HIGH COURT OF AUSTRALIA

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

GARRY SEAN MULLIGAN APPELLANT

AND

COFFS HARBOUR CITY COUNCIL & ORS RESPONDENTS

Mulligan v Coffs Harbour City Council [2005] HCA 63
21 October 2005
S502/2004

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

G O'L Reynolds SC with R J M Foord and J C Hewitt for the appellant (instructed by Martin Bell & Co)

M T McCulloch SC with S P W Glascott for the first respondent (instructed by Phillips Fox)

J E Maconachie QC with B M Green for the second to fourth respondents (instructed by Crown Solicitor for New South Wales)

CATCHWORDS

Mulligan v Coffs Harbour City 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.

Marine Parks Act 1997 (NSW).

1 GLEESON CJ AND KIRBY J. This appeal was heard together with *Vairy v Wyong Shire Council*[1]. In our reasons in that case we made some general remarks about the role of precedent in decision-making on the issue of breach of duty in negligence actions. We would incorporate them by reference in these reasons, and would add the following in relation to arguments that were put to the Court by reference to what was described as a "calculus".

2 Reference is often made to the "*Wyong Shire Council v Shirt* calculus". In that case[2], Mason J referred to the way in which a tribunal of fact might determine what a reasonable person would do by way of response to a foreseeable risk. As he made clear, he was describing a process of factual judgment. He referred to such factors as the magnitude of the risk, the degree of probability of its occurrence, the expense, difficulty and inconvenience of taking alleviating action, and any other conflicting responsibilities of the defendant. These, he said, were matters to be balanced out in making a judgment about reasonableness. The later use of the word "calculus" to describe this passage is unfortunate. A calculus is a method of calculation. What is involved in the process to which Mason J was referring is not a calculation; it is a judgment. In *Ridge v Baldwin*[3], Lord Reid observed that "[t]he idea of negligence is ... insusceptible of exact definition". Moreover, depending upon what may be involved in the concept of conflicting responsibilities, in some contexts, of which the present is an example, to treat what was said in *Shirt* as an inflexible formula could produce a distinctly unreasonable result. Where the suggested alleviating action is putting up a single warning sign at a particular location in a public recreational area, the expense, difficulty and inconvenience involved may be made to appear negligible. The more important question may be why a public authority would choose to single out that particular spot, or that particular risk, as the subject of a warning. In *Vairy*, according to the evidence, there were clear reasons why the public authority would choose to single out the elevated rock platform. There was an established risk that supported the factual conclusion of the primary judge that a prohibition, or warning, sign should have been erected. Fifteen years before Mr Vairy's injury a similar accident had occurred. A young man who dived from the platform had struck the ocean bed and had been rendered tetraplegic. Contemporaneous reports had indicated a beach inspector's recommendation that a sign be placed in position. Yet it was not. The public authority's employees knew, or ought to have known, of the continued practice of diving from the rock platform in conditions of established danger. No such features were present in the facts of Mr Mulligan's case.

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1 [2005] HCA 62.

2 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

3 [1964] AC 40 at 65.

3 This Court recently said, in *Thompson v Woolworths (Q'land) Pty Ltd*[4], that reasonableness may require no response to a foreseeable risk, and pointed out that householders do not ordinarily place notices at their front doors warning entrants of all the dangers that await them if they fail to take reasonable care for their own safety. That observation was not the product of a calculus; it was simply a statement about community standards of reasonable behaviour.

4 The facts of this case are set out in the reasons of Callinan and Heydon JJ. The appellant and a friend were swimming in the waters of a tidal estuary adjoining the Pacific Ocean in the popular holiday resort of Coffs Harbour. They were not doing anything that was unusual or that was attended by any particular level of danger over and above that which exists whenever and wherever swimmers plunge head first into water of variable depth. The appellant, a capable and experienced swimmer, was standing about thigh-deep in water. He had been swimming in the locality for about half an hour. He could not see the sandy bottom. As he had done, safely, on a number of earlier occasions, he dived into the water. This time, he hit his head on the sand. The appellant knew that the water was of variable depth, and that diving into water of variable depth is risky. The trial judge, Whealy J, found that the variation in depth resulted from bedforms that were "within normal and naturally occurring limits" of such an estuary.

5 In terms of appellate review, a significant difference between this case and the case of *Vairy* is that, in this case, there are concurrent findings of fact by the primary judge, and the Court of Appeal, adverse to the appellant on the issue of negligence[5]. Whealy J, in a carefully reasoned judgment, concluded that reasonableness did not require any of the public authorities who were sued by the appellant to erect a warning sign relating to the danger which the appellant encountered, and that conclusion was upheld unanimously by the Court of Appeal.

6 The reasoning of Whealy J on all the issues in the case was orthodox. His conclusion on the issue of breach of duty was amply supported by the evidence, and unsurprising. There were features of the place where the appellant was swimming that were distinctive, but the conditions that led to the appellant's injury were not unusual. The danger that materialised was one that exists at virtually every Australian beach, and in most waterways. It is one of many

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4 (2005) 79 ALJR 904 at 911 [36]; 214 ALR 452 at 460.

5 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 567-569 [50]-[54].

dangers involved in swimming. It is difficult to see how such common dangers can be addressed by particular warnings at particular locations.

7 This has not been shown to be a case of injustice or error such as would justify the interference by this Court in the concurrent findings on the issue of negligence made in the Supreme Court of New South Wales. In any case, having considered the reasons of the Court of Appeal, and of the primary judge, we find no error.

8 The appeal should be dismissed with costs.

9 McHUGH J. The issue in this appeal is whether the respondents negligently failed to erect a sign warning swimmers of the danger of striking the bottom of a channel artificially created in a tidal creek. The appeal is brought by an unsuccessful plaintiff against a judgment of the Court of Appeal of the Supreme Court of New South Wales upholding the finding of the trial judge that the respondents had not been negligent. The respondents also contend that, contrary to the finding of the trial judge, they owed no duty of care to the appellant.

The material facts

10 Near the mouth of Coffs Creek at Park Beach in New South Wales is a crescent shaped channel, walled off from the main body of a tidal creek. On the eastern and western sides of the channel are two rock "training" walls whose function is to train the creek water to flow into the channel and out to the adjoining ocean. The wall on the eastern side is the longer of the two and is about 100 metres long. It runs in an east-west direction until it reaches Park Beach. Coffs Harbour City Council, the first respondent, constructed the channel at the expense of the second respondent, the State of New South Wales, which owned the land north and south of the creek and the creek bed itself. The Coffs Harbour Jetty Foreshore Reserve Trust, the third respondent, was the trustee of the Reserve and had the care, control and management of the southern bank of the creek.

11 The water in the channel flows faster than the water in other parts of the creek. This made it attractive to swimmers who would jump or dive into the channel at its western end and be carried by, or would "ride", the faster flowing water to the beach end where the water was shallower than at its western end. Commonly, swimmers left the water at the end of the "ride" and walked back along the southern bank to re-enter the channel at the western end.

12 Most of the time, the creek contained sand dunes known as bedforms. They are undulations on the floor of the creek, caused by the movement of water along the bed of the creek, particularly the movement of water caused by tides. They are a well-known and natural phenomenon, found in tidal estuaries around the world. Their existence, size and structure are in a constant state of flux and change as the tide moves in and out. They "are sometimes large and sometimes not, sometimes hard and sometimes soft"[6]. Because bedforms are often present, the depth of water in the channel can vary significantly over comparatively short distances.

13 The appellant sustained injury when he dived forward in the channel and his head struck a bedform, breaking his neck. The Court of Appeal accepted that

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6 (2004) Aust Torts Reports ¶81-754 at 65,873 [58] per Tobias JA.

"in the area where Mr Mulligan was diving, the probability was that these bedforms would have been of a height of less than 0.5 metres." However, it concluded that "the proliferation of bedforms within the relevant part of the creek were within normal and naturally occurring limits appropriate to a tidal estuary of the dimensions of Coffs Creek."[7]

14 On the day of his accident, the appellant entered the channel in an area slightly to the east of the western end of the eastern training wall. He took about six or seven steps in a northerly direction towards the centre of the creek and found that the creek went from "quite shallow down to his thighs fairly quickly"[8]. He dived forward from a standing position in a roughly eastern direction. Upon surfacing, he found he could not touch the bottom of the channel bed. He breaststroked towards the sea assisted by the current and left the water at a place where the creek became shallower. He repeated this diving and swimming six or seven times over the next half-hour. On each occasion when the appellant dived forward, he did not know the depth of water ahead of him. He said that he had tried to ascertain the depth of water at various points but was unable to touch the bottom at any stage until the channel approached the sea. His last dive was in the same general area as his previous dives. The learned trial judge found that all his dives were shallow dives[9].

No warning was required

15 In my reasons in *Vairy v Wyong Shire Council* – which was argued at the same time as the present case – I have set out the principles applicable to cases concerned with entrants on land under the control of public authorities. I incorporate them in this judgment.

16 In *Romeo v Conservation Commission (NT)*[10], I said that the duty of a public authority owed to an entrant on land under its statutory control is owed to each personally and is not owed to entrants as a class. Brennan CJ expressly denied that proposition saying[11] that the duty owed to such an entrant "must be measured by the duty owed to the public at large or at least to that section of the public entitled to enter as of right." Kirby J also implicitly rejected my statement

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7 (2004) Aust Torts Reports ¶81-754 at 65,873 [58] per Tobias JA.

8 (2004) Aust Torts Reports ¶81-754 at 65,872 [55] per Tobias JA.

9 (2003) Aust Torts Reports ¶81-696 at 63,883 [319].

10 (1998) 192 CLR 431 at 460 [76].

11 (1998) 192 CLR 431 at 444 [20].

saying[12] that the "scope of the duty must therefore be tested, not solely with the hindsight gained from the happening of the accident to the particular plaintiff but by reference to what it was reasonable to have expected the Commission to have done to respond to foreseeable risks of injury to members of the public generally". The reasoning in the joint judgment of Toohey and Gummow JJ and in the judgment of Hayne J in *Romeo* is also arguably inconsistent with my statement concerning the personal nature of the duty.

17 Read in the light of the decision in *Romeo*, the reasoning of the majority Justices in that case indicates that the standard of care required of a public authority towards entrants on land under its control is determined by reference to the entrants as a class. In that respect, it accords with the statement of principle by Dixon J in *Aiken v Kingborough Corporation*[13]. In *Aiken*, Dixon J said that "[t]he member of the public, entering as of common 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."

18 Consistently with the decision in *Romeo*, then, it should now be accepted that the duty of care owed to entrants on public land is a duty owed to them as a class, and not to each of them as individuals. In so far as a public authority owes a duty to an individual entrant, it is correlative with the duty to the class and is not measured by reference to the personal characteristics of that individual member. Only in that sense can the duty be said to be owed to each entrant personally. There is nothing unusual in the common law defining a duty in terms of a class without regard to the characteristics of individual members of that class. Indeed, until the decision of this Court in *Australian Safeway Stores Pty Ltd v Zaluzna*[14], the duty owed to entrants on private lands was owed to them as members of a class – invitees, licensees or trespassers, as the case may be – without regard to their personal knowledge or characteristics.

19 Accordingly, the duty of care each respondent owed to the appellant – although owed to him personally in the sense I have explained – arose out of his entry as a member of the class of entrants upon public land.

20 Measuring the standard of care in cases that a public authority owes to a class for the derivative benefit of individual members of that class can seldom be easy. That is because the characteristics of members of the class can vary

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12 (1998) 192 CLR 431 at 478 [123].

13 (1939) 62 CLR 179 at 209.

14 (1987) 162 CLR 479.

considerably. In *Aiken*[15], Dixon J thought that the obligation was measured by the "dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care." But, as his Honour's judgment shows, this formulation was influenced by the differing duties then owed by occupiers of private land to invitees, licensees and trespassers. Since *Zaluzna*, however, the duty owed by the occupier of private land is simply one of reasonable care, though no doubt the character or purpose of the entry affects the standard of care necessary to discharge the duty owed to the entrant. This statement of Dixon J, therefore, does not accord with the modern law[16].

21 In the end, the standard of care required of a public authority must be that standard that can reasonably be expected of the authority given the condition of the land or premises and the character of the entrants as a class. It does not mean that the authority is bound to consider extreme situations that may possibly occur. The standard of care required of the authority is predicated upon reasonable foresight and the adjective "reasonable" must be given full weight. The authority cannot be required to exercise a standard of care that will protect every person that human imagination may foresee as a possible entrant on the land or premises. Its duty is limited to those that can reasonably be expected to enter the land or premises.

22 Further, in determining whether the respondents' duties of care required the erection of a warning sign, the issue has to be evaluated having regard to what the respondents knew or ought to have known concerning the conditions of the channel and the likely knowledge of the users of the channel concerning its dangers. Their duties had to be determined looking forward to what was "reasonably foreseeable", not by looking back at what happened on this occasion. Nor were they to be determined by reference to the appellant's knowledge of the risks, except in so far as his knowledge might indicate the knowledge of channel users generally. His knowledge went to the issue of contributory negligence, not to the respondents' duties.

23 Short of prohibiting swimming in the channel – which would probably also mean prohibiting swimming in the creek generally – there was no practical way that the respondents could eliminate the physical risk of a swimmer striking a sand dune unless they greatly deepened the channel. And at no stage has the appellant contended that the respondents should have deepened the channel. Instead, the appellant contended at the trial that "[t]he danger to be addressed is to warn persons against diving into waters where the depth is variable." He

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15 (1939) 62 CLR 179 at 210.

16 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 489 [158] per Hayne J.

contended that a notice was required because the respondents had "to have in mind a whole variety of human nature who might resort to the area, including, children, teenagers, persons unfamiliar with the area (tourists), even the foolhardy."

24 If this contention of the appellant were accepted, any occupier or controller of a waterway of varying depth could only discharge its duty of care to users by either eliminating the risk or erecting a warning sign. But the common law does not require so high a standard of care on the part of those who control waterways such as creeks. Swimmers generally are aware that there are widespread variations in the depths of creeks and rivers and that, unless the water is deep enough for any particular dive, there is an ever present risk that part of the diver's body will strike the bed of the creek. Very often, a swimmer, wading into a creek, will feel the undulations in the bed of the creek. As the learned trial judge pointed out[17] in a passage cited by the Court of Appeal[18]:

> "Ordinary competent swimmers know and can immediately sense that there is a variability in creek beds because of the presence of sand dunes underneath their feet as they enter the creek waters. They will know that variability is not uniform because of the varying nature of the sand dunes. They may not understand the physics but they know there is variability."

25 The risk of a diver striking the bottom of a creek bed is well known and likely to be present to the mind of a swimmer at all times. Ordinarily, the occupier or controller of a creek or river bed is not acting unreasonably if that person does not erect a sign warning of the danger of a swimmer striking the bed of the creek or river. But in particular situations, other features of the creek or river or the swimming may require a warning sign. If persons are habitually diving from heights – such as overhanging trees or creek or river banks – into shallow water, a warning may be required. Similarly, if a particular part of a creek or river suddenly becomes much shallower than other parts of that creek or river, a warning may be required, particularly if swimmers are diving from heights. The greater the magnitude of the risk or the greater the probability of injury, the more likely it is that a warning will be required.

26 Nothing in the present case, however, suggests that the respondents were dealing with a situation presenting dangers that were different from those confronting any swimmer who dives forward in a creek or river. The case was simply one where swimmers dived forward – apparently from a standing position in most cases – went under water, and either swam or were carried downstream

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17 (2003) Aust Torts Reports ¶81-696 at 63,880 [303].

18 (2004) Aust Torts Reports ¶81-754 at 65,875 [64].

by the current. A swimmer who dived forward ran the risk that, if the dive was too deep, he or she could strike the uneven bed of the creek and sustain injury. But that is a risk of which swimmers are aware and which is generally present to their minds. And given that swimmers were not diving from heights into the creek, it was a remote risk. In those circumstances, the appellant has failed to prove that it was unreasonable for the respondents not to erect a sign warning of a risk that is generally present to the mind of swimmers.

Order

27 The appeal must be dismissed with costs.

28 GUMMOW J. Many of the significant decisions of this Court in the field of negligence, particularly in recent years, have concerned alleged liability for failure to take preventative action – in particular, the failure of public authorities to exercise their legislatively based powers to regulate or to control human activity, or to attempt to do so. The authorities include *Pyrenees Shire Council v Day*[19], *Romeo v Conservation Commission (NT)*[20], *Crimmins v Stevedoring Industry Finance Committee*[21], *Brodie v Singleton Shire Council*[22], and *Graham Barclay Oysters Pty Ltd v Ryan*[23]. This appeal, like that in *Vairy v Wyong Shire Council*[24], is one more such case. As was the case in *Romeo*, the failure in these appeals is said to lie in a failure to warn of danger to those using public lands for recreational or sporting activities. Two further aspects of the development in negligence law thus are implicated: the occupation of land for public not private use, and the efficacy warnings would have had if they had been given.

29 The plaintiff in *Mulligan* failed both at trial and before the Court of Appeal. The trial judge (Whealy J) held that the Council and one or more of the other defendants (identified collectively as "the State interests") had owed a duty of care to persons (of whom the plaintiff was one) who entered Coffs Creek from its southern bank and swam in the area where the plaintiff was injured. Coffs Creek is tidal. The plaintiff was injured at mid-tide and not far from the point where the creek entered the sea. The duty found by Whealy J was one to take reasonable care to avoid foreseeable risks of injury to persons swimming in the creek. In this Court, the Council and the State interests seek to challenge that holding and to deny the existence of any duty of care, but it will not be necessary to determine that issue.

30 However, Whealy J also found that the scope of the duty of care did not include an obligation to warn the plaintiff about the risk of diving in the creek for reason of its variable depth. In addition, his Honour concluded that none of the defendants was in breach of its duty of care to the plaintiff. He added that he had not found the decision easy to reach.

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19 (1998) 192 CLR 330.

20 (1998) 192 CLR 431.

21 (1999) 200 CLR 1.

22 (2001) 206 CLR 512.

23 (2002) 211 CLR 540.

24 [2005] HCA 62.

31 With respect to the scope of the duty, Whealy J said that "the danger which eventuated fell within the ambit of the normal dangers that, for experienced swimmers, attach to the ordinary activity of swimming in the ocean or in tidal creeks"[25]. Although pleaded as a prohibition case, at the trial the plaintiff's case stood or fell on the basis of a failure to warn by the placement of signs at public access points to the recreational areas adjacent to Coffs Creek which warned against diving because of the variable depth of the creek and the possible presence of sand dunes. The trial judge held that the scope of the duty of care owed by each of the relevant defendants did not require that the plaintiff be warned of the risk "that was plainly inherent in the activity he was undertaking"[26]. His Honour prefaced that conclusion by saying[27]:

> "To an experienced swimmer and diver such as the plaintiff, notwithstanding that he was not familiar with Australian conditions and probably knowing nothing of the physics of creek beds, the risk of striking a transient sand dune occurring naturally on the bed of a tidal creek was, as a matter of factual evaluation, an inherent risk involved in swimming and diving in such an estuary. The plaintiff knew in general terms of the danger of diving in a creek of variable depth. But, as he said, he did not know it was 'that variable'. This bespeaks an error or misjudgment on his part."

32 To succeed in his appeal to this Court, the plaintiff must displace the reasoning respecting "obviousness" which was so significant for the Court of Appeal's judgment. I do not repeat what I said on that subject in *Vairy*, with particular reference to the reasons of Hayne J[28].

33 But it is also necessary for the plaintiff to overcome the holding of the primary judge as to the scope of the duty of care if the plaintiff is to obtain the relief he seeks here, namely judgment in his favour in the sum of $9,481,310.20 together with interest on past economic loss and past care[29].

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25 (2003) Aust Torts Reports ¶81-696 at 63,879.

26 (2003) Aust Torts Reports ¶81-696 at 63,879.

27 (2003) Aust Torts Reports ¶81-696 at 63,879.

28 [2005] HCA 62 at [163].

29 Whealy J, properly, had gone on to deal with damages, despite dismissing the action.

34 In considering the duty of care, Whealy J had referred to the "higher level of abstraction" identified by Glass JA in *Shirt v Wyong Shire Council*[30]. In this Court, the plaintiff criticised the reference in the above passages in the judgment of Whealy J to experienced swimmers. It was submitted that there was an error of law in failing to make allowance for the possibility of inadvertence and carelessness, even on the part of experienced swimmers, and for the range of experience and capacity of those, including tourists, resorting to the Coffs Harbour area.

35 What Whealy J said respecting experienced swimmers must be read with earlier passages in his reasons. In the course of finding the existence of a duty of care, his Honour made it plain that the waterways of the creek were used for swimming and recreational purposes by a range of persons, namely tourists, visitors, residents and local schools. The submissions for the plaintiff at trial, which were recounted in detail by the trial judge, had argued that there had been a "hidden trap"; the water was cloudy and the plaintiff had not known that bedforms existed on the creek bed. It was in response to that submission that his Honour remarked that "[t]he necessary analysis must be made bearing well in mind that the plaintiff was an experienced swimmer, a strong swimmer and experienced at diving"[31]. He went on to identify as misleading in two respects the submission that the bedform which the plaintiff's head had struck was hidden from him.

36 In this Court, counsel for the plaintiff emphasised the effect which the running of the current against a training wall had on the creation of what he called "the channel ride". But that was not a matter emphasised for the plaintiff at trial.

37 Having regard to the way in which the plaintiff's case had been presented, it was not erroneous for the trial judge to approach and to resolve the question of the scope of the duty of care in the fashion that he did.

38 It was appropriate also for his Honour to examine the issue of scope of duty as he did, by reference to considerations, albeit not propositions of law, touching the readily apparent danger of an activity against which it was alleged the public authorities in question were obliged to warn entrants upon the public land.

39 After the trial the Council erected four signs at access points: three on the northern bank of the creek and one on the southern side. Under a heading

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30 [1978] 1 NSWLR 631 at 639.

31 (2003) Aust Torts Reports ¶81-696 at 63,877.

"GENERAL WARNINGS", there appeared under pictorial devices the words "SUBMERGED OBJECTS", "DANGEROUS CURRENT", "SLIPPERY ROCKS" and "NO LIFEGUARD OR LIFESAVING SERVICE HERE TODAY". This was said by the plaintiff to show "the practicability of diving warning signs", so that it was unreasonable for the Council not to have acted before the plaintiff's accident occurred. Reliance was placed upon *Nelson v John Lysaght (Australia) Ltd*[32]. The later placement of signs may have been a relevant part of the *Shirt* calculus. But it does not fault the steps taken by the trial judge in dealing at the more generalised level involved with the issue of the scope of the duty.

40 The propositions apparently advanced by the Court of Appeal respecting "obviousness" should not be read as supporting any principle of law. However, that apart, the finding by the trial judge respecting the scope of the duties of care of the Council and the State interests is not, having regard to the case presented at trial, shown to have been erroneous.

41 The appeal should be dismissed with costs.

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32 (1975) 132 CLR 201 at 215.

42 HAYNE J. The appellant is now a quadriplegic as a result of a spinal injury sustained when he plunged forward into the waters of the Coffs Creek, not far from where that creek enters the sea at Park Beach, Coffs Harbour, New South Wales. In the half hour immediately preceding his injury, the appellant had done the same thing six or seven times: waded into the water until it was up to his thighs, dived into what he thought was much deeper water, floated down the creek towards the sea, and then waded out of the water before making his way back to the beach beside the creek. On these occasions he did not touch the bottom when he dived in; he did not notice any debris or obstruction; he could not see the bottom of the creek when he was in what he thought was the deeper water near the centre of the creek.

43 The appellant was injured when he made his last dive into the water. He described launching himself into a dive, with his arms in front of him as he hit the water, and then bringing his arms to his side when in the water. He hit the creek bed with his head and fractured cervical vertebrae.

44 The appellant brought an action for damages in the Supreme Court of New South Wales. He sued Coffs Harbour City Council ("the Council"), the State of New South Wales, the Coffs Harbour Jetty Foreshore Reserve Trust ("the Trust"), the Manager of the Trust and the New South Wales Marine Park Authority ("the Authority")[33]. He alleged that the Council had the care, control and management of a reserve on the northern side of Coffs Creek. On that side the Council had created a swimming area and had provided some recreational facilities. To the west of the reserve a railway bridge crossed the creek. On the southern side of the creek there was another reserve for public recreation and environmental protection. The Trust had the care and control of this reserve. The appellant had entered the creek from the southern side.

45 The creek bed was unalienated Crown land. A rock training wall (sometimes called a retaining wall) had been built on the northern side of the creek, near the place where the appellant suffered injury. The appellant alleged that the Council and the New South Wales Department of Public Works each played a part in constructing and improving that wall. He alleged that the Authority had the care, control and management of the creek bed itself pursuant to the *Marine Parks Act* 1997 (NSW).

46 The central allegation made by the appellant was that one or more of the defendants had breached a duty of care owed to him by failing to erect warning signs at public access points to the recreational areas adjacent to the creek. He

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33 The Authority succeeded at trial and was not a party to the appeal to the Court of Appeal or to this Court.

contended that such signs should have warned about the danger of the variable depth of the creek.

47 The trial judge (Whealy J) held[34] that although the Council and one or more of the other defendants (referred to collectively as the "State interests") owed the appellant a duty of care, no breach of duty was proved. The trial judge held[35] that "the reasonable response required by each of the defendants did not require the giving of a warning as argued".

48 The appellant appealed to the Court of Appeal. That Court dealt with the appeal in this matter, together with an appeal in the matter of *Vairy v Wyong Shire Council*[36], an appeal in which was heard in this Court immediately before the appeal in this matter. The Court of Appeal (Mason P, Beazley and Tobias JJA) dismissed[37] the appeal brought by the present appellant. By special leave he now appeals to this Court. His appeal must be dismissed.

49 In my reasons in *Vairy*[38], I have sought to set out the relevant principles that are to be applied in cases where, as here, it is alleged that a statutory authority having the care, control and management of a recreation or other reserve should have warned of the risk of serious injury that may be suffered by a person entering a body of water in or beside the reserve by diving or plunging into the water. These reasons must be read in conjunction with my reasons in *Vairy*.

50 As is explained in *Vairy*, a statutory authority having the care, control and management of land to which the public has access owes each member of the public who enters the land a duty to take reasonable care. In assessing what performance of that duty requires it is necessary to ask first, whether the risk of injury of the kind sustained by the plaintiff was reasonably foreseeable and secondly, what the reasonable person would have done in response to that risk[39]. Although the judgment about what would have been the reasonable response to

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34 *Mulligan v Coffs Harbour City Council* (2003) Aust Torts Reports ¶81-696 at 63,875 [286].

35 (2003) Aust Torts Reports ¶81-696 at 63,881 [308].

36 [2005] HCA 62.

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

38 [2005] HCA 62.

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

the risk must be made after the event, the inquiry is directed to identifying what the reasonable response would have been by a person looking forward at the prospect of the risk of injury. That must be assessed having regard to the magnitude of the risk, the degree of probability of its occurrence, the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities the alleged tortfeasor may have[40]. And because the inquiry is prospective, there is no basis for assuming that the only risk to be considered by the reasonable person is the particular kind of risk that came to pass at the place and in the way it did.

51 The appellant was injured when he did something that he had done several times before. It was something that many others had done before him. He launched himself into the water by plunging forward into it. But on the last occasion he did so at a point that was too shallow for him safely to execute the entry he attempted. That a swimmer might do that was reasonably foreseeable. The risk of injury resulting from this activity was not far-fetched or fanciful. But would a reasonable authority having the care, control and management of a reserve beside the creek, or having the care, control and management of the creek itself, respond to that risk by warning against diving or warning that the creek may be too shallow? I would answer that question: no.

52 As I explained in *Vairy*, that conclusion does not depend upon what the Court of Appeal referred[41] to as the obviousness of the risk. Rather, it is a judgment about what, in *all* the circumstances of the case, a reasonable authority having the care, control and management of an area to which the public has access would have done in response to the foreseeable risk of diving injuries.

53 Those circumstances include in this case the steps taken by the authorities that had care, control and management of the nearby reserves to encourage, or at least facilitate, the use of the creek, the knowledge that those authorities had, or ought reasonably to have had, that the creek was used as a place to swim, and the knowledge that those authorities had, or ought reasonably to have had, about the variable depth of the creek. Moreover, given that the Council and the Department of Public Works played a part in constructing and improving the training wall, it may be assumed, for present purposes, that those authorities knew or ought reasonably to have known that the presence of the wall assisted in creating the conditions that led the appellant to dive into the water as he did, so that he might be carried by the current towards the mouth of the creek. But accepting all these matters, looking forward, *before* the appellant suffered his injury, the reasonable authority would not have responded to the risk that a

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40 *Shirt* (1980) 146 CLR 40 at 47-48.

41 (2004) Aust Torts Reports ¶81-754.

swimmer might plunge into the water, at a point too shallow to make the entry safely, by erecting one or more signs warning of that danger.

54 For these reasons the appeal must be dismissed with costs.

55 CALLINAN AND HEYDON JJ. This case raises questions as to the liability of a local authority for injuries sustained by a visitor to a recreational area administered by the authority.

Facts

56 There is a tidal estuary at the mouth of Coffs Creek at Park Beach in New South Wales. The northern extremity of the estuary adjoins an area which is popular with tourists. The configuration of the creek has been altered to create a crescent shaped pool or lagoon of sheltered water for swimming. The alteration was made by the first respondent at the expense of the second respondent (the State of New South Wales). The pool may be entered by steps and is bounded on its western and eastern sides by two rock training walls.

57 The larger of the training walls is about 100 metres long and is on the eastern side of the pool. It continues in a line running approximately east-west until it reaches the beach. The purpose of the wall is to cause, or "train", the water in the creek to flow next to it in a confined channel to the sea.

58 The channel is the deepest part of the estuary. It flows fast, indeed faster than other parts of the creek. People regularly jumped and dived into the channel at the western end of the training wall to "ride" the fast flowing water to the beach. There, the channel is shallow enough to allow bathers to walk back along the southern bank and to re-enter it at the original point of entry. On the day of the appellant's accident a number of people, including the appellant and his fiancée, were riding the channel in this way.

59 The first respondent was sued because it may have been responsible for the management and control of part at least of the area from which access to the channel could be gained and because of its involvement in the construction of the pool. The fourth respondent (Mr Hambly) was at all material times the senior officer of the third respondent (the Coffs Harbour Jetty Foreshore Reserve Trust) but has been conceded by the appellant not to be liable. The second respondent was not only involved in the construction of the alterations but may also have had the control and management of the watercourse of the creek, and other adjoining areas. It is unnecessary, as will appear, to explore the respective roles and responsibilities of the respondents.

The accident

60 The appellant is an Irish national who came to Australia with his fiancée for a holiday. On 24 January 1999 they visited a tourist attraction (the Porpoise Pool) on the southern bank of Coffs Creek on the western side of the highway.

61 After deciding that the surf at the nearby open beach was too rough for swimming, they began to bathe in the vicinity of the training wall. They saw that other people were swimming and being carried by, that is, "riding", the fast flowing water in the channel to the beach. They decided to join them. They entered the creek where the water was shallow opposite the eastern end of the pool. The appellant and his fiancée then spent the next 30 to 60 minutes riding the waters in the channel.

62 Each time, the appellant waded out until the water reached to his mid-thigh and he could discern a sharp fall in the gradient of the creek bed, at the edge of the channel. He then made a shallow dive to enter the water.

63 Several times, perhaps as many as seven, the appellant tried to touch the bottom of the channel with his feet, but was unable to do so except near the beach at the end of the rock wall. He accordingly assumed that the channel was deep enough for diving.

64 He dived this way several times without mishap. On the last occasion he struck his head on a moderately elevated bedform on the floor of the channel, and suffered devastating spinal injuries. The bedform was one of the relatively large undulations that appeared and reappeared from time to time on the channel floor. The extent of variations in depth due to such undulations exceeded half a metre over short distances. At times there were no bedforms in the channel at all.

The trial

65 The appellant sued the respondents for negligence in the Supreme Court of New South Wales. The action was tried by Whealy J. In addition to those to which we have so far referred, his Honour found these facts. The respondent was an experienced swimmer, competent in freestyle, backstroke and breastroke swimming. He had swum and dived into the waters and seas of Ireland, the Indian Ocean and Thailand. He was aware that areas of beach were from time to time set aside and designated by flags and signs for swimming. He was also conscious of the need to take care when diving into water, especially in circumstances in which the depth was uncertain. He had not however previously swum or dived in a creek. The appellant did on the day observe that there was variability of depth and speed of the current, that the water was cloudy, and that visibility was limited.

66 The trial judge did not doubt that the first respondent owed the appellant a duty of care, for the reason, among others, that it had promoted the area in which the channel was situated as a tourist attraction. He concluded that the other respondents (but not Mr Hambly) also owed him a duty of care, of much the same content as that owed by the respondent Council.

67 It was with respect to the scope and breach of that duty that his Honour found against the appellant even though he thought the injury foreseeable because the risk of its occurrence was neither far fetched nor fanciful. His Honour said this[42]:

> "The factual situation in the present case may, I think, be contrasted with these [other cited] diving cases. Here, it is true that the [appellant] did not know the depth of the water that lay in front of him when he made his last dive. He was not able to see his feet nor the creek bed below them at the point each time when he dived into the creek. He knew how deep the water was where he was standing and made certain assumptions about the depth beyond that point. He did not know whether the water beyond was 'four feet or fourteen feet deep'. He also knew in a general sense that the creek was of variable depth. For example, he knew (or believed probably erroneously) that the water in the first area where he swam was not safe to dive. He thought that it was too shallow. He knew in the second area that the water was of variable depth. He had in fact taken a sudden step down to a deeper position before he made his first dive. He knew as well that it was dangerous to dive in water which was of variable depth. At least, he knew this in a generalised way. He agreed with this proposition when it was put to him but said that he did [not] know it was 'that variable'. He 'only knew' that it was shallow at the bank and got deeper as he went into the centre. He agreed however, that although he made an assumption that it was deep enough to dive he in fact did not know one way or another whether it was deep enough to dive."

68 Whealy J also took into account that the appellant was an experienced swimmer and diver. He added this[43]:

> "It is true that [the appellant] had not swum in a creek before and that Australian conditions were not known to him at the time of his accident. But the existence of sand dunes in tidal conditions are not confined to creeks. They occur in the ocean and they occur in creeks and oceans world wide. The [appellant] certainly knew that the creek was sand based and that its depth varied at different positions. In other words, he knew two things: first that the water depth was variable. Second, that the variability in part related to the condition of the creek bed. Another critical feature of analysis relates to the factual findings I have made about the state of the creek bed at the time of the [appellant's] accident and what

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42 (2003) Aust Torts Reports ¶81-696 at 63,877 [293].

43 (2003) Aust Torts Reports ¶81-696 at 63,877 [294].

> it was his head actually struck. As to the first, there was nothing unusual in the tidal or weather conditions at the time of the [appellant's] accident. It was a fine pleasant day and although the tide was running out at a reasonable velocity, there was nothing unusual whatsoever in the situation. Quite a number of people were swimming at the same time as the [appellant] as indeed, was Miss Brady. There was nothing unusual or untoward at all in the situation. The second matter is the finding that the [appellant's] head struck a bedform. This was a naturally occurring phenomenon on the bed of the creek and there can be no suggestion on the factual evaluation I have made that there was anything unusual or out of the ordinary in relation to the formation and no doubt later dissipation of the particular sand dune ... I [am] not prepared to find that the evidence established that it was a sand dune of any unusual or out of the ordinary proportion."

69 Although it was unnecessary for him to do so, his Honour then prudently dealt with the issue of causation. He accepted that the appellant was more likely than not to have heeded a "sign dealing with specific local conditions"[44]. Specifically he found this[45]:

> "In my view, the [appellant's] general conduct, his general standing and behaviour in the community and his specific conduct on the day in question lead me to believe that he was the sort of person who would have been most likely to have obeyed a sign which warned him of the dangers of diving in the creek. None of the matters relied upon by the [respondents] to which I have made reference detract from this assessment of the [appellant] and of his likely behaviour on the day in question."

70 His Honour also explored a question of contributory negligence. Assuming all else in the appellant's favour (contrary to his Honour's actual findings adverse to the appellant as to breach) he would have held the appellant to be negligent to the extent of 15% only. On the same theoretical basis his Honour apportioned responsibility between the respondents.

The appeal to the Court of Appeal

71 The appellant's appeal to the Court of Appeal of New South Wales was dismissed in a judgment which also disposed of the appeal in *Vairy v Wyong Shire Council*[46]. In this case, although not in that however, the Court was

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44 (2003) Aust Torts Reports ¶81-696 at 63,883 [320].

45 (2003) Aust Torts Reports ¶81-696 at 63,883 [324].

46 (2004) Aust Torts Reports ¶81-754.

unanimous in its conclusion. Our reasons in this case should accordingly be read with our reasons in *Vairy*[47].

72 Tobias JA said this[48]:

> "It is also appropriate, having defined an obvious danger, to draw a distinction between an 'obvious danger' and an 'inherent danger'. The point is that an obvious danger is not necessarily an inherent danger. Just as a danger may be both obvious and inherent, it may, dependent upon the circumstances, also be obvious and non-inherent. For that matter, a hidden danger need not necessarily be a non-inherent danger: a danger could, in a given case, be hidden and inherent. Accordingly, the fact that a danger is (or is not) inherent will not be a clue to whether such a danger is obvious. However, as will be explained below, the fact that a danger is inherent or non-inherent may, in some circumstances, be a factor of weight in determining if a reasonable response of an occupier under a duty of care toward an entrant involves the need (or duty) to warn of the danger.
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> An inherent danger is a danger (or risk) attaching to a condition or activity that cannot be removed by the exercise of due care[49]. That is, by exposing oneself to a condition or activity involving an inherent danger one has thereby become subject to the possibility of the danger crystallising. For example, in *Prast*, Ipp J[50] explained that the risk of being dumped by a wave while bodysurfing was not only obvious, but also inherent since, once a bodysurfer has caught a wave, he or she has, as it were, become subject to the will of the wave which, even in normal surf conditions, may unexpectedly dump them. Accordingly, even the exercise of reasonable care on the part of the surfer will not remove this danger. *Rogers*[51] provides a further example, but from the perspective of a hidden danger. In that case the risk of surgery to one eye was found to carry with it the inherent danger of both the patient's eyes becoming subject to

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47 [2005] HCA 62.

48 (2004) Aust Torts Reports ¶81-754 at 65,892-65,901 [163]-[165], [167], [205]-[209], [212].

49 *Prast v Town of Cottesloe* (2000) 22 WAR 474 at 483 [35]; *Rogers v Whitaker* (1992) 175 CLR 479 at 483, 491.

50 *Prast v Town of Cottesloe* (2000) 22 WAR 474 at 482 [32].

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

sympathetic ophthalmia and consequently blindness. This danger, while inherent, would seem to have also been a hidden danger since a reasonable patient without specific medical knowledge would not, as at least a matter of commonsense, be aware of the danger. Hence the necessity for a warning.

Of particular concern in the context of the present case is the danger associated with diving into water of unknown depth. Generally speaking such a danger will be non-inherent where the depth of water is constant or stable; for example, in a swimming pool. By ascertaining either the depth of the water before diving or by the occupier giving a warning (or an indication of the depth) under such constant conditions, the danger (be it hidden or obvious) can be eliminated all together.

...

However, 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. That is, under such conditions, the giving of a warning or the checking of the depth of the water prior to diving may not remove the risk. For instance, generally a dive into the sea will be subject to the surge, swell, tide and the continuous rise and fall of the waves. Further, the seabed itself may be undergoing change, sometimes at short notice, as sands are washed about as the sea's moods and tempers constantly fluctuate. In such cases, particular circumstances depending and irrespective of the danger being obvious or hidden, the danger will be inherent.

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For present purposes, I will assume that, like Wyong in *Vairy*[52] the public authorities in *Mulligan*[53] knew or ought to have known of the variations in the sandy bed of the creek due to the natural ebb and flow of the tides to which I have referred.

In my opinion, this knowledge (or assumed knowledge) on the part of the defendants is neutralised by the fact that each of Mr Vairy and Mr Mulligan were aware that the water into which they were diving was not only of variable depth but also of unknown depth. It was those

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

53 *Mulligan v Coffs Harbour City Council* (2003) Aust Torts Reports ¶81-696.

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 defendants did not require a duty to warn. The duty of care owed to the plaintiffs was not breached by the failure of any of the defendants to give any warning: the giving of a warning was not within the scope of their duty of care.

A more difficult issue relates to the experience of each of the plaintiffs. In the case of Mr Vairy he had knowledge both on the day in question, and from his previous visits to Soldiers Beach, that people dived from the rock platform seemingly without sustaining injury. It was these facts that caused Bell J to observe[54]:

> 'The danger that I identify (in addition to the general difficulty of estimating the depth of the water) is (i) that persons who have previously dived with safety may be misled by the belief that the depth of water will be sufficient to allow of safe diving, and (ii) persons such as the plaintiff who have observed people diving safely on other occasions may be misled into thinking the water is sufficiently deep to dive safely when it is not.'

In *Mulligan*, Whealy J found that Mr Mulligan had observed others diving in the vicinity of the training wall and he had on previous occasions dived without mishap from approximately the same location. It was submitted by each plaintiff that each was misled into assuming that it was safe to dive when it was not.

In my opinion, the response to this submission is that the fact that Mr Mulligan on the one hand, and other people to Mr Vairy's observation on the other, 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 on the one hand and the creek bed on the other, and that each 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 defendants' duty of care did not require the erection of a warning sign or signs.

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54 *Vairy v Wyong Shire Council* (2002) 129 LGERA 10 at 41 [170].

> I have already referred to the shift in decisions of the High Court whereby persons ordinarily would be expected to exercise sufficient care for their own safety by perceiving and avoiding obvious dangers. It is true as pointed out in the joint judgment in *Ghantous*[55] that allowance must be made for inadvertence. No question of inadvertence arose in either of the present cases. Inadvertence is different to the failure of a person to take reasonable care for his or her own safety. In the present cases, neither Mr Vairy nor Mr Mulligan took that care; otherwise they would have ensured that the depth of the water into which they each dived was sufficient to enable them to execute the manoeuvre safely."

The appeal to this Court

73 We do not disagree with the descriptions of Tobias JA of inherent and obvious dangers, and the different consequences that may on occasion attach, according to which of them is present. We do not think however that this case turns upon the categorisation of the bedform as either of these, although in some cases a categorisation will do so. We will return to this topic later.

74 The appellant in this Court submits that in asking, as his Honour did, whether the factors able to be advanced in favour of the appellant neutralised or detracted from the obviousness of the risk, Tobias JA adopted a novel and erroneous approach. The appellant contended that to do so was to proceed in a way that was inconsistent with recent authorities of this Court[56] in which the Court has treated the question of obviousness as not conclusive and one of degree only.

75 Whether that is so or not, does not however deny that obviousness may be of such significance and importance, indeed of such a very high degree of importance as to be overwhelmingly so, and effectively conclusive in some cases. Those in this Court upon which the appellant seeks to rely do not hold to the contrary.

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55 *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512.

56 *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934; 201 ALR 470; *Swain v Waverley Municipal Council* (2005) 79 ALJR 565; 213 ALR 249.

76 In *Hoyts Pty Ltd v Burns*[57], obviousness was not the issue or indeed even an issue of any relevance. *Swain v Waverley Municipal Council*[58] was a jury case. We do not take Gummow J, one of the majority in that case, in observing[59] that obviousness is only one and not the decisive factor, to be saying that it can never be the most significant factor, and in that respect the factor against which the countervailing matters will need to be weighed, and may be found wanting. In that case, his Honour made specific reference to the availability to the jury of an inference of non-obviousness, thereby emphasising its importance at least in the mix of factors to be taken into account. It is clear that in *Woods v Multi-Sport Holdings Pty Ltd*[60], Gleeson CJ, with whom Hayne J agreed, thought obviousness decisive in relation to the recreational activity in which the appellant was there engaged, indoor cricket[61]. What Callinan J said in that case too, we think, is relevant to this case and also emphasises the importance of obviousness[62]:

> "The sport of indoor cricket involved many of the risks to which I have just referred. Played as it was, with a semi-flexible ball and a bat with which to hit it as hard as possible, it gives rise to an obvious risk that a ball might strike an eye. Any assertion to the contrary is simply untenable. Any person could not be other than aware of that particular risk after a few moments observation of the game. As I said in *Agar v Hyde*[63] sports injuries and duties of care owed by those involved in sport simply cannot be approached in the same way as non-recreational or involuntary activities. What I have said is sufficient to dispose of the appellant's argument that the respondent should have warned the appellant of the risk, which was realised, of injury to his eyes. And, for the reasons that I have given, that of the ultimate objective of most sports, of the achievement of physical superiority or domination of one form or another by one person or team over another, promoters and organisers of sport will

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57 (2003) 77 ALJR 1934; 201 ALR 470.

58 (2005) 79 ALJR 565 at 590 [126]; 213 ALR 249 at 283.

59 (2005) 79 ALJR 565 at 593 [142]; 213 ALR 249 at 287.

60 (2002) 208 CLR 460.

61 (2002) 208 CLR 460 at 472-473 [40].

62 (2002) 208 CLR 460 at 509 [159].

63 (2000) 201 CLR 552 at 600-601 [125]-[127].

rarely, if ever, be obliged to warn prospective participants that they might be hurt if they choose to play the game."

77 And in *Ghantous v Hawkesbury City Council*[64] five judges of this Court stressed, and treated obviousness as a decisive factor[65].

78 What we read Tobias JA to be saying in this case is that obviousness was the critical factor because all of the other relevant factors, each of which was considered by the trial judge, were not such as to outweigh the obviousness of the risk[66]. This, in all of the circumstances, justified the omission to do the only thing in substance that the appellant contended the respondents should have done, erect an appropriate warning sign in an appropriate place or places. Obviousness of a risk very much conditions the response, or even the necessity for any response at all to it.

79 The appellant drew attention to the possibility that the vulnerable, children, the elderly, the physically and mentally impaired, the intoxicated and the exuberant would on occasions swim and dive in the channel. Of course that is so. But it is in the nature of human affairs that people will possess very different attributes and sensibilities. Similarly, there will be many who will neither see, nor if they do, bother to read or heed the most obvious of warnings. These may all be relevant factors in an appropriate case. They were simply not such as to require a different conclusion here in the light of the obviousness of the risk of diving in uncertain and unfamiliar clouded waters.

80 The imperialism of the law of torts has had many beneficial products. Employers, governments, statutory authorities and others have been forced to exercise their minds in the interests of those who may be injured by their conduct and to improve performance accordingly. Even empires must however have their borders and equally, society should be entitled to expect that people will take elementary precautions at least for their own safety against obvious risks. In *March v E & M H Stramare Pty Ltd*[67] Mason J pointed out that a finding of causation required, among other things, the application of common sense[68]. It is

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64 (2001) 206 CLR 512.

65 (2001) 206 CLR 512 at 526 [8] per Gleeson CJ, 581 [163] per Gaudron, McHugh and Gummow JJ, 639 [355] per Callinan J.

66 (2004) Aust Torts Reports ¶81-754 at 65,898-65,899 [194]-[195].

67 (1991) 171 CLR 506.

68 (1991) 171 CLR 506 at 515.

only reasonably to be expected that people will conduct themselves according to dictates of common sense, which must include the observation of, and an appropriately careful response to what is obvious. Courts in deciding whether that response has been made are bound to keep in mind that defendants have rights and interests too. A tendency to see cases through the eyes of plaintiffs only is to be avoided.

81 The appellant seeks to make much of the trial judge's finding that the appellant's method of dive was not reckless or dangerous, and that he had executed a similar dive safely six or seven times before from about the same location. He was therefore entitled, it is submitted, to assume that he could do it safely every time. We cannot agree. The fact that a potentially dangerous act may have been completed without mishap previously, even frequently, can never provide an assurance that it will always be able to be completed safely.

82 Some reference should be made to the holding in the Court of Appeal that the respondents did not create the relevant danger[69]:

> "Furthermore, it was submitted that in no relevant sense were the public authorities in control of the situation as they were not the creator of the facts and circumstances that gave rise to the risk. In my opinion, these submissions have considerable force especially as the relevant danger constituted by the variable water depths was created by naturally occurring phenomena (such as movement of the sand bed) over which the authorities had no control."

With respect we do not think that what is said in that passage is entirely correct. The bedform was naturally occurring, but the training wall was exactly that, a wall to "train" the creek floor into a channel which was to some extent at least realigned. That the construction may have in some way contributed to such risks as existed is relevant, but does not dictate a different result. Bedforms could occur in the channel because of the movement of sand, and people could be attracted to diving and swimming there, whether the banks were realigned or not.

83 Analysis of the appellant's argument discloses that much of it is directed to the dubious proposition that the trial judge should have been held by the Court of Appeal to have erred in not attaching greater weight to various factual matters. These included the relative inexpensiveness and simplicity of erecting signs, the magnitude of the risk, the possibility of inadvertence, or that a swimmer might himself be careless, the promotion of the area as a resort for tourists, the proximity of safe, still waters, the respondents' superior knowledge, and some of

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69 (2004) Aust Torts Reports ¶81-754 at 65,888 [139].

the other matters to which we have previously referred. The appellant's argument is not made out. There were many facts and competing considerations to be weighed in this case. For our own part, we think that both at first instance, and in the Court of Appeal, this exercise was performed in a careful, comprehensive and ultimately correct manner.

84 We would dismiss the appeal with costs.