

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
TOOHEY, GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

ROMEO

APPELLANT

AND

CONSERVATION COMMISSION OF THE
NORTHERN TERRITORY

RESPONDENT

Romeo v Conservation Commission of the Northern Territory (D584-1996)
[1998] HCA 5
2 February 1998

ORDER

Appeal dismissed.

On appeal from the Supreme Court of the Northern Territory.

Representation:

J B Waters with S R Southwood for the appellant (instructed by Waters, James, McCormack)

T I Pauling QC (Solicitor-General for the Northern Territory) with R J Webb and R P Balkin for the respondent (instructed by Solicitor for the Northern Territory)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Romeo v Conservation Commission of the Northern Territory

Negligence – Duty of care – Source of duty - Reasonable foreseeability – Proximity – Policy considerations - Statutory powers – Public authority's power to control and manage land – Public right to enter – Statutory discretion – Whether municipal council under a public or common law duty to protect members of the public who may foreseeably fail to take reasonable care for their own safety – Obvious dangers.

Negligence – Standard of care – Reasonable foreseeability – Obviousness of risk – Gravity of risk – Nature of precautions required – Relevance of provision of facilities by public authority in control and management of land upon which the public may enter as of right – Relevance of statutory functions, powers and duties – Whether failure to take reasonable care for entrant's own safety with regard to obvious dangers breaks the chain of causation – Whether such failure amounts to contributory negligence.

Local government – Liability of local authority in negligence – Relevance of statutory functions, powers and duties – Suggested immunity for policy decisions – Applicability of policy/operational decisions distinction – Whether *Nagle v Rottneest Island Authority* imposes excessive burden on authority – Whether *Nagle* should be overruled.

Conservation Commission Act 1980 (NT), ss 19, 20.

1 BRENNAN CJ. On 24 April 1987 Nadia Anne Romeo, the appellant, fell 6½ metres from the top of the Dripstone Cliffs onto the Casuarina Beach in suburban Darwin. She was nearly 16 at the time. She suffered serious injuries causing high level paraplegia. She claimed damages in the Supreme Court against the respondent, the Conservation Commission of the Northern Territory ("the Commission"). The Commission is a public authority charged with the management and control of the Casuarina Coastal Reserve which includes the Dripstone Cliffs and the beach below. The reserve is an area of natural beauty which extends over 8 kilometres of coastline. The section of the Reserve near the Dripstone Cliffs was described¹ by the trial judge, Angel J, in these terms:

"At that time, most visiting members of the public used the cliff-top area of the reserve in the early evening to view tropical sunsets. An area known as Dripstone Park or Lions Park is some distance from the cliffs. A range of facilities were provided at that park by the [Commission], such as barbeques, showers and toilets, car parking facilities, lighting, play equipment, shade and grassed areas. The only facility provided at the top of the Dripstone Cliffs was a car park, the perimeter of which consisted of low post and log fencing erected by the [Commission]. The grass at the top of the cliffs was cut and maintained by the [Commission] and plants there were irrigated by the [Commission]."

2 On the day of the accident the appellant worked until 9.00pm at the Casuarina Shopping Square. She met her friend, Jacinta Hay, and arranged to meet other young people for a beach party. They arrived at the Reserve adjacent to the cliffs at about 10.15pm. The two girls had bought a 750 ml bottle of Bundaberg Rum and some Coca Cola on the way. Angel J found that the two girls each consumed approximately 150 ml of rum during the evening prior to the accident. The appellant was an inexperienced drinker and Angel J found that she was adversely affected by alcohol at the time of her accident but it was not possible to say with any accuracy to what degree her behaviour, concentration and judgment were impaired. The appellant and Jacinta Hay both fell over the cliff after 11.45pm. Neither has any recollection of the circumstances in which she fell and there is no other direct evidence as to the circumstances of their fall.

3 The low wooden post and log fence constructed as a perimeter of the car park was some little distance back from the edge of the cliff. Between this fence and the edge of the cliff there was an open space. Some low vegetation was growing along the cliff top. There was a gap in the vegetation. The appellant was found on the beach at a point below the gap.

1 *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71 at 72; 104 NTR 1 at 2.

2.

4 Angel J found² that the accident happened in the following manner:

" The [appellant] and Jacinta were affected by alcohol. The [appellant] and Jacinta wandered off from the group of friends who were congregating on the sea-side of the log fence. This group of friends were approximately 3 metres from the cliffs nearest edge. It is apparent and I infer that the [appellant] and Jacinta did not realise the location of the cliff edge and walked off and over the cliff edge at the point where there is a gap in the vegetation, some distance from the log fence. Leading to that gap was an area of light coloured bare earth naturally created by surface water running off the cliff. ... In the gloom it had the deceptive appearance to the girls of a footpath leading to the gap in the vegetation. It did not have that appearance in daylight. Nor would it have so appeared to a sober alert person on the night in question. It did not appear so to Mr Henry or to others on the night in question. I infer that the [appellant] and Jacinta were deceived to follow that path to and over the cliff edge. They literally walked over the edge with their heads in the air. They did not slip or at any time apprehend the presence of the cliff edge prior to their fall."

5 In the Full Court, Mildren J pointed out that there was no evidence as to how the girls arrived at the point in the gap in the vegetation. His Honour said³:

"It is equally possible that the girls decided to jump over the cliff onto the sand below and misjudged the height of the cliff. I should point out that the evidence was that the vegetation on either side of the gap was no more than a metre high and at no relevant place obstructed the view from the car park across the top of the cliffs to the beach and to the open sea."

In my opinion, there is much force in his Honour's criticism of the trial judge's finding. But special leave to appeal to this Court was granted in order to consider the issues of law that arise, or might be seen to arise, on the findings made by the trial judge. As those issues have been fully argued and as a consideration of those issues leads, in my opinion, to a dismissal of the appeal, I need not consider whether the appeal should be dismissed for error in the finding of the material facts. I proceed on the footing that the accident happened in the manner found by the trial judge.

On those findings Angel J dismissed the appellant's claim. The appellant had pleaded that the Commission was in breach of its duty of care to her in failing,

2 (1994) 123 FLR 71 at 78; 104 NTR 1 at 7.

3 *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 84 at 101.

3.

inter alia, to give warning of the presence of the cliff or to erect a fence or other barrier at the edge of the cliff. Apart from denying that, on the authorities, there was any duty on the Commission to take these steps, his Honour found⁴:

"The [appellant] knew of the existence and nature of the cliff edge; she was aware of the danger of walking on the cliff top in the darkness, particularly if affected by the consumption of alcohol; and provision of fencing, while acting as a barrier, would not have prevented the [appellant] progressing beyond it; the [appellant] had in fact passed beyond a barrier fence to be in the area she was in immediately prior to her fall. ...

If there had been a sign or signs, or illuminated signs, near the car park fence (and there is no reason why such sign or signs should be located precisely where the [appellant] and her friends gathered), on my view of the evidence, it can not be said that the [appellant] would probably not have proceeded as she did beyond the car park fence, on to the cliff top and over the cliff edge ... If, on the other hand, there had been a log fence closer to the cliff edge than the fence at the perimeter of the car park, one could not say that that, in all probability, would have avoided the [appellant's] mishap either. A log fence near and following the alignment of the edge of the cliff would, on the evidence, have been impractical."

Thus, even if it were held that the Commission was under a duty to erect warning signs or a log fence closer to the cliff edge, his Honour's findings of fact deny any causal relationship between the absence of signs or a log fence and the appellant's injuries.

- 6 However, the chief reasons why Angel J dismissed the appellant's claim were founded on his Honour's appreciation of the legal principles that govern the existence and standard of the duty of care owed by a statutory authority having the management and control of land onto which the public may enter by right. His Honour cited from the judgment of Dixon J in *Aiken v Kingborough Corporation*⁵ and appears to have adopted the standard of care which Dixon J held to be the standard of care needed to discharge the duty owed by a public authority to persons entering as of right⁶.

4 (1994) 123 FLR 71 at 83; 104 NTR 1 at 12.

5 (1939) 62 CLR 179 at 209.

6 (1939) 62 CLR 179 at 210.

4.

7 I understand Angel J to have adopted Dixon J's statement of that duty of care as definitive of the Commission's obligation to members of the public entering on the Reserve. Angel J held⁷ that -

"a member of the public entering as of common right to land controlled by a public authority is only entitled to expect care for his safety measured according to the nature of the premises. In the present case, and particularly given the scope of the [Commission's] duty towards the [appellant], the [appellant] has the difficulty that any risk of injury reasonably foreseeable to the [Commission] was equally foreseeable to the [appellant] and other members of the public who visited the cliff area."

His Honour pointed out that the danger of the cliffs was apparent and known and could have been avoided by the appellant's exercise of reasonable care. Accordingly, the Commission was held not to be in breach of its duty of care to the appellant. His Honour distinguished *Nagle v Rottnest Island Authority*⁸ as a case that "involved the failure to warn of a hidden danger"⁹.

8 Next, his Honour regarded decisions on questions of public safety and expenditure made by the Commission in the performance of its statutory function of "managing and conserving a natural and beautiful coastal area frequented by members of the public" to be "matters of policy for the [Commission] involving multifarious financial and governmental factors"¹⁰. Public safety measures of fencing, lighting or erecting signs, which had been pleaded by the appellant in her particulars of alleged negligence, would have involved "financial, aesthetic and other factors which would in their turn have involved budgetary allocations and allocations of resources"¹¹. Following what Mason J said in *Sutherland Shire Council v Heyman*¹², Angel J held that the court should not decide policy questions which the legislature had entrusted to a statutory authority for decision. Therefore his Honour rejected the submission that the Commission was under any common law duty to take any of the suggested measures.

7 (1994) 123 FLR 71 at 81; 104 NTR 1 at 10.

8 (1993) 177 CLR 423.

9 (1994) 123 FLR 71 at 81; 104 NTR 1 at 10.

10 (1994) 123 FLR 71 at 82; 104 NTR 1 at 11.

11 (1994) 123 FLR 71 at 82; 104 NTR 1 at 12.

12 (1985) 157 CLR 424 at 468-469.

5.

9 An appeal by the appellant to the Court of Appeal of the Northern Territory failed. In his reasons for judgment Martin CJ, with whom Thomas J agreed, said that it would be erroneous to define the Commission's duty as Dixon J defined the duty in *Aiken v Kingborough Corporation*. However, he did not think that Angel J had so defined the Commission's duty and had thereby failed to apply "the general principles of negligence based on the later High Court authorities"¹³. Martin CJ did not find it necessary to determine whether the Commission could be under a duty to take public safety measures when the decision to take the suggested measures was a matter of policy.

10 Mildren J, following *Wyong Shire Council v Shirt*¹⁴, held that the Commission's duty of care was to be determined by "what a reasonable man would do by way of response to the risk"¹⁵. Accepting that "the risk was an obvious one and the danger which the cliffs represented could have been avoided by the exercise by the [appellant] of ordinary care"¹⁶, his Honour did not find that the Commission was in breach of its duty. He did not find it necessary to determine whether the test laid down by Dixon J in *Aiken v Kingborough Corporation* should now be regarded as correct or not.

11 To determine the issues of law arising on the appeal, it is necessary first to identify the source of the Commission's duty of care to those who entered on the Reserve as of right.

The statutory functions and powers of the Commission

12 Section 19 of the *Conservation Commission Act* 1980 (NT) ("the Act") provides that the functions of the Commission are, inter alia, to -

- "(a) promote the conservation and protection of the natural environment of the Territory;
- (b) establish and manage parks, reserves and sanctuaries".

13 (1994) 123 FLR 84 at 87.

14 (1980) 146 CLR 40 at 47.

15 (1994) 123 FLR 84 at 100.

16 (1994) 123 FLR 84 at 107.

6.

- 13 Section 20 of the Act provides that, subject to the direction of the Minister¹⁷, the Commission has power to:

"do all things necessary or convenient to be done for or in connection with or incidental to the performance of its functions and the exercise of its powers"

including the power¹⁸ to:

"occupy, use, manage and control any land or building owned or leased by the Territory ... and made available to the Commission".

But s 21 provides that "[t]he Commission shall not acquire or hold any estate or interest in real property". Thus the Commission's authority over or in respect of the Reserve is purely statutory, not proprietary or possessory.

- 14 The Commission's power to manage and control land is similar to the power of the defendant Council in the case of *Schiller v Mulgrave Shire Council*¹⁹. In that case a plaintiff, walking along a track in a scenic area to which tourists resorted as of right, was injured when a dead tree fell upon him. It was found that the Council ought to have known of the danger of the dead tree falling and ought to have taken steps to avoid the risk of injury to those using the track. The plaintiff recovered damages against the Council for negligence, the basis of the duty of care being found in the Council's function and power to care for, control and manage the reserve. Barwick CJ said²⁰:

"Whilst it is convenient perhaps to refer to the respondent as the occupier of land, I would prefer to describe it as the trustee having the care, control and management of the reserve. The capacity for care, control and management derived from that trusteeship clearly extended in this case to the whole of the area. Consequently, in my opinion, the source of liability in this case is the statutory power and duty of care, control and management and not merely the occupation of land."

17 Section 22 declares that:

" The Commission, in the performance of its functions and the exercise of its powers, is subject to the direction of the Minister."

18 s 20(2)(e).

19 (1972) 129 CLR 116.

20 (1972) 129 CLR 116 at 120.

Similarly, Walsh J said²¹:

"The control by a statutory body of premises used by the public constitutes, in my opinion, the 'occupation' of them by that body. It was said in *Commissioner for Railways v McDermott*²², that an occupier of private land may incur liability towards persons permitted or invited to come onto the land, *for the reason that his occupation gives him control over and knowledge of the state of the premises and it is right that he should have some degree of responsibility for the safety of persons entering his premises with his permission*. In *Burrum Corporation v Richardson* Latham CJ said²³ that the liability of an occupier really depends upon his control and management which create duties, varying in degree, to persons coming upon and using the premises. When land to be used for public purposes is placed under the control of a statutory body then, whether the measure of its duty to persons using the land is or is not identical with that of an occupier of private land, *the fact that it has control and that it alone has the means of securing the users of the land against injury provides a basis for holding that a duty of care is cast upon it: see Aiken v Kingborough Corporation*²⁴." (Emphasis added.)

The basis of liability

- 15 Neither possession nor occupation of land is by itself a foundation for a duty of care owed to another who enters on land. The existence and extent of the duty of care depends upon the title of the other to be there, the object with which the other comes upon the land and the interest of the defendant in the other's presence²⁵. However, possession or occupation are material to the existence of a duty of care in two respects. First, because the terms on which an entrant enters on land in the possession or occupation of a defendant will determine the entrant's title to be there and, second, because possession or occupation gives the defendant an ability to safeguard the entrant against dangers in the condition of the premises. It is not simply possession or occupation of premises which founds the duty of care

21 (1972) 129 CLR 116 at 124.

22 [1967] 1 AC 169 at 186.

23 (1939) 62 CLR 214 at 228.

24 (1939) 62 CLR 179 at 203-206.

25 *Lipman v Clendinnen* (1932) 46 CLR 550 at 554.

but power to determine the terms on which an entrant may enter and power to safeguard the entrant against dangers in the condition of the premises entered²⁶.

- 16 In *Aiken v Kingborough Corporation*, the plaintiff was injured at night by falling into an unlit gap between a bollard and the decking of a wharf under the control and management of the defendant Corporation. He recovered damages. The reasoning of Dixon J proceeded²⁷ from the Corporation's statutory powers of management and control of the wharf:

" If in any statute any intention can be discovered that the council's control or occupation of the jetty shall or shall not carry with it a duty towards persons lawfully using it to take reasonable care by guarding, lighting or warning for their protection from such a danger as befell the plaintiff, that intention is of course decisive. But, though it is often said that the liability of a public authority in such a matter depends upon the intention of the statute, the truth is that in most cases the statute stops short after establishing the relation of the public authority to the structure or work with which it is concerned and goes no further than defining or describing the nature and degree of its control, authority or occupation, the function it is to perform and the powers it may exercise. It leaves to the general law the definition of the duty of care for the safety of the individual which flows from the position in relation to the structure or work in which it has placed the public authority. The conclusion that such a duty does or does not result and the measurement of the duty thus become matters of principle; and, however much reliance may be placed upon processes of interpretation, except in the rare case of an actual intention appearing on the face of the statute, to give any answer to the problem necessarily means that some general principle of liability is applied, or, what amounts to the same thing, that some presumption has been invoked in favour of a recognized head of liability."

Although his Honour said that "control and management ... spells occupation"²⁸, he was unable to assimilate the duty of a statutory authority having control and management of premises to the duty owed by an occupier to any of the three distinct categories in which entrants were then placed - invitees, licensees and trespassers²⁹. The power of management and control authorises a public authority to safeguard an entrant against dangers on the premises but it does not, or does not

26 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 335-336; see *Wheat v E Lacon & Co Ltd* [1966] AC 552 at 578-579.

27 (1939) 62 CLR 179 at 204.

28 (1939) 62 CLR 179 at 203.

29 (1939) 62 CLR 179 at 207.

necessarily, empower the public authority to regulate entry by the public onto the premises. The public may be entitled to enter as of right. The power of management and control is thus to be distinguished from occupation as a source of liability. However, by treating the statutory powers of control and management as, or as the equivalent of, de facto occupation, Dixon J³⁰ was able to treat the duty of the public authority to an entrant as a duty arising under the general principle of *Donoghue v Stevenson*³¹.

- 17 The duty which Dixon J formulated³² as the duty owed to an entrant as of right by a public authority statutorily charged with the management and control of premises was derived³³ from "the very situation" in which the statute places the authority. The authority is -

"in charge of a structure provided for the use of people who must, in using it, rely upon its freedom from dangers which the exercise of ordinary care on their own part would not avoid. Unless measures are taken to prevent it falling into disrepair or dilapidation or becoming defective, or if it does so, to warn or otherwise safeguard the users from the consequent dangers, it will become a source of injury. The body to which the statute has confided the care and management of the place alone has the means of securing the users against such injury, the risk of which arises from continuing to maintain the premises as a place of public resort and from the reliance which is ordinarily placed upon an absence of unusual or hidden dangers by persons making use of structures or other premises provided for public use."

The standard of care was defined by Dixon J in these terms³⁴:

" What then is the reasonable measure of precaution for the safety of the users of premises, such as a wharf, who come there as of common right? I think the public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such a person through 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."

30 See (1939) 62 CLR 179 at 206.

31 [1932] AC 562.

32 (1939) 62 CLR 179 at 210.

33 See (1939) 62 CLR 179 at 205-206.

34 (1939) 62 CLR 179 at 210.

His Honour's formulation of the authority's duty of care reflects the formulation then current of the duty owed by an occupier to an invitee³⁵. But, in my respectful opinion, when the sole basis of liability of a public authority is its statutory power of management and control of premises, its liability for injury suffered by a danger in the premises is not founded in the common law of negligence but in a breach of a statutory duty to exercise its power and to do so reasonably having regard to the purpose to be served by an exercise of the power. Of course, the statutory powers of management and control of premises are usually accompanied by the public authority's occupation of the premises, the nature and extent of the occupation varying with the nature of the premises. But, for the reasons stated, that occupation is not, or is not necessarily, to be equated with occupation that regulates the terms of another's entry onto the occupier's premises. In any event, whatever duty of care is imposed on the authority towards those who enter the premises as of right can hardly depend on whether the public authority has gone into de facto occupation of the premises. The powers are statutory and any duty that arises from the conferring of those powers must also be statutory.

- 18 In *Pyrenees Shire Council v Day*³⁶, I expressed my opinion that no duty to exercise a statutory power and to exercise it with care can be imposed by the common law on the repository of the power when the statute, operating in the particular circumstances, leaves the repository with a discretion whether to exercise it or not. If it were otherwise, the common law would impose on the repository a duty to exercise the power when the legislature had intended the repository to decide for itself whether and in what manner the power should be exercised. But a public authority charged with the management and control of premises on which the public may enter as of right is given those powers for the purpose, inter alia, of protecting the person of those who enter. As that is a purpose for which the powers of management and control are conferred, the repository is obliged to exercise them and to exercise them reasonably to fulfil that purpose unless there be some contrary statutory direction. But the manner of their exercise is for the repository to determine, provided that determination is not unreasonable in the *Wednesbury*³⁷ sense. That being the extent of the statutory duty, the duty owed by the repository to an entrant must be correspondingly defined. One reason why a court cannot hold a public authority liable in negligence for failing to take some action when the taking of the action is a matter of "policy" is that policy connotes a discretion to be exercised by the public authority not by the court. Some

35 *Indermaur v Dames* (1866) LR 1 CP 274 at 288 per Willes J; affirmed (1867) LR 2 CP 311.

36 [1998] HCA 3 at 22.

37 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

11.

public law justification must exist before a court can intervene to compel the exercise of a discretionary statutory power by a repository which has failed or refused to exercise the power.

- 19 I would respectfully adopt the standard defined by Dixon J in *Aiken v Kingborough Corporation*³⁸ as the standard of care to be observed in the absence of any statutory indication to the contrary. That standard expresses the true extent of a public authority's statutory duty to exercise a power to manage and control premises for the purpose of protecting persons entering thereon as of right. The duty is to exercise reasonable care to prevent injury from dangers arising from the structure or condition of the premises which are not apparent and are not to be avoided by the exercise of reasonable care on the part of the entrant. There is no warrant for extending the statutory duty to the taking of steps to protect particular entrants from the consequences of their failure to take reasonable care to protect themselves. The duty being owed to entrants as a class, "reasonable care" must be assessed by reference to the nature of the premises, the extent of their use by entrants and any particular characteristics of the class who enter. This accords with what Dixon J said in *Aiken v Kingborough Corporation*³⁹:

"The 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*." (Emphasis added.)

Where statute alone is the source of a public authority's duty of care to an entrant on premises, there can be no disparity between the authority's public law duty and the duty owed to the entrant as a member of the class of those entering the premises.

- 20 Dixon J was surely correct in holding that the duty to an entrant imposed by the statute on a public authority having no interest in or power over premises other than general powers of management and control 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. Unless there be either (i) conduct on the part of the public authority creating a risk of injury to an entrant or (ii) some anterior relationship between the authority and a particular entrant affecting the title of the entrant to enter or the terms of entry, the entrant is not entitled to expect any higher standard of care from the public authority than that which is reasonably required to safeguard the public at large or that section of the public entitled to enter on the premises.

38 (1939) 62 CLR 179 at 210.

39 (1939) 62 CLR 179 at 209.

- 21 In *Nagle v Rottnest Island Authority*⁴⁰ the plaintiff dived off a rock ledge at the edge of a swimming area known as the Basin on Rottnest Island and struck his head on a submerged rock. Mason CJ, Deane, Dawson and Gaudron JJ held that the Board which had control of the Island and which encouraged the public to swim in the Basin was under a duty of care expressed in these terms⁴¹:

"As occupier under the statutory duty already mentioned, the Board, 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."

Finding that it was foreseeable that a swimmer might dive into the water and strike a submerged rock, their Honours held that a failure to warn of the danger of diving was a breach of the Board's duty of care⁴². Their Honours thought that such a warning would have been likely to alert the plaintiff to the risk and thereby avoid the risk of injury. In determining the measure of the Board's duty, the majority treated the case as though it were identical in principle with cases where a defendant's duty of care arises from the doing of some act that creates or increases a foreseeable risk of damage to another⁴³. Taking that approach, their Honours included within the scope of foreseeability "the possibility that one or more of the persons to whom the duty is owed might fail to take proper care for his or her own safety"⁴⁴. That approach conformed to the majority view in *Australian Safeway Stores Pty Ltd v Zaluzna*⁴⁵ where the touchstone of the existence of a duty of care owed by an occupier of premises to persons entering thereon was held to be -

"reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of

40 (1993) 177 CLR 423.

41 (1993) 177 CLR 423 at 430.

42 (1993) 177 CLR 423 at 432.

43 See their Honours' citations (1993) 177 CLR 423 at 431 from *McLean v Tedman* (1984) 155 CLR 306 at 311-312 and *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 519, 520, 536-537, both cases of conduct exposing the plaintiff to a risk of injury.

44 (1993) 177 CLR 423 at 431.

45 (1987) 162 CLR 479 at 488.

13.

the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk."⁴⁶

Risks which are foreseeable include risks arising from an entrant's failure to exercise reasonable care for his or her own safety⁴⁷.

- 22 In my dissent in *Nagle*, I preferred the test propounded by Dixon J in *Aiken v Kingborough Corporation*. I said⁴⁸:

"The test expressed by Dixon J in *Aiken v Kingborough Corporation* focuses attention on the nature of the danger itself assessed prior to the event according to the obviousness of the danger and the care ordinarily exercised by the public. In determining in a particular case the measure of the duty of a public authority having control and management of a large area of land used for public enjoyment, the better assessment is likely to be made by reference to the test expressed by Dixon J."

Having considered further the statutory basis of the duty of care⁴⁹ owed by a public authority having the management and control of premises, I would adhere to that test not as a matter of mere preference but as a matter of principle. A public authority empowered to manage and control premises has a discretion as to the steps it will take to protect the person of those entering the premises and that discretion is governed relevantly by the purpose for which the power is conferred. If the discretion be exercised on the footing that entrants upon the premises will exercise reasonable care for their own safety, it cannot be said that there is some additional duty of care to be discharged. There is no statutory duty to take positive action to protect entrants against risks of their own making which the authority has done nothing to create or increase, even if the possibility of an entrant's careless conduct be foreseeable. If the public authority's statutory duty does not extend beyond what *Aiken v Kingborough Corporation* defined it to be, whence can a more onerous duty be derived in the absence of some conduct on the part of the public authority creating or increasing a risk to an entrant or some anterior relationship between the authority and a particular entrant?

- 23 The appellant, relying on *Nagle v Rottnest Island Authority*, submits that all that is necessary to impose a duty on the part of the Commission to take positive

46 *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-663 per Deane J.

47 *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Ferraloro v Preston Timber Pty Ltd* (1982) 56 ALJR 872; 42 ALR 627.

48 (1993) 177 CLR 423 at 440.

49 See further my judgment in *Pyrenees Shire Council v Day* [1998] HCA 3.

steps to prevent a member of the public falling over the edge of the cliff and suffering serious injury is the foreseeability of the risk that such an event could happen given the youthfulness and exuberance of many of the visitors to the area and the possibility of their consumption of alcohol. If this were the correct approach, the statutory powers conferred on the Commission would expose it to liability for failing to take reasonable care to protect any member of the public against that person's failure to avoid the manifest risk of going over the cliff. As McHugh J concludes, that standard of care entitles the appellant to succeed. But it is a standard much higher than the legislature can be taken to have intended the Commission to discharge.

- 24 The Commission invites this Court to overrule *Nagle* in so far as it imposes a duty of care measured by what a reasonable person would do in response to a foreseeable risk including the risk of an entrant failing to take reasonable care for his or her own safety⁵⁰. In the Court of Appeal of New South Wales, in a case of occupier's liability⁵¹, Mahoney JA observed that "the law of negligence is not functioning well in this area". He added:

"The difficulties which it imposes on, for example, local authorities in deciding whether facilities are to be provided for swimming, playgrounds or the like, advice is to be given to the public, and other facilities are to be available and what precautions must be taken are substantial. The Court is, I think, entitled to know that difficulties exist in obtaining insurance against such liabilities and that those difficulties are influenced by the state of the law. It is, in my respectful opinion, proper that the law in this regard be the subject of review."

It has been said judicially⁵² that *Nagle* can effectively place a public authority "in the position of an insurer" and create "a surprising result". If *Nagle* stands, public authorities will be required to erect structures in reserves, parks and other

50 (1993) 177 CLR 423 at 430-431.

51 *Bardsley v Batemans Bay Bowling Club Limited* unreported, New South Wales Court of Appeal, 25 November 1996 at 7.

52 *Inverell Municipal Council v Pennington* [1993] Aust Torts Reports 81-234 at 62,404, 62,410. See also the comment of Pincus JA on *Inverell* in *Jaenke v Hinton* [1995] Aust Torts Reports 81,368 at 62,807-62,808. *Nagle* has also attracted criticism from some legal commentators: Allen, "Liability of a public authority as occupier: *Romeo v Conservation Commission of the Northern Territory*", (1997) 5 *Torts Law Journal* 7; Berns, "Judicial Paternalism and the High Court", (1993) 18(5) *Alternative Law Journal* 202; Gleeson, "High Court Presents Problems for Park Managers", (1993) 10(4) *Environmental and Planning Law Journal* 225.

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areas of natural beauty to the detriment of the environment and the enjoyment thereof by the general public in order to safeguard or to attempt to safeguard the few careless visitors against the consequences of their own carelessness. In my respectful opinion, the practical operation of *Nagle* follows and illustrates the error of principle that informs the reasons for judgment. No vested right would be affected by overruling *Nagle*. I would accede to the respondent's request that it be overruled.

25 Applying the test which Dixon J expressed in *Aiken v Kingborough Corporation*, I would acquit the Commission of common law negligence and of breach of statutory duty. To those who exercised reasonable care for their own safety, the cliff and its dangers were obvious. The Commission was under no duty to fence, light, erect warnings or take any other step to protect the public from those obvious dangers.

26 I would dismiss the appeal.

27 TOOHEY AND GUMMOW JJ. The resolution of the issues raised by this appeal from the decision of the Court of Appeal of the Northern Territory⁵³ turns very much on an appreciation of the location and circumstances in which the appellant sustained her injuries.

28 On 24 April 1987 the appellant, who was then nearly 16 years of age, was badly injured when she fell from the top of the Dripstone Cliffs onto the Casuarina Beach in Darwin. The distance of her fall was 6½ metres or thereabouts. Her fall occurred some time after 11.45 pm.

The Reserve

29 The Dripstone Cliffs are part of the Casuarina Coastal Reserve ("the Reserve"), an area of 1,361 hectares "which includes some 8 kms of coastline and adjacent land and offshore areas extending from Rapid Creek to just beyond Lee Point, within municipality of the City of Darwin, to the north of the suburbs of Brinkin, Tiwi and Rapid Creek"⁵⁴. The *Conservation Commission Act* 1980 (NT) established the respondent⁵⁵. One of its functions is to "establish and manage parks, reserves and sanctuaries": s 19(b). It is common ground that the Reserve falls within par (b) and that the respondent is responsible for its management.

30 The Reserve runs roughly north-east and south-west. There is a small area of intensive use at Lee Point, at the northern end of the Reserve. At about its centre is a Free Beach Zone. Further south is the Darwin Surf Life Saving Club, then Dripstone Park which has facilities such as barbecues, showers and toilets, car parking facilities, lighting, play equipment, shade and grassed areas. Further south again and fairly close to the end of the Reserve are the Dripstone Cliffs. The southern end of the Reserve is at Rapid Creek. The area from the Free Beach Zone to Rapid Creek is also an area of intensive use.

31 As found by Angel J, the trial judge⁵⁶:

"The only facility provided at the top of the Dripstone Cliffs was a car park, the perimeter of which consisted of low post and log fencing erected by the

53 *Romeo v Conservation Commission of NT* (1995) 123 FLR 84.

54 Casuarina Coastal Reserve Management Plan 1.1.

55 s 9. References are to the Act as it stood at the relevant time.

56 *Romeo v Conservation Commission of NT* (1994) 123 FLR 71 at 72; 104 NTR 1 at 2.

[respondent]. The grass at the top of the cliffs was cut and maintained by the [respondent] and plants there were irrigated by the [respondent]."

- 32 Angel J described the Reserve as an area of natural beauty and the Dripstone Cliffs and Casuarina Beach as a popular recreation area to which members of the public were attracted for recreational purposes. He added⁵⁷:

"At that time, most visiting members of the public used the cliff-top area of the reserve in the early evening to view tropical sunsets."

The accident

- 33 At the time of her accident the appellant had part-time work from 5.00 pm until 9.00 pm. On the day in question she and her friend, Jacinta Hay, had arranged to meet other young people at Dripstone Cliffs for a beach party. The appellant said that after leaving work she bought a small bottle of Bundaberg Rum and six Island Coolers. There was evidence as to what she drank. It is unnecessary to detail this evidence. The trial judge's conclusion, which was not challenged on appeal, was in these terms⁵⁸:

"I am of the view that the [appellant] was adversely affected by alcohol. However, it is not possible to say with any accuracy to what degree her behaviour, concentration and judgment were obviously impaired."

- 34 On arriving at the Reserve the appellant went with Jacinta Hay and another friend, Kelly Docherty, to Dripstone Park near the barbecue area. They arrived there at about 10.15 pm. They reached the car park at Dripstone Cliffs between 10.45 pm and 11.00 pm. They spent some time talking with friends. The appellant and Jacinta were seen talking to each other on the sea side of the log fence and to the east of a Sea Hibiscus which appears in photographs tendered in evidence. The evidence placed them there until about 11.45 pm.

- 35 Neither the appellant nor Jacinta has any recollection of what happened thereafter until they found themselves on the beach at the base of the cliff. Ambulance officers (alerted, it is not clear by whom) arrived on the scene at 2.07 am the next morning. The two girls were injured, the appellant seriously. Clearly, they fell over the cliff onto the beach but there is no direct evidence as to how this happened.

⁵⁷ (1994) 123 FLR 71 at 72; 104 NTR 1 at 2.

⁵⁸ (1994) 123 FLR 71 at 75; 104 NTR 1 at 5.

- 36 There was a conflict of evidence as to the position the appellant was found on the beach and as to the position on the cliff top from which she fell. The position of the latter is of some importance because it is the appellant's case that at the point where she fell there is a gap in the vegetation which borders the cliff. After a detailed examination of the evidence, Angel J said⁵⁹:

"I find that the [appellant's] position was ... at a point on the sand directly below the gap in the vegetation on the edge of the cliff face".

That finding was not seriously challenged and this Court must proceed accordingly. It should also be noted that a number of witnesses described the night of 24 April as a clear, dark night.

- 37 As mentioned earlier, there was no direct evidence as to how the appellant fell from the cliff. However, Angel J reached certain conclusions. He found that the appellant and Jacinta "wandered off from the group of friends who were congregating on the sea-side of the log fence ... approximately three metres from the cliff's nearest edge"⁶⁰. His Honour continued:

"It is apparent and I infer that the [appellant] and Jacinta did not realise the location of the cliff edge and walked off and over the cliff edge at the point where there is a gap in the vegetation, some distance from the log fence. Leading to that gap was an area of light coloured bare earth naturally created by surface water running off the cliff. ... In the gloom it had the deceptive appearance to the girls of a footpath leading to the gap in the vegetation. It did not have that appearance in daylight. Nor would it have so appeared to a sober alert person on the night in question. ... I infer that the [appellant] and Jacinta were deceived to follow that path to and over the cliff edge. They literally walked over the edge with their heads in the air. They did not slip or at any time apprehend the presence of the cliff edge prior to their fall."

- 38 The implications of the term "deceived" are not clear. In the passage just quoted, Angel J spoke of "the deceptive appearance to the girls of a footpath leading to the gap in the vegetation". This must be a matter of inference; neither the appellant nor Jacinta said that she was deceived. At the same time he said that the appearance was not deceptive to anyone in daylight or to a sober alert person on the night in question. We infer therefore that by "deceived" his Honour meant that, because of their condition, the appellant and Jacinta did not appreciate what

59 (1994) 123 FLR 71 at 78; 104 NTR 1 at 7.

60 (1994) 123 FLR 71 at 78; 104 NTR 1 at 7.

was apparent to others, namely, that there was not a path leading to the edge of the cliff. In that sense, they deceived themselves.

- 39 At the point where the appellant fell, the top of the cliff is unfenced. Indeed there was no evidence of fencing anywhere along the cliff face in the Reserve. There was no suggestion of anyone else having fallen over the edge of the cliff in the Reserve or of any complaint about the safety of the area prior to the accident⁶¹. On 28 June 1993, some six years after the appellant's accident, the Director of the respondent wrote to the Sacred Sites Authority with a list of proposed projects in the Reserve. One was: "Installation of safety fence along cliff face in the vicinity of the Dripstone cliff section of the ... Reserve." There was no evidence that such a fence was ever installed. Had a fence been installed at that time, its relevance would have been only to the practicability of a precaution that might have been taken⁶². What is described in Angel J's judgment as a "log fence" is simply a low barrier around the car park to contain vehicles in order to prevent erosion.

Rejection of the claim

- 40 The appellant's claim against the respondent was formulated on the basis that the respondent was the occupier of the Reserve and further that the respondent was responsible for its management, regulation and control. As Barwick CJ observed in *Schiller v Mulgrave Shire Council*⁶³, the source of liability in a case such as this is "the statutory power and duty of care, control and management and not merely the occupation of land". Essentially, the claim was one in negligence, particularised in various ways. The particulars of negligence included failure to install adequate lighting, to erect warning signs and to erect a fence or other barrier at the edge of the cliff.
- 41 Angel J rejected the appellant's claim for several reasons, principally because the cliffs and their physical circumstances were there for all to see in daylight, adding⁶⁴:

"Their dangers were inherent and self-evident. ... The [appellant] knew of the presence of the cliffs from her general knowledge of the area and her

61 Although the fact that an accident had not happened before cannot, of itself, be determinative of the claim: *Fryer v Salford Corp'n* [1937] 1 All ER 617 at 620.

62 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 223-224; *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201.

63 (1972) 129 CLR 116 at 120.

64 (1994) 123 FLR 71 at 80; 104 NTR 1 at 9.

observations and experience prior to the night in question when going to and from Casuarina beach via the cliff area."

- 42 The appellant's appeal to the Court of Appeal was rejected by all judges. Martin CJ and Mildren J delivered separate reasons. Thomas J agreed with the Chief Justice. Martin CJ accepted the approach taken by Angel J but went a step further by holding⁶⁵:

"[I]t was not reasonably foreseeable that a person in the position of the [appellant], affected by alcohol or not, would venture onto a place, whether it looked like a path or not, which that person knew, and could see, was in the immediate vicinity of the top of the cliffs. The risk of a person in the appellant's position doing such a thing was far fetched or fanciful."

However, although Mildren J dismissed the appeal, he did point out in relation to Angel J⁶⁶:

" His Honour found that the risk of someone falling off the cliff and suffering injury was reasonably foreseeable. That finding is not challenged. That being so the only question is whether the appellant had established that the respondent was in breach of its duty of care."

That statement puts the matter in its correct perspective. Mildren J held that the respondent was not in breach of its duty of care, largely as we read his judgment, because the risk of someone falling over the cliff where the appellant fell was no greater than at any other point so that, on the appellant's argument, it would have been necessary to provide a barrier along the whole of the cliffs, some two kilometres in length. And furthermore, according to his Honour, a warning sign would probably not have deterred the appellant from proceeding as she did.

Causation

- 43 There is one aspect of Angel J's reasons that calls for comment immediately, if only to bring it into question as a legitimate foundation for rejecting the appellant's claim.
- 44 His Honour held, as a further reason why the appellant should not succeed in her claim, that she had failed to prove that the alleged breaches of duty on the part of the respondent were "causative" of her injuries. This was because the appellant

65 (1995) 123 FLR 84 at 99.

66 (1995) 123 FLR 84 at 100.

knew of the existence and nature of the cliff edge; she was aware of the danger of walking on the cliff top in the darkness, particularly if affected by alcohol; and provision of fencing, while acting as a barrier, would not have prevented her progressing beyond it; "the [appellant] had in fact passed beyond a barrier fence to be in the area she was in immediately prior to her fall"⁶⁷. With respect, this progression of propositions culminates in a non sequitur. To begin with, the appellant had not passed beyond a barrier fence in any relevant sense. The "log fence" was not intended to do any more than keep vehicles back so that they would not cause damage to the environment. There is simply no basis for concluding that the appellant would have climbed over or through a fence clearly intended to keep persons back from the edge of the cliff. On the other hand, Angel J was justified in concluding that the presence of warning signs was unlikely to have prevented the accident. The appellant knew the general area well and the conclusion is inevitable that nevertheless she did proceed to the edge of the cliff.

- 45 None of this is to say that the respondent was negligent in failing to fence off the cliff top or indeed in failing to light the area or provide warning signs. There are other considerations that bear on this issue, considerations to be discussed later in these reasons. But it is to say that if the appellant established a breach of the duty of care cast upon the respondent, by reason of the failure to provide a fence a finding of causation was almost inevitable. If negligence lay in the failure to provide a warning sign, causation would remain a live issue.

The duty of care

- 46 The appellant relied heavily upon the decision of this Court in *Nagle v Rottnest Island Authority*⁶⁸ in which a statutory authority was held liable to a person who was injured when diving into the water at a reserve managed by the Authority. The respondent argued that the decision was distinguishable from the present case. In the event that this submission was not accepted, the respondent sought leave to challenge the correctness of the decision⁶⁹.
- 47 The appellant relied particularly upon the following passage from the judgment of the majority⁷⁰:

67 (1994) 123 FLR 71 at 83; 104 NTR 1 at 12.

68 (1993) 177 CLR 423.

69 See *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316; *Lange v ABC* (1997) 71 ALJR 818 at 822-823; 145 ALR 96 at 101-102.

70 (1993) 177 CLR 423 at 429-430.

" The trial judge was plainly right in concluding 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. As stated earlier, the Board was the occupier of the Reserve and was under a statutory duty to manage and control it for the benefit of the public. Moreover, the Board promoted the Basin as a venue for swimming and encouraged the public to use it for that and other purposes by installing, maintaining and servicing various facilities on that part of the Reserve which was immediately adjacent to the Basin. In these circumstances, it is beyond question that the Board brought itself into a relationship of proximity with those visitors who lawfully visited the Island and resorted to the Basin for the purpose of swimming with respect to any foreseeable risks of injury to which they might be exposed."

48 Although, in argument, the appellant relied upon *Nagle*, the statement of claim is expressed to some extent in the earlier language of occupier's liability. There is a pleading that the cliff was "a concealed danger known to the Defendant" and "an unusual danger of which the Defendant knew, or ought to have known"⁷¹. Nevertheless, Angel J correctly identified the source of the duty of care upon the respondent as its control of the Reserve. His Honour distinguished *Nagle* as involving the failure to warn of a hidden danger when a warning sign would have been an effective deterrent to the plaintiff diving where he did.

49 Although Angel J referred to the more recent authorities which apply the ordinary principles of negligence to an occupier of land, in particular *Australian Safeway Stores Pty Ltd v Zaluzna*⁷², his Honour was clearly influenced by the statement of Dixon J in *Aiken v Kingborough Corporation*⁷³ that:

"the public authority in control of ... premises is under an obligation to take reasonable care to prevent injury to such a person through 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".

However, that statement must be read in light of the majority judgment in *Nagle* while that decision stands. As will appear, in light of the majority judgment, the appeal must fail.

71 See Allen, "Liability of a public authority as occupier: *Romeo v Conservation Commission of the Northern Territory*", (1997) 5 *Torts Law Journal* 7 at 7-8.

72 (1987) 162 CLR 479.

73 (1939) 62 CLR 179 at 210.

Breach of duty

50 Whether there was a breach of the duty of care owed by the respondent to those who came onto the Reserve depended on "the action that a reasonable person in the respondent's situation would have taken to guard against the foreseeable risk of injury which existed"⁷⁴. An assessment of that action must be on the footing that the respondent had to take into account "the possibility that one or more of the persons to whom the duty is owed might fail to take proper care for his or her own safety"⁷⁵. But this does not mean that the respondent was obliged to ensure, by whatever means, that those coming onto the Reserve would not suffer injury by ignoring an obvious danger. This is particularly so in the case of the cliff which did present an obvious danger.

51 Because the appellant was aware of the danger presented by the cliff and since she failed to exercise ordinary care for her own safety, Angel J held that the respondent was not in breach of its duty of care. This approach directs attention to the degree of probability of the occurrence of an accident. There is however some tension between this approach and decisions of this Court which place this factor on the scales, to be weighed against the seriousness of the foreseeable risk and the expense, difficulty and inconvenience of precautions which could be taken⁷⁶.

52 In *Nagle* Brennan J (who was in dissent) saw a reconciliation between the *Zaluzna* approach and that taken by Dixon J in *Aiken*. He expressed it in this way⁷⁷:

"The flexibility available in determining the response of the 'reasonable man' to the foreseeable risk under the *Zaluzna* approach means that the measure of duty resting on the public authority need not be different from that ascertained by reference to the test advanced by Dixon J in *Aiken v Kingborough Corporation*. But, in practice and with the wisdom of hindsight, a concentration on the gravity of a particular plaintiff's injury, the foreseeability of such an injury occurring (albeit contributed to by the plaintiff's own carelessness) and the modesty of the cost of fencing off or warning against the danger causing the injury would tend to impose on the public authority a liability which might not have been imposed if attention had been focused on the duty owed by the public authority to the public at

74 *Nagle* (1993) 177 CLR 423 at 431.

75 *Nagle* (1993) 177 CLR 423 at 431.

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

77 (1993) 177 CLR 423 at 440.

large. The test expressed by Dixon J in *Aiken v Kingborough Corporation* focuses attention on the nature of the danger itself assessed prior to the event according to the obviousness of the danger and the care ordinarily exercised by the public. In determining in a particular case the measure of the duty of a public authority having control and management of a large area of land used for public enjoyment, the better assessment is likely to be made by reference to the test expressed by Dixon J."

As can be seen from the passage quoted, Brennan J placed emphasis on the nature of the danger itself, assessed before the event according to its obviousness and the care ordinarily exercised by the public. This is not the test of "concealed danger" pleaded by the appellant or referred to in some earlier decisions. It is simply that the care to be expected of members of the public is related to the obviousness of the danger.

- 53 The point from which the appellant fell was not a viewing point except in the sense that visitors used the car park in order to watch sunsets from their cars. It was an obvious part of the cliff, even allowing for the vegetation in the area. And the evidence does not support a conclusion that there was an appearance of a path leading to the edge. If reasonable foreseeability is isolated from any other consideration, there may have been a "risk" of someone falling over the edge of the cliff in the sense used by Mason J in *Wyong Shire Council v Shirt*⁷⁸:

"A risk which is not far-fetched or fanciful is real and therefore foreseeable."

But in the present case the risk existed only in the case of someone ignoring the obvious.

- 54 In putting the matter in that way, there is a danger of drawing in the question of contributory negligence of the plaintiff to what is a consideration of the duty of care on the defendant. For that reason we think it is preferable to approach the matter on the footing that there was a duty of care on the respondent to take any steps that were reasonable to prevent the foreseeable risk becoming an actuality. But reasonable steps did not extend to fencing off or illuminating the edge of a cliff which was about two kilometres in length. The relationship of the car park to the rest of the Reserve did not call for special precautions at the cliff face nearby. A sign might serve as a warning to someone unfamiliar with the area. But to someone who was familiar, as the appellant was, a warning sign would serve no purpose. Angel J held⁷⁹:

⁷⁸ (1980) 146 CLR 40 at 48.

⁷⁹ (1994) 123 FLR 71 at 83; 104 NTR 1 at 12.

" If there had been a sign or signs, or illuminated signs, near the car park fence ... on my view of the evidence, it can not be said that the [appellant] would probably not have proceeded as she did beyond the car park fence, on to the cliff top and over the cliff edge".

As Mildren J observed⁸⁰:

"There was no evidence upon which a challenge to this finding could succeed."

55 In that case, for the reasons given earlier, any negligence on the part of the respondent in this respect would not have caused the appellant's injuries. In that regard the case stands in contrast to *Nagle* and also to *Shirt* where the sign was ambiguous.

56 The respondent was under a general duty of care to take reasonable steps to prevent persons entering the Reserve from suffering injury. But the taking of such steps did not extend to fencing off an area of natural beauty where the presence of a cliff was obvious. In other words, there was no breach of the respondent's duty of care in failing to erect a barrier at the cliff edge.

57 While we would not support, in all respects, the approach taken by the trial judge and the Court of Appeal, their conclusion that the appellant had failed to establish negligence against the respondent was correct.

58 For this reason it is unnecessary to deal with the respondent's submissions on the distinction between policy and operational factors in relation to statutory bodies and what was said to be the "non-justiciability" of policy decisions made by such bodies. These matters do not call for consideration.

59 We would dismiss the appeal.

80 (1995) 123 FLR 84 at 108.

60 GAUDRON J. The facts, the issues and the relevant legislative provisions pursuant to which the respondent Commission ("the Commission") occupied and managed the public reserve ("the reserve") on which Nadia Romeo ("the appellant") sustained her injuries are set out in other judgments. I shall repeat them only to the extent necessary to make clear my reasons for concluding that her appeal should succeed.

61 The central issue in this case is the content of the duty of care owed by the Commission as a body having statutory power to control and manage the reserve. However, that issue is illuminated by a consideration of the source of the duty owed by public authorities to members of the public who enter upon public land. That source was identified by Barwick CJ in *Schiller v Mulgrave Shire Council*⁸¹ as "the statutory power and duty of care, control and management and not merely the occupation of land."

62 In *Schiller*, Barwick CJ was concerned to identify a broad basis for liability and his view that a public authority's duty of care arises out of its statutory powers and duties seemingly led him "to think that the obligation of the person in authority having the care and control of a place to which members of the public resort as of common right is more extensive than the duty owed by an occupier of land to a person satisfying the description of an invitee."⁸² Since *Schiller*, however, the old rules with respect to occupier's liability have been subsumed in the law of negligence⁸³. And since then, also, attempts have been made to anchor the law of negligence in the notion of "proximity"⁸⁴.

81 (1972) 129 CLR 116 at 120.

82 (1972) 129 CLR 116 at 120.

83 See *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 487-488 per Mason, Wilson, Deane and Dawson JJ, adopting the statement of Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-663; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 429-430 per Mason CJ, Deane, Dawson and Gaudron JJ.

84 See, for example, *Jaensch v Coffey* (1984) 155 CLR 549 at 583-587; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 441, 495-498; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 30, 51-53; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 355; *Cook v Cook* (1986) 162 CLR 376 at 381-382; *Hawkins v Clayton* (1988) 164 CLR 539 at 545, 576; *Gala v Preston* (1991) 172 CLR 243 at 252-253; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 542-544; *Bryan v Maloney* (1995) 182 CLR 609 at 617-619, 656.

63 The notion of "proximity" is not without its difficulties⁸⁵. However, it is a useful term indicating that a duty of care depends on some definite relationship, some assumption of responsibility or some significant feature of the position of one person in relation to another, and not simply the foreseeability of injury to that person⁸⁶. In my view, the mere existence of statutory powers and duties with respect to the care, control and management of public land is not, of itself, a significant feature of the position of a public authority in relation to those members of the public who enter upon that land.

64 To treat the existence of statutory powers and duties as a significant feature giving rise to a duty of care on the part of public authorities would, in effect, be tantamount to imposing a duty of care to take reasonable steps to guard against all foreseeable risks. At least that is so unless public authorities are isolated from the general law of negligence or their duty is differentiated in some way from the general duty of care. The Commission invited the Court to take the latter course in this case, arguing that the duty should be as stated by Dixon J in *Aiken v Kingborough Corporation*⁸⁷, namely, a duty "to take reasonable care to prevent injury ... through dangers ... which are not apparent and are not to be avoided by the exercise of ordinary care."

65 If the statutory powers and duties of public authorities were to be treated as the source of the duty of care owed by them to members of the public who enter upon land under their control, it would, I think, be necessary to consider whether the law of negligence could properly be applied to them. However, a narrower approach was taken to the source of their duty in *Nagle v Rottnest Island Authority*⁸⁸. It was said by the majority in that case that⁸⁹:

85 See, for example, *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 367-368 per Brennan J; *Hawkins v Clayton* (1988) 164 CLR 539 at 555-556 per Brennan J; *Gala v Preston* (1991) 172 CLR 243 at 259-263 per Brennan J, 276-277 per Dawson J; *Bryan v Maloney* (1995) 182 CLR 609 at 652-655 per Brennan J; *Hill v Van Erp* (1997) 188 CLR 159 at 176-178 per Dawson J, 210 per McHugh J, 237-239 per Gummow J.

86 See *Gala v Preston* (1991) 172 CLR 243 at 276 per Dawson J; *Hill v Van Erp* (1997) 188 CLR 159 at 177-178 per Dawson J, 189 per Toohey J.

87 (1939) 62 CLR 179 at 210. See also the dissenting judgment of Brennan J in *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 438-440.

88 (1993) 177 CLR 423.

89 (1993) 177 CLR 423 at 430 per Mason CJ, Deane, Dawson and Gaudron JJ.

"the basis for holding that the Board came under a duty of care may be simply stated: the Board, by encouraging the public to swim in the Basin, brought itself under a duty of care to those members of the public who swam in the Basin."

66 It follows from *Nagle* that the source of the duty of care of a public authority charged with the control and management of public land is more narrowly based than was indicated by Barwick CJ in *Schiller*. In any case in which a duty arises, its source (ie, the special feature of the public authority's position in relation to those who enter upon public land) is, in my view, the manner in which it has exercised its statutory powers or, if it has failed to exercise them, the circumstances in which that failure occurred. And in either case, the question whether there is some special feature of its position in relation to those who enter on the land in question can only be answered in the light of the purposes for which they enter on that land and the activities or uses which the authority encourages or allows on it.

67 Once a narrow view is taken of the source of the duty of care, there is no basis for thinking either that the position of public authorities charged with the control and management of public land is not appropriately subsumed in the general law of negligence or that their duty should be different from the general duty of care owed by one person to another with whom he or she is in a relationship of proximity. That is because the question whether there is something significant in the manner in which the relevant public authority has exercised its powers or in the circumstances in which it has failed to exercise them ensures that the position of public authorities is properly taken into account in determining their liability for injuries sustained on land which they control.

68 The particular part of the reserve from which the appellant fell is clifftop land which looks out to sea. The area is frequently visited for its scenic attractions, including for the viewing of tropical sunsets. So far as is presently relevant, the Commission exercised its powers in respect of the reserve by providing access to the area from which the appellant fell by means of a graded but untarred road and by constructing car parking facilities nearby.

69 The actions of the Commission in constructing the road and providing parking facilities were calculated to encourage people to visit the particular area from which the appellant fell. And it was foreseeable that at least some would leave their cars and walk towards the clifftop, perhaps to obtain a better view, perhaps, simply, to stretch their legs. And it was also foreseeable that not all would be astute to take care for their own safety. In that context, it seems to me unarguable that, having provided access and car parking facilities, there was a duty of care to provide fencing along the clifftop in the area near the car park, although not in areas not readily accessible from it. That duty was a duty to provide fencing of a kind that would prevent visitors from straying too near the clifftop, not a low

log fence as the trial judge appears to have had in mind in holding that a fence would not have made any difference in this case⁹⁰.

70 As the duty of care is, in my view, limited to the fencing of the clifftop in the vicinity of the car parking area, no question arises as to the reasonableness of that measure. More precisely, the Commission's argument as to the impracticability of fencing the entire clifftop is simply irrelevant. And as there was a duty to fence, the argument that the appellant was well acquainted with the area and aware of its terrain and dangers is irrelevant to the question whether there was a breach by the Commission of its duty of care. It is, however, relevant to the question of causation.

71 Unless the view be taken that the appellant was, in fact, intent on throwing herself over the cliff - and there is no evidence to support that view - it must be accepted that the Commission's failure to fence the clifftop was a cause of her injuries. However, it was not the only cause. On any view of the matter, the appellant did not exercise proper care for her own safety and, thus, although the Commission was in breach of its duty of care, she was guilty of contributory negligence. It follows that the Commission is liable in negligence but liability must be apportioned between it and the appellant.

72 As mine is a minority view, it is unnecessary to consider the appropriate course for the apportionment of liability. It is sufficient to say that, in my view, the appeal should be allowed.

90 *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71 at 83; 104 NTR 1 at 12.

73 McHUGH J. The question in this appeal is whether the appellant, Nadia Anne Romeo ("the plaintiff") can properly recover damages for negligence from the respondent ("the Commission") in circumstances where the plaintiff suffered injuries after falling off an unfenced cliff top in a recreational reserve area managed by the Commission. In my opinion, the appeal should be allowed and a verdict entered for the plaintiff.

74 The facts are sufficiently set out in other judgments. It is not disputed that the Commission owed the plaintiff a duty of care. For the reasons given by Kirby J, the content of that duty is to be determined in accordance with the principles laid down by this Court in *Nagle v Rottnest Island Authority*⁹¹. To the extent that *Aiken v Kingborough Corporation*⁹² advocates an approach contrary to that subsequently adopted in *Nagle*, the authority of *Aiken* did not survive the reform of occupier's liability which this Court brought about in *Australian Safeway Stores Pty Ltd v Zaluzna*⁹³. Because that is so, the judgment of Dixon J in *Aiken*⁹⁴ no longer authoritatively states the law regarding a public authority's liability in respect of a person who suffers injury on premises under its control.

75 Since *Zaluzna*, the duty of a public authority is to take reasonable care in all the circumstances of the case. Once a risk of injury to an entrant on the premises is reasonably foreseeable, the duty requires the authority to eliminate that risk if it is reasonable to do so 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 taking alleviating action and any other conflicting responsibilities which the [authority] may have."⁹⁵

76 The duty of care is owed to each entrant personally⁹⁶. It is not owed to entrants as a class. If, for example, the Commission knew that a blind person was about to enter the Reserve, the Commission's duty would be measured by reference to the particular circumstances of that person's disability. The Commission was not aware that the plaintiff was adversely affected by alcohol. But it was reasonably foreseeable that a person such as the plaintiff, affected by alcohol, might come to the Reserve and go beyond the limit of the car parking area - a limit

91 (1993) 177 CLR 423.

92 (1939) 62 CLR 179.

93 (1987) 162 CLR 479.

94 (1939) 62 CLR 179 at 210.

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

96 *Paris v Stepney Borough Council* [1951] AC 367 at 375, 380, 386, 390.

that was marked by the low posts and logs. That being so, the Commission was under a duty to exercise such care as would reasonably protect a person such as the plaintiff from the reasonably foreseeable consequences of her condition, including the possibility that she might by inadvertence or inattention expose herself to the risk of injury⁹⁷.

77 The Commission also knew or should have known that there was a gap in the vegetation on the cliff side of the parking area and that leading to that gap was "an area of light coloured bare earth"⁹⁸. It was reasonably foreseeable that at night an inattentive person, particularly one affected by alcohol, might mistake that area of light coloured bare earth for a well trodden path through the vegetation. If a person did so, a fall of 6.5 metres, if not inevitable, was at least a clearly foreseeable consequence of that inattention.

78 So what did reasonable care require the Commission to do to protect the plaintiff from the reasonably foreseeable risk that she might fall from the cliff top? First, the Commission had to consider the magnitude of the risk. In this case, there was a grave risk of injury. Death and quadriplegia were among the reasonably foreseeable consequences of a fall from the cliff top. Second, the Commission had to consider the probability of the risk occurring. In this case, the probability of a fall was very low. No previous accident had been reported. Nevertheless, the risk was not negligible or so remote that a reasonable person would reject it as unworthy of consideration. It was not like the risk that a person standing in the street would be injured by a cricket ball, hit from a pitch 100 yards away over a fence 17 feet higher than the pitch, as in *Bolton v Stone*⁹⁹. There as Lord Radcliffe said¹⁰⁰:

"a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences."

79 Here the chance of a person, intoxicated as the plaintiff was, inadvertently walking through the gap in the vegetation and over the cliff was a real one -

97 See *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 342; *Bus v Sydney County Council* (1989) 167 CLR 78 at 90; *Inverell Municipal Council v Pennington* (1993) 82 LGERA 268 at 272-273; [1993] Aust Torts Reports 81-234 at 62,402; *Northern Territory of Australia v Shoesmith* (1996) 5 NTLR 155 at 158.

98 *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71 at 78; 104 NTR 1 at 7.

99 [1951] AC 850.

100 [1951] AC 850 at 869.

sufficiently real to require consideration of what precautions should be taken to eliminate it. Indeed, once it is accepted that the risk of a fall was reasonably foreseeable, a reasonable person in the Commission's position was bound to consider what it "would do by way of response to the risk."¹⁰¹ As the Judicial Committee said in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd*¹⁰², a reasonable person would disregard a risk that was likely to happen even once in a very long period only "if he had some valid reason for doing so, eg, that it would involve considerable expense to eliminate the risk." Their Lordships went on to say¹⁰³:

"In their Lordships' judgment *Bolton v Stone*¹⁰⁴ did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it."

- 80 The risk in the present case was that a person, through inadvertence, might walk through the gap in the vegetation and step off the cliff. Given the likely consequences of a fall from the cliff top, no reasonable public authority, careful of the safety of the users of the Reserve, would think it right to neglect taking steps to eliminate that risk. Reasonable care required some sort of barrier to prevent that risk occurring if it could be done with little expense and without coming into conflict with other responsibilities which the Commission might have. A three strand wire fence is one precaution which would have eliminated the risk and which would have been relatively inexpensive to install. The learned trial judge believed that there was no certainty that a log fence closer to the cliff edge "would have avoided the plaintiff's mishap"¹⁰⁵. It is probable, however, that his Honour had in mind the same low log fence that was situated within three or four metres of the cliff face. A three strand wire fence, on the other hand, would almost certainly have prevented the plaintiff's fall.

101 *Shirt* (1980) 146 CLR 40 at 47.

102 [1967] 1 AC 617 at 642.

103 [1967] 1 AC 617 at 642-643.

104 [1951] AC 850.

105 *Romeo* (1994) 123 FLR 71 at 83; 104 NTR 1 at 12.

81 The Commission contended that, if it had to erect a wire fence at this spot, it would have to erect a fence along the rest of the coastline under its control (some eight kilometres). But that is not a necessary consequence of requiring the Commission to fence this particular area of the cliff face. The precautions which reasonable care requires always depend upon the particular nature of the risk and the likelihood of its occurrence.

82 Close to the cliff top from which the plaintiff fell was a car park. A great many people congregated in or near this car park from time to time, particularly at sunset. That they might stay on or come later at night was highly predictable, given the nature of the place, its views, the allurements of a graded but untarred road and carpark and a grass strip that was regularly cut by the Commission. As many as a thousand people were known to come to this area to watch the fireworks on "cracker night". Probably, only one other area along the coastline (where various facilities were provided) was likely to attract greater numbers at night. That being so, the carpark and its surrounds was an area where a fall from the cliff top was more likely to occur than at other parts of the coastline under the Commission's control. In addition, the Commission knew or should have known that there was no lighting in the area and that, at night, the gap in the vegetation and the area of light coloured bare earth might mislead an inattentive person to think that there was a path down the cliff face. Although it is unnecessary to decide the issue in the present case, the possibility of a fall from most other parts of the eight kilometres of coastline under the Commission's control might fairly be regarded as so unlikely that a reasonable person would disregard it. That could not be said of the possibility of a fall from the cliff top adjacent to the car park area.

83 In these circumstances, the Commission's failure to fence the cliff top at this point of the coastline was negligent. The appeal should be allowed and a verdict entered for the plaintiff. The matter should be remitted to the Supreme Court to determine the quantum of the plaintiff's damages and whether those damages should be reduced because of any contributory negligence on the plaintiff's part.

- 84 KIRBY J. This appeal comes by special leave from a decision of the Court of Appeal of the Supreme Court of the Northern Territory¹⁰⁶. That court unanimously confirmed the decision of the primary judge¹⁰⁷ to reject a claim for damages at common law framed in negligence and brought by a profoundly injured young woman.

The legal context: liability of public authorities

- 85 Once again this Court has been asked to declare the limits of the common law liability of a public authority¹⁰⁸. This is an area of the law which has been much criticised as unsatisfactory¹⁰⁹ and unsettled¹¹⁰, as lacking foreseeable and practical outcomes¹¹¹ and as operating ineffectively and inefficiently¹¹². Particular decisions, such as *Nagle v Rottnest Island Authority*¹¹³, have been said to have caused "a degree of consternation in public authorities and their insurers"¹¹⁴. It is claimed that they have occasioned great uncertainty amongst the officers of such

106 *Romeo v Conservation Commission of the Northern Territory* (1995) 123 FLR 84.

107 *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71; 104 NTR 1.

108 For earlier cases see for example *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 and *Pyrenees Shire Council v Day* [1998] HCA 3. Previous cases included *Aiken v Kingborough Corporation* (1939) 62 CLR 179; *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116 and *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

109 This was the description by Lord Keith in *Murphy v Brentwood District Council* [1990] 3 WLR 414 at 432; [1990] 2 All ER 908 at 923 of the attempt by Lord Wilberforce to simplify the principles in *Anns v Merton London Borough Council* [1978] AC 728 at 751-752.

110 This was the description used by Sopinka J in "The Liability Of Public Authorities: Drawing The Line" (1993) 1 *Tort Law Review* 123 at 149.

111 Masel, "Are Rulings on Proximity Reasonably Foreseeable?" (1993) 6 *Insurance Law Journal* 59 at 66-67.

112 *Bardsley v Batemans Bay Bowling Club Ltd* unreported, Court of Appeal of New South Wales, 25 November 1996 at 2-3 per Mahoney P.

113 (1993) 177 CLR 423.

114 Trindade, "The Liability Of Public Authorities To The Public In Negligence" (1994) 2 *Tort Law Review* 69.

authorities as to the steps which they can take to reduce their potential liability for injuries to visitors, brought about largely by the visitors' own conduct¹¹⁵. In response to what is described as "judicial paternalism"¹¹⁶ the Local Government Ministers of Australia and New Zealand have commissioned a report on policy options to provide statutory limitations on the liability of local authorities¹¹⁷.

- 86 In the United States of America and Canada, where similar problems have arisen, statutory solutions have also been considered and some have been introduced¹¹⁸. Courts¹¹⁹ and commentators¹²⁰ have urged a refinement of the applicable principles in order to produce results less disharmonious with the suggested expectations of the community as to where liability should attach and where it should be rejected¹²¹. Reflecting, in a general way, the diminishing functions accepted by modern government and the growing appreciation that government and its authorities cannot "make the world safe from all dangers"¹²², judicial decisions in negligence claims against public authorities both in this

115 Gleeson, "High Court Presents Problems For Park Managers" (1993) 10 *Environmental and Planning Law Journal* 225 at 225.

116 Berns, "Judicial paternalism and the High Court" (1993) 18 *Alternative Law Journal* 202.

117 Malcolm, "The Liability and Responsibility of Local Government Authorities: Trends and Tendencies" (1991) 7 *Australian Bar Review* 209 at 220-221.

118 *Just v British Columbia* (1989) 64 DLR (4th) 689 at 691-693 per Sopinka J.

119 See for example *Inverell Municipal Council v Pennington* (1993) 82 LGERA 268 at 279 Clarke JA.

120 Allen, "Liability of a public authority as occupier: *Romeo v Conservation Commission of Northern Territory*" (1997) 5 *Torts Law Journal* 7.

121 See also Masel, "Are Rulings on Proximity Reasonably Foreseeable?" (1993) 6 *Insurance Law Journal* 59 at 67.

122 Sopinka, "The Liability Of Public Authorities: Drawing The Line" (1993) *Tort Law Review* 123 at 151.

country¹²³ and elsewhere¹²⁴ have lately come to address more closely the limited resources available for the execution of the functions and responsibilities committed to them by statute¹²⁵.

- 87 This, then, is the context in which the present appeal comes before this Court. The Court's duty is to apply established authority to the problem presented. As will be shown, that authority provides answers to many of the complaints and criticisms which I have mentioned. However, in applying authority, the Court will inform itself about the debates concerning the legal principles and legal policy which have enlivened this area of discourse.

A young woman falls off a cliff in a nature reserve

- 88 The Conservation Commission of the Northern Territory ("the Commission") was established by the *Conservation Commission Act* 1980 (NT)¹²⁶ ("the Act"). Pursuant to the *Crown Lands Act* (NT), land about ten kilometres from the centre of Darwin, on and adjacent to Casuarina Beach, was established as a public reserve. It is known as the Casuarina Coastal Reserve ("the reserve"). Within it are found the Dripstone Cliffs. They rise about 6.5 metres above the beach presenting a promontory which looks out to sea.

- 89 It was accepted that, because of this vantage, the Dripstone Cliffs were visited by large numbers of people each year - the highest concentration being about a thousand to watch the fireworks on "cracker night". The Commission responded to this public use of the cliffs by constructing a graded but untarred road and a carpark adjacent to the cliffs, set back about three metres from the cliff drop. The limit of the carparking area was marked by low posts and logs. Whereas various facilities (barbeques, showers, toilets, car parking, artificial lighting, play equipment, shade and extensive grassed areas¹²⁷) were provided by the Commission in the Dripstone Park itself, no facilities were provided at the top of the hill abutting the cliffs, except for the carpark area, posts and logs. In particular

123 *Cekan v Haines* (1990) 21 NSWLR 296 at 306-307; cf *Phillis v Daly* (1988) 15 NSWLR 65 at 77; Dugdale, "Public Authority Liability: To What Standard?" (1994) 2 *Tort Law Review* 143; Fleming, "The Economic Factor in Negligence" (1992) 108 *Law Quarterly Review* 9.

124 See for example *Stovin v Wise* [1996] AC 923.

125 *Heyman's case* (1985) 157 CLR 424 at 456-457 per Mason J.

126 s 9(1). References to Act are as at the relevant date.

127 *Romeo v Conservation Commission of the Northern Territory* (1995) 123 FLR 84 at 85.

there was no lighting. There were no warning signs, fences or barriers. The conditions were "spartan"¹²⁸ indicating, in the opinion of one judge¹²⁹:

"an expectation of temporary and casual use of the area by the general public to observe its natural beauty, and an attempt by the respondent to protect and control the area from unwanted intrusion by motor vehicles, with some modest effort being made to improve its natural beauty by the enhancement of its visual amenity".

90 The vegetation near the point where the appellant fell was no more than a metre high. The grass was regularly cut by the Commission. The vegetation was not such as to obstruct the view of the beach and the open sea beyond. One of the main attractions of the site was the aspect which it afforded of tropical sunsets.

91 Ms Nadia Romeo (the appellant) was just short of her sixteenth birthday. She knew the reserve and the Dripstone Park, having visited the area on at least six occasions. She had played cricket on the beach below the Dripstone Cliffs. While she had previously visited the carpark she had never been to the edge of the cliffs near the point where she fell. Nonetheless, from her knowledge of the beach, she would have been aware of the existence and height of the cliffs. At 9 pm on 24 April 1987 she finished work and purchased a bottle of rum. Then, together with a friend, Ms Jacinta Hay, she proceeded to the Dripstone Park. With her friend, she consumed a quantity of rum mixed with cola. At about 11 pm, the two women went to the top of the cliffs. They sat on the line of logs, bordering on the carpark, talking to friends for about twenty minutes. They consumed some chicken brought by another friend. It was then, sometime after 11.45 pm, and possibly in the early hours of 25 April 1987, that the two girls walked from the logs on which they had been sitting and fell off the cliffs to the beach below. The appellant was rescued some time after 2 a.m. by ambulance and other officers. The rescue operation was observed by the appellant's older sister who, by coincidence, had arrived at the scene not knowing that the appellant was one of the victims of the fall. Neither the appellant nor Ms Hay had any recollection of the events immediately preceding their fall or how it had come about. Nor were there any direct witnesses. Ms Hay suffered a broken collarbone and punctured lung. However, the appellant was much more seriously injured. She suffered a burst fracture of the thoracic spine with complete paraplegia. Her damage and losses are very great.

128 *Romeo v Conservation Commission of the Northern Territory* (1995) 123 FLR 84 at 100.

129 *Romeo v Conservation Commission of the Northern Territory* (1995) 123 FLR 84 at 100 per Mildren J.

92 Because of the absence of direct evidence of where and how the girls had fallen off the cliff, the primary judge endeavoured to resolve the evidentiary contests by drawing inferences from the facts which he found. He resolved one contest by determining that the appellant "was adversely affected by alcohol"¹³⁰. He accepted the evidence of a medical expert that, at about 11.30 p.m., the effect of the alcohol consumed by the appellant would have been "intense". The appellant was not accustomed to consuming alcohol, having done so on only two previous occasions. The trial judge could not say with accuracy or precision "to what degree her behaviour, concentration and judgment" were affected. But they were "obviously impaired".

93 The judge resolved another evidentiary conflict concerning the point at the top of the cliffs from which the appellant had fallen. He did this with the advantage of conducting a view. He determined that it was at a point where there was a gap in the vegetation leading from the log perimeter of the carpark to the edge of the cliff. His conclusions were as follows¹³¹:

"It is apparent and I infer that the plaintiff and Jacinta did not realise the location of the cliff edge and walked off and over the cliff edge at the point where there is a gap in the vegetation, some distance from the log fence. Leading to that gap was an area of light coloured bare earth naturally created by surface water running off the cliff. ... In the gloom it had the deceptive appearance to the girls of a footpath leading to the gap in the vegetation. It did not have that appearance in daylight. Nor would it have so appeared to a sober alert person on the night in question. It did not appear so to [witnesses] on the night in question. I infer that the plaintiff and Jacinta were deceived to follow that path to and over the cliff edge. They literally walked over the edge with their heads in the air. They did not slip or at any time apprehend the presence of the cliff edge prior to their fall."

The primary judge rejects the claim

94 The appellant's amended statement of claim referred to the Commission's statutory obligations pursuant to which it had improved the reserve, by the installation of roads, car barriers and facilities for access. She pleaded [general] reliance upon the Commission and that, as a result of its statutory obligations and conduct, it owed her a duty of care. Whilst admitting the improvements, the Commission denied this and the other foundations for the suggested duty of care. It pleaded that the area of the cliffs had "obvious physical features naturally

130 (1994) 123 FLR 71 at 75; 104 NTR 1 at 5.

131 *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71 at 78; 104 NTR 1 at 7.

occurring in that environment", that the appellant was aware of the cliffs and voluntarily assumed the risk of injury. It further pleaded that she was affected by the consumption of alcohol and "by her own negligence" had contributed to her damage.

- 95 The primary judge accepted that the appellant had entered upon the reserve as of right. He applied for the ascertainment of the duty of care and the definition of its measure the principles stated by this Court in *Aiken v Kingborough Corporation*¹³². There, Dixon J had described the duty as follows¹³³:

"The 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 ... [T]he public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such a person through 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".

The primary judge may have been led into this application of *Aiken* by the way in which the appellant's statement of claim was pleaded. In addition to a general claim framed in negligence, the appellant's pleader averred¹³⁴ that the cliff from which she had fallen was a "concealed danger" known to the Commission and/or an "unusual danger" of which the Commission knew or ought to have known. Clearly enough, this pleading sought to pick up the statements in the old authorities concerning the duty of care owed by the occupier of land to licensees and invitees or their equivalents. Holdings of this Court, after *Aiken*, established that the duty owed by a public authority to a member of the public entering upon the authority's land as of right, was akin to that owed by the occupier of premises to an invitee and higher than that owed to a licensee¹³⁵.

- 96 After reference to *Heyman's* case¹³⁶, the primary judge concluded that the appellant's reliance on the Commission to make the area safe for public use was insufficient to give rise to a duty of care because any risk of injury to the appellant was reasonably foreseeable. It was reasonably foreseeable to the Commission; but it was equally foreseeable to her. Pursuing the classifications reflected in *Aiken*

132 (1939) 62 CLR 179.

133 (1939) 62 CLR 179 at 209-210.

134 Amended statement of claim par 6.

135 See *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116.

136 (1985) 157 CLR 424 at 463-464.

(and in *Schiller*), the judge decided that the clifftop was neither a concealed danger nor an unusual danger so that there was no breach of any duty of care owed to the appellant¹³⁷. Additionally, he accepted that one reason why there was no common law duty to take positive steps, as suggested by the appellant, was that such matters were within the policy decisions on "budgetary allocations and allocations of resources"¹³⁸ which were reposed by law in the Commission. Upon such matters, he inferred, courts would not second-guess the Commission's decisions.

97 Finally, the primary judge concluded that the appellant had failed to prove that the alleged breaches of duty had caused her injuries. On this issue he said¹³⁹:

"The plaintiff knew of the existence and nature of the cliff edge; she was aware of the danger of walking on the cliff top in the darkness, particularly if affected by the consumption of alcohol; and provision of fencing, while acting as a barrier, would not have prevented the plaintiff progressing beyond it; the plaintiff had in fact passed beyond a barrier fence to be in the area she was in immediately prior to her fall. That barrier fence was within 3 to 4 metres of the cliff ... If there had been a sign or signs, or illuminated signs, near the car park fence ... on my view of the evidence, it can not be said that the plaintiff would probably not have proceeded as she did beyond the car park fence, on to the cliff top and over the cliff edge ... There are sound policy reasons - questions of finance and allocation of resources apart - for thinking that a fence near the edge of the cliff would be wholly inappropriate."

98 Thus, for four reasons, the appellant's claim was dismissed¹⁴⁰.

The Court of Appeal rejects the appeal

99 In the Court of Appeal¹⁴¹, it appears to have been accepted that simply to apply the *Aiken* test for the ascertainment of the existence, and measure, of the Commission's duty of care would have been erroneous following the rejection by

137 (1994) 123 FLR 71 at 82; 104 NTR 1 at 11.

138 (1994) 123 FLR 71 at 82; 104 NTR 1 at 12.

139 (1994) 123 FLR 71 at 83; 104 NTR 1 at 12.

140 *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71 at 83; 104 NTR 1 at 12.

141 *Romeo v Conservation Commission of the Northern Territory* (1995) 123 FLR 84 at 87.

this Court of the old categories for the legal liability of occupiers of land¹⁴² and the acceptance that such liability was to be determined by the application of the general principles of the law of negligence¹⁴³. Certainly, the Court of Appeal addressed itself correctly to this development of the law and specifically to the application of that law in *Nagle*¹⁴⁴.

100 The Court of Appeal took into account the fact that the standard of care required of the reasonable person must take cognisance of the possibility of inadvertent and negligent conduct¹⁴⁵. Martin CJ (with whom Thomas J agreed), considered that the references by the primary judge to *Aiken* had not amounted to error, overlooking the later authority of this Court. They merely provided an example of a similar case which had been used to "demonstrate the application of the now generalised notion of negligence to those circumstances"¹⁴⁶. Nevertheless, by treating the appellant's lack of care for her own safety as a consideration vital to the ascertainment of whether or not a duty of care was established in this case, the Chief Justice, with respect, may himself have fallen into the error of using the old categories by which the liability of occupiers of land to entrants was formerly ascertained. As Samuels JA pointed out in *Phillis v Daly*¹⁴⁷, soon after *Australian Safeway Stores Pty Ltd v Zaluzna*¹⁴⁸ was decided, "[i]f judges persist in the verbal invocation of familiar but obsolete doctrine their adherence to new developments may be only colourable."

101 Nonetheless, all judges in the Court of Appeal appear to have accepted that a duty of care of some kind, owed by the Commission to the appellant, was established or could be assumed¹⁴⁹. This took their Honours to a consideration of

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

143 *Hackshaw v Shaw* (1984) 155 CLR 614 at 663 per Deane J.

144 (1993) 177 CLR 423.

145 *Nagle* (1993) 177 CLR 423 at 431 applying *McLean v Tedman* (1984) 155 CLR 306 at 311-312.

146 (1995) 123 FLR 84 at 87.

147 (1988) 15 NSWLR 65 at 68.

148 (1987) 162 CLR 479.

149 This may have been because it appears that the finding by the trial judge that a foreseeable risk of injury existed was unchallenged in the appeal.

whether the Commission had breached its duty by failing to respond to a foreseeable risk of injury as a reasonable person would have done¹⁵⁰.

- 102 Martin CJ referred briefly to the bases upon which the primary judge had found against the appellant, namely the scope of policy and discretionary decisions reserved to the Commission and the want of proof that any breach had caused the appellant's damage¹⁵¹. However, in light of his primary finding that no breach of any duty of care owed by the Commission to the appellant was established, the Chief Justice did not explore these questions further. Accordingly, this became the basis upon which the Court of Appeal dismissed the appeal. It held that the Commission's failure to provide precautions, most especially a fence or barrier, to guard against the inadvertent act which caused the appellant's injuries, was not established. In short, if there was a duty of care, breach had not been shown.

Arguments of the parties

- 103 In this Court, the appellant repeated the complaints against the approach and findings of the primary judge. Counsel for the appellant suggested that the errors of the Court of Appeal in failing to correct his erroneous application of the "narrow" *Aiken* test and in substituting conclusions on the facts which were contrary to those of the primary judge had led to an erroneous conclusion. The appellant argued that if only the primary judge and the Court of Appeal had applied the principles governing liability stated by the majority of this Court in *Nagle*, with the criterion of liability being no more than the "undemanding test"¹⁵² of foreseeability of the risk of injury, negligence on the part of the Commission would have been established. The cost of a preventive measure, such as the installation of a strand wire fence across the break in the vegetation would have been trivial. Such a barrier would have interrupted the appellant's inadvertence, even in her "affected" state. It would have been aesthetically tolerable. It was needed by reason of the large numbers of persons shown by the evidence who came annually to the vantage point provided by the cliffs. The Commission had facilitated and even encouraged such visits by the provision of a graded road and carpark. Having

150 Referring to *Wyang Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 and to *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 at 784; [156 ER 1047 at 1048] per Alderson B; cited by Brennan J in *Australian Safeways Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 490; see (1995) 123 FLR 84 at 93-95 per Martin CJ; at 100, 106-108 per Mildren J.

151 (1995) 123 FLR 84 at 99.

152 *Inverell Municipal Council v Pennington* (1993) 82 LGERA 268 at 277 per Clarke JA; *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641 per Glass JA adopted in *Shirt* (1980) 146 CLR 40 at 47.

43.

done this, it was obliged to provide a safety barrier. Its failure to do so gave rise to its liability to the appellant in negligence. So went the argument for the appellant.

104 Although it was prepared to concede that it owed a duty of care of an unspecified kind to persons entering upon the reserve, the Commission disputed that "in the circumstances" the measure of the duty extended to any obligation, to provide any of the precautions at the cliffs which at different times had been urged by the appellant (lighting, warning signs, a log fence or wire barrier). The Commission argued that there was no breach of any duty owed by it; that any breach had not been shown to be the cause of the appellant's unfortunate fall; and that its response to any foreseeable risk that existed to persons such as the appellant was a matter within its legitimate area of policy determination, not a matter upon which the courts could coerce the discharge of the Commission's statutory responsibilities and budgetary priorities.

Statutory provisions

105 The Act contains few provisions of relevance to the appellant's claim. It establishes the Commission¹⁵³. Detailed provisions are made for its operation and for the office of Director of Conservation¹⁵⁴. Amongst the functions of the Commission set out in s 19 are to:

- "(a) promote the conservation and protection of the natural environment of the Territory;
- (b) establish and manage parks, reserves and sanctuaries;
- ...
- (f) monitor and assist in the management of the impact of development on the environment".

By s 20 of the Act power is given to the Commission, subject to an irrelevant exception, to "do all things necessary or convenient to be done for or in connection with or incidental to the performance of its functions and the exercise of its powers". This is to include erecting "buildings and structures"¹⁵⁵ and to:

¹⁵³ s 9(1).

¹⁵⁴ s 4.

¹⁵⁵ s 20(2)(b).

"(e) occupy, use, manage and control any land or building owned or leased by the Territory ..."

It was not contested that the reserve was such land or that the Commission had the power, had it chosen to do so, to erect any of the several structures (lighting, warning signs, fences or wire barriers) which the appellant successively suggested might have been placed at the cliff face to impede or prevent her fall.

106 It was never argued that this was a case where the Commission was liable to the appellant for breach of statutory duty. No such claim was pleaded, still less proved. What was asserted was that the Commission, having the requisite statutory powers, was liable to the appellant at common law. It has long been clear that a body such as the Commission might be liable at common law for negligent failure to perform a statutory function¹⁵⁶. Various ways of establishing a duty of care to a person in the position of the appellant have been accepted. They include where the person has reasonably relied on the authority to perform the function committed to it by law and where otherwise it is proper to hold that a duty of care is established by considerations of proximity. In this case, a species of reliance (so-called "general reliance") was pleaded. General reliance has found some support in the cases¹⁵⁷. Lately, however, the notion has been criticised¹⁵⁸. In my opinion it is a fiction which serves only to complicate reasoning in cases such as this¹⁵⁹. For whatever reason, reliance did not predominate in the appellant's argument of her case. It can be ignored, safe in the knowledge that it would not have advanced her cause.

107 That leaves the claim based in general negligence. Under this head, the duty owed by a public authority such as the Commission can only amount to an elaboration of the responsibilities which the common law exacts of a body having the statutory powers and functions conferred on it by Parliament¹⁶⁰. What the common law does in effect, is to impose on the statutory body, as a legal person,

156 *Heyman* (1985) 157 CLR 424 at 463 per Mason J.

157 *Pyrenees Shire Council v Day* [1998] HCA 3 at 70-71 per Toohey J; *Heyman* (1985) 157 CLR 424 at 464 per Mason J; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 330-331 per McHugh JA.

158 *Stovin v Wise* [1996] AC 923 at 953-955 per Lord Hoffmann; *Capital and Counties v Hants CC* [1997] 3 WLR 331 at 342-343; [1997] 2 All ER 865 at 876-877.

159 *Pyrenees Shire Council v Day* [1998] HCA 3 at 230-232 per Kirby J; see also at 163-165 per Gummow J.

160 cf *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116 at 120 per Barwick CJ; *Nagle v Rottneest Island Authority* (1993) 177 CLR 423 at 437-438 per Brennan J.

the liability which it attaches to all other persons¹⁶¹. This does not contradict the purpose of Parliament, at least in the case of a body with statutory powers like those of the Commission. When Parliament has committed the management of reserves to the Commission and empowered it to erect structures in those reserves and to carry out work in the pursuit of its management and control of the land committed to its charge, it is scarcely a contradiction of such a legislative grant to require that the powers be exercised with reasonable care¹⁶².

Common ground

108 Despite the fierce arguments about the evidence in the courts below, most of the factual disputes had evaporated by the time the appeal reached this Court. There was no challenge to the finding that the appellant was affected by alcohol, or that she knew that the cliffs presented risks and that their dangers were obvious and such as could be avoided by the exercise of ordinary care. The appellant did not challenge the conclusion that a sign, even an illuminated one, would not have deterred her from walking over the cliff as she did. Nor did she contest the finding that a log fence, as at one time hypothesised, would have been impracticable or ineffective.

109 It was accepted that there had never previously been an accident similar to that which befell the appellant and that there was no evidence of any prior complaint about the lack of a fence before the appellant's fall. It was agreed that young people commonly went to the cliff area and that the perimeters of the reserve facing the sea extended about eight kilometres, some of it elevated. The appellant disclaimed the suggestion that she was seeking to impose on the Commission the standard of an insurer. She accepted that its response need be no more than that

161 See for example *Scott v Green & Sons* [1969] 1 WLR 301 at 304; [1969] 1 All ER 849 at 850 per Lord Denning MR "The statute does not *by itself* give rise to a civil action, but it forms the foundation on which the common law can build a cause of action" (emphasis in original).

162 The question of how a statutory power to act could give rise to a duty at common law where the authority had merely failed to confer protection rather than causing positive damage has been a matter of theoretical argument. In *Anns v Merton London Borough Council* [1978] AC 728 at 755 Lord Wilberforce suggested that, because the exercise of public law functions were subject to judicial review, the necessary premise for the proposition "if no duty to inspect, then no duty to take care in inspection" failed. However, Mason J in *Heyman's* case (1985) 157 CLR 424 at 465 found this explanation inadequate because mandamus will compel consideration of the discretion by the public authority "but that is all"; see also *Stovin v Wise* [1996] AC 923 at 933-934, 947-950.

which was appropriate and reasonable having regard to the foreseeable risk of injury to persons such as herself.

110 For the Commission there was no further challenge to the point at which the appellant had fallen, or to the fact that, in the gloom, a gap in the vegetation could have had the deceptive appearance of a path to a person in the appellant's state, although not to a sober or alert person or to someone moving about in the daylight. According to the "undemanding test", it was not contested by the Commission that the risk of someone falling off the cliff and suffering injury was reasonably foreseeable.

111 In these circumstances, the appellant urged this Court to correct the courts below by applying the principles expounded in *Nagle*. The Commission contended that, even if those principles were applied, there would be no liability to the appellant for the four reasons previously stated. Alternatively, if *Nagle* rendered the Commission liable, it asked for leave to have that decision reconsidered and re-expressed in a way less onerous to public authorities such as itself. Ideally, the Commission asked that *Nagle* be discarded in favour of a return to the principles expressed by the Court in *Aiken*, as favoured in *Nagle* by Brennan J's dissenting opinion¹⁶³.

112 The extent to which the factual disputes which loomed so large in the early stages of this litigation have now fallen away makes the task of this Court simpler. This is not a case where credibility, in the ordinary sense, played an important part in the critical findings of fact. Neither the appellant nor Ms Hay who fell with her, had any recollection of precisely what had occurred or how the fall had happened. In this sense, this Court is in much the same position as it found itself in *Schiller*¹⁶⁴. There Walsh J considered that the Court should conclude for itself what inferences should be drawn and what ultimate conclusions of fact might be reached upon the evidence so as, if possible, to dispose finally of the action¹⁶⁵. In doing this, the Court here - as in *Schiller* - has the benefit of the primary judge's resolution of the factual contests. It has the advantage of the somewhat different analysis of the facts provided by the Court of Appeal. I mean no disrespect to the courts below or to the parties, by declining the invitation to conduct a critical analysis of the judgments. With every respect to the contrary conclusion stated in the Court of

¹⁶³ (1993) 177 CLR 423 at 437-440; see also *Schiller v Mulgrave Shire Council* (1972) 129 CLR 116 at 124 per Walsh J.

¹⁶⁴ See (1972) 129 CLR 116 at 128-129.

¹⁶⁵ (1972) 129 CLR 116 at 129.

Appeal, it seems to me that the learned primary judge fell into error by applying the *Aiken* test.

113 Although the test in *Aiken* gained a measure of endorsement when it was reconsidered in *Schiller*¹⁶⁶, even there, in 1972, its acceptability as a sufficient and accurate statement of the liability of a public authority was called into question¹⁶⁷. However, once this Court had rejected the approach to the expression of the liability of occupiers of land found in the old classifications¹⁶⁸, and had replaced that approach with the more conceptual notions afforded by the general law of negligence, it was scarcely possible to excise, as a special case, the position of an entrant as of right onto land controlled by a public authority. The overturning of the old categories has been criticised. For all their defects, they were devised by practical judges in the hope of sorting out different but typical cases and offering outcomes which, it was hoped, would provide a measure of predictability¹⁶⁹. But once the old categories were rejected, their preservation for isolated cases such as the present would be completely anomalous. The logic of *Zaluzna* clearly required the approach taken by the majority in *Nagle*. No party asked this Court to reconsider the approach which the Court took in *Zaluzna*. In light of the other holdings by the Court, designed to simplify and conceptualise abandoned special categories of liability¹⁷⁰, any such application would have faced major obstacles of legal principle.

114 Once the approach required by *Zaluzna* is accepted, the appeal of *Aiken* must, as it seems to me, be rejected. It is a siren song which, if heeded, would create gross inconsistency in an area of the law already marked by "sticky questions" of analysis¹⁷¹. There should be no going back to *Aiken*. The application to reargue

166 Notably in *Schiller* (1972) 129 CLR 116 at 127 per Walsh J.

167 See (1972) 129 CLR at 137 per Gibbs J; see also 133 per Walsh J; cf 120 per Barwick CJ.

168 In *Australian Safeways Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; see also *Gala v Preston* (1991) 172 CLR 243 at 252-253.

169 *Phillis v Daly* (1988) 15 NSWLR 65 at 73 per Mahoney JA; cf Masel, "Are Rulings on Proximity Reasonably Foreseeable?" (1993) 6 *Insurance Law Journal* 59 at 66-67; Mullender, "Treading a more Uncertain Path: Negligence and the House of Lords" (1997) 5 *Tort Law Review* 180 at 183.

170 See for example *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 and *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

171 Sopinka, "The Liability Of Public Authorities: Drawing The Line" (1993) 1 *Tort Law Review* 123 at 149.

Nagle, in any case a recent decision of the Court reached by a large majority, should be rejected¹⁷².

Proper approach and issues

115 These proceedings therefore fall to be determined by the application of the tests accepted in *Nagle*. The way in which this Court approached the problem in *Nagle* provides a model for the way in which similar problems should be addressed in future cases where, as seems inevitable, claims by injured persons will be brought against local and other public authorities seeking damages in negligence. Unless particular issues are conceded, it is highly desirable that trial courts should approach such disputes by considering, in turn, the standard questions:

1. Is a duty of care established? (The duty of care issue).
2. If so, what is the measure or scope of that duty in the circumstances? (The scope of duty issue).
3. Has it been proved that the defendant is in breach of the duty so defined? (The breach issue).
4. If so, was the breach the cause of the plaintiff's damage? (The causation issue).
5. (Where relevant). Were the defaults alleged on the part of the public authority within the area of the authority's legitimate discretion on questions of policy and allocation of resources so that there was no duty of care owed to the plaintiff? Or was any suggested breach a matter left by law to the authority whose decision the courts would respect and uphold against the plaintiff's complaints? (The policy/operations issue).
6. (Where relevant). Has contributory negligence on the part of the plaintiff been proved and, if so, with what consequence? (The contributory negligence issue).

116 If the structure of the reasons below had examined these successive issues, some of the apparent confusion in the application of established authority might have been avoided.

¹⁷² In this it is assumed that leave is required by the Court's practice. In at least some cases, this has been a matter of controversy; see *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316.

Duty of care

117 In *Pyrenees Shire Council v Day*¹⁷³, I have expressed my preference for the conclusion that three considerations are involved in deciding whether a duty of care exists:

1. Whether it was reasonably foreseeable to the alleged wrong-doer that particular conduct or an omission on its part would be likely to cause harm to the person who has suffered damage or a person in the same position¹⁷⁴;
2. Whether there exists between the alleged wrong-doer and such person a relationship characterised by the law as one of "proximity" or "neighbourhood"¹⁷⁵; and
3. Whether it is fair, just and reasonable that the law should impose a duty of a given scope on the alleged wrong-doer for the benefit of such person¹⁷⁶.

118 If the test which the law required in this case was that stated by Deane J in *Hackshaw v Shaw*¹⁷⁷, adopted in *Zaluzna*¹⁷⁸ and applied by the majority in *Nagle*¹⁷⁹, it was a prerequisite of a duty of care that there had to be the necessary degree of proximity between the parties. The touchstone of the existence of

173 [1998] HCA 3 at 244 adopting *Caparo Plc v Dickman* [1990] 2 AC 605 at 617-618.

174 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488 applying *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-663 per Deane J.

175 Whereas some authorities treat proximity and foreseeability as substantially synonymous, the differentiation reflects the long history of the common law in which foreseeability of the risk of harm to another is insufficient of itself to impose a legal duty to act to avoid consequences to that other; cf McHugh, "Neighbourhood, Proximity and Reliance" in Finn (ed) *Essays on Torts*, (1989) 5 at 17.

176 This tripartite test reflects *Caparo Plc v Dickman* [1990] 2 AC 605 at 617-618. It is to be preferred to simplistic tests which impose undue work to be done by the notions of proximity and foreseeability; cf Dugdale, "Public Authority Liability: To What Standard" (1994) 2 *Tort Law Review* 143 at 156.

177 (1984) 155 CLR 614 at 662-663.

178 (1987) 162 CLR 479 at 488.

179 (1993) 177 CLR 423 at 428.

proximity was that there was reasonable foreseeability of a real risk of injury to a person such as the appellant. Questions of legal policy, reflecting the need sometimes to limit the imposition of a duty of care to that which is fair and reasonable, have also been recognised by this Court¹⁸⁰. Although this last consideration is sometimes overlooked, it should not be, for the law of negligence must ultimately respond to common notions of fairness and justice. If foreseeability and proximity, alone, take the law into the imposition of duties of care which are unfair, unreasonable and unrealistic, the time will have come to re-express the preconditions for the existence of the duty in a way more harmonious with such considerations.

119 Whether the Commission ultimately conceded a relevant duty of care to the appellant is not entirely plain from its pleadings and argument. It appeared to be willing to accept a general duty limited to its statutory obligations for the management of the reserve and nothing more. It disclaimed a duty of the kind for which the appellant argued. By its submissions that decisions on the way the reserve would be managed were policy matters for it alone, it seemed to be contending that there was no relevant duty. The Court of Appeal did not accept that submission. In this, I consider that the Court of Appeal was correct.

120 The foundation for the Commission's duty of care to the appellant was the statutory power of management and control of the reserve. But the factual circumstances of the case went beyond mere power. This was not a case of unalienated Crown land, left entirely, or virtually entirely, in its natural state¹⁸¹. The cliffs were part of a public reserve, which attracted up to half a million visitors a year. Although it would be quite wrong to describe the reserve (as the appellant did) as akin to a suburban park, it was certainly close to the outlying suburbs of Darwin. The cliffs, to the knowledge of the Commission, attracted a proportion of those visiting the reserve. The Commission did not create the ungraded road and carpark as an allurement to people to visit the cliff area, but rather as a means of controlling traffic and limiting damage to the environment. However, these improvements certainly facilitated access to the cliffs by visitors. The positioning of logs at the edge of the carpark was obviously designed to mark the limit of vehicular access in a way that still preserved the natural character of the site. It would have been foreseeable that the logs would have been used by visitors, sitting on them and watching the scenery. It was obvious that visitors would arrive at the reserve and the cliffs of different ages, different visual capacities, different states of sobriety and exhibiting different levels of advertence to their surroundings.

¹⁸⁰ See for example *Gala v Preston* (1991) 172 CLR 243 at 253, 260-262, 277.

¹⁸¹ cf *South Australia v Wilmot* (1993) 62 SASR 562 at 574.

121 Accordingly, the elements of foreseeability and proximity were satisfied in this case. Subject to any special considerations of legal policy deriving, for example, from the fact that the Commission is a public authority with limited resources committed to its discretion, the considerations necessary in law to give rise to a duty of care were all satisfied. But the question remains: what was the scope of that duty and was the Commission in breach of it?

Scope of the duty

122 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.

123 The ordinary formulation of the common law is that a body such as the Commission must take reasonable care to avoid foreseeable risks of injury to persons entering an area such as the reserve, including the cliffs, as of common right¹⁸². However, that expression of the duty must be elaborated if it is to be of any practical guidance. The entrant is only entitled to expect the measure of care appropriate to the nature of the land or premises entered and to the relationship which exists between the entrant and the occupier. The measure of the care required will take into account the different ages, capacities, sobriety and advertance of the entrants. While account must be taken of the possibility of inadvertance or negligent conduct on the part of entrants, the occupier is generally entitled to assume that most entrants will take reasonable care for their own safety¹⁸³. For example, it would be neither reasonable nor just to impose upon a body such as the Commission an obligation to erect secure climb-proof fencing along the entire elevated headland of the reserve against the risk of injury suffered by the occasional visitor bent on suicide. In judging the measure of the duty which is owed regard will certainly be had to any particular statutory obligations or powers enjoyed by a public authority. But where, as here, the statutory duties are stated in general and permissive terms, the scope of the duty of care imposed by the common law will be no more than that of reasonable care. Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just. In considering whether the scope of the duty extends, in a case such as the present, to the provision of fencing or a wire barrier, it is not sufficient to evaluate that claim by reference only to the area of the Dripstone Cliffs. An accident of the kind which occurred to the appellant might have occurred at any other elevated promontory in every similar reserve under the control of the Commission to which

182 cf *Nagle* (1993) 177 CLR 423 at 429-430.

183 *McLean v Tedman* (1984) 155 CLR 306 at 311-312; *Nagle* (1993) 177 CLR 423 at 431; cf *Phillis v Daly* (1988) 15 NSWLR 65 at 74.

members of the public had access. The projected 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 coming upon any part of the lands under its control which presented similar risks arising out of equivalent conduct¹⁸⁴.

- 124 It must never be forgotten that, in defining the measure of the duty of care, a court is not only determining an element essential to the ascertainment of the rights of the particular parties. It is also giving expression to the standards which occupiers of land or premises generally must reach, and possibly insure against, in case similar mishaps befall them¹⁸⁵.

Breach of duty

- 125 The conclusion that a duty of care is owed to a class of persons including the plaintiff, is not, of itself, determinative of the negligence of the defendant. The critical question in many cases is whether the plaintiff has proved that the duty has been breached in the circumstances of the case.

- 126 In *Wyong Shire Council v Shirt*¹⁸⁶, Mason J expressed the test which is accepted in Australia for ascertaining whether a breach of a duty of care of the defined scope has occurred. He said that the tribunal of fact must ask whether a reasonable person in the defendant's position would have foreseen that the conduct complained of involved a risk of injury to the plaintiff or to a person in a similar position¹⁸⁷:

"If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The 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. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

184 *Cekan v Haines* (1990) 21 NSWLR 296.

185 *Cekan v Haines* (1990) 21 NSWLR 296 at 299-300.

186 (1980) 146 CLR 40.

187 (1980) 146 CLR 40 at 47-48.

127 It was not contested that this was the test to be applied in the present case. Thus, it is the reasonableness of a defendant's actions or inactions, when faced with the relevant risk, which is critical in determining whether a duty of care has been breached. The question whether the defendant has met the requisite standard of the reasonable person must be assessed on the facts of each case with reference to considerations such as those collected by Mason J in *Shirt*. These considerations provide a framework for determining which risks the defendant should guard against and which it can safely ignore.

128 Insufficient attention has been paid in some of the cases, and by some of the critics, to the practical considerations which must be "balanced out" before a breach of the duty of care may be found. It is here, in my view, that courts have both the authority and responsibility to introduce practical and sensible notions of reasonableness that will put a brake on the more extreme and unrealistic claims sometimes referred to by judicial and academic critics of this area of the law. Thus, under the consideration of the magnitude of the risk, an occupier would be entitled, in a proper case, to accept that the risk of a mishap such as occurred was so remote that "a reasonable man, careful of the safety of his neighbour, would think it right to neglect it"¹⁸⁸. It is quite wrong to read past authority as requiring that *any* reasonably foreseeable risk, however remote, must in *every* case be guarded against. Such an approach may result from the erroneous conflation of the three separate inquiries: duty, scope of duty and breach of duty. Although a reasonably foreseeable risk may indeed give rise to a duty, it is the inquiry as to the scope of that duty in the circumstances and the response to the relevant risk by a reasonable person which dictates whether the risk must be guarded against to conform to legal obligations. Precautions need only be taken when that course is required by the standard of reasonableness¹⁸⁹. Although it is true, as the appellant argued, that an occupier is not entitled to ignore safeguards against dangers because of the absence of past mishaps, it is equally true that years of experience without accidents may tend to confirm an occupier's assessment that the risks of harm were negligible.

129 As to the expense of taking alleviating action, it is increasingly recognised that courts must "bear in mind as one factor that resources available for the public service are limited and that the allocation of resources is a matter for" bodies accorded that function by law¹⁹⁰. Demanding the expenditure of resources in one

188 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 at 642-643; cf *Inverell Municipal Council v Pennington* (1993) 82 LGERA 268 at 276 per Clarke JA.

189 *Phillis v Daly* (1988) 15 NSWLR 65 at 73 per Mahoney JA.

190 *Knight v Home Office* [1990] 3 All ER 237 at 243 per Pill J; cf *Just v British Columbia* (1989) 64 DLR (4th) 689.

area (such as the fencing of promontories in natural reserves) necessarily diverts resources from other areas of equal or possibly greater priority¹⁹¹. Whilst this consideration does not expel the courts from the evaluation of what reasonableness requires in a particular case, it is undoubtedly a factor to be taken into account in making judgments which affect the operational priorities of a public authority and justify a finding that their priorities were wrong¹⁹². I leave aside, but shall return to, the extent to which "true policy" decisions of a public authority are justiciable. But even in so-called operational decisions, which are subject to court assessment, it is necessary to evaluate more than simply the cost of preventing the particular accident. Inherent in the suggestion of the obligation of prevention is the cost that would be incurred in the measures necessary to prevent all equivalent accidents of a like kind and risk¹⁹³.

130 In the reference to "other conflicting responsibilities" regard may be had to considerations such as the preservation of the aesthetics of a natural environment¹⁹⁴ and the avoidance of measures which would significantly alter the character of a natural setting at substantial cost and for an improvement in safety of negligible utility¹⁹⁵.

131 When, therefore, the considerations mentioned by Mason J in *Shirt* are given their full measure, the conclusion in this case that no breach was shown on the part of the Commission must be upheld. The important distinction between this case and *Nagle* is that there the danger of the submerged rocks was hidden from the ordinary users of the Basin. Here, the danger of the elevation of the cliffs was perfectly obvious to any reasonable person.

132 In determining what risks the defendant was required by law to respond to, it is necessary to have regard to what acts the defendant may have reasonably anticipated in the circumstances. Given the prominence of the danger, past usage of the site and accident experience it was not reasonable to expect the defendant to anticipate the inadvertance of the plaintiff in this case. So far as her complaint about the clearing of the vegetation and its appearance as a path is concerned, that appearance would not have deceived her, according to the primary judge's

191 *Cekan v Haines* (1990) 21 NSWLR 296 at 314 per Mahoney JA; Dugdale, "Public Authority Liability: To What Standard?" (1994) 2 *Tort Law Review* 143 at 154-155.

192 *Swanson Estate v Canada* (1991) 80 DLR (4th) 741.

193 *Cekan v Haines* (1990) 21 NSWLR 296 at 307-309.

194 *Phillis v Daly* (1988) 15 NSWLR 65 at 68 per Samuels JA.

195 *South Australia v Wilmot* (1993) 62 SASR 562 at 569-570 per Cox J.

findings, but for her alcohol affected state. It is true to say that the Commission, acting reasonably, would have to anticipate a variety of visitors, including children, the elderly, the shortsighted, the intoxicated and the exuberant. However, because the risk was obvious and because the natural condition of the cliffs was part of their attraction, the suggestion that the cliffs should have been enclosed by a barrier must be tested by the proposition that all equivalent sites for which the Commission was responsible would have to be so fenced. The proposition that such precautions were necessary to arrest the passage of an inattentive young woman affected by alcohol is simply not reasonable. The perceived magnitude of risk, the remote possibility that an accident would occur, the expense, difficulty and inconvenience of alleviating conduct and the other proper priorities of the Commission confirm the conclusion that breach of the Commission's duty of care to the appellant was not established. The Commission's failure to provide protection against the risk that occurred was not unreasonable. The decision of the Court of Appeal to that effect was correct. It should be confirmed.

Causation

133 The foregoing conclusion relieves me of the obligation to deal at length with the remaining arguments of the parties concerning causation, policy decisions and contributory negligence. Nevertheless, out of deference to the arguments, I shall deal briefly with the first two.

134 Where a breach of a relevant duty of care is shown, it is still necessary for a plaintiff to prove, on the balance of probabilities, that such breach caused or materially contributed to the damage¹⁹⁶. This means that the plaintiff must show that, if the defendant had fulfilled its duty, as defined, doing so would have resulted in the avoidance of the plaintiff's damage and loss¹⁹⁷. Necessarily, the question is hypothetical. It calls for a consideration of what might have been if certain things had been done because, by definition, they were not done and that is the plaintiff's complaint¹⁹⁸. Sometimes a plaintiff has been asked directly what he or she would have done if the acts constituting fulfilment of the suggested duty had occurred¹⁹⁹. Normally, however, there is no direct evidence on the point and in any case the question is one for objective assessment, not subjective protestations after the

¹⁹⁶ cf *The Public Trustee v Sutherland Shire Council* [1992] Aust Torts Reports ¶81-149, 61, 131 at 61, 139.

¹⁹⁷ *Heyman* (1985) 157 CLR 424 at 467; *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 335.

¹⁹⁸ *Mallett v McMonagle* [1970] AC 166 at 176 per Lord Diplock.

¹⁹⁹ As was done in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 559-561, 581-582.

event. In this case, the appellant was not asked. It was left as a question of fact for the tribunal of fact to decide whether the protective measures suggested would have been effective in preventing her loss and damage²⁰⁰.

135 It is often easy, after a mishap, to conceive of precautions which might have been taken. Doing so involves the application of a great deal of wisdom after the event. Many of the cases concerning reserves, and particularly those involving swimming accidents, have addressed the need for signs to alert entrants about particular dangers. Occasionally, the absence of a relevant sign²⁰¹ or the inadequacy of the signs provided²⁰² have been held to constitute a breach of the duty of care which caused the plaintiff's injuries²⁰³. On the other hand, cases exist where the courts have been convinced that the impetuous nature of the conduct of the plaintiff was such that it was unlikely that a mere sign would have deflected the plaintiff from the course leading to injury and loss²⁰⁴. In judging both the need for, and possible effect of, a sign or other precaution, a court is entitled to take into account the plaintiff's own knowledge of the site and understanding of the risks involved as well as its own commonsense²⁰⁵.

136 In the Court of Appeal, Mildren J expressed doubts about the primary judge's factual finding that the appellant had been deceived by the break in the vegetation and path-like appearance caused by a natural watercourse leading to the edge of the cliff. He suggested that it was equally possible that the appellant and her companion had decided, in their alcohol affected state, to jump off the cliff and had mistaken the height²⁰⁶. Moreover, as his Honour pointed out, by the time the appellant's family revisited the scene the day after the accident, a considerable number of people had walked over the area including police, rescue workers and

200 *The Public Trustee v Sutherland Shire Council* [1992] Aust Torts Reports ¶81-149, 61, 131 at 61, 140.

201 *Nagle* (1993) 177 CLR 423.

202 *Inverell Municipal Council v Pennington* (1993) 82 LGERA 268.

203 In *Inverell Municipal Council v Pennington*, Meagher JA commented that the conclusion of the trial judge that the absence of an adequate sign was causative of the plaintiff's injury was "very extraordinary" but not one which he felt he could disturb. See (1993) 82 LGERA 268 at 282.

204 *The Public Trustee v Sutherland Shire Council* [1992] Aust Torts Reports ¶81-149, 61, 131 at 61, 143; cf *State of South Australia v Wilmot* (1993) 62 SASR 562 at 572.

205 *Black v City of South Melbourne* (1964) 38 ALJR 309.

206 (1995) 123 FLR 84 at 101.

others. Obviously, the scene and vegetation would have altered still more between the date of the accident and the time that photographs were taken and the view conducted at the trial. Even accepting that the break in the vegetation gave an appearance of a path to a person, affected as the appellant was, it would have remained a path to the edge of a cliff whose elevation the appellant well knew²⁰⁷. This is not a case where lighting or signs would have been appropriate or effective. So far as a log fence is concerned, it seems scarcely likely to have deterred the appellant. She had already passed beyond the logs placed to mark the edge of the carpark. That leaves only the suggestion that a wire barrier should have been created.

- 137 In her state of intoxication, it is not certain that such a barrier, had it been erected, would necessarily have prevented the appellant from approaching the cliff edge. This was the conclusion which the primary judge, reached with the advantages which he enjoyed²⁰⁸. Care must be taken by appellate courts in substituting their assessments of such factual questions for those reached by the primary judge²⁰⁹. Such matters require commonsense and judgment²¹⁰. However, if duty and breach had been established in this case, I am inclined to think that causation would not have stood in the way of the appellant's recovery. In view of my earlier conclusion, it is unnecessary for me to reach a final opinion on this question.

Policy decisions and justiciability

- 138 It was then suggested that the Commission, being a governmental authority, was exempted from a duty of care in circumstances such as the present because the decision on whether to provide the kinds of precautions urged by the appellant, or any of them, at the Dripstone Cliffs involved detailed evaluation of financial, economic, social or political factors. It was argued that, by law, such considerations, and the budgetary allocations which they entailed, were committed to the Commission, as matters of policy. They were therefore beyond the purview of the courts. Either there was no duty of care in such a case, whatever the foreseeability of the risk of injury and the proximity factors. Or the questions which the appellant presented by her allegations of breach would be classified as

207 (1995) 123 FLR 84 at 104-105.

208 (1994) 123 FLR 71 at 83; 104 NTR 1 at 12.

209 *Nagle* (1993) 177 CLR 423 at 433.

210 cf *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515.

non-justiciable, such that a court would hold back from substituting its conclusion for that of the public authority²¹¹.

- 139 As Mason J observed in *Heyman's* case²¹², there is a great deal of learning in the United States on this question. There is still comparatively little legal authority about it in Australia²¹³. In this country, a distinction has occasionally been drawn between the policy-making powers of a public body which are treated as quasi-legislative in character²¹⁴ and so-called operational or managerial decisions which are susceptible to judicial evaluation. It is a distinction which it is not easy to apply²¹⁵. Outside the United States, common law courts have been loathe to accept the submission that public authorities can conclusively and exclusively determine, by their allocation of funds, what is required to be done in the discharge of their powers²¹⁶. Unless an express statutory exemption is enacted²¹⁷, courts normally prefer to exercise their responsibility to decide whether, in the particular circumstances, a duty of care is imposed and whether it has been breached. They have sometimes acknowledged that no such duty will arise from decisions on matters of pure policy on the part of public authorities²¹⁸. In other matters, they have accepted that budgetary, political and other constraints within which such authorities must operate are factors to be taken into account in determining the scope of the duty of care and whether, in a particular case, it has been breached²¹⁹.

211 Dugdale, "Public Authority Liability: To What Standard?" (1994) 2 *Tort Law Review* 143 at 155.

212 *Heyman* (1985) 157 CLR 424 at 469.

213 See *South Australia v Wilmot* (1993) 62 SASR 562 at 577.

214 *Heyman* (1985) 157 CLR 424 at 500 per Deane J.

215 *Heyman* (1985) 157 CLR 424 at 469 per Mason J; cf Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728.

216 See for example *Knight Area v Home Office* [1990] 3 All ER 237; *Bull v Devon Health Authority* [1993] 4 Med LR 117; Dugdale, "Public Authority Liability: To What Standard?" (1994) 2 *Tort Law Review* 143 at 152-154.

217 *Just v British Columbia* (1989) 64 DLR (4th) 689 at 708 per Cory J; but see 690-691 per Sopinka J (dissenting).

218 *Just v British Columbia* (1989) 64 DLR (4th) 689 at 708 per Cory J; see also Sopinka J at 696.

219 *Cekan v Haines* (1990) 21 NSWLR 296.

140 When the foregoing principles are applied to the present case, I do not doubt that the determination of whether some preventive measures, such as a wire barrier, should have been installed at the perimeter of the Dripstone Cliffs was properly to be classified as an operational or administrative rather than a policy or discretionary decision²²⁰. Although it had financial, economic, social and possibly political implications, so would many, if not most, decisions of public authorities. Virtually every suggested precaution, said to be necessary to prevent damage, has financial and economic implications, whether the defendant is a public authority or private individual. In relation to the operational decisions of a body such as the Commission, the present state of the law would not sustain its submission that such questions were exclusively for it. Nor would such consideration justify the conclusion that the Commission was released from any duty of care to entrants onto land such as the reserve or from a court's consideration of the case which the appellant brought²²¹. In the conclusion which I have reached the final issue, that of contributory negligence, does not arise for consideration.

Orders

141 The appellant established that the Commission owed her a duty of care. Its scope was determined by the general law of negligence. The Commission was not exempt from the duty owed to an entrant such as the appellant coming upon the reserve in its charge as of common right. Nor was the appellant's claim non-justiciable, as the Commission submitted. However, the Court of Appeal rightly dismissed the claim on the basis that no breach of the duty of care was established. That conclusion makes it unnecessary to determine the remaining issues and in particular whether the additional reason given by the primary judge was made out, namely that the appellant had failed to prove that any such breach of duty was the cause of her damage.

142 The appeal should be dismissed.

220 cf *South Australia v Wilmot* (1993) 62 SASR 562 at 577.

221 cf Allen, "Liability of a public authority as occupier: *Romeo v Conservation Commission of Northern Territory*" (1997) 5 *Torts Law Journal* 7 at 16.

143 HAYNE J. The facts giving rise to this appeal are set out in the reasons for judgment of other members of the Court and I need not repeat them.

144 It was submitted that the Court should reconsider the principles that were applied in *Nagle v Rottnest Island Authority*²²² because, so it was submitted by the respondent, these principles have extended too far the liability of public authorities which manage or control land which the public use. It was submitted that the Court should limit the extent of that liability by giving full weight to what was said by Dixon J in *Aiken v Kingborough Corporation*²²³ leaving such authorities liable (so the argument went) only to take reasonable care to prevent injury to persons who enter such land as of common right against dangers that are hidden and not to be avoided by the entrant exercising ordinary care.

145 *Nagle* established no new principle. In particular it established no new principle governing the responsibility of public authorities controlling land which members of the public use as of right. Rather, the majority applied principles that had been stated in *Hackshaw v Shaw*²²⁴ and *Australian Safeway Stores Pty Ltd v Zaluzna*²²⁵ in holding that the Rottnest Island Board (to the liabilities of which the respondent authority was successor) "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"²²⁶. The Court accepted²²⁷ that "foreseeable risk" was to be understood in the way described by Mason J in *Wyong Shire Council v Shirt*²²⁸, ie, "that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable."

222 (1993) 177 CLR 423.

223 (1939) 62 CLR 179 at 210.

224 (1984) 155 CLR 614 at 662-663 per Deane J.

225 (1987) 162 CLR 479 at 488 per Mason CJ, Wilson, Deane and Dawson JJ.

226 *Nagle* (1993) 177 CLR 423 at 429-430 per Mason CJ, Deane, Dawson and Gaudron JJ.

227 *Nagle* (1993) 177 CLR 423 at 431 per Mason CJ, Wilson, Deane and Dawson JJ, 439-440 per Brennan J.

228 (1980) 146 CLR 40 at 48.

146 The Court held that the risk that someone would dive into the water where the plaintiff did and suffer injury was reasonably foreseeable²²⁹. The majority held that a warning sign would probably have deterred the plaintiff from diving into the water where he did²³⁰, and that the Board acted in breach of its duty of care by not erecting a sign²³¹. Brennan J was of the view that, although the Board owed a duty of care to the public, that duty "did not require that the possibility of carelessness in diving be forestalled by a warning sign"²³². As I have said, no new principle was applied. That may well be reason enough to reject the call to reconsider *Nagle* but there are other important reasons not to do so.

147 First, the need for stability and predictability in this area of the law is no less than it is in others. Persons have ordered their affairs on the basis that the principles applied in *Nagle* will be applied to their circumstances. Thus, persons have started or not started litigation, have settled or not settled litigation, have entered insurance and other commercial arrangements on that basis. Very powerful reasons would need to be shown to warrant the Court changing the basis on which those persons have acted or chosen not to act.

148 Secondly, the suggestion that the liability of public authorities has been taken too far is a suggestion that, in my view, does not withstand close analysis.

149 It was not (and could not be) seriously suggested that the respondent in this case owed no duty of care to members of the public that might go to areas which it manages. The real subject for debate was what that duty required of it, for it is only when the content or scope of the duty is identified that questions of breach and causation of damage can be considered. So, too, in *Nagle* the central question was not whether the Board owed any duty of care to those visitors lawfully visiting the island, it was what that duty of care required it to do. No question arose in *Nagle* (and no question arises here) whether the presence of the injured person in the area managed by the Board (or in this case the Conservation Commission of the Northern Territory) was reasonably foreseeable. No question arose in *Nagle* (or arises here) whether there was the necessary degree of proximity of relationship between the parties.

229 *Nagle* (1993) 177 CLR 423 at 430-431 per Mason CJ, Wilson, Deane and Dawson JJ, 441-442 per Brennan J.

230 *Nagle* (1993) 177 CLR 423 at 433.

231 *Nagle* (1993) 177 CLR 423 at 431-432.

232 *Nagle* (1993) 177 CLR 423 at 442.

150 It is as well, however, to say why the question of the existence of a duty of care, as opposed to its scope, is not an issue in this case.

151 The Commission is given power by the legislation that creates it to "occupy, use, manage and control" any land owned or leased by the Territory²³³. The Casuarina Coastal Reserve, of which the Dripstone Cliffs is a part, is an area of land (and sea) managed by the Commission pursuant to those statutory powers.

152 It has now long been held by this Court that the position of an authority, such as the Commission, 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 land²³⁴. It is the management of the land by the authority which provides the necessary relationship of proximity between authority and members of the public.

153 I, therefore, need not (and do not) consider the difficult questions that can arise in connection with other activities of public authorities such as the exercise of (or failure to exercise) powers to inspect and approve the work of others²³⁵ or powers to require others to perform works on land near a road²³⁶.

154 Further, I need not (and do not) deal with the difficult issues that the law must sometimes grapple with when the complaint is that a person has failed to act and not a complaint that the person has acted but acted without reasonable care. Just as private owners of private land may be liable for their omissions as well as their positive acts²³⁷ so, too, may public authorities that manage land the public use²³⁸.

155 In this case the Commission owed visitors who lawfully entered land which it managed, a duty to take reasonable care to avoid foreseeable risks of injury to them. But the bare fact that the risk of the injury which in fact occurred was reasonably foreseeable (in the sense of not far-fetched or fanciful) does not

233 *Conservation Commission Act* 1980 (NT), s 20(2)(e).

234 *Aiken* (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* (1993) 177 CLR 423 at 428 per Mason CJ, Deane, Dawson and Gaudron JJ.

235 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

236 *Stovin v Wise* [1996] AC 923.

237 See, eg, *Hargrave v Goldman* (1963) 110 CLR 40; *Goldman v Hargrave* (1966) 115 CLR 458; [1967] AC 645.

238 *Schiller* (1972) 129 CLR 116.

conclude the enquiry about the scope of the Commission's duty²³⁹. The duty is a duty to take *reasonable care*, not a duty to prevent any and all reasonable foreseeable injuries.

156 The fact that an accident has happened and injury has been sustained will often be the most eloquent demonstration that the possibility of its occurrence was not far-fetched or fanciful. Indeed, often it will be difficult, if not impossible, to demonstrate the contrary to a tribunal of fact. That is why it is of the first importance to bear steadily in mind that the duty is not that of an insurer but a duty to act reasonably.

157 What is reasonable must be judged in the light of *all* the circumstances. Usually the gravity of the injury that might be sustained, the likelihood of such an injury occurring and the difficulty and cost of averting the danger will loom large in that consideration. But it is not only those factors that may bear upon the question. In the case of a public authority which manages public lands, it may or may not be able to control entry on the land in the same way that a private owner may; it may have responsibility for an area of wilderness far removed from the nearest town or village or an area of carefully manicured park in the middle of a capital city; it may positively encourage, or at least know of, use of the land only by the fit and adventurous or by those of all ages and conditions. All of these matters may bear upon what the reasonable response of the authority may be to the fact that injury is reasonably foreseeable. Similarly, it may be necessary, in a particular case, to consider whether the danger was hidden or obvious, or to consider whether it could be avoided by the exercise of the degree of care ordinarily exercised by a member of the public, or to consider whether the danger is one created by the action of the authority or is naturally occurring. But all of these matters (and I am not to be taken as giving some exhaustive list) are no more than particular factors which *may* go towards judging what reasonable care on the part of a particular defendant required. In the end, that question, what is reasonable, is a question of fact to be judged in all the circumstances of the case²⁴⁰.

158 In *Aiken* Dixon J said²⁴¹:

"What then is the reasonable measure of precaution for the safety of the users of premises, such as a wharf, who come there as of common right? I think the public authority in control of such premises is under an obligation

239 *Wyong Shire Council* (1980) 146 CLR 40 at 48 per Mason J.

240 *Herrington v British Railways Board* [1971] 2 QB 107 at 120 per Salmon LJ cited with approval in *Hackshaw* (1984) 155 CLR 614 at 663 per Deane J.

241 (1939) 62 CLR 179 at 210.

to take reasonable care to prevent injury to such a person through 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."

If Dixon J was intending to state the scope of the duty of care of a public authority exhaustively, I do not consider that such a statement of the scope of that duty can stand with later decisions of the Court - particularly *Nagle*. It would be a statement of the scope of the duty which is unduly restricted and it would proceed from an unstated premise that public authorities which manage land owe a different and more limited duty of care from the duty which others managing land owe. This premise can no longer be accepted. If it is a statement of the scope of duty, it is a statement which may be seen to have been much influenced by the then current distinctions between the duties of care owed by an occupier to particular classes of entrant as well, perhaps, as by what Dixon J described as the then "present chaos" which had overtaken "the law of torts"²⁴². But in any event what is the "reasonable measure of precaution for the safety of users of premises, such as a wharf, who come there as of common right" is not frozen for all time. The reasonableness of measures of protection must be judged according to the prevailing standards of the day. Moreover, for my part, I doubt very much that Dixon J was intending to give a comprehensive or exhaustive statement of the scope of the duty owed by a public authority such as Kingborough Corporation. The respondent corporation in that case was found not to have taken reasonable care to prevent injury to the public through dangers arising from the state or condition of the premises which were not apparent and were not to be avoided by the exercise of reasonable care. It was not necessary to consider whether it would have been liable in other, different, circumstances.

159 It is because the duty is a duty to take reasonable care that the suggestion that the liability of public authorities has been taken too far is a suggestion that should be rejected. As I have pointed out, it may be relatively easy to show that the risk of occurrence of an injury which a person has suffered in fact was a reasonably foreseeable risk, but if it was reasonable for the defendant authority to take steps to avoid such a risk there is no reason why it should not be held liable for its failure. And if it was not reasonable to take steps to avoid the risk the authority will not be liable.

160 It may be said that this analysis does not recognise, or even may be said to obscure, the forensic disadvantage which a defendant suffers once a court concludes that a risk of injury was reasonably foreseeable. Counsel for the Commission suggested, in effect, that some cheap solution can always be put

²⁴² *Aiken* (1939) 62 CLR 179 at 208. What Dixon J (at 206) called "the already well-known statement of Lord Atkin in *Donoghue v Stevenson*" [1932] AC 562 was then but seven years old.

forward after the event and that a finding of liability is then inevitable once foreseeability of the risk is accepted. This case is a good illustration of why that argument is flawed.

161 It was suggested in this Court, and below, that all that would have been necessary to stop the plaintiff walking off the edge of the cliff was two star pickets and one or two strands of wire across the part of the cliff which the trial judge inferred that she and her companion had mistaken for a path. Thus, so the argument ran, a cheap and obvious means of avoiding catastrophic injury was readily available. That attributes a false degree of precision to identification of the foreseeable risk; it attributes too high a probability to the occurrence of that risk and it fails to identify properly the response that would have had to be made to that risk to avoid it.

162 First, it is as well to recall that the trial judge, who had the benefit of hearing the witnesses and seeing the place of the accident, said of the area of the cliff concerned that:

"In the gloom it had the deceptive appearance *to the girls* of a footpath leading to the gap in the vegetation. It did *not* have that appearance in daylight. *Nor would it have so appeared to a sober alert person on the night in question.*"²⁴³

163 The plaintiff was not sober and alert that night. In the view of the trial judge, she was "adversely affected" by alcohol²⁴⁴ having consumed about 150 mls of rum on that evening²⁴⁵ between about 10.15 pm and the happening of the accident somewhere between 11.30 pm and 1.00 am²⁴⁶. Thus the risk which was to be foreseen by the Commission was that a person (or perhaps a young person) adversely affected by alcohol would mistake the appearance of an area on the cliffs at night (in a way which a sober and alert person would not) and walk off the edge of the cliff. It will be noted that I refer to "the cliffs" generally rather than a particular part of the cliffs for it is apparent from the photographs of the area included in the appeal book that the point on the cliffs from which the plaintiff fell is not unique (and indeed the contrary was not contended). Thus it is to attribute a false degree of precision to the identification of the foreseeable risk to say that it was *this* area (and only this area) which needed fencing against the possibility that

243 *Romeo v Conservation Commission* (1994) 123 FLR 71 at 78; 104 NTR 1 at 7 (emphasis added).

244 (1994) 123 FLR 71 at 75; 104 NTR 1 at 5.

245 (1994) 123 FLR 71 at 74; 104 NTR 1 at 4.

246 (1994) 123 FLR 71 at 73-75; 104 NTR 1 at 2-4.

a person affected by alcohol would be deceived in a way that a sober and alert person would not. To say that only this area needed fencing assumes (wrongly) that it is only at this point on the cliffs that a mistake of the tragic kind made by the plaintiff on this night might be made.

164 Further, to say that it was reasonable to fence this area (or some other areas as well) assumes that a reasonable person would think that the possibility of such an unusual combination of circumstances as led to this accident was sufficient to warrant taking the step of installing fences. No doubt the reasonable person takes account of the fact that people do not always pay attention, that people do not always take care for themselves²⁴⁷ and that people may be affected by alcohol²⁴⁸. But what was the likelihood of the events which happened here occurring? Was it a possibility that required serious consideration? If the risk was of sufficient likelihood to warrant serious consideration did reasonableness require the authority to fence *all* areas of the Dripstone Cliffs from which a person affected by alcohol might have fallen? Did it require like attention to *all* other elevated parts of the area under the Commission's management? Should this area have received special attention because of the height of the cliffs and the provision of car parking, or because it was known to be a place that young people went at night?

165 The courts below have answered these questions in the negative and in my view no error is shown in those conclusions. They are, in the end, questions of fact and I see no error in their being resolved against the plaintiff in this case.

166 Counsel for the Commission invited us to say that there are certain "policy decisions" of bodies like the Commission which are not to be reviewed by the courts. I do not consider that that question now falls for decision. In *Sutherland Shire Council v Heyman*²⁴⁹ Mason J said that:

"it is possible that a duty of care may exist in relation to discretionary considerations which stand outside the policy category in the division between policy factors on the one hand and operational factors on the other".

He went on to say that²⁵⁰:

²⁴⁷ cf *McLean v Tedman* (1984) 155 CLR 306 at 311 per Mason, Wilson, Brennan and Dawson JJ.

²⁴⁸ *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 520 per Deane J, 536-537 per McHugh J.

²⁴⁹ (1985) 157 CLR 424 at 469.

²⁵⁰ (1985) 157 CLR 424 at 469.

"The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

The difficulties of drawing such a distinction are emphasised by Lord Hoffman in *Stovin v Wise*²⁵¹ and there seems to be much force in what is said there but, as I say, it is not necessary to decide now whether the distinction can be drawn or, if it can, whether it does offer "a touchstone of liability"²⁵². In this case the plaintiff failed to demonstrate that the Commission, in the exercise of reasonable care, should have fenced the area in some way that would have prevented her falling and suffering the horrific injuries which she has. Her claim against the Commission must therefore fail and her appeal be dismissed.

251 [1996] AC 923 at 951. See also *Rowling v Takaro Properties Ltd* [1988] AC 473 at 500-501.

252 *Rowling* [1988] AC 473 at 501.