theory of negligence advanced in the High Court of Australia", (2004) 78 *Australian Law Journal* 595 at 602-606.

Shifts in authority

65 In England, particularly after the judgments of Lord Reid in *Dorset Yacht Co Ltd v Home Office*[62] and of Lord Wilberforce in *Anns v Merton London Borough Council*[63], acceptance appeared likely of an equation between reasonable foreseeability of injury and duty of care in negligence, at least in cases of physical injury; the equation would apply unless there was some justification or sufficient explanation for its exclusion. But that state of affairs did not come to pass. Instead, in England there has been a trek from *Anns* to the "incrementalism" of *Caparo Industries Plc v Dickman*[64] and *Murphy v Brentwood District Council*[65], and now towards a vision of adjudication of negligence cases as a dialogue between the muses of "distributive justice" and "corrective justice"[66].

66 This Court has insisted that a defendant will be liable in negligence for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff only if the law imposes a duty to take such care[67]. Nor has this Court adopted the requirement, also associated with *Caparo*[68], that the court consider it "fair, just and reasonable" that the law impose a duty of care of a given scope[69]. In addition, the case law in this Court[70] charts the rise, followed in the decade since *Nagle* by the decline, in the use of "proximity" as a distinct and general

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62 [1970] AC 1004 at 1027.

63 [1978] AC 728 at 751-752.

64 [1990] 2 AC 605.

65 [1991] 1 AC 398.

66 See *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 82-83.

67 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 555 [9]; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 524 [5]-[6]. The House of Lords spoke to the same effect in *D v East Berkshire Community Health NHS Trust* [2005] 2 WLR 993 at 1023-1024, 1025; [2005] 2 All ER 443 at 474-475, 476-477.

68 [1990] 2 AC 605 at 617-618.

69 *Sullivan v Moody* (2001) 207 CLR 562 at 579 [49].

70 The authorities are collected by Gleeson CJ, Gummow, Hayne and Heydon JJ in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 528-529 [18].

limitation upon the test of reasonable foreseeability, and as a necessary relationship between plaintiff and defendant before a relevant duty of care can arise. The quietus was delivered by McHugh J in *Tame v New South Wales*[71]. The same fate befell the fiction of "general reliance"[72].

67 What the above-mentioned shifts in authority over fairly short periods demonstrate is the unlikelihood that any writer who tackles the subject, even in a final court of appeal, can claim thereafter a personal revelation of an ultimate and permanent value against which later responses must suffer in comparison.

The post "proximity" authorities

68 The recent authorities in this Court which discounted the search for "proximity" in cases approaching the frontiers of the law of negligence gave much attention to the particular features of the instant situations of the parties which did or did not call for the imposition by law of a duty of care. Thus, in *Perre v Apand Pty Ltd*[73], the existence of the duty of care which was found depended upon the combination of foresight of the likelihood of harm, knowledge or means of knowledge of an ascertainable class of vulnerable persons unable to protect themselves from harm, and control of the occurrence of activity from which the damage flowed; it was also significant that the imposition of a duty of care would not impede the legitimate pursuit by the defendant of its commercial activity.

69 On the other hand, the duty alleged in *Sullivan v Moody*[74] did not exist. The appellants were family members who were actual, or potential, suspects in allegations of child sexual abuse. They complained of negligent investigation upon these allegations by the medical practitioners, social workers, Department of Community Welfare officers and hospitals involved. It was held that a duty of the kind alleged would not be found if it would not be compatible with other duties owed by the respondents, as matters of statutory and professional obligation. The nature and extent of those obligations and of the apprehended

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71 (2002) 211 CLR 317 at 355-356 [106]-[107]. See also the judgment of Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ in *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48].

72 See the discussion by Callinan J in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 659 [310].

73 (1999) 198 CLR 180; cf *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 533 [31], 557-559 [106]-[113], 592-593 [222]-[231].

74 (2001) 207 CLR 562.

incompatibility were considered in some detail by the Court in its joint judgment[75].

Level of abstraction

70 The approach in the above authorities to the question of duty of care is consistent with that taken by Glass JA in his influential judgment in *Shirt v Wyong Shire Council*[76]. He isolated[77] the three issues: first, whether there was no evidence capable of showing that the Council owed a duty of care to the plaintiff; secondly, whether, if a duty was owed, there was no evidence capable of establishing its breach; and, thirdly, if there was such evidence of breach, whether there was no evidence of a causal relationship between breach and the plaintiff's injuries. As will be apparent from the way in which the issues were framed, that was an appeal from a jury verdict against the Council, after the trial judge had ruled that the Council had owed a duty of care to the plaintiff.

71 Glass JA said that the existence or non-existence of a duty of care fell to be considered at "a higher level of abstraction" than some factual considerations which were entirely relevant to the breach question[78]. His Honour then specified several considerations as distinctly pertinent to the "more general level" that was appropriate with the duty issue[79]. The Council had dredged the bed of the Tuggerah Lake in an area where it then knew members of the public engaged in various water sports including water skiing; there was a foreseeable danger to water skiers if the bed were left in a condition which presented concealed hazards for boats towing them. A duty to exercise due care in the interests of the indeterminate class of skiers was generated by their foreseeable exposure to the risk of injury if care were not taken, both in performing the dredging work and in relation to the permanent state of affairs obtaining on its completion. Glass JA went on to state it was more debatable whether the evidence at trial on the second issue, that of breach, had been sufficient to go to the jury[80]. (These doubts were

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75 (2001) 207 CLR 562 at 582-583 [60]-[63]. The same result was reached by the House of Lords, albeit by a consideration of what was "fair, just and reasonable", in *D v East Berkshire Community Health NHS Trust* [2005] 2 WLR 993; [2005] 2 All ER 443.

76 [1978] 1 NSWLR 631.

77 [1978] 1 NSWLR 631 at 639.

78 [1978] 1 NSWLR 631 at 639.

79 [1978] 1 NSWLR 631 at 640.

80 [1978] 1 NSWLR 631 at 640.

later entertained by Mason J[81].) The evidence to a substantial degree concerned the steps taken by the Council employee responsible for the placement and wording of warning signs. In the end, Glass JA was persuaded by the "undemanding test of foreseeability" to be attributed to a reasonable man in the position of the employee[82].

72 In the appeal in *Shirt* to this Court, the issues concerned not duty but breach. This appears both from the report of argument[83] and from the judgments of Mason J and Wilson J[84]. However, in respect of breach, the close attention required to the totality of the circumstances by what has become known as the "*Shirt* calculus" propounded by Mason J[85] made good the distinction which Glass JA had drawn respecting levels of abstraction in dealing with duty and breach questions. It should also be observed in this connection that Mason J emphasised that the references in the "*Shirt* calculus" to foreseeability were made "in the context of breach of duty, the concept of foreseeability in connexion with the existence of the duty of care involving a more generalized enquiry"[86].

73 The foregoing analysis shows the care needed to distinguish between considerations going to the existence of duty and those going to breach. It also indicates that to speak as Glass JA did of the higher level of abstraction in dealing with that first step does not support a formulation of duty in the terms conceded by the Council in the present appeal but devoid of meaningful content.

The concession by the Council

74 At trial and in this Court, the Council conceded that "as a public authority vested with statutory care, control and management of public land [it] owed a duty to take reasonable care to [Mr Vairy]". The trial judge saw the real issue as the scope of that admitted duty the Council owed to lawful entrants upon the Norah Head Reserve, of whom the plaintiff had been one. On his part, the plaintiff relied upon what had been said by the majority in *Nagle* as to the "natural" requirement of the duty of care respecting warning of foreseeable risks of injury. The Council countered with reference to the statement by Kirby J in

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81 (1980) 146 CLR 40 at 48.

82 [1978] 1 NSWLR 631 at 641.

83 (1980) 146 CLR 40 at 42.

84 (1980) 146 CLR 40 at 44, 52.

85 (1980) 146 CLR 40 at 47-48.

86 (1980) 146 CLR 40 at 47.

Romeo v Conservation Commission (NT)[87] to the effect that it was neither reasonable nor just to require a warning by the public authority of a risk obvious to a person exercising reasonable care for that person's own safety.

75 The trial judge deferred consideration of the reasonable response by the Council to her consideration of the breach of the duty of care. Whilst this appeared to be the practical course, the result was the telescoping of questions of duty and breach with the consequence referred to earlier in these reasons.

76 In the passage in *Nagle*[88] upon which the plaintiff particularly relied, their Honours indicated that the generally formulated duty would "naturally require" warning of foreseeable risks of injury. But, as Callinan and Heydon JJ point out in their reasons on the present appeal, the majority did not take the matter any further. Their Honours did note[89] that the failure of the plaintiff to identify the content of an adequate warning sign had not been a subject of contention at trial. The present appeal cannot be resolved in a conceptually coherent manner unless the question respecting scope of duty, which was left at large in *Nagle*, is taken further. The point may be put another way by saying that the submissions on the appeal respecting the need for warning signs present a dispute as to whether this is the relevant content of the duty of care accepted by the Council. I will now proceed on that footing.

The content of the duty of care

77 In the judgment of this Court in *Sullivan v Moody*, the following appears[90]:

> "Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will

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87 (1998) 192 CLR 431 at 478 [123].

88 (1993) 177 CLR 423 at 430.

89 (1993) 177 CLR 423 at 432.

90 (2001) 207 CLR 562 at 579-580 [50].

> then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle." (footnotes omitted)

78 For the first example (nature of harm), the Court referred to *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[91]; for the second (statutory powers) to *Crimmins v Stevedoring Industry Finance Committee*[92] and *Brodie v Singleton Shire Council*[93] (to which may be added *Graham Barclay Oysters Pty Ltd v Ryan*[94]); for the third (class indeterminacy) to *Perre v Apand Pty Ltd*[95] (to which may be added *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[96]); and for the fourth (coherence) to *Hill v Van Erp*[97] (to which may be added *Koehler v Cerebos (Australia) Ltd*[98]).

79 What then, in the sense of the passage in *Sullivan v Moody*, are the problems in determining the scope of a duty of care owed to the plaintiff in this case? A starting point is suggested by the path taken by Brennan J in his dissenting judgment in *Nagle*[99], namely, looking to the nature of the danger, assessed prior to the accident, with reference to such matters as the functions of the public authority, the obviousness of the danger, and the care ordinarily exercised by members of the public.

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91 (2000) 205 CLR 254.

92 (1999) 200 CLR 1.

93 (2001) 206 CLR 512.

94 (2002) 211 CLR 540. See also *Commissioner of Main Roads v Jones* (2005) 79 ALJR 1104; 215 ALR 418. These cases illustrate the point made by Lord Nicholls of Birkenhead that identification of the parameters of the law of negligence is especially difficult in fields involving the discharge of statutory functions by public authorities: *D v East Berkshire Community Health NHS Trust* [2005] 2 WLR 993 at 1023; [2005] 2 All ER 443 at 475.

95 (1999) 198 CLR 180.

96 (2004) 216 CLR 515.

97 (1997) 188 CLR 159 at 231.

98 (2005) 79 ALJR 845; 214 ALR 355.

99 (1993) 177 CLR 423 at 440.

80 The Council in this case had the control and management of a large area of land used for public recourse and enjoyment. There were 27 kilometres of coastline, with extensive sandy beaches interrupted by prominent headlands with rocky foreshores. The area of Wyong Shire also includes the extensive Tuggerah Lakes system where the accident with which *Shirt* was concerned took place. The danger of diving off the rock ledge from which the plaintiff dived was apparent. In that respect, reference is apt to the formulation of duty in *Brodie*. This was to the effect that, even in the case of public roads, the use of which is "a matter of basic right and necessity"[100], the duty of the public authority requires that "a road be safe not in all circumstances but for users exercising reasonable care for their own safety"[101]. An observation by Callinan J in *Agar v Hyde*[102] is also apposite; the site from which the appellant dived as a recreational pursuit was of a different character "from the workplace, the roads, the marketplace, and other areas into which people must venture"[103].

81 The basis upon which a duty of care, owed to members of the public who use public premises, is imposed upon statutory authorities responsible for the control and management of those premises was explained by Hayne J in *Romeo*[104]:

> "It has now long been held by this Court that the position of an authority ... which has power to manage, and does manage, land which the public use as of right is broadly analogous to that of an occupier of private land. It is the management of the land by the authority which provides the necessary relationship of proximity between authority and members of the public." (footnote omitted)

However, to observe the existence of the analogy thus drawn is not to say, as the Council's concession referred to above appears to assume, that the mere circumstance that a statutory authority has powers of management over public lands, which are in turn used as of right by members of the public, is alone sufficient to enliven the duty of care in question. Such a proposition fails to take into account the emphasis given by this Court to the notion that where, as in the present case, those powers of management may be said to be quasi-legislative in

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100 (2001) 206 CLR 512 at 574 [141].

101 (2001) 206 CLR 512 at 581 [163].

102 (2000) 201 CLR 552.

103 (2000) 201 CLR 552 at 600 [127].

104 (1998) 192 CLR 431 at 487-488 [152].

nature, their exercise cannot be compelled or constrained by a common law duty of care[105].

82 Indeed, for the majority in *Nagle*, it did not suffice to found the duty of care that the defendant Authority was under a duty to manage and control for the benefit of the public the reserve in which the plaintiff had suffered his injury. Instead, as noted earlier in these reasons, the notion of "proximity" as then understood was decisive. Proximity was created by the circumstance that the defendant Authority had encouraged members of the public to swim in the particular basin where the injury eventually occurred[106].

83 It might be noted for the present appeal that, whilst there was an adjacent car park at the Norah Head Reserve, the Council did not promote the rock platform as a diving point in the same manner in which the defendant in *Nagle* both promoted the basin within the reserve as a swimming area and sought to derive revenues from its use by members of the public. To the contrary, the evidence was that, when surf life-savers on patrol at the nearby Soldiers Beach had warned the youths and young men jumping and diving from the rock platform, the surf life-savers had been verbally abused.

84 At trial, Mr Vairy's case was conducted primarily on the basis that the Council "was negligent by its failure to erect signs prohibiting diving *reinforced* by signs warning of the dangers of diving by reason of the depth of the water" (emphasis added). As at the date of Mr Vairy's accident, the Council had power to prohibit diving by use of such signs under s 354(2) of the *Local Government Act* 1919 (NSW) or under cl 8 or cl 21 of Ordinance 52 made under that statute. Given that failure to comply with a notice or warning made under Ordinance 52 was made an offence pursuant to the terms of cl 29, such a prohibition would have had the force of law. It would have represented the exercise by the Council of a quasi-legislative power.

85 At trial, the Council had relied upon *Crimmins v Stevedoring Industry Finance Committee*[107] to submit that it "could not be in breach of a duty of care owed to [Mr Vairy] by reason of failure to exercise quasi-legislative powers". Bell J rejected this submission, saying:

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105 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 20-21 [32], 39 [93], 62 [170], 101 [292].

106 (1993) 177 CLR 423 at 430.

107 (1999) 200 CLR 1.

> "If the Council has the power to prohibit members of the public from engaging in a dangerous activity, such as diving from a rock platform located in a reserve the subject of its care, control and management and to prohibit that activity does not occasion undue expense, difficulty or inconvenience, then it seems to me that its failure to do so may show a want of reasonable care for the safety of visitors to the reserve. To say this does not seem to me to trench on the core policy-making functions of the Council."

Her Honour thus adverted to the notion that a failure to exercise a quasi-legislative power may constitute a breach of a duty of care where questions concerning "core policy-making functions" are not involved. This notion finds some support in the following statement by Deane J in *Sutherland Shire Council v Heyman*[108]:

> "The existence of liability on the part of a public governmental body to private individuals ... will commonly, as a matter of assumed legislative intent, be precluded in cases where what is involved are actions taken in the exercise of policy-making powers and functions of a quasi-legislative character".

86 However, as appears from the passage just quoted, his Honour saw "assumed legislative intent" as the basis for such an exclusion of liability. That proposition can no longer be said to provide a complete representation of the present state of the law in Australia. In *Crimmins*, Hayne J said[109]:

> "Put at its most general and abstract level, the fundamental reason for not imposing a duty in negligence in relation to the quasi-legislative functions of a public body is that the function is one that must have a public rather than a private or individual focus. To impose a private law duty will (or at least will often) distort that focus. This kind of distinction might be said to find reflection in the dichotomy that has been drawn between the operational and the policy decisions or functions of public bodies. And a quasi-legislative function can be seen as lying at or near the centre of policy functions if policy and operational functions are to be distinguished. But as more recent authority suggests, that distinction may not always be useful". (footnotes omitted)

Three points may be extracted from this passage. First, it is not so much an assumed legislative intent, as it is the public focus of a quasi-legislative function, which limits the private law duties of a public body. Secondly, the distinction

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108 (1985) 157 CLR 424 at 500.

109 (1999) 200 CLR 1 at 101 [292].

between the operational and policy functions of such a body is of dubious utility[110]. And, thirdly, to the extent that this distinction nonetheless is useful and should be preserved, the mere circumstance that a function is quasi-legislative should suffice as a basis upon which to describe it as a policy function. Hayne J was one of the minority in *Crimmins* but these points were all reflected in the various other judgments, both of the majority and minority[111].

87 When seen in this light, the reasoning of the learned trial judge discloses error. The Council's failure to erect signs prohibiting the act of diving from the rock platform cannot attract liability in tort. This conclusion, however, does not touch Bell J's view that the Council "was, at the least, required to erect signs warning of the danger of diving from the rock platform". To that issue I now turn.

88 Reference has been made above to the geographic reach of the Council's responsibilities. It is doubtful whether the rock platform may properly be described as "a distinct and unusual natural formation". The finding on that issue by the trial judge was based upon evidence concerning the geography of the Warringah Shire.

89 Indeed, one may doubt whether there is anything to distinguish the rock platform from the other areas of coastline or shoreline which the Council had been charged with the task of managing. The Council submitted, for example, that evidence of the frequency with which members of the public are injured as a result of activities associated with the rock platform is of little assistance in this case because "[t]here was no attempt on [Mr Vairy's] part to show that there was something special [in this] in relation to [the] rock platform". The Council also sought in oral argument to diminish the significance of the accessibility of the rock platform from Soldiers Beach and the substantial bituminised car park provided to beach visitors. No doubt, although no explicit reference was made to it, this submission drew some support from the finding in *Romeo* that there was nothing distinctive about the part of the cliff from which the appellant fell, not even in the circumstance that there was a car park nearby[112]. These submissions by the Council should be accepted.

90 Weight is also to be given to the Council's submission in this Court that members of the public are exposed to a multiplicity of dangers when they attend beaches or rock headlands, including sharks, the possibility of being washed off

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110 See *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393-394 [180]-[182].

111 (1999) 200 CLR 1 at 20-21 [32], 39 [93], 62 [170].

112 (1998) 192 CLR 431 at 455 [54].

rocks, dangerous currents and sandbars. It is true that some years before Mr Vairy's accident, another person had been seriously injured after diving from the same rock platform and that this was known to the Council. But many others had dived or jumped there without injury. And the risk of spinal injury brought about by the impact upon the swimmer of natural phenomena would be present in many other areas of the Shire.

91 The question must then be asked: if, as Mr Vairy contends, the Council had a duty to warn of the risks associated with diving from the rock platform, why did it not also have a duty to warn of these other risks both on the platform and at every point along the coastline and shoreline for which it was responsible? A similar question was posed by Gleeson CJ in *Woods v Multi-Sport Holdings Pty Ltd* in relation to the risks that arise from indoor cricket[113]:

> "The case was that there should have been a warning of the dangers associated with indoor cricket and, in particular, the danger of serious eye injury. It is useful to reflect upon what exactly might have been the content of the warning. There was no reason to limit it to the risk of head injury, much less eye injury. There was one particular respect in which the type of eye injury suffered at indoor cricket can be different from the type suffered at outdoor cricket, but there were probably also a number of respects in which the risk of back injury, or concussion from collisions, might be different from the risks associated with outdoor cricket. The risk that, in the confined space in which the game was played, any player, batsman or fielder, might receive a severe blow to any part of the head, including the eye, was, the trial judge found, obvious, and well known to the appellant. It was argued that the appellant was not aware of the precise nature, and full extent, of the risk. But warnings of the kind here in question are not intended to address matters of precision."

92 The Council did not put Mr Vairy in harm's way in the sense that it required or invited or encouraged him to dive from the rock platform. It is of no relevance that the Council could have prohibited diving from the rock platform – that is, that it could have, by legal coercion, directed Mr Vairy out of harm's way. The exercise of the Council's powers of prohibition was, as discussed above, incapable of being compelled or constrained by a common law duty of care, and the existence of those powers cannot be taken to establish the measure of control required to found such a duty. Nor was the Council's control over the rock platform such that it could be said to have created the risk of injury to which Mr Vairy was exposed on the day of his accident. Both littoral drift and the normal movements of the tide are natural phenomena. Therefore, to the extent that the Council owed Mr Vairy a duty of care requiring a warning, that duty

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113 (2002) 208 CLR 460 at 473-474 [43].

must have been founded upon the concept of control. But the control exercisable by the Council over both Mr Vairy and the rock platform did not rise to such a level that the content of the duty should have included an obligation to issue the sort of warning for which Mr Vairy now contends.

The conduct of the plaintiff

93 Some emphasis was placed in the reasons of the learned trial judge upon the circumstance that Mr Vairy had, on the day of his accident, observed other people diving and jumping into the water from the rock platform without suffering adverse consequence. In a similar fashion, it was submitted for Mr Vairy in this Court that those observations gave him "reasonable grounds for believing ... that the water was deep enough for him to dive into in safety". One might doubt, however, whether reliance upon this circumstance is of any real assistance to Mr Vairy in the present appeal.

94 After all, it is not pertinent to the question of duty whether or not he had reasonable grounds for believing that the water adjacent to the rock platform was of sufficient depth to allow for safe diving. Indeed, to fix upon this issue would be to overlook what has already been said concerning the proper approach to determining the content of the Council's duty of care. The scope of that duty must be assessed, not by exclusive reference to the risk which resulted in Mr Vairy's accident, but against the background of the whole multitude of risks that may crystallise over the length of shoreline, the care, control and management of which is the responsibility of the Council.

95 The reasonableness of Mr Vairy's belief that it was safe to dive from the rock platform goes only to the question of breach, and specifically to the obviousness or otherwise of the risk to which he was exposed. To accept, as dispositive of this appeal, the contention that that belief was founded upon reasonable grounds is to assume, as the Court of Appeal did, that the determinative issue in this case is the obviousness of the risks associated with diving into a body of water of unknown depth. For the reasons given by Hayne J, that assumption should not be made.

96 And, once that assumption is rejected, it is difficult to see what weight, if any, may be given, in deciding this appeal, to the reasonableness of Mr Vairy's belief concerning the safety of diving from the rock platform. That he observed others diving safely before diving himself, thus displaying a modicum of caution, does not make any more or less reasonable the Council's response to the multitude of apparent risks to which members of the public are exposed along the coastline in the Shire of Wyong, namely, its omitting to place along that coastline signs warning of all of those risks.

97 It might be said, given the legal principles already outlined, that Mr Vairy's observations on the day of his accident can only be relevant if this

Court were to quarantine from review the findings and holdings of the learned trial judge on the ground that they relate entirely to matters of fact. However, as Gleeson CJ noted in *Swain v Waverley Municipal Council*[114], a jury case, the concept of reasonable care has a normative content. Where the application of normative standards to a given set of facts is required of a judge, so much more pressing is the need for reasoning which displays soundness and cogency.

Conclusions

98 The trial judge erred in merging the question of the scope or content of the conceded duty of care and the question of breach. The content of the duty did not include, whatever else it may have included, an obligation to warn (still less to prohibit) of the kind contended for by the plaintiff.

99 However, given the course pursued by the Council in its appeal to this Court, it would be wrong to uphold on that basis the decision of the Court of Appeal which deprived the plaintiff of the verdict he recovered at trial.

100 Upon that footing, the appeal must be determined by reference to the *Shirt* calculus. In that regard, I agree that the appeal should be dismissed, not to support the reasoning of the Court of Appeal, but for the particular reasons appearing in the judgment of Hayne J under the headings "Warning?" and "Prohibition". Orders should be made dismissing the appeal with costs.

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114 (2005) 79 ALJR 565 at 567 [8]; 213 ALR 249 at 252.

101 HAYNE J. A person entering a body of water, by diving or plunging into it, can suffer catastrophic spinal injury. The appellant in this case, and the appellant in the case heard immediately after this[115], each suffered such an injury. This appellant suffered irreversible tetraplegia when he dived into the sea from a natural rock platform at Soldiers Beach, a popular surfing beach on the central coast of New South Wales. He hit his head on the sea bed.

102 The appellant sued the respondent ("the Council") in the Supreme Court of New South Wales. The Council is a local government authority constituted under the *Local Government Act* 1919 (NSW). The appellant alleged that the Council had been negligent in not erecting a sign prohibiting diving from the rock platform or warning of its dangers. The circumstances of the accident and the place where it happened are sufficiently described in the reasons of Callinan and Heydon JJ. I need not repeat that description.

103 At trial, the appellant obtained judgment for damages[116]. The primary judge (Bell J) found the Council to have been negligent but the appellant to have been contributorily negligent. Her Honour assessed the reduction in the damages to be awarded to the appellant, on account of contributory negligence, as 25 per cent. The amount of damages to be allowed to the appellant had been agreed by the parties as $6,739,671. Judgment was entered for $5,054,753.25.

104 The Council appealed to the Court of Appeal. That Court (Mason P, Beazley and Tobias JJA) delivered reasons dealing not only with the Council's appeal but also with an appeal that had been brought in the matter of *Mulligan v Coffs Harbour City Council*[117]. In the present matter, the Court concluded (Mason P and Tobias JA, Beazley JA dissenting) that the Council had not breached its duty of care. Tobias JA, with whose reasons Mason P agreed, directed much attention to whether the risk of injury was "obvious" and, concluding that it was, determined that there had been no breach of duty. The judgment entered below was set aside and judgment entered for the Council. By special leave, the appellant now appeals to this Court.

The issue

105 The central issue in the appeal is whether the Council breached a duty of care it owed to the appellant by not erecting one or more signs warning against,

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115 *Mulligan v Coffs Harbour City Council* [2005] HCA 63.

116 *Vairy v Wyong Shire Council* (2002) 129 LGERA 10.

117 *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* (2004) Aust Torts Reports ¶81-754.

or prohibiting, diving from the rock platform. Resolving that question, a question of fact, hinges critically upon recognising that what has come to be known as the "*Shirt* calculus"[118] is not to be undertaken by looking back at what has in fact happened, but by looking forward from a time before the occurrence of the injury giving rise to the claim. The several questions described by Mason J in *Wyong Shire Council v Shirt* are to be asked and answered with that perspective. Thus, before the appellant was injured, would "a reasonable man in the [Council's] position … have foreseen that his conduct involved a risk of injury to the [appellant] or to a class of persons including the [appellant]"[119]? If the answer to that question is affirmative, "it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk"[120]. As Mason J went on to point out[121]:

> "[t]he perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have."

106 In the present appeal (and in the matter of *Mulligan v Coffs Harbour*) it is this second set of inquiries (about response to a risk that is foreseeable) which is critical. That is because foreseeability of risk of injury, at least since *Shirt*[122], if not before[123], includes risks which, although quite unlikely to occur, are not far-fetched or fanciful.

107 Diving or plunging into water carries a risk of catastrophic spinal injury if the water is too shallow. That risk is always present, and foreseeable, wherever there is a body of water into which someone may dive or plunge. The diver may strike his or her head on the bottom or on some obstacle in the water. But it does not follow because an injury is foreseeable that the person who has the care, control and management of the land from which a person may enter the water in that way must in *every* case take steps to warn against, or prohibit, such conduct.

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118 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

119 (1980) 146 CLR 40 at 47.

120 (1980) 146 CLR 40 at 47.

121 (1980) 146 CLR 40 at 47-48.

122 (1980) 146 CLR 40 at 46-47 per Mason J.

123 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* (*The Wagon Mound [No 2]*) [1967] 1 AC 617 at 643-644 per Lord Reid.

The parties' contentions

108 The appellant's case, accepted at trial[124], depended upon a number of elements which can be marshalled as followed:

(a) The Council had the care, control and management of the rock platform and the land giving access to it. (Council's powers)

(b) The Council knew that people often dived off the rock platform. (Knowledge of diving)

(c) The Council had built carparks and steps which gave people ready access not only to Soldiers Beach, where there was a patrolled surf beach, but also to the rock platform. (Encouragement)

(d) The Council knew not only that persons had suffered some relatively minor injuries as a result of diving from the rock platform, but also that there had been a previous case of catastrophic spinal injury. (Knowledge of previous injuries)

(e) The Council knew, or ought reasonably to have known, that as a result of littoral drift, sand accumulated on the sea bed near the rock platform, thus affecting the depth of the water. (Littoral drift)

(f) A warning sign near the rock platform would have cost very little. (Warning signs)

(g) The appellant would have heeded a warning sign and not have dived into the water as he did. (Causation)

(h) The facts of the present case were not different in any material respect from those considered by the Court in *Nagle v Rottnest Island Authority*[125]. There the Court held that the respondent Authority had breached its duty of care by not warning those whom it encouraged to swim in the waters off Rottnest Island of the risks of diving into the water even though "'it may have reasonably been considered foolhardy or unlikely' for a person to dive as the appellant [in that case] did"[126].

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124 *Vairy v Wyong Shire Council* (2002) 129 LGERA 10.

125 (1993) 177 CLR 423.

126 (1993) 177 CLR 423 at 430-431 per Mason CJ, Deane, Dawson and Gaudron JJ.

109 In the appeal to this Court the Council accepted that it owed a duty of care. It sought to answer the appellant's case by contending that when assessed *before* the happening of the appellant's injury, foreseeability of the risk of such an injury did not reasonably require the Council to take steps at or near the rock platform to prohibit diving, or warn against its dangers. What the Council knew or ought to have known about the frequency of diving and the severity of the injuries that might be sustained bore also upon these questions of breach.

110 Although the focus of the debate must finally be directed to questions of breach, it is necessary to begin by examining more closely what duty the Council owed. To do that it is necessary to begin from an understanding of the Council's statutory powers and responsibilities.

Council's powers

111 In 1954, the Minister for Lands, acting under the *Crown Lands Consolidation Act* 1913 (NSW), temporarily reserved from sale an area of about 50 acres, which included Soldiers Beach, for the purposes of public recreation and camping. The Council was appointed trustee of this land, known as the Norah Head Reserve, pursuant to the *Public Trusts Act* 1897 (NSW). Thereafter, some changes were made to the area of the Reserve, but it is not necessary to trace those changes. At the time the appellant suffered his injury, the rock platform from which he dived formed part of the Reserve. The platform was land vested in the Council and the legislation applying at the time of the appellant's injury[127] charged the Council with the care, control and management of that land. When the appellant dived off the rock platform he left land under the care, control and management of the Council.

112 At the time the appellant suffered his injury, s 344(1) of the *Local Government Act* provided that the Council should have the care, control and management of certain public reserves, of which the Norah Head Reserve was one. Part XIII of the *Local Government Act* conferred certain powers on councils in respect of public reserves and parks. Division 3 of Pt XIII (and, in particular, s 354) empowered the Council to control and regulate public bathing in public reserves and the sea adjacent to a public reserve. Provision was made[128] for Ordinances to be made in relation to public bathing. One such Ordinance, in force at the time of the appellant's accident, provided[129] that "[a] person shall not

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127 *Crown Lands Act* 1989 (NSW), s 92(5).

128 *Local Government Act* 1919 (NSW), s 367.

129 Ordinance No 52 under the *Local Government Act* 1919, cl 8.

bathe in any public bathing reserve … in respect of which a warning has been given that it is dangerous to bathe therein". The same Ordinance[130] empowered the Council "by notices exhibited in or in the vicinity of a public bathing reserve" to "indicate where bathing shall be prohibited". To fail to comply with a warning given under that Ordinance was an offence[131] and an offender was liable[132] to be removed forthwith from the reserve by (among others) a servant of the Council.

113 It may be assumed that the Norah Head Reserve was not the only reserve over which the Council had care, control and management. How many other reserves there were under the Council's care, control and management at the relevant times was not explored in evidence. What was demonstrated was that, at the time of the appellant's accident, Wyong Shire was about 827 square kilometres. It had 27 kilometres of coastline described as being "largely sandy beach with intermittent prominent headland[s] with rocky foreshores". There were six patrolled beaches on the coastline and at least another six, unpatrolled, beaches. In addition, the Tuggerah Lakes system lay within the Shire. Those lakes were said to be "very popular" recreation areas within the Shire.

114 As a local government authority, the Council had many obligations. Even if attention is confined to the subject of Public Recreation, the Table of Provisions in Pt XIII of the *Local Government Act* reveals that the Council, like other councils, had powers and functions that ranged from care of parks (s 344) and the provision of parking areas on public reserves (s 351A), to the provision, control and management of baths and bathing facilities (ss 353-356), to the provision, control and management of libraries (s 357), schools of arts and mechanics' institutes (s 358), and gymnasia (s 361), to the control and regulation of skating rinks (s 362), and places of public amusement (s 363), to the protection, acquisition, preservation and maintenance of "places of historical or scientific interest and natural scenery" (s 365). In addition, of course, the Council had many other functions to perform.

115 What duty did the Council owe the appellant?

Duty of care

116 It is sometimes said that a statutory authority having the care, control and management of a reserve is in a position analogous to that of an owner of private

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130 cl 21.

131 cl 29(a).

132 cl 29(b).

land[133]. Like all analogies, however, it is dangerous to assume that the analogy is perfect. For example, a statutory authority having the care, control and management of land may not be able to control entry on the land in the same way as a private owner. It may or may not be able to close the area or part of it. And its task of care, control and management of the various areas committed to its care may be much larger and more complicated than any obligations a private owner of land may encounter.

117 It is long established, however, that a statutory authority, having the care, control and management of land to which the public has access, owes a duty of care to those who enter[134]. To this extent, the analogy with private land owners is apt[135]. But what reference to the breadth of a council's obligations reveals is that the analogy is not perfect. In particular, the content of the duty is not necessarily identical.

118 That may suggest that an attempt should be made to define the content of the Council's duty of care more precisely. Subject to one qualification, that would not be a useful exercise. The qualification is that it is necessary to recognise that the duty of care, owed by a statutory authority to those who enter land of which the authority has the care, control and management, is not a duty to ensure that no harm befalls the entrant. It is a duty to take *reasonable* care. Beyond that, however, it is not possible to amplify the content of the duty without reference to particular facts and circumstances. In each case, the content of the duty will turn critically upon the particular facts and circumstances.

Breach of duty

119 Recognising that the Council owed those who entered the Norah Head Reserve, including the appellant, a duty to take reasonable care, the central question in this case is what performance of that duty required. The appellant sought to answer that question by referring to the several matters mentioned earlier in these reasons: knowledge of diving, encouragement, knowledge of

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133 *Aiken v Kingborough Corporation* (1939) 62 CLR 179 at 190-191 per Latham CJ, 199-200 per Starke J, 205-206, 209 per Dixon J; *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116 at 120 per Barwick CJ, 124-128 per Walsh J, 134 per Gibbs J; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 428 per Mason CJ, Deane, Dawson and Gaudron JJ; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 487-488 [152] per Hayne J.

134 *Aiken* (1939) 62 CLR 179; *Schiller* (1972) 129 CLR 116; *Nagle* (1993) 177 CLR 423; *Romeo* (1998) 192 CLR 431.

135 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

previous injuries and littoral drift. These were said to require the conclusion (like that reached in *Nagle*) that the Council should have warned against diving from the rock platform or should have prohibited that practice.

120 It is necessary to examine more closely the way in which the question of breach should be approached in this case. Although it was not disputed that this is a task requiring the application of the so-called *Shirt* calculus, there are some particular aspects of the way in which that is to be done which require further elucidation. Those matters can be grouped under two headings:

(a) the particularity of the inquiry; and

(b) look forward or look back?

The particularity of the inquiry

121 All the matters relied on by the appellant in connection with breach of duty took as the focus of their attention what was to be done about diving from the rock platform near Soldiers Beach. Is that question too confined?

122 A plaintiff in a negligence action must prove that the defendant owed the plaintiff a duty of care. That duty may be proved to exist by showing that the defendant owed a duty of care to a class of persons of whom the plaintiff was one. But the duty thus established is a duty which the defendant owed to the particular plaintiff. If the analysis is interrupted at this point, the focus in the present case upon what, if anything, the Council ought to have done about diving from the rock platform is well justified. It is well justified because the question is whether the Council breached the duty of care which it owed to the *appellant*. And it is clear, therefore, that to ask what was to be done about diving from the rock platform near Soldiers Beach was a relevant, indeed a central, question to ask and answer. But, as *Romeo v Conservation Commission (NT)* demonstrates[136], while it is necessary to look at what ought to have been done in relation to activities on the rock platform, attention cannot be confined to the precise place at which the events in question took place. In deciding what the response of a reasonable council would have been to the risk of diving injuries it is necessary to recognise that that council would be bound to consider all of the land of which the council had the care, control and management. That consideration may yield different answers for different places but all would have had to be considered. And it is a consideration that must be set into a much wider context than is provided by focusing only upon diving injuries. The duty of care which a council owes to those who enter land of which it has the care,

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136 (1998) 192 CLR 431 at 455 [54] per Toohey and Gummow JJ, 491 [164]-[165] per Hayne J.

control and management is a duty which is not limited to taking reasonable care to prevent one particular form of injury associated with one particular kind of recreational activity.

123 At once it can be seen that the inquiry may not be simple. The risks of injury may differ from place to place. They may differ because of the number of people who resort to one place rather than another; they may differ because one place differs from another in relevant respects; there are many reasons why the risks may differ. But the question for a council having the care, control and management of land to which members of the public may resort is: what is to be done in response to the various foreseeable risks of injury to those persons?

124 Again, because the inquiry is prospective, it would be wrong to focus exclusively upon the particular way in which the accident that has happened came about. In an action in which a plaintiff claims damages for personal injury it is inevitable that much attention will be directed to investigating how the plaintiff came to be injured. The results of those investigations may be of particular importance in considering questions of contributory negligence. But the apparent precision of investigations into what happened to the particular plaintiff must not be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an accident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be "nothing".

125 There are fundamental reasons why the inquiry cannot be confined to where the accident happened or how it happened. Chief among them is the prospective nature of the inquiry to be made about response to a foreseeable risk.

Look forward or look back?

126 When a plaintiff sues for damages alleging personal injury has been caused by the defendant's negligence, the inquiry about breach of duty must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered. That inquiry must attempt, after the event, to judge what the reasonable person *would* have done to avoid what is now known to have occurred. Although that judgment must be made after the event it must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury.

127 There may be more than one place where this risk of injury may come to pass. Because the inquiry is prospective there is no basis for assuming in such a case that the only risk to be considered is the risk that an injury will occur at one of the several, perhaps many, places where it could occur. *Romeo* was just such a case and so is this. In both cases there were many places to which the public had access and of which the Commission (in *Romeo*) and the Council (in this case) had the care, control and management. In *Romeo*, there were many places where a person could fall off a cliff; here, there were many places where a person could dive into water that was too shallow. Because the inquiry is prospective, all these possibilities must be considered. And it is only by looking *forward* from a time before the accident that due weight can be given to what Mason J referred[137] to in *Shirt* as "consideration of the magnitude of the risk and the degree of the probability of its occurrence". It is only by looking *forward* that due account can be taken of "the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have"[138].

128 If, instead of looking forward, the so-called *Shirt* calculus is undertaken looking back on what is known to have happened, the tort of negligence becomes separated from standards of reasonableness. It becomes separated because, in every case where the cost of taking alleviating action at the particular place where the plaintiff was injured is markedly less than the consequences of a risk coming to pass, it is well nigh inevitable that the defendant would be found to have acted without reasonable care if alleviating action was not taken. And this would be so no matter how diffuse the risk was – diffuse in the sense that its occurrence was improbable or, as in *Romeo*, diffuse in the sense that the place or places where it may come to pass could not be confined within reasonable bounds.

129 To approach the inquiry about breach in this prospective way is to apply long-established principle. In *Aiken v Kingborough Corporation*[139], Dixon J described the test to be applied in determining whether a statutory authority had breached a duty of care owed to a person entering land as being that a member of the public, entering public land as of right, "is entitled to expect care for his safety measured according to the nature of the premises and of the right of access vested, not in one individual, but in the public at large". No doubt this statement of the content of the duty must now be understood, taking proper account of subsequent developments in the common law concerning the duty of care owed

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137 (1980) 146 CLR 40 at 47.

138 (1980) 146 CLR 40 at 47-48.

139 (1939) 62 CLR 179 at 209.

to entrants by those who occupy land[140] or have the care, control and management of public land[141]. But those later developments do not affect the conclusion which underpins the passage cited from *Aiken* that the inquiry about breach must be made looking forward, not looking back at what happened to the particular plaintiff. Further, as earlier explained, *Shirt* is consistent with only that approach to the problem. And later decisions of the Court, notably *Romeo*[142] and *Commissioner of Main Roads v Jones*[143], can be understood only in that way.

130 Before the appellant suffered his injury, a reasonable council would have recognised that there was a risk that a person diving or jumping off the rock platform would suffer catastrophic spinal injury if the water was too shallow. That this was foreseeable was amply demonstrated by the fact that, before the appellant suffered his injury, another man (Mr von Sanden) had sustained spinal injury when he dived off that rock platform. The occurrence of this accident was found to have been "common knowledge within the Council", but the Council took no steps to warn or prevent others diving from the rock platform. It may be that Mr von Sanden leapt off a point on the platform higher than the point from which the appellant dived. It matters not whether that is so. What matters is that it was reasonably foreseeable that a person entering the water from this point could suffer injury if the entry was head first and the water was too shallow.

131 In this connection it is important to notice that it was not alleged in this case that the Council had done anything to make the risk of diving injury at Soldiers Beach any greater than it was. Nor (subject to the contentions about littoral drift) was it alleged that there were any particular hidden dangers of which the Council was or ought to have been aware but a visitor to the area would not. Rather, the essential complaint of the appellant was that the Council should have warned that the water near the rock platform may be too shallow.

132 The depth of the water into which the appellant dived was, therefore, the critical fact which contributed to his suffering the injury he did. The courts below made no finding about the depth of the water into which the appellant dived. That is not a matter for criticism. The water at this point was tidal and subject to the ordinary ebbs and flows of the open sea meeting the coast. The depth of the water, therefore, varied from moment to moment according to the state of the sea. No doubt, as the appellant sought to emphasise, the phenomenon of littoral drift provided a further cause of significant variation in water depth

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140 *Zaluzna* (1987) 162 CLR 479; *Jones v Bartlett* (2000) 205 CLR 166.

141 *Romeo* (1998) 192 CLR 431.

142 (1998) 192 CLR 431.

143 (2005) 79 ALJR 1104; 215 ALR 418.

over periods of days or weeks. This may well have meant, as the appellant alleged, that a person who had checked the conditions near the rock platform on one day could not be sure that the conditions were likely to be the same on another day. But much more significant in their effect on the depth of the water into which the appellant dived than any effect of littoral drift were the effects of tide and of surge or swell.

133 Immediately before the appellant suffered his injury, others had safely entered the sea from the rock platform. Whether they did so by diving head first was not explored in evidence. Whether, having dived in, those who had done so stood up and walked away from the point where they entered the water was again not explored in evidence. Some photographs of the scene taken many weeks after the accident, but tendered in evidence, suggested that there might be conditions where the water was no deeper than hip height at the point where persons jumping from the rock platform would enter it. And those who came to the appellant's rescue seem to have been able to stand on the sea bed, supporting him. Again, however, the fact that conditions of this kind might be encountered is not significant to the inquiry about breach. What matters is that, because the water *could* be too shallow, there was a risk of injury.

Applying *Shirt*

134 The particular risk to be considered in the *Shirt* calculus was, then, the risk that a person would be injured by diving or plunging into water that was too shallow. That was a risk that could come to pass if someone dived or plunged off the rock platform at the end of Soldiers Beach, but it was a risk that could come to pass at many other places of which the Council had the care, control and management. Indeed, as the facts in *Swain v Waverley Municipal Council*[144] all too tragically show, it was a risk that could come to pass at any beach, if a person dived into the surf and hit a sand bar or other obstacle. It was a risk that could come to pass if a swimmer was dumped by a wave.

135 If littoral drift had any influence on either the magnitude of the risk or the probability of its occurrence at this place, it was very slight. The effect of littoral drift was gradual and occurred over comparatively long periods. Of course, account must be taken of the number of people who used *this* rock platform as a place from which to enter the water. Account must be taken of the fact that, although very many seemed to have made their entry into the water from this place without harm, some had not, and one, Mr von Sanden, had suffered a catastrophic injury. And account had to be taken of the fact that a person standing on the rock platform may very well be unable to judge the depth of the water or may misjudge it. All of these are features of the case that bore upon the

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144 (2005) 79 ALJR 565; 213 ALR 249.

magnitude of the risk of injury and the degree of probability of its occurrence at *this* place. Nonetheless, the probability of occurrence of the risk of spinal injury at this place was low.

136 What would the reasonable council's response to that risk have been?

137 It was not and could not be suggested that a reasonable council would have marked every point in its municipal district from which a person could enter a body of water, and warned against or prohibited diving from that point. The principal case that the appellant sought to make was that the Council should have erected a warning sign, warning against diving from the rock platform. He also contended that the Council should have prohibited diving. The contentions that a reasonable authority would have warned against diving and that a reasonable authority would have prohibited the activity are distinct. They should be dealt with separately.

138 Before doing that, however, it is necessary to deal with *Nagle*. The appellant submitted that *Nagle* required the conclusion that the primary judge's judgment for the appellant should be restored; the Council submitted that *Nagle* was to be understood as no more than a factual decision having no relevant precedential value. What did *Nagle* decide?

Nagle v Rottnest Island Authority

139 The majority of the Court concluded[145] that the failure to warn of the danger of diving from a rock ledge into the Basin on the northern coast of Rottnest Island due to the presence of rocks was a breach of the respondent Authority's duty of care. The critical step taken towards that conclusion was described[146] by the majority in the following terms:

> "As occupier under the statutory duty [to manage and control the public reserve on the Island's coast for the benefit of the public], the Board [of the Authority], by encouraging persons to engage in an activity, came under a duty to take reasonable care to avoid injury to them and the discharge of that duty would naturally require that they be warned of foreseeable risks of injury associated with the activity so encouraged."

Why discharging the duty "would naturally require" giving a warning was not examined. This lack of examination suggests that a question about duty of care was understood to be the main subject for debate and decision in the case.

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145 (1993) 177 CLR 423 at 432 per Mason CJ, Deane, Dawson and Gaudron JJ.

146 (1993) 177 CLR 423 at 430 per Mason CJ, Deane, Dawson and Gaudron JJ.

140 And examination of the written and oral arguments of the parties in *Nagle* confirms that duty of care was indeed the chief focus of argument in the case. Little or no separate argument was advanced in *Nagle*, in the appeal to this Court, about breach of duty.

141 That argument took this course may be explained by referring to the decision from which the appeal was brought. The majority in the Court below (the Full Court of the Supreme Court of Western Australia) had held[147] that the Authority did not owe the plaintiff a duty of care. One member of the majority in the Full Court, Kennedy J, had reached[148] that conclusion on the basis that "there was, relevantly, no reasonable foreseeability of a real risk that injury of the kind sustained would be sustained by persons swimming at the Basin". On appeal to this Court, most attention was directed in argument to the correctness of this conclusion.

142 By contrast with the majority's reasons, Brennan J, who dissented in *Nagle*, held[149] that whether the Board of the Authority was under a duty to the plaintiff to erect a warning sign depended on "whether such a duty was owed to the public at large". The answer to that question was said[150] to depend on whether the danger of diving off the particular wave platform "was apparent and not to be avoided by the exercise of ordinary care". These conclusions were identified[151] by Brennan J as following from the flexibility available in determining the response of the reasonable man, and from the application of the test expressed by Dixon J in *Aiken* for determining whether a statutory authority had breached the duty of care it owed to those entering land of which the authority had care, control and management.

143 The principal question about breach of duty that was agitated in *Nagle* was understood by the majority of the Court[152] as being whether the plaintiff had sufficiently specified what action the Authority had failed to take in response to the risk. That some response was required appears to have been treated by the

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147 *Nagle v Rottnest Island Authority* (1991) Aust Torts Reports ¶81-090 at 68,764 per Kennedy J, 68,771 per Rowland J.

148 (1991) Aust Torts Reports ¶81-090 at 68,764.

149 (1993) 177 CLR 423 at 440.

150 (1993) 177 CLR 423 at 440.

151 (1993) 177 CLR 423 at 440.

152 (1993) 177 CLR 423 at 431-432.

majority as accepted; it was treated as following "naturally" from the conclusion that the Authority owed the plaintiff a duty to take reasonable care to avoid injury to those who used the Basin.

144 What does *not* emerge from *Nagle* is any rejection of what had been decided in *Shirt*. The majority made passing reference[153] to *Shirt* for the proposition that a risk that is unlikely to occur may be foreseeable, but did not expressly or impliedly reject *Shirt*. Brennan J relied[154] on *Shirt*. Nor is there to be found in *Nagle* any implicit rejection of the need to view questions of breach prospectively. Rather, the actual decision in *Nagle* must be understood as responding to the arguments of the parties in that case focusing, as they did, almost entirely upon questions of duty and foreseeability. The arguments of the parties said nothing about how the *Shirt* calculus was to be applied beyond making the assertion[155] that "it [was] going beyond a reasonable response to the postulated foreseeable risk to conclude that a sign warning [that diving was dangerous] was called for".

145 If, contrary to that view, the difference between the majority and Brennan J were to be understood as depending upon some difference of principle as distinct from a difference of application of identical principles governing the question of breach of duty, Brennan J was right to emphasise two points. Attention must be focused upon the nature of the danger assessed prior to the event[156] and account must be taken of the breadth of the obligations owed by a statutory or public authority (obligations which Brennan J referred[157] to as the authority's duty "to the public at large").

146 *Nagle* neither supports the appellant's case nor detracts from the Council's case. It is properly to be seen as a case turning upon its own facts and the way in which it was argued, not as establishing any new principle about breach of duty or departing from established principles.

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153 (1993) 177 CLR 423 at 431.

154 (1993) 177 CLR 423 at 439-440.

155 (1993) 177 CLR 423 at 425.

156 (1993) 177 CLR 423 at 440.

157 (1993) 177 CLR 423 at 440.

Warning?

147 In the present case, would a reasonable council have erected a warning sign? It was found that the appellant would have heeded a warning sign and would not have dived off the rock platform.

148 A warning sign seeks to convey information which an observer would not or may not otherwise have known, or seeks to remind the observer of something that otherwise would not or may not be considered. In this case the subject of the warning would be diving into water the depth of which is unknown or is too shallow. A warning would remind those considering diving of this risk. It may inform the young or the ill-informed of something they did not know or understand. But just such a warning would be apt to many other places.

149 There are many places along the coast or beside the Tuggerah Lakes where the water may sometimes appear to be deep but be too shallow to dive into safely or conceal some obstruction which a diver may strike.

150 Of course, it is relevant and important to know that one person had been seriously injured after diving off the rock platform at Soldiers Beach. But showing that the risk against which the proposed warning would be offered is one which has come to pass does not mean that a reasonable council would conclude that it should provide the warning. If the fact of occurrence sufficed to lead to that conclusion, there would be many points along the roadside where an accident has happened and a sign would read "speed kills" or "inattention can be fatal".

151 What is more important is that many people came to Soldiers Beach, and of those there seem to have been many who used the rock platform as a point from which to dive or jump into the water. The frequency of the activity reveals an aspect of the matter that must be taken into account. It reveals that the rock platform was only *sometimes* an unsafe place from which to dive or jump because the water was only *sometimes* too shallow in at least some places or some circumstances. Yet the more that people used the rock platform, the greater the chance one would suffer an accident; the greater the chance that one of those accidents would be very serious.

152 It may readily be accepted that the Council, by providing car parks and ready access to Soldiers Beach, encouraged persons to come there. The beach was popular and one reason for that popularity was, no doubt, that the beach was patrolled sometimes by lifeguards employed by the Council and at other times by surf lifesavers from the Surf Lifesaving Club whose clubhouse looked on to the beach. But it is not right to say that the Council encouraged persons to use the rock platform as a place from which to enter the water. Indeed, when the beach was patrolled, as it was when the appellant had his accident, to enter the water

from the rock platform was to act contrary to the basic prudential rule which governs swimming at a patrolled beach: swim between the flags.

153 Further analysis of the facts beyond this point is then neither necessary nor fruitful. The probability of the risk occurring was very low. But if it did, the consequences could be catastrophic. What is required is a judgment of what would have been the reasonable response to that risk in the circumstances that have been identified.

154 There is no doubt that the consequences of the risk occurring *could* be catastrophic. Did that possibility, judged in the light of the probability of its occurrence, reasonably require the response of erecting a warning sign?

155 Attaching the qualitative description "low", to the probability of occurrence of the risk, must not be understood as conveying some normative judgment about whether the risk may reasonably be ignored. But the likelihood of occurrence is an important factor to consider. Nor should the use of words like "calculus" be permitted to suggest that what is then required is some mathematical or mechanical analysis. In the end, the question is what response was reasonable? One possible answer is "none was needed".

156 In the present case, there are several reasons which require the conclusion that the reasonable response did not require the erection of a warning sign. They can be expressed in a number of different ways but can be brought together under two headings.

157 First, to mark out this place as especially dangerous, and this particular form of danger as especially worthy of warning, was neither reasonably necessary nor appropriate. Secondly, neither the frequency with which people used the rock platform as a launching pad, nor its evident suitability for that use, sufficiently distinguished this place from others in which there was a risk of spinal injury if a person dived or plunged into water that was too shallow.

158 Every form of physical recreation carries some risk of physical injury. The more energetic the activity, the greater are those risks. Fatigue, lack of fitness, slowness of reaction, general ineptitude can all contribute to injury. The magnitude and probability of occurrence of those risks rise if the activity is one in which there may be a collision between the participant and others, or between the participant and his or her surroundings. That risk of collision is evidently present in contact sports, but the solitary bike rider pedalling along a dedicated cycle track may fall from the bike and suffer serious injury. So too, the solitary swimmer may collide with an obstacle or strike the sea bed.

159 There are many dangers associated with bathing in the sea – not least the danger of drowning. The form of danger with which this case is concerned – the danger of diving into water that is too shallow – is only one of the risks that

attend this form of recreation. And the Council had to consider many forms of recreation conducted in many different areas of which the Council had the care, control and management. Swimming was but one of these many forms of recreation, every one of which had its risks and dangers. And even if attention could be confined to the risks associated with swimming, the risk of spinal injury brought about by a swimmer's collision with his or her surroundings is not confined to those who dive or plunge into the sea from a natural launching pad like the rock platform[158].

160 Only by looking back at what actually happened in this case would it be right to confine the attention of a reasonable council to the foreseeable risks of swimming in the sea. When judged from the proper standpoint – looking forward at all forms of risk associated with all forms of recreation on or from land of which the Council had the care, control and management – what would the response of a reasonable council have been to the foreseeable risk of a diving injury like the appellant suffered?

161 It was not reasonable to expect the Council to warn of this particular danger. The Council had done nothing to make the danger worse and had no knowledge of some feature of this particular area that was not readily discovered by someone contemplating diving or plunging into the water at this point.

"Obviousness"

162 The conclusion that a reasonable council would not have warned of this danger does not depend upon what the Court of Appeal referred[159] to as the obviousness of the risk. Reference to a risk being "obvious" is apt to mislead and cannot be used as a concept determinative of questions of breach of duty. Not least is that because obviousness of risk may divert attention from what would have been the reasonable response to foreseeable risk to consideration of how someone other than the plaintiff could have avoided injury. Inquiries of this latter kind will be relevant when considering questions of contributory negligence. They are not useful, however, when considering breach of duty.

163 That is not to deny the importance of considering the probability of occurrence of the risk in question. The probability of occurrence of a risk that is not apparent on casual observation of a locality or of a set of circumstances may be higher than the probability of occurrence of a risk that is readily apparent to

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158 cf *Swain v Waverley Municipal Council* (2005) 79 ALJR 565; 213 ALR 249; *Mulligan v Coffs Harbour City Council* [2005] HCA 63.

159 *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* (2004) Aust Torts Reports ¶81-754.

even the casual observer. But the focus of inquiry must remain upon the putative tortfeasor, not upon the person who has been injured, and not upon others who may avoid injury. And in looking at the reasonable response to a foreseeable risk it is necessary to recall that there will be times when others do not act carefully or prudently. That is why, as the Court of Appeal recognised[160], what it referred to as "the obviousness factor" is not to be elevated into some doctrine or general rule of law. It is why little if any assistance is to be gained from considering the several American cases to which the Court of Appeal referred in connection with what was identified as the "open and obvious doctrine" sometimes applied in several jurisdictions in the United States.

Prohibition

164 Finally, it is necessary to deal with the appellant's alternative contention that the Council should have prohibited diving from the rock platform. The reasons which lead to the conclusion that a reasonable council, having foreseen the risk of diving accidents, would not have warned against diving from the rock platform require the conclusion that such a council would not have prohibited the activity. That conclusion can only be reinforced by considering what prohibition would entail.

165 If a reasonable council would have concluded that the activity should be prohibited it would follow that the Council would have had to take steps to enforce that prohibition whether by attempting to preclude the activity by physical barriers or by having the area supervised. Yet the appellant did not, in the end, contend that enforcement of a prohibition was appropriate. Rather, the appellant's case depended upon the contention that what was called for was a sign near the rock platform which either warned of the dangers of diving or, as an emphatic form of warning, prohibited the activity. Understood in that way, the appellant's contention of prohibition fails with his contention about warning.

Order

166 The appeal should be dismissed with costs.

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160 (2004) Aust Torts Reports ¶81-754 at 65,899 [195].

167 CALLINAN AND HEYDON JJ. This appeal raises questions as to the nature and extent of the liability of a local authority to participants in physical recreational activities within its boundaries. It was heard in conjunction with *Mulligan v Coffs Harbour City Council*[161], which should be read together with the reasons in this appeal.

Facts

168 The boundaries of the respondent Shire include a coastline of about 27 kilometres. Soldiers Beach forms part of that coastline. At the northern end of that beach there is an outcrop of rock that extends around the base of a headland which separates Soldiers Beach from Pebbly Beach.

169 At the southern end of the outcrop there is another rock formation, "the platform", separated by a small channel from an area of flat rock adjoining the sand of Soldiers Beach. The platform is a long expanse of rock of varying heights. It is most elevated at the northern end. The platform, the channel and the area of flat rock adjoining the beach were shown on a plan, and in a series of photographs and films which were in evidence. Some of those photographs show people walking out of the water near the platform. Standing upright they are immersed to no more than waist height. It is not clear however what the state of the tide was when these photographs were taken.

170 Soldiers Beach is a popular surfing beach. It is one of six patrolled beaches within the Shire of Wyong. Near to it is a car park with marked spaces for cars. A set of concrete steps leads from the car park to the beach into which the platform intrudes. The platform can also be reached from the car park by descending a set of low wooden steps to a gravel path leading directly to it. Adjacent to the car park is a kiosk. A substantial Surf Life Saving Association clubhouse stands at the northern end of the beach. It offers an unobstructed view of the platform.

171 The height of the platform varies between 1.91 metres and 5.27 metres above sea level.

172 It is not disputed that the land from which the appellant dived was within the Norah Head Reserve ("the Reserve"), an area vested in the respondent as trustee and over which it exercises care, control and management. The ocean floor is however outside the area of the Reserve.

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161 [2005] HCA 63.

173 By s 92(5) of the *Crown Lands Act* 1989 (NSW), a trustee of a reserve is charged with its care, control and management. Section 98 of the *Crown Lands Act* also provides that a council, as manager of a public reserve, has all the functions of a council under the *Local Government Act* 1919 (NSW) in relation to the reserve.

174 Section 344(1) of the *Local Government Act* is as follows:

> "(1) The council shall have the care, control and management of –
>
> (a) public reserves which are not under the care of or vested in any body or persons other than the council, and are not held by any person under lease from the Crown; and
>
> (b) public reserves which the Governor by proclamation places under the care, control, and management of the council."

175 Part XIII of the *Local Government Act* confers powers on councils in respect of public reserves and parks. Division 3 of Pt XIII of the *Local Government Act* deals with baths and bathing. Section 354 provides:

> "(1) The council may control and regulate public bathing and the conduct and costume of bathers –
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> (a) in any public baths under the care, control, and management of the council;
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> (b) in any private baths open to the public view;
>
> (c) in any river, watercourse, or tidal or non-tidal water;
>
> (d) in the sea adjacent to though outside the area; and
>
> (e) in any public place or public reserve adjacent to any of the aforesaid places.
>
> (2) The council may prohibit bathing in any specified locality by notices erected in the vicinity of such locality."

176 The appellant places much weight upon the powers of the respondent to regulate, and in particular to prohibit by notice, bathing in dangerous places. Ordinance 52 made under the *Local Government Act* relevantly provides:

> "**Bathing in dangerous places**
>
> 8. A person shall not bathe in any public bathing reserve or in any part thereof in respect of which a warning has been given that it is

dangerous to bathe therein. For the purposes of this Ordinance a warning may be given by an inspector, or by a flag, signal, or notice exhibited or given in or in the vicinity of the bathing reserve or part thereof.

...

Regulation – notices

21. The Council may, by notices exhibited in or in the vicinity of a public bathing reserve, public baths or public swimming pool, regulate the lighting of fires, require animals and vehicles to be kept off places indicated, indicate where bathing shall be prohibited, regulate vehicular and pedestrian traffic, regulate the conduct of persons, and generally regulate the use of the reserve, baths or swimming pool by the public.

...

Penalties

29. (a) Any person not complying with or offending against any of the provisions of this Ordinance or the terms of any notice, order, direction, warning, or signal exhibited, issued, or given thereunder shall be guilty of an offence, and shall where no other penalty is provided be liable for every such offence to a penalty not exceeding $20.

(b) Any person guilty of an offence may be forthwith removed from the bathing reserve or bath by a servant of the Council, or the lessee or caretaker of the bath or the dressing sheds (as the case may be), or by an inspector, or by a constable or officer of police, without affecting his liability to be subsequently prosecuted for such offence."

177 The appellant was thirty-three years old in 1993. He had left school at fifteen. He was by occupation a fencing contractor. In 1989 he had moved to San Remo which is near to Soldiers Beach.

178 The appellant was a frequent visitor to Soldiers Beach in summer. He swam, snorkelled and fished there. It was his practice to park his car in the car park. He often saw people diving and jumping from the platform into the ocean although he had not dived from it himself before he was injured. He had occasionally however sat on the edge of the rock platform and "rolled" backwards from it into the water. He would then swim out to a nearby rock shelf where he snorkelled to look for octopus and other marine life.

179 The appellant said that he had made no assessment of the depth of the water adjacent to the platform on any occasion when he entered the water from it. He must however have had some consciousness of it, unless he had always swum rather than walked away from it, as people shown in the photographs appear to have been doing. On the day before his accident the appellant had snorkelled on the western side of the southern tip of the platform. He had duck-dived in an attempt to pick up a necklace on the seabed. He was unable to say how deep the water was there beyond saying that it was "a fair way down".

180 On the morning of Sunday 24 January 1993 the appellant and his sister's family decided to visit Soldiers Beach. It was a hot day. The appellant parked his car in the car park and made his way down to the northern end of the beach where he had arranged to meet the others who had made their own way there. A surf carnival was in progress at the southern end of Soldiers Beach.

181 The appellant and his brother-in-law went for a swim. His sister joined them. She left the water first.

182 Following his swim, the appellant walked to the platform with his young niece. It was his intention to dive into the water from it. By then a number of people were on the platform. Over the ensuing five minutes he saw two or three people safely dive into the water. There was uncontradicted evidence that many people on other occasions had dived from the platform. Further confirmation of this appears in the photographs to which we have referred. The appellant said at the time that he entered the water it was lapping over the platform where he was standing.

183 The platform was flat at that point. The appellant was able to see the water but he could not see the seabed. He did nothing to assess the depth of the water adjacent to the platform before he dived. His assumption was that it was safe to dive because other people repeatedly jumped and dived there.

184 The appellant did notice that the surface of the rock immediately in front of him was wet and slippery. He accordingly moved three steps backwards to avoid the slippery edge. He dived into the water at an angle of forty-five degrees with his arms outstretched in front of him. As he passed through the water he felt a bump on the top of his head. He soon floated to the surface. As he floated he noticed that his arms and legs were limp. He was unable to lift his head. He thought that he had broken his neck and believed that he was dying. He began to inhale water. He was conscious of noises. He then passed out for a short time. As soon as possible he was taken by helicopter to an intensive care unit at Royal North Shore Hospital in Sydney. We will discuss other relevant factual matters when we come to the disposition of the appeal.

The trial

185 The appellant sued the respondent in the Supreme Court of New South Wales. His action came on for hearing before Bell J. The respondent sought to defend it on several bases. One was that the evidence did not establish that the appellant suffered injury as the result of an impact with the seabed. This argument had two bases, first that the appellant's head was unlikely to have hit the ocean floor while his arms were outstretched as for a conventional dive as he had said that they were. Secondly, his description of the impact, as if he had been "struck by a soft pillow", was inconsistent with an impact of such force as to cause the serious injury that he had suffered which was a burst fracture at C5 causing irreversible tetraplegia. It was, the appellant said in evidence, his belief that his head had hit the sand because there was a quantity of sand in his hair. He denied any collision with another person. Some support for this contention was to be found in the absence of abrasions or bruising to his head or forehead. It was the respondent's submission that a collision with another person was a much more likely explanation.

186 The trial judge preferred the appellant's evidence on this aspect of the case and held that he had in fact struck his head on the floor of the sea.

187 Not surprisingly, it was accepted, as is common knowledge, that the level of the ocean floor may and does change because of the movement of sand along the coast caused by currents and wind. It was not possible to say precisely what the depth of the water adjacent to the platform was on 24 January 1993 at the time of the appellant's accident, although a lifesaver on duty at Soldiers Beach then who was very familiar with the beach, and with the platform, said that the shallowest that he had seen the water at about the point of the appellant's entry into it was one metre or even less. The greatest depth there of which he was aware was around three metres. The best estimate that he was able to make of the depth where the appellant was floating when, as he did, he went to assist him was about 1.5 metres. By reference to tidal charts and other evidence, the trial judge concluded that the distance between the position from which the appellant dived, and the top of the water, absent any concurrent swell or surge, was less than 1.6 metres.

188 The trial judge undertook a view of the beach and the platform. It did not however assist her to assess visibility or depths on the day.

189 We return to the evidence of the appellant which was generally accepted by the trial judge. He said that he had been unable to see the ocean floor although it was a bright day and there was no weed or foam in or on the water. He recalled that the water was quite dark blue and said that "it looked deep".

190 Another witness said he could see the bottom but not judge its depth. He described the water as being fairly clear. Rock shelves were "here and there". He was unable to estimate the depth of the water where the appellant was floating when he was removed from it.

191 A further witness who was very familiar with Soldiers Beach said that on a clear sunny day when there was no weed, one could see the ocean floor from the platform from which the appellant dived. He added, "you wouldn't be able to estimate the actual depth, but you would possibly see it".

> "Q. So, in your experience, without being able to estimate the depth when the water was that high, I assume you would have formed the view it was too dangerous to dive?
>
> A. Depending. Maybe if other people had gone into the water before me, I would assume from that."

192 There had been a tragic, similar, earlier accident, in 1978, when another diver from the platform, Errol von Sanden, had struck the ocean bed and had been rendered tetraplegic. Following it, *The Advocate*, a newspaper circulating in the locality, published an article on 18 January 1978 under the heading "Action call after injury":

> "The Soldiers Beach Inspector will recommend that Wyong Shire Council be asked to place a 'Danger: No Diving' sign at Soldiers Point following a weekend accident in which a young man [Errol von Sanden] was seriously injured."

193 Mr Dawson, the General Manager of the respondent, gave evidence on its behalf. He had been the Council's chief executive officer since 1972. He was the Shire Clerk throughout the period of the litigation in *Wyong Shire Council v Shirt*[162], and at the time of Mr von Sanden's accident. In 1993, although his title had changed to "General Manager", Mr Dawson's duties remained substantially the same. He was aware of Mr von Sanden's accident around the time of its occurrence. He was also aware of its location and the circumstances of it. These were matters of common knowledge within the Council. Her Honour thought it was probable that the Council gave some consideration to the implications for it arising from Errol von Sanden's accident in the following months.

194 Mr Edwards, the inspector referred to in the newspaper article extracted above, had himself dived from the high rock on many occasions in the past. He had stopped diving from it well before Mr von Sanden's accident. The adjacent

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162 (1980) 146 CLR 40.

water had been quite deep in the early 1970s, but thereafter much sand had accumulated around the platform: in consequence it was more shallow than in his youth. He said, "I certainly wouldn't dive off there now". It had been unsafe, he said, to dive, at least from the high rock, from the late 1970s onwards. There was also evidence that lifesavers had warned divers from the platform not to dive. They had generally been ignored or rebuffed, sometimes aggressively so, by the divers.

195 Three engineers gave evidence which was said to be expert evidence although we would have thought much of what they said obvious. The basic tenor of it was that it could be dangerous to dive from the platform, and that the height of the seabed changed from time to time. One of them said that he, as an engineer, would recommend, or cause prohibition signs to be erected stating "Diving is prohibited" or "Beware of shallow water when diving". Another of the experts similarly favoured the erection of signs.

196 The respondent had adopted a policy about warning signs which was explained by Mr Dawson as follows:

> "In broad terms the Council placed warning signs where it had created a hazard. For example, if it dredged the Entrance channel; or where there was an activity that of itself didn't present risks but there may have existed at that particular location a risk that would not be evident to someone using the area."

197 In 1993 the Council employed a Risk Manager. Mr Dawson explained the Council's approach in 1993 in this way:

> "Our approach was one of where if the risk was evident to the user then it was not – Council was not derelict in its duty of care by not erecting signs. For example, beach fishing; everyone knows there are risks inherent in beach fishing. Surfing on unpatrolled beaches. There are numerous others. They are activities that take place on a daily basis up and down our coastline, and they are frequently on Council property or property vested in the Council, but are risks where the person concerned would be able to detect that there was that risk, there was that hazard and danger. And that's the distinction I'm attempting to draw."

198 Mr Dawson was aware that people of all ages visited the platform. He was aware that on weekends young people would jump and dive from it. He had seen groups of as many as ten to fifteen, or perhaps more young people engaging in these activities.

199 Mr Dawson explained why the Council had not erected warning signs at natural locations such as Soldiers Point in this way:

> "It comes back to the Council's duty of care. You have to draw the line somewhere because it is a physical impossibility for the Council to warn every user. We have twenty-seven kilometres of coastline, all of which is dangerous, all of which is accessible to the public, and all of which contains specific dangers from sand moving, to rips, to sharks, to blue bottles, to sunbathing if you like. The Council – it is a physical impossibility for anyone to sign post all of those risks, because most of them ought to be evident to the user, and Council attempts to deal with that issue by having a number of beaches which are patrolled in the major swimming seasons."

200 At the trial the appellant submitted that as the respondent had the care, control and management of the Reserve and provided facilities to encourage the public to make use of the area, it owed to him a common law duty of care to take reasonable care for his safety as a visitor. The appellant relied on the joint judgment of this Court in *Nagle v Rottnest Island Authority*[163], contending not only that the facts of that case had much in common with this one, but also that the principles stated in it were applicable here.

201 The respondent accepted that, "in its capacity as manager of the reserve trust, and having the care, management and control of the Reserve, it owed certain duties to entrants upon the Reserve". It pointed out that it was important to distinguish between an occupier of private land, and of a local government authority charged with statutory powers and responsibilities in respect of public land. The scope of its duty, having regard to the powers and responsibilities conferred upon it by the *Local Government Act*, did not encompass a duty to warn the appellant of obvious risks of which diving from the platform was clearly one.

202 Nonetheless, the trial judge was satisfied that the risk that a person might sustain severe injury in diving from the platform was foreseeable, in that it was neither a far-fetched nor a fanciful possibility. The erection of signs prohibiting diving or, at least, warning of the dangers of it, would have been relatively inexpensive.

203 The trial judge referred to the facts and reasoning in many other cases. Her Honour then went on to hold that the risk of sustaining severe injury by diving from the platform was not so obvious that it was reasonable for the Council to take no step to warn of it. The reasonable response of the respondent to a risk of the magnitude of the one that was realized here, required that it take

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163 (1993) 177 CLR 423 per Mason CJ, Deane, Dawson and Gaudron JJ.

steps to eliminate, or reduce the danger by erecting signs at the access points identified actually prohibiting diving from the platform. Her Honour added that if she were wrong about that, the application of *Nagle* required that she hold that the installation of warning signs was required as a minimum. Her Honour then found that such a sign or signs would have deterred the appellant from diving, and accordingly, that foreseeability, negligence and causation were all made out, with the result that the appellant's action succeeded.

204 The trial judge did however regard the appellant as having negligently contributed to his injuries[164]:

> "It seems to me that the plaintiff failed to take reasonable care for his own safety by not making any independent assessment of the depth of the water before he dived. The fact that he had frequently seen people diving on other occasions and that he saw some persons diving from it on this day I do not consider to relieve him of responsibility, as a person taking reasonable care for his own safety, for ensuring that the depth of the water was sufficient to make diving on this occasion safe for a person of his height.
>
> I do not accept the Council's submission that the plaintiff's culpability as between it and him was by far the greater nor that the proximate and significant cause of his injury was his own carelessness. I consider the appropriate reduction in the award of damages on account of the plaintiff's own negligence to be one of 25%."

205 Judgment was accordingly entered in favour of the appellant in the reduced sum of $5,054,753.25 with costs.

The Court of Appeal

206 The respondent appealed to the Court of Appeal of New South Wales (Mason P, Beazley JA and Tobias JA). At the same time, that Court also heard an appeal in *Mulligan v Coffs Harbour City Council*[165] and pronounced a single judgment in respect of both cases[166]. The Court of Appeal was divided in this appeal and unanimous in *Mulligan*. Mason P and Tobias JA upheld the appeal, Beazley JA would have dismissed it.

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164 (2002) 129 LGERA 10 at 50 [222]-[223].

165 (2003) Aust Torts Reports ¶81-696.

166 (2004) Aust Torts Reports ¶81-754.

207 The majority were in no doubt that the risk should have been obvious to the appellant, and that the trial judge erred by defining the risk at too narrow a level of abstraction: the knowledge of the respondent as to the danger, actual or assumed, was neutralised by the obviousness of the risk of injury attaching to diving into water of variable and unknown depth, a risk apparent to the appellant. In those circumstances the scope of the respondent's duty did not include a duty to warn or prohibit diving. That the appellant had seen others dive without mishap on numerous occasions may have detracted from the obviousness of the risk of diving into water of unknown and variable depth, but the appellant, having regard to his knowledge of the serious injury suffered by a relative in an earlier diving accident, should have been especially cautious and careful.

The appeal to this Court

208 It is not only unnecessary but also unhelpful to refer to a multiplicity of cases in order to resolve this appeal, as, for the most part, each turns on its own facts. We will however refer at the outset to the case upon which the appellant seeks to place the greatest weight, *Nagle*, and the correctness of which the respondent seeks to challenge. It too was a diving case. The plaintiff there hit a submerged rock when he dived into a pool of water in a reserve administered by the defendant. The basis upon which the majority of this Court upheld the plaintiff's appeal and found for him, was that it was clearly foreseeable that a person might dive into the water as he did, and, to meet that contingency, the defendant Authority should have erected an appropriate warning sign[167]. Unfortunately the reasons of the majority do not descend to the detail of the actual contents and location(s) of a sign or signs which would have been likely to present a sufficient deterrent to the plaintiff[168]. Notwithstanding this, their Honours rejected the trial judge's finding that the erection of a sign "giving an appropriate warning" would not have prevented the plaintiff's injury[169].

209 On one view, *Nagle* depends on its own facts but as this case at first instance shows, it has been taken to have precedential significance in diving cases generally. In our opinion however, the dissenting judgment of Brennan J is persuasive and should be regarded as stating the relevant principles, particularly in this passage in which the hypothetical circumstances alluded to by his Honour correspond with this case[170]:

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167 (1993) 177 CLR 423 at 431.

168 (1993) 177 CLR 423 at 432.

169 (1993) 177 CLR 423 at 433.

170 (1993) 177 CLR 423 at 442.

> "The danger of diving into one of the rocks adjacent to the wave platform on the eastern perimeter was not the only foreseeable danger of diving into the Basin. In other parts of the Basin, a diver might hit other rocks – there are several standing on the floor of the Basin – or might dive into shallow water and hit the sandy floor. Or a diver who does not look before diving might dive on top of another swimmer. All of these possibilities are foreseeable and are fraught with the risk of serious consequences but it is not suggested that the Board should have erected a sign forbidding all diving. To have erected a sign forbidding diving from the wave platform on the eastern perimeter or warning of the danger of diving from there might have conveyed the false impression that diving from or into other parts of the Basin was safe. Diving is safe only if the diver takes reasonable care."

210 His Honour's reasons, unlike those of the majority, confront the problem of the location, number and content of a warning sign or signs. In another passage which also strikes a chord in this appeal, his Honour answered a rhetorical question that he posed for himself "Would a warning have prevented the plaintiff from diving?" in this way[171]:

> "To answer this question, one must hypothesize about the type and location of the warning for which the plaintiff contended. Clearly a warning that did no more than inform the plaintiff of what he already knew would have been ineffective. A warning which read 'Caution – submerged rocks' would have been quite ineffective, for the plaintiff already knew that caution was required by reason of the existence of submerged rocks lying close to the wave ledge from which he dived. But obviously he was unaware at the moment when he dived of the position of the particular rock which he struck. ... If he were to be deterred from diving, the warning would have had to alert him either to the position of [the submerged rock] or to the risk of diving when submerged rocks might not be observed by an intending diver from the wave platform. What was suggested is that some sign should have been erected on or near the wave platform warning of the risk of diving from any part of the wave platform on the eastern perimeter of the Basin into the water."

211 Reference has already been made to the fact that this respondent was the unsuccessful defendant in an action arising out of injuries suffered by a water skier on other waters in the Shire[172]. A jury before whom that case was tried

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171 (1993) 177 CLR 423 at 443.

172 *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

returned a verdict for the plaintiff. In this Court, the Council argued that before a plaintiff could succeed he must show that the event or risk against which a defendant had failed to guard must be one that was "not unlikely to happen". This submission echoed what had been said and applied in this Court in *Caterson v Commissioner for Railways*[173].

212 That submission was rejected. Mason J, with whom Stephen and Aickin JJ agreed, said that a risk which is not far-fetched or fanciful is real and therefore foreseeable[174]. Murphy J was of a similar opinion, and drew an analogy between the conduct of road users, saying that although almost every car is driven unsafely close to the car in front, few accidents occur because of that conduct[175], an example which may have as much to say, in our opinion, about the futility of some prohibitions on the part of the authorities, as it has about the question of the likelihood or unlikelihood of the occurrence of an accidental injury.

213 As Callinan J recently pointed out in *Koehler v Cerebos (Australia) Ltd*[176], the fact that the test of foreseeability as stated in *Wyong Shire Council v Shirt* is so undemanding has the consequence that too much emphasis has come to be placed upon some of the other elements of liability for negligence. Having concluded that an event is foreseeable, as almost every occurrence can be, a court then has to consider as a related matter "the reasonable man's response" to it, having regard to the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of alleviating action, and other competing demands upon a potential defendant[177]. These are all matters in respect of which the maintenance of absolute objectivity and the statement of norms or standards are very difficult. Included in those matters is an assessment of, in effect, the extent of the non-fancifulness of the occurrence, or, as is put, "the degree of probability of the occurrence"[178]. It might have been better to retain the law as it was stated to be in *Caterson*[179] by Barwick CJ and

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173 (1973) 128 CLR 99 at 101-102.

174 (1980) 146 CLR 40 at 48.

175 (1980) 146 CLR 40 at 49.

176 (2005) 79 ALJR 845 at 854 [54]; 214 ALR 355 at 367-368.

177 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

178 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

179 (1973) 128 CLR 99 at 101-102.

before *Wagon Mound (No 2)*[180] was decided, the case which was very influential in the reasoning of the majority in *Wyong Shire Council v Shirt*[181]. On the basis of the law as it was propounded in *Shirt*, which was not challenged in this appeal, there could be no doubt that an injury of the kind, and the circumstances in which he might sustain it, here were foreseeable.

214 What then was the response that a reasonable council was obliged to take in fulfilment of the duty of care which the respondent correctly conceded it owed to the appellant? In our opinion the duty did not include an obligation to erect a warning sign or signs, to prohibit entry into the water from the platform, whether by signs or otherwise, or to construct, as it was at one stage suggested, a fence or other barrier to seek to deny access to the platform entirely.

215 The Council was not obliged to adopt any of these measures to protect the appellant for these reasons.

216 The appellant was engaged in a physical recreational activity. This does not mean that the respondent owed him no duty of care but it does mean that the duty was conditioned very much by the fact that the appellant set out to extend himself physically, albeit not in any excessive way, against the elements, in particular, the sea. Callinan J said in *Agar v Hyde*[182], that when adults voluntarily participate in sport they may be assumed to know the rules, and to have an appreciation of the risks of the game. The same may be said of diving into the sea from a rock platform, particularly when the dive is undertaken by a person of mature years, with a considerable experience and knowledge of the waters which he was entering. The game in which the plaintiff in *Agar v Hyde* injured himself was notoriously a dangerous one, but the seas too are dangerous and have been understood to be so for thousands of years[183].

217 And, despite their allure, the sea waters of Australia, notoriously, are far from benign. Depending on how far north the traveller goes, sea lice, flotsam and jetsam, weed, blue bottles, stingers, quicksand, sea snakes, crocodiles, unpredictable waves, sand bars, sharks, absence of effective netting, shifting sea beds, broken bottles on the beach or in the water, sunstroke from sun bathing,

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180 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 at 642-643.

181 (1980) 146 CLR 40 at 46-47 per Mason J.

182 (2000) 201 CLR 552 at 600 [127].

183 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161; see footnote 329 at 229-230 [184].

and unpredictable tides and currents constitute a non-exhaustive catalogue of the risks a bather runs. Indeed, swimming itself, without more, can be hazardous. Much was made in this case of the tragic case of another tetraplegic within the relatively recent corporate memory of the respondent, but it would be interesting to know how many people have suffered injuries of different kinds from one or other of the risks to which we have referred, including merely swimming itself, an activity in which people of greatly varying abilities participate. We do not think it could be seriously suggested that a shire should erect a multiplicity of signs in the vicinity of its beaches saying "swimming can be dangerous". But the point in particular that we wish to make here is simply that the respondent could reasonably expect that a person of the appellant's age, knowledge and experience would not need a warning that to dive from the platform could be a dangerous thing to do. It is not without significance that according to the appellant, he had never dived there before, and had on other occasions chosen to enter the water from the platform in what clearly was a more cautious manner. Again, as Callinan J pointed out in *Agar*[184] places of recreation are not places to which people are compelled to resort, and nor are they obliged, if they do, to participate in physical activities there.

218 We have already touched upon the second reason why we do not think the respondent was obliged to erect a warning or prohibitory signs. It is that it has within its control 27 kilometres of coastline along which there inevitably would be many places of natural hazard. Just how many of these there are was not, and would not in the nature of things be likely to be able to be proved: it would be very difficult, and probably in the end fruitless to attempt to do so. Some of the hazards are likely however to be greater hazards than the platform, and capable of causing injuries as serious as those suffered by the appellant. Having regard to their existence, and the other demands upon the respondent, and in the light of the other matters that we have referred and will refer to, the respondent should not be seen as having been negligent in not singling out the platform for a special warning, or prohibition of diving.

219 The primary judge seems to have been impressed by a submission by the appellant that he had seen other people diving safely from the platform on the day of his injury, and on earlier occasions. That submission says as much against the appellant's case as it does for it. As we have noted, Murphy J pointed out in *Shirt* that drivers of motor cars customarily follow too close behind cars in front of them[185]. That is true, but his Honour could equally have pointed out that this conduct, prohibited and criminalized by law as it was, demonstrated that people

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184 (2000) 201 CLR 552 at 600 [127].

185 (1980) 146 CLR 40 at 49.

will continue to do it, and are not deterred by the relatively infrequent, but nonetheless occasional catastrophic accident that it causes. Having regard to this, and to the other matters to which we have referred, the respondent was not obliged in our view to erect a warning sign. The same reasoning refutes the view that there should have been a prohibitory sign or signs, and the consequential criminalizing, pursuant to, for example, cll 8 and 29(a) of Ordinance 52, of diving from the platform. There is a further reason why a prohibitory sign was not warranted. It is that authorities should not lightly criminalize recreational conduct, particularly conduct, unlike that of the motorist driving too close to the preceding vehicle, which is unlikely to harm others. Even in times of increasing intrusions by governments and local authorities upon personal autonomy, some degree of latitude of choice in conduct must be allowed.

220 In a similar vein to what we have just said, and of relevance to any question of contributory negligence also, we would seek to make the point that it is not right to say, without qualification, that the difference between the duties of an injured plaintiff, and those of a tortfeasor, is that the former owes absolutely no duties to others including the defendant[186], while the latter owes duties to all of his "neighbours". The "duty" to take reasonable care for his own safety that a plaintiff has is not simply a nakedly self-interested one, but one of enlightened self-interest which should not disregard the burden, by way of social security and other obligations that a civilized and democratic society will assume towards him if he is injured. In short, the duty that he owes is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realized.

221 Because it can be disposed of shortly, it is convenient to deal at this point with the suggestion that access to the platform should have been prevented by the erection of a wall, fence or barrier. That is not a response which the respondent was required to make. It is not clear by any means that it could have been done completely, and if it could, at what cost? Access may still perhaps have been available from the water itself at low tides, unless in some way, as seems unlikely, a wall within the sea could have been built around the headland, as well as across the access to it from the shore. But in any event it would seem to us to be unreasonable, that careful recreational users should be prevented from using the platform.

222 It was argued by the appellant that even if the risk could and should have been obvious to him, he was still entitled to succeed. A corollary of this

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186 cf *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563 at 570-571 per Mason J; *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 per Viscount Simon.

argument was that to attach too much weight, indeed all the weight, to obviousness, was to disregard, among other things, and in particular, the possibility of inadvertence. As to that, we would point out first that the dividing line between inadvertence and negligence, indeed even gross negligence, can be very much in the eye of the beholder, and is often assessed almost entirely subjectively. This was, on no view however, a case of mere inadvertence. It was a very clear duty of the appellant, and one which any responsible authority would expect him to fulfil, to make some soundings at least of depth, and accordingly of risk to himself before diving from the platform.

223 As to the question of obviousness generally, and its significance to the attribution of liability in a negligence case, we have nothing further to add to what we say in our judgment in *Mulligan v Coffs Harbour City Council*[187].

224 Some reliance was sought to be placed by the appellant on the decision of this Court in *Crimmins v Stevedoring Industry Finance Committee*[188]. That reliance is misplaced. *Crimmins* was a case of a workplace injury and not a recreational one. It was in other respects also a very different case. In particular, the plaintiff there was effectively incapable of taking any steps to protect himself or indeed of even knowing of the risk to which his employment subjected him. The industry in which he was working was a uniquely organized one and the defendant was in a special relationship with the plaintiff[189].

225 The law has always been alert to the difference between omission and commission, in an appropriate case taking a more critical view of the latter[190]. Despite the fact that paths led from various places to the platform, it largely remained in a state of nature. This is a relevant, but far from decisive, consideration in favour of the respondent.

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187 [2005] HCA 63.

188 (1999) 200 CLR 1.

189 (1999) 200 CLR 1 at 114-117 [345]-[360].

190 *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 at 784 [156 ER 1047 at 1049] per Alderson B who said:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

226 There is only one further matter to which we should refer. The trial judge held that had warning or prohibitory signs been erected, the appellant would have been likely to have seen, heeded and obeyed them. Accordingly, causation had, the trial judge held, been made out. In *Rosenberg v Percival*[191], Callinan J referred to the very limited utility, indeed practical uselessness, of reliance by a court upon an answer by a plaintiff denying that he or she would have run a particular risk had he or she known about it. Her Honour here did not rely simply upon such a denial. Quite properly, she looked to supporting objective factors such as an innate cautiousness on the part of the appellant, and his awareness of a serious accident in water in which a relative had suffered injury. We are not convinced that these factors provide a complete answer to the essential anterior question, whether the appellant would have actually seen or read the contents of the sign or signs on the day, however many there were and wherever they were located. The appellant was, he said, influenced by the sight of others diving from the platform, a matter which the trial judge accepted. There was also uncontradicted evidence that other divers on other occasions had rudely rebuffed requests by lifesavers that they cease diving from the platform which might suggest that they would equally have ignored prohibitory signs and might be seen to be diving despite them. Her Honour did not weigh up these matters with the potential deterrent effect of signs had the appellant seen them. Nor was the question of the enforcement of any prohibition by signs, its expense, and practicality explored in this particular context. These are by no means decisive matters but they are relevant ones which detract from the appellant's arguments.

227 For the reasons that we have given, we would dismiss the appeal with costs.

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191 (2001) 205 CLR 434 at 504-505 [221].