

BEACH SAFETY – THE LAW OF NEGLIGENCE

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AN INTRODUCTION

On the afternoon of 7 November 1997, Guy Swain went to Bondi Beach for a swim. Weather conditions were generally fine. It was a little overcast but the surf was light. There were lifeguards employed by Waverley Council at the beach that afternoon. They had assessed the conditions at the beach earlier in the day and had placed flags on the beach opposite a sandbar to indicate the best place for swimming. The Council's employees patrolled the areas between the flags and kept the conditions under review. They did not alter the position of flags during the day. Mr Swain was swimming between the flags. He was about 15 metres from the shore when he attempted to dive through a wave, a common enough procedure in the surf. It appears he struck the face of a sandbar hidden from his view and suffered very serious spinal injuries. This was a tragic accident but in the short term, it had no great resonance beyond its own circumstances. Mr Swain, however, sued the Council for negligence. The trial was heard before a four-person jury. It ran over about six days and the principal part of the evidence appeared to be concerned with the question of whether Mr Swain had been swimming between the flags or outside them. In a decision which reverberated around the country, both in the media and discussions elsewhere, the jury found for the plaintiff, although it reduced his damages by 25% for contributory negligence.

The Council appealed to the New South Wales Court of Appeal. In the view of most sections of the media, sanity was restored by the appellate decision. The Court of Appeal (Handley and Ipp JJA, Spigelman CJ dissenting) allowed the appeal on the basis that there was no evidence upon which the jury could find that the Council had been negligent in placing the flags where it did. The Court also held, unanimously, that there was no evidence to support a verdict against the Council on the basis of

the Council's failure to warn that it was dangerous to dive in the surf due to the presence of sandbanks. Mr Swain appealed to the High Court of Australia. The appeal, as it turned out, was successful. Gleeson CJ Gummow and Kirby JJ, McHugh and Heydon JJ dissenting, held that there was evidence capable of sustaining the jury's findings that the Council was negligent in placing and maintaining the flags. The question for the Appellate Court was whether it was reasonably open to the jury to make an assessment unfavourable to the Council, not whether the Appellate Court agreed with it. (1)

The reaction to this decision was as vociferous in Queensland as it was in other parts of Australia. Two days after the decision was announced, Stateline Queensland interviewed David Power of the Gold Coast City Council about the Court's decision. Mr Power said his initial reaction was "absolute horror". "We have", he said, "something like 38 patrol beaches on average". The implications for Gold Coast City Council, Mr Power maintained, were "quite horrific", particularly "in terms of our public liability". Mr Power added: -

"Now that we are responsible for shifting sands underneath the ocean surface, I think that our insurers in London will be taking a long hard close look at this and I shudder to think what it will do to our Surf Clubs...clearly you can't warn every single person that comes to every patrolled beach that the sand underneath the ocean surface may be shifting".

Towards the end of the interview, Mr Power expressed grave concern about whether the Council would be able to effectively patrol the many thousands of people who use Gold Coast beaches in summer.

Of course, the views expressed by Mr Power were those stated by many concerned persons in the community. They probably had no real cause for alarm. The High Court's decision was in fact based on a very narrow premise, namely whether there was evidence upon which the jury could reach the decision it had made. The ultimate issue, undoubtedly, was not one based on the failure to give a warning to people at the beach about the presence of sandbanks. Rather, it was a case that succeeded in relation to evidence about where the flags had been placed. In particular, it succeeded because the defendant council did not call evidence to explain why the

flags remained where they were. Nor was there any evidence from the defendant to explain why the flags could not have been moved elsewhere on the beach, if that were necessary.

There was another reason, however, why Mr Power need not have worried to the extent he did. After all, the High Court decision was given in 2005. It was nearly eight years since Mr Swain had been injured. In that time, a sweeping movement for Tort Reform in Australia had already led to the enactment in most States and Territories of a broad platform of reform, addressing the very issues mentioned by Mr Power in the interview.

AN OUTLINE OF THE PAPER'S CONTENT

The objects of this paper may be briefly stated as follows: -

1. To describe briefly the background to the broad movement for Tort Reform that emerged in Australia during 2001-2002.
2. To mention, as an important reference point, a number of the recommendations of the **Ipp Report** especially in relation to actions for negligence likely to involve Beach Safety issues.
3. To categorise the reforms that have been introduced by legislation particularly in Queensland and New South Wales, especially those that have a bearing on Beach Safety issues. In this regard, the paper will focus on: -
 - (a) The concept of "obviousness"
 - (b) The effect of obviousness of risk of harm on the need to warn
 - (c) The concept of obviousness in relation to dangerous recreational activities
 - (d) Volunteers and good Samaritans

In preparing this paper, I would like to acknowledge the assistance I have obtained from a considerable number of Papers, Publications, Articles and Speeches that are available in the public arena. May I make particular reference to the Papers prepared and delivered by the Chief Justice of New South Wales, the Honourable James Spigelman AC; by the Honourable Justice David Ipp, a Judge of the Supreme Court of New South Wales and the Court of Appeal. My special thanks also to Professor Barbara McDonald of the Sydney University Law School for her invaluable advice and assistance.

A brief history – a change in emphasis

When I began practice in the early 1960's, there was still a discernable bias in court decisions in negligence actions. It was generally in favour of the defendant. This was especially so in the case of actions against professional people and in particular members of the medical profession. "Dr Knows Best" was not merely a moral truth embraced by patients and practitioners alike. It was, in the majority of cases, a starting point in cases where it was alleged that a doctor had been negligent in the treatment of his patient.

But this trend was not confined to medical negligence cases. Local Councils and community groups were not found to have been careless, save in fairly extreme circumstances.

Gradually, over the course of the following thirty years, I noticed, as did many of my fellow practitioners, a significant swing in favour of plaintiffs. Anecdotally, it appeared that nine out of ten plaintiff's cases resolved in favour of the plaintiff or at least led to a generous settlement. Why was this so? The answer seems to be rooted in two major considerations. The first was the inevitable historic swing away from a defendant-orientated system. The second factor appears to have undoubtedly related to the emergent underlying assumption, generally correct, that a defendant had the benefit of insurance. Spigelman CJ, in one of the papers to which I have earlier made reference, suggests that Judges may have proved more reluctant to make findings of negligence, if they knew the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home. It is hard to quarrel with this assumption. As our Chief Justice put it, given a situation involving an injured plaintiff on the one hand and a bucket of money on the other, the bucket seldom won.

The practical result of the major two factors I have identified, was this: a burgeoning number of both judge and jury decisions began to incur the wrath of the community generally. This mounting wave of concern, especially in the last 15 years or so, was reflected in heated editorials in the newspapers and talkback radio commentary. Once it was accepted that insurance was generally available to defendants, an enlightened compassion for the injured and a desire to compensate handsomely

those injured by the negligence of others tended to outweigh practical considerations as to the cost these attitudes might perhaps have on the community generally.

In this climate, public concern was expressed about a number of court outcomes. For example, as I mentioned in my introduction, Mr Swain recovered damages against Waverley Council when diving into a sandbank on Bondi Beach. A number of pedestrians fell over and injured themselves on public roads or on footpaths in circumstances where it might have been thought that, by keeping their eyes open and their wits about them, they would not have been injured. In 1996, a general practitioner was held liable in these circumstances: he had been at his surgery one morning when a young woman, a stranger, knocked on his door and asked him to examine her brother who was lying on the roadway some three hundred metres away, he having had a seizure. The doctor declined to attend to the young man on the basis that he was not his patient but, as I say, was held negligent nevertheless. In a celebrated diving case, a young man was injured when he dived into water at Rottneest Island. He hit his head on a submerged rock. It was a popular holiday spot and people had been diving there for a considerable period of time. The majority of the High Court held that the diver's injury was caused by the Authority's failure to warn of the presence of submerged rocks that were ordinarily plainly visible. (2)

Public concern with judicial decisions

It will be seen that community attitudes had changed markedly by the early 2000's. It is fair to say that undisciplined findings in relation to liability and what were perceived as overly large damages awards, fanned no doubt by political statements and somewhat hysterical media coverage, excited a degree of fierce public resentment. Judges were perceived – myself included no doubt - as being unduly generous with insurers' money. Whether this criticism was justified or not, premiums rose sharply and insurance cover became difficult to obtain. In the areas of health care, sporting events, charitable fund raisings and public recreation there arose a degree of panic. There was much public consternation over the early retirement of medical practitioners and their refusal or threatened refusal to perform certain services, particularly obstetrics, in country areas. There was a concern that community groups would be unable to carry out their useful and benevolent work. Developments in the

insurance industry brought the matter to a head. As Chief Justice Spigelman noted in his paper – “by 2002 what had for many years been a buyers market in insurance had become a seller’s market. At an international level there had been a series of natural disasters which had drawn down the capital of insurance companies, particularly that of re-insurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom, which further reduced the capital available to insurance companies. Quite quickly, demand exceeded supply in the Global re-insurance market. This was immediately reflected in premiums and in decisions as to what kind of businesses to write and where.”

In this country there were, in addition, the problems sustained following the collapse of HIH. In the area of medical insurance, Australia’s largest medical indemnity insurer was faced with insolvency and was only saved by the financial support of the Commonwealth Government. In addition to a package of other remedies, the government indicated it would subsidise premiums in certain fields of practice where the damages were large, such as obstetrics.

I have thus far dealt with this history but briefly and in a very generalised way. There are some qualifications that need to be made. For example, although it was rarely reflected in the media reports of the time, there were, during the same period, many instances, particularly in the appellate courts throughout Australia, where extravagant findings on both liability and damages were overturned. This can be seen in fact on a regular basis over the last 20 years. Secondly, there have been in existence for some time legislative schemes, which had endeavoured, as one of their aims, to keep down, for example, third party insurance premiums in relation to motor vehicles. Thirdly, by 2001, New South Wales had also sought to make important changes to the common law for recovery in medical negligence cases. This legislation had the unfortunate consequence, in the short term, of promoting a spate of claims before the cut-off date, a factor which threatened the liquidity of UMP. There remained, however, a clear need for reform on a broader basis.

The Ipp Committee Report

Because of the reality of the insurance crisis, and for that matter the problems it spawned in the community, the Australian Government convened a series of meetings with ministers from all jurisdictions and a representative of municipal government. With surprising rapidity, a non-partisan accord was reached by all jurisdictions to consider the implementation of major reforms to Australian law, in a consistent manner, in an endeavour to restore confidence and a degree of affordability and predictability.

In Australia, there are six States and two Territories. Each has its own government with powers and responsibilities within its own jurisdiction. Then there is the Commonwealth with its range of powers and responsibilities in respect of all Australian jurisdictions.

The common law, including the law of negligence, falls within the jurisdiction of the States and Territories. States and Territories also have responsibility for the administration of their own court systems including the hearing of claims falling within their jurisdictions and the implementation of statutes relating to civil liability in their areas. There is, although there is no need for me to attempt to detail it here, an overlapping of responsibility between the Commonwealth and the States in certain areas of insurance. For example, the States and Territories have the control of compulsory third party motor vehicle insurance.

This level of potential disparity highlighted the need to have some sort of partisan or uniform approach to tort reform, otherwise it would be likely to achieve very little.

A significant contribution to setting the reform on the right path was the 2002 report commissioned by ministers to review the law of negligence. (3) The committee was chaired by the Honourable Justice David Ipp and included Professor Peter Cain, Professor Don Sheldon and Mr Ian Macintosh. The report made sixty-one recommendations to governments on a principled approach to reforming the law.

At the Fourth Ministerial meeting in November 2002, ministers made a significant breakthrough, agreeing to a package of reforms to put in place a number of the main recommendations of the Ipp Report. Each jurisdiction agreed to introduce the necessary legislation as a matter of priority. The Australian Government confirmed that, within its own jurisdiction, it would amend the **Trade Practices Act 1974** to underpin the changes being made by States and Territories so as to avoid plaintiffs circumventing the range of reforms in other jurisdictions. The resultant legislative reforms in the various States and Territories of Australia, subsequently enacted, are at the core of this keynote address. The topic of tort reform is however a vast one; and it will certainly be the case that certain parts of it only are of interest to this conference. But may I preface a brief analysis of the reforms of most interest to this conference by a brief overview of the changes. They may be broadly grouped into three types: -

First, there were changes to the law governing decisions on liability, including contributory negligence and proportional liability. Secondly, there were changes to the amount of damages paid or payable to an injured person for personal injury claims or for economic claims against a professional. Thirdly, there were new time limits and methods for making and resolving claims, including improved court procedures, control of legal conduct and legal costs. Each of the groups of reforms has elements that focus on, but are not limited to, personal injury claims thus impacting both on issues of public liability and medical indemnity.

The reforms generally – an example

May I give an example of the first category: prior to the reforms, critics argued that the negligence arena in Australia had altered so that events with a very low probability of occurring could still be held to be foreseeable. In tort law, a basic principle is that a person owes another person a duty of care if the first person could reasonably have foreseen that, if he or she did not take care, the other would suffer either physical or economic injury or death. In **Wyong Shire Council v Shirt** (4), nearly 30 years ago, the High Court had found that persons could be held liable for failure to take reasonable precautions to avoid foreseeable risks, that is risks which were other than farfetched or fanciful. Critics argued, perhaps not entirely correctly, that this

benchmark may have required a person to take precautions against a risk of very low probability simply because it was foreseeable.

In general terms, the reforms were designed, first, to replace the test of foreseeability as established by **Wyong Shire Council v Shirt** with a test that persons could only be held liable for risks that were “not insignificant”. In addition, the legislative changes were fashioned to reinforce the situation where foreseeability is a necessary but not a sufficient condition for a finding of negligence. A person will not be liable merely by reason that a risk was foreseeable.

Under Part 1A Division 2 of the **Civil Liability Act 2002** – the New South Wales legislation – there are certain general and other principles relating to liability and negligence resulting from a failure to take precautions against a risk of harm. Under s 5B, a person will not be liable for harm unless the person knew or ought to have known of the risk; the risk was not insignificant and, in the circumstances, a reasonable person in that person’s position would have taken precautions against the risk. Section 5C sets out the matters that the Court is to consider when determining whether a reasonable person would have taken precautions against the risk.

The matters in s 5C are a reference to what has been described as “the negligence calculus”. This is a statement of the factors which have to be balanced out in establishing whether failure to guard against a foreseeable risk should be deemed negligent (ie, determining whether the standard of care has been breached). The calculus has also been described as providing a framework for deciding what precautions a reasonable person would have taken to avoid the harm that has occurred; and what precautions the defendant could reasonably have been expected to have taken. There are four named components:

- The probability that the harm would occur if care were not taken
- The likely seriousness of the harm
- The burden of taking precautions to avoid the risk of harm; and
- The social utility of the risk creating activity (that is, is it more worthwhile to take risks for some activities than for others – for example, if life is at stake).

The calculus involves weighing the first two matters against the last two. It should be noted that there is nothing new or novel in these matters. They were essentially the very matters mentioned by Mason CJ as relevant factors to be taken into account (see **Wyong Shire Council v Shirt** at 478).

The High Court of Australia had, in relatively recent times, prior to the reforms, emphasised again the need to bring considerations of this kind to account especially in the context of assessing foreseeability (**Tame v New South Wales; Annetts v Australian Stations Pty Limited**) (5).

In any event, reforms of the kind I have set out above are now in place in all States and Territories.

Reforms – Legislation around Australia

This paper is, of course, concerned primarily with tort reform and its impact in the specific area of beach safety. Participants in this conference will be aware, no doubt, that the raft of reforms that came about following the **Ipp Report** embraced a very wide area indeed. For example, medical negligence was singled out in a significant way. A medical practitioner was not to be regarded as negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the Court considered that the opinion was irrational (Recommendation 3; see s 50 of **NSW CLA**; s 22 **CLA 2003 (Qld)**). Policy considerations were introduced into the causation test in determining whether responsibility for harm should be imposed on the negligent party or whether it should be left to lie where it fell (Recommendation 29; sections 5D, 5E of **CLA Act (NSW)**; Queensland sections 11, 12). The limitation periods for commencement of proceedings were tightened up; the contributory negligence of a plaintiff, if it were sufficiently extensive, might defeat altogether a claim brought against a wrong doer. A threshold for damages was created and damages themselves were capped or scheduled in a number of respects. Claims for gratuitous services were significantly curtailed. I do not propose to examine any of these matters in this paper.

The areas of special interest to this Conference emerging from the **Ipp Report**, are the recommendations relating to the protection of “Good Samaritans”, when assisting injured persons in an emergency; the protection of volunteers from liability for work carried out for community organisations; and the significant limitation placed on the right to recover damages for injury arising from participation in dangerous recreational activities. This limitation arose from the **Ipp Report’s** concern as to the need for implementation of a strong form of personal responsibility in circumstances of dangerous recreational activity. Whilst all activity carries some level of risk of physical injury, the **Ipp Report** authors were of the view that the level of risk must be “significant” to satisfy the definition (Recommendation 12). The legislation enacted in both New South Wales and Queensland exempts a defendant from liability in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm (section 19 **CLA 2003 (Qld)**); see 5L of **CLA 2002 (NSW)**. Moreover, in New South Wales, a duty of care is not owed to a plaintiff in certain circumstances where, in relation to a recreational activity the risk has been the subject of a “risk warning” to the plaintiff. (Section 5M **CLA 2002 (NSW)**).

The concept of “obviousness”

Let me put this part of the discussion in some kind of realistic context. I have a brother-in-law who is a doctor in Forster. Like many medical professionals, he is markedly anti-lawyer. We often have heated discussions on topics of interest where he considers that the law and lawyers are acting in a bizarre way. One such lively discussion centred upon an unfortunate young boy, one Phillip Dederer. He was 14 years of age when he dived off the Forster/Tuncurry Bridge into the water below. Forster/Tuncurry is a busy tourist area. For many years young people, particularly in the summer months, had jumped and dived off the bridge into the estuary below. Mr Dederer had spent many holidays in the area since he was a very small boy. He had frequently observed children and adults jump and dive from the bridge. The day before his accident he had dived or jumped from the bridge without mishap. On the next day, he dived off the bridge at a point that was about 9 metres from the surface of the water. Unfortunately for him, on this occasion, he dived into approximately 2 metres of water and struck his head on a sandbar. As a consequence, he became a

paraplegic. There were pictographs signs at or on the approaches to the bridge prohibiting diving. There were also signs in words prohibiting climbing on the bridge. Prior to diving, Mr Dederer had seen and understood these signs but he simply ignored them.

Mr Dederer brought a claim against the Roads & Traffic Authority. It had, either in its own right or that of its statutory predecessor, designed and constructed the bridge and exercised a significant degree of control over the bridge. In the subsequent proceedings brought by Mr Dederer as plaintiff, there was no argument but that the RTA owed a general duty of care to the users of the bridge. The plaintiff also joined the local Council in the proceedings. However, for reasons that will become more significant in a later part of this discussion, the local Council was not joined until after the **Civil Liability Act (NSW)** had been passed. In other words the new legislation applied to Mr Dederer's action against the Council but it did not apply to the action against the RTA.

The trial Judge (Dunford J) found for the plaintiff as against both the RTA and the Council. The parties had agreed on quantum of damages. The plaintiff was, however, held to be guilty of contributory negligence. The trial Judge apportioned his share of responsibility for his own injury at 25%. On appeal, by majority (Ipp and Tobias JJA, Handley JA dissenting) the trial Judge's finding against the RTA was confirmed although the plaintiff's contributory negligence percentage was increased to 50%. On the other hand, the Council's appeal was successful on appeal and it was exempted from liability, having regard to the provisions of the **Civil Liability Act (NSW) 2002**(6)

As you would expect, my brother-in-law, the doctor from Forster, thought the Court of Appeal's decision in relation to the proceedings against the RTA (and that of the trial judge) was preposterous. He said "It must have been completely obvious to the plaintiff that he could be seriously injured by diving from the bridge into the estuary below". Now, as a matter of interest the trial judge didn't think so, although the Court of Appeal did, at least in the proceedings against the Council. My point, though is, that my brother-in-law's point of view was a clearly permissible one. It is perhaps a view that would be shared by many of the people in the room here. After all, most

people do not look at all the facts and they don't hear all the evidence. More significantly, however, I think the real danger is that there can be a very basic misconception about this notion of "obviousness".

Well, let me assume that the plaintiff in Dederer's case was, in a general sense, aware that there was a risk of serious injury. That might well have been obvious to him, even if he didn't think about it to any great extent. Plainly enough, he wouldn't have dived, if he thought that he was going to be injured. But the possibility of harm probably occurred to him as he leapt from the bridge. Many 14-year-old boys can be foolhardy in such situations.

If I may leave to one side, for the moment, the effect of the new legislation on the situation, what, might it be asked, as a matter of logic, should follow from the proposition that the risk may have been obvious to him? Surely it cannot follow, as a matter of logic, that just because a risk of harm may have been obvious to the plaintiff, that the defendant, who owes him a duty of care is entitled, because of the obviousness of the risk, to do nothing at all. This would be something of a paradox. After all, if the risk was obvious to the plaintiff, wouldn't it be equally obvious (perhaps more so), to the defendant? How then can it be argued that the defendant is under no duty whatsoever to take some steps to minimise or reduce that risk to a plaintiff?

This, I venture to suggest, may be thought to be the logical misconception to which I have referred. After all, a careful reading of the facts in the case will show that the RTA probably knew, and the Council did know, that scores of young people jumped from the bridge regularly, particularly in the summer months. There had never been a serious accident but, during the holiday periods, scores of young people went over the bridge and into the water. This was common knowledge. What the trial judge found was that the pictograph did not tell anyone what the danger was. Yes, it appeared to indicate that diving from the bridge head-first was not permissible. But it did not make clear what the danger was when the diver entered the water. In particular, it did not tell the hordes of young people who jumped regularly from the bridge that the water was of shifting depth from time to time. Secondly, the construction of the main railing of the bridge positively encouraged people to climb up on it and then jump over the side. The trial judge found that, with very little expense

involved, the railing could have been changed and the horizontal railings could have been replaced by vertical pool type railings. These structures were commonly found in modern bridges and could have easily been incorporated into the subject bridge without undue expense. With those improvements, young people would have found climbing and jumping from the bridge much more difficult. Changes of this nature would have discouraged the practice. The judge found that the situation of the bridge was “an accident waiting to happen”. That was his view of course, whereas it was probably not the view of the many young people who leapt from the bridge in their scores every summer.

So the first proposition I would enunciate is this: The obviousness of the possibility of harm in diving from a structure into the river, the creek or the ocean, is not something that, as a matter of logic, should obviate altogether the need for the controller of the structure to make sure it is safe or that it is not an encouragement for dangerous diving or jumping into the water. At the very least, any sign or pictograph should alert people as to the real reason for the danger that lurks below. The second proposition is that the logical role of “obviousness” is that it properly informs the concept of contributory negligence. It does not eliminate the need for a defendant to carry out its reasonable responsibilities. But it does mean that a plaintiff’s claim for damages should be reduced, and perhaps significantly so, depending upon the failure to take care for his or her own safety involved in the particular circumstances.

Putting this in legal terms, one might say that the notion of obviousness is not destructive of the existence of a duty of care but is relevant to whether a defendant is in breach of his duty of care. Secondly, it is relevant to questions of whether a plaintiff should have his claim reduced for contributory negligence. There is presently no binding authority, at the level of the High Court, to suggest that obviousness in itself, without more, can be a complete answer to the breach of duty question.

In **Consolidated Broken Hill Limited v Edwards**, Ipp JA has provided a very useful and careful summary of the current High Court situation in relation to the concept of obviousness (7). Ipp JA articulated the position as follows: -

“Obviousness of risk is not a phrase that denotes a principle or rule of the law of negligence. It is merely a descriptive phrase that signifies the degree to which risk of harm may be apparent. It is a factor that is relevant to whether there has been a breach of the duty of care. I make no comment as to whether it is relevant also to the existence of a duty of care as that was not an issue in this case...The weight to be attached to the obviousness of the risk depends on the totality of all the circumstances. In some circumstances it may be of such significance and importance as to be effectively conclusive”.

Professor Barbara McDonald has some criticisms of this summary. (8) For present purposes, she has pointed out that the last sentence in the summary, presumably extracted from the joint judgment of Callinan and Heydon JJ in **Mulligan**, (9) goes much further than any of the other judges in the High Court and may only serve to tempt, in cases where the risk is highly obvious, an incomplete consideration of the circumstances of the case and the various factors relevant to a determination of breach.

A case with somewhat extreme factual circumstances in the realm of “obviousness” is the decision of Moynihan J in **Enright v Coolum Resort Pty Limited**. (10) This was a case decided in November 2002. Accordingly, it pre-dates the reform legislation in Queensland. I shall take a moment or two to look at the facts of the case and the decision of Moynihan J.

The plaintiff was the widow of the unfortunate Mr Enright who drowned at Yaroomba Beach on 3 March 1993. The claim was one for the loss of dependency. The principal issue was the liability of the defendants. They included the Resort and its interests. The second defendant was the local council. It sued on the basis that Yaroomba Beach was under its control. There was no dispute in the case that each of the defendants owed a duty of care to Mr Enright. The issue was as to the nature and extent of the duty and, in particular, whether there was a breach of duty. The plaintiff’s case was essentially one of failure by the defendants to warn Mr Enright of the dangers of swimming at un-patrolled Yaroomba Beach. In the case of the Council, there was an alleged failure to provide a warning sign in the park area from which Mr Enright had accessed the beach. In the case of the Resort interests, it was the failure to warn the swimmer of the hazards of entering the surf at an un-patrolled beach.

In the course of his careful judgment, Moynihan J referred to a number of cases dealing with the issue of reasonableness in the context of whether a defendant had or had not breached its duty of care towards a plaintiff. One of those was the decision of the Full Court of the Supreme Court of Western Australia in **Prast v Town of Cottesloe** where the issue was whether the local authority ought to have provided a warning to surfers of the dangers of suffering a serious injury as a consequence of being dumped by a wave. (11) Moynihan J quoted a well-known passage from the judgment of Ipp JA (with whom Wallwork and Parker JJ agreed): -

“Sea conditions often change. Currents, rips and surges unexpectedly materialise. Large and unexpected waves materialise out of the deep. These phenomenon are all capable of causing serious injury or death. The currents and rips can take an unsuspecting swimmer far out to sea and result in drowning. Surges and unexpected large waves can hurl an unsuspecting swimmer against rocks or on to the seashore, with serious damage to body and limb. And yet the suggestion that signs should be placed on all beaches in Australia indicating that swimming in the sea could lead to serious injury or death would, I suggest, be absurd. The absurdity lies in the obviousness of the danger that attaches to the common everyday, activity of swimming in the sea...

In my opinion, the risks attendant upon body surfing fall into the same category. Of course, where there are dangerous currents or rips or surges or rocks, or the possibility of occasional “king” waves or other dangers that are peculiar to a particular beach or part of a beach, special warnings may be called for, but that is not the case...As a matter of law, there is a point at which those who indulge in pleasurable but risky past times must take personal responsibility for what they do...that point is reached when the risks are so well known and obvious that it can reasonably be assumed that the individuals concerned will take reasonable care for their own safety”.

The facts found by Moynihan J were quite unusual. It seems that the unfortunate Mr Enright went off on a frolic of his own. For example, on his way to the Resort, he had been told that Yaroomba Beach was not a safe place at which to swim. In fact, he had been advised that he should swim only at Coolum Beach where it was safer, or in one of the Resort’s swimming pools. Secondly, it seems that Mr Enright ignored all of the hotel brochures and signs indicating that there was a patrolled beach available at which pleasurable swimming might be had. He and a companion walked to a deserted beach area which was remote from the Resort Beach Club area. The two men made their own assessment of the water conditions there and swam and surfed

at the un-patrolled beach area for some 30 or 40 minutes. Moynihan J found that Enright was familiar with water based recreational activities and had experience of surfing conditions. The trial Judge rejected the plaintiff's case that the two men were caught unexpectedly in a rip and swept out of their depth. Rather, he found that the weather conditions had deteriorated while they were swimming. When they decided that they would return to the beach, they found that they were now some 80 to 100 metres from the beach area. One of the men, Mr Hickey was able to make it to shore although he experienced a strong undercurrent during the process. Mr Enright, who was not in good physical condition, did not manage to get back into shore and drowned.

Moynihan J also found that, even if there had been a sign erected at Yaroomba Beach, Mr Enright would have entered and remained in the surf as he, in fact, did on the day in question. In any event, the trial Judge was satisfied that the defendants did not create the risk of Mr Enright drowning in the surf or have any control over or responsibility for the conditions, which created it. The choices Enright made, in the events leading up to his death, were made without reference to or reliance on the defendants. The choices were those of Mr Enright alone. His Honour said: -

“A sign which said for example, “surfing dangerous, it is dangerous to get out of your depth” is simply a statement of what already ought to have been obvious to Enright. Since in my view Enright did not drown because of a rip, a sign warning against rips would not have been to the point.

I have spoken about the inherent dangers of surfing. No doubt there may be circumstances in which it is foreseeable that potential surfers do not have the experience to be aware of and to make judgments about the inherent risks. This might well give rise to an obligation to warn them or even to safeguard against their entering the surf unsupervised. On the basis of the findings I have made Enright was not such a person”.

In the ultimate, the trial Judge held that Enright had determined, notwithstanding advice he had received to the contrary, to surf while he was at the Resort. He took no attempt to acquire any relevant information at the Resort. He entered the water without locating the Beach Club and without the prospect of assistance other than from his companion if they got into trouble. He was experienced in risks associated with water based recreational activities and the decisions he took to enter remain in

and leave the water were his own. The risk which led to his drowning was within his knowledge and within his competence to deal with had he been paying proper regard to conditions and the depth of water and distance from the shore and his state of fatigue and fitness. For these reasons, he found that the plaintiff had failed to establish breach of duty by any of the defendants causing Enright's death.

Some might argue that this was a hard decision. But it fell within orthodox lines of legal approach. The plaintiff essentially failed on the causation issue. The defendants' conduct was examined to determine whether there was breach of duty. The role of "obviousness" fell within the parameters of the examination of breach. One has to be careful, however, to distinguish between inherent risks and obvious risks. Clearly, as in **Prast**, there was an inherent danger that surfers might be dumped on the seabed by a breaking wave but was it obvious? That would of course, depend upon the circumstances.

One final case on obviousness in Queensland is the decision in **Lynch v Kenny Shoes (Australia) Limited** (12)

This is a Queensland illustration of a trend, which appears to be cementing itself throughout most parts of Australia. Whether he or she be a road user, or simply a person in a domestic situation, the plaintiff who trips or falls may find it very difficult to win. In **Lynch's** case, the plaintiff, while in a shoe shop, tripped on the carpet covering the protruding base of a shoe stand. At the time, she was looking into the distance to another display stand. McMurdo P said: -

"Whilst a reasonable shopkeeper should be aware that a shopper might be distracted by the display of goods in the shop, a shoe shop like the respondent's is distinguishable from a supermarket with aisle shopping. It should have been obvious to shoppers in the shoe store that they must negotiate their way around stands and trays of stock to reach other stock. It ought also have been obvious to customers that if they looked only at displays of shoes and not where they were walking they might walk into or trip over platforms displaying other shoes and injure themselves. This should have been apparent to a reasonable person in the appellant's position exercising ordinary perception, intelligence and judgment. It follows that the risk of injury from the display platform was obvious but unlikely. This conclusion is supported by the evidence that no-one fell over the platform in at least eight years. The risk identified by [the expert] Mr Kahler did not require a response

from the respondent. People who do not look where they are going can inadvertently fall over obvious items anywhere; living is not risk free and the community does not want nor expect courts to attempt to make it so by imposing unreasonable and unrealistic standards”.

The reform legislation – the role of “obviousness”

Let us now turn to the reform legislation. I propose to confine my remarks to the New South Wales and Queensland statutes. There are a number of publications detailing the legislative schemes in other places throughout Australia.

The **Civil Liability Act 2002 (NSW)**, in s 5F, provides:

“Meaning of “obvious risk”

5F Meaning of “obvious risk”

- (1) For the purposes of this Division, an "obvious risk" to a person who suffers [harm](#) is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) [Obvious risks](#) include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an [obvious risk](#) even though it has a low probability of occurring.
- (4) A risk can be an [obvious risk](#) even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.”

In Queensland, s 13 of the **CLA Act 2003** makes provision in similar terms to the New South Wales legislation. There is an additional sub-section 5 in the following terms: -

“(5) To remove any doubts, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

Examples for subsection (5) -

1 A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.

2 A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.”

The concept in s 5f(1) is one that is well known to lawyers: for example, in the criminal law in the law relating to provocation, a factor that can reduce murder to manslaughter. It is not an easy concept for many lay people. This is because it requires, at the one time, consideration of both objective and subjective attributes. I shall give four examples of its operation in New South Wales, although only one of these has to do with risks emanating from aquatic recreation.

The first case was that of Doubleday v Kelly. (13) Here, the plaintiff was a seven-year-old who had stayed overnight at a friend's home. She and the friend went out early in the morning where a pair of roller blades and a trampoline were situated. The defendant, who was the parent of the other child, was asleep at the time. The plaintiff put on the roller blades and moved onto the trampoline, believing that it was a hard surface. The little girl fell and was injured. The New South Wales Court of Appeal did not accept the defendant's argument that there was no liability because the risk in question was “an obvious risk”.

The argument put before the Court was that s 5L applies to children as though they were adults. Bryson JA rejected this outright. He said: -

“In my view this submission does not accord with the meaning of s 5F(1), which requires consideration of the position of the person who suffers harm and whatever else is relevant to establishing that position. The characteristics of being a child of seven with no previous experience in the use of trampoline or roller skates, who chose to get up early in the morning and play unsupervised, is part of that position”.

This conclusion might have been thought reasonable enough in the case of a small child. What, one asks, would its application be in the case of a naive tourist visiting a

Queensland beach? Or perhaps far north Queensland in areas where, for example, crocodiles in swimming areas can be dangerous? The answer, in each case, would require a careful examination of the attributes and knowledge of the plaintiff. The second example appeared in **C. G. Maloney Pty Ltd v Hutton-Potts**. (14) There, the plaintiff was injured when she fell on unbuffed liquid polish on a floor in the hotel which the defendant contractor's employee had not completed cleaning.

Again, Bryson JA (with whom McColl JA agreed) observed: -

“Much depends, in the application of provisions dealing with obvious risk, upon the degree of generality or precision with which the risk is stated. Rejecting more highly generalised statements, such as that bad things sometimes happen in hotels or that people sometimes fall over when walking on floors, the risks which confronted Mrs Hutton-Potts can be stated at several different degrees of intensity. In a room in a hotel where a cleaner is polishing the floor with a buffing machine, there is a risk that a recently polished floor will be slippery, because it is polished. I do not think it would be correct in fact to see this as the risk which matured...a higher degree of intensity is required in stating the risk. Her injury was caused by there being polishing material on the floor which was not visible, and which had not been removed in the buffing process.”

Once again, all this states no more than that one has to examine the factual situation of a particular case very carefully to understand the nature of the risk, which has eventuated. It is only when that is appreciated that one can ask whether it is a risk “that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff”.

The third case (**Smith v Perese**) involved a plaintiff who was engaged in spear fishing at sea. He was an experienced spear fisherman. He was fishing in company in an area in which he was familiar in reasonably good conditions. He was using a float which he believed to be conspicuous. The area was one which was commonly used by spear fisherman. Both he and his companion were in reasonable proximity to the shoreline. The plaintiff was, however, struck and injured by a vessel. Studdert J held that he was not persuaded that the risk which eventually materialised was an obvious risk. It was not a risk, based on the plaintiff's evidence, of which he was aware. (15)

One could readily imagine a different factual scenario, which would require a finding that being struck by a vessel whilst spear fishing may well have been quite obvious to a reasonable person in the position of the injured plaintiff. Each case, it is suggested, must invariably turn upon its own facts and circumstances.

A final example I will give is **Dederer's** case itself. Here the Court of Appeal overturned the trial judge's finding that the risk to the plaintiff was not "obvious" within the meaning of section 5F of the **New South Wales Act**. The result is, perhaps, not surprising, although the Court of Appeal's reasoning, with respect, is not beyond reproof. Basically, the trial judge had found that the risk of serious permanent physical injury would not have been obvious to this particular plaintiff, even if it would have been obvious to a mature adult. Ipp JA reasoned that some of the trial judge's finding on contributory negligence were "inconsistent" with his Honour's finding that the risk was not obvious. These findings included the plaintiff's knowledge that the depth of water was variable; that jumping from heights could result in injury; and that part of the thrill the plaintiff obtained from diving and jumping from the bridge was "the risk". These matters, it might be argued, were not necessarily inconsistent with his Honour's ultimate finding in relation to section 5F. Ipp JA also thought that the trial judge's finding, based on his inspection of the accident scene, that the situation at the bridge was "in effect an accident waiting to happen" was also inconsistent with his finding that the risk was not obvious. It might however, be thought that the views of a 70 year old trial judge, especially one with some 20 years of experience, reflecting upon the event in the light of all the evidence he had absorbed, including his inspection of the accident scene, would be of little moment in determining what may have been obvious to a reasonable person in the position of the 14 year old plaintiff.

In the ultimate, however, Ipp JA (with whom the other members of the Court agreed) stated that, in his opinion, even without the sign on the bridge, it should have been obvious to a reasonable 14 and a half-year-old that such a dive was dangerous. And it should have been obvious that it could lead to catastrophic injuries. Here, Ipp JA was on surer ground. The dive was from a height of some nine metres into the estuary. The point of entry was about 10 metres from a visible sandbar. In addition, the plaintiff conceded that he was aware that sand on the sandbar moved with the

current and that, in the channel, the depths were hard to judge and some parts were more shallow than others.

Overall, it needs to be kept in mind that the statutory definition of “obvious risk” is a stepping stone to the operation of other provisions of the tort reform legislation. In particular, for the purposes of this paper, it is a provision that is highly relevant to the duty to warn itself and to the liability for harm encountered in dangerous recreational activities. I shall consider each of these separately.

No duty to warn of obvious risk

Section 5H of the **CLA Act 2002 (NSW)** provides:

- (1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to warn of an [obvious risk](#) to [the plaintiff](#).
- (2) This section does not apply if:
 - (a) [the plaintiff](#) has requested advice or information about the risk from [the defendant](#), or
 - (b) [the defendant](#) is required by a written law to warn [the plaintiff](#) of the risk, or
 - (c) [the defendant](#) is a professional and the risk is a risk of the death of or [personal injury](#) to [the plaintiff](#) from the provision of a professional service by [the defendant](#).
- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

The **CLA 2003 (Qld)**, in section 15, provides in similar terms to section 5H of the New South Wales legislation except that, in sub-section (2)(c) there is a proviso that the professional be “other than a doctor”.

The position at Common Law, prior to the enactment of the reform legislation, was that the proper discharge of a person’s duty to another may require that there be a warning of risk. If an incident were caused by such failure to warn of the risk, the

person found to have the duty to warn would be liable. It was relevant, but not fatal, if the risk was an obvious one.

Superior Courts have held, however, that a plaintiff might well need to prove a more fundamental departure from reasonable care other than simply saying a warning should have been given. This may be seen in Vairy v Wyong Shire Council (16) where Gleeson CJ observed: -

“If a public authority, having the control and management of a large area of land open to the public for recreational purposes, were to set out to warn entrants of all hazards, regardless of how obvious they were, and regardless of any reasonable expectation that people would take reasonable care for their own safety, then signs would be either so general, or so numerous, as to be practically ineffective. If the owner of a ski resort set up warnings signs at every place where someone who failed to take reasonable care might suffer harm, the greatest risk associated with downhill skiing would be that of being impaled on a warning sign...Often the answer (to the question as to whether reasonableness requires a warning) will be influenced by the obviousness of the danger, the expectation that persons will take reasonable care for their own safety, and the consideration of the range of hazards naturally involved in recreational pursuits.”

The obvious intent of the new legislation, as set out above, is to preclude, in certain situations, reliance upon a duty to warn as a particular breach of duty.

It is not unimportant to observe that sub-section 1 says nothing of any remedial step, other than a warning, which, arising from the exercise of reasonable care in discharge of a duty of care, might be appropriate.

Two recent examples may be given of situations that have arisen in New South Wales. In the first, Chotiputhsilpa's case the plaintiff, a young man of 16, suffered severe injuries when he was struck by a motor vehicle while endeavouring to cross Anzac Bridge in Sydney. The bridge was heavily trafficked at the time. The plaintiff had alighted from a bus and endeavoured to head in the opposite direction back towards the city. He did not know the area well. Unknown to him, there was a pedestrian subway, which allowed safe crossing to the other side of the bridge. This was located underneath the bridge at about 60 metres from the bus stop. The RTA was the statutory authority which had responsibility for the design and construction of the bridge, including any necessary signage. There was no signage at the bus stop

or surrounding area that would have alerted a person in the vicinity of the bus stop to the existence of the pedestrian subway or that the footpath would provide access back towards the city.

The plaintiff failed before the trial court but succeeded on appeal against the RTA. Obviously enough, it might well have been argued that the plaintiff, in attempting to cross a heavily trafficked multi-lane bridge, would encounter an “obvious risk” so as to satisfy the statutory test. As the Court of Appeal found, however, the appropriate response of the road authority to that risk was not a warning of it, but the design and maintenance of a safe system of signage to draw the attention of people to the pedestrian subway beneath the bridge (17)

The second example is **Randwick City Council v Muzic** (18) The plaintiff in that case well knew of the risk in question, namely the danger of slipping on algae on a beach promenade. The algae was not safely removable by the defendant council for environmental reasons. The Court of Appeal held that it was not reasonable for the defendant to simply do nothing in the circumstances. It was clear that the provision of a notice warning that the surface of the promenade was slippery would have made no difference to the plaintiff in the case (because the plaintiff admitted that she was aware that it was slippery). Nevertheless, it would have been a reasonable response to the risk of injury for the council to close the relevant part of the promenade until it could undertake the remedial work.

The position in **Muzic’s** case has clear ramifications for councils and other statutory bodies with the control of beach promenades. This is particularly so where there are large crowds of tourists involved. The case highlights the fact that it is not simply enough to reason that there is no need to put up a warning in relation to an obvious risk. There may well be a need to do something else besides. It is the corollary, if you like, of the paradoxical situation suggested by Gleeson CJ in **Vairy’s** case. The Anzac Bridge case really illustrates the same point. In neither case would a warning about a particular risk have come as any surprise to the plaintiff. The risk of crossing the heavily trafficked Anzac Bridge would have been obvious to a pedestrian, even to a stranger to the city. The risk of slipping on the promenade was one of which Ms Muzic was well aware. What was required of the defendant in each case, however, was a different response dictated by the circumstances of the risk.

Let us now turn to “obviousness” in the context of “dangerous recreational activity”.

Dangerous recreational activity

In New South Wales, Division 5 applies in respect of liability and negligence for harm to a person resulting from a recreational activity engaged in by the plaintiff. Section 5K defines the relevant term as follows: -

“Dangerous recreational activity means a recreational activity that involves significant risk of physical harm”.

The expression “recreational activity” includes: -

- (a) any sport (whether or not the sport is an [organised](#) activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.”

The key provision is section 5L which provides as follows: -

“No liability for harm suffered from obvious risks of dangerous recreational activities

5L No liability for [harm](#) suffered from [obvious risks](#) of dangerous recreational activities

- (1) A person ("the defendant") is not liable in [negligence](#) for [harm](#) suffered by another person ("the plaintiff") as a result of the materialisation of an [obvious risk](#) of a [dangerous recreational activity](#) engaged in by [the plaintiff](#).
- (2) This section applies whether or not [the plaintiff](#) was aware of the risk.”

I have earlier set out the definition of “obvious risk” in Division 4 which is stated to have application for the purposes of Division 5. It is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the plaintiff.

The New South Wales legislation also provides, in section 5M, that the defendant does not owe a duty of care to another person who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff. I have not set out the full detail of this section since it is not applicable in Queensland. Generally, sections 17, 18 and 19 of the **CLA 2003 (Qld)**

provide in similar terms to sections 5J, 5K and 5L of the New South Wales legislation. The Queensland Act carries no discrete definition of “recreational activity”. The definition of “dangerous recreational activity” in section 18, however, does incorporate a de facto definition of “recreational activity” expressed simply as “an activity engaged in for enjoyment relaxation or leisure”. As I have said, the Queensland Act does not contain a section analogous to the risk warning section contained in the New South Wales Act.

Commentary on legislation

The term “recreational activity” is in New South Wales very broadly defined. It is an inclusive definition, as will have been seen. Although the expression is not discretely defined in the Queensland legislation, it is likely that it would receive a similar interpretation in your State. The scheme for dealing with risks emerging from “dangerous recreational activity” in each of the two States is essentially the same.

The breadth of the definition is indeed extremely general. The authors of **Civil Liability Australia**, in their commentary, note some 40 odd activities which might fall within the concept of “recreational activity” (19). It includes such innocent pastimes as a backyard barbecue, children’s parties, attendance of a group at a restaurant or hotel or sporting fixture; it would extend to library user patronage, concert patronage or patronage at a fete or festival. It might even extend to “recreational” browsing in shops. Liability is excluded altogether for breach of duty (NSW) or negligence (Qld), where the harm is a result of materialisation of an obvious risk of dangerous recreational activity engaged in by the plaintiff. This is defined, as has been seen, to mean a recreational activity that involves a significant risk of physical harm. Commentators have noted that this is a rather undemanding test. Professor McDonald has noted that perfectly legal and common activities can involve a significant risk of harm, as do foolhardy activities. This observation is clearly correct. One of the problems is to determine whether the harm arose out of a dangerous activity itself or out of an incidental aspect.

This is very much the type of argument that was considered by the New South Wales Court of Appeal in **Fallas v Mourlas** (20) This is an unusual decision in a number of respects. In that case, the injury occurred in the course of the activity of “kangaroo

spotting”. This was, on its face, a dangerous activity as it involved the use of firearms. The plaintiff’s task in the activity however, was to act as a “spotter”. He held a spotlight from within the passenger’s seat of a vehicle while the other men with firearms were outside. He was shot, not as someone was shooting at a kangaroo, but when the driver re-entered the vehicle with a loaded gun and began to attempt to unjam it while pointing it at the plaintiff. This was despite repeated requests from the plaintiff that the driver not enter the vehicle with a loaded gun; and despite assurances from the weapon holder that it was not a loaded weapon. As it happened, the gun went off and the plaintiff was shot in the leg. Even in this rather unusual situation, the unfortunate plaintiff was treated as engaged in the dangerous activity of kangaroo spotting with firearms. Ipp JA held that, although the risk of another person being negligent might be obvious in some circumstances involving dangerous recreational activities, it might not be obvious that the person would act in a grossly negligent manner. Here, the defendant had acted in a grossly negligent manner so that section 5L did not excuse him. On the other hand, Ipp JA (with whom Tobias JA agreed) held that the recreational activity in which the plaintiff was engaged carried with it a significant risk of physical harm and therefore was a dangerous recreational activity within the meaning of section 5K of the **New South Wales Act**.

There was disagreement between Basten JA and Ipp JA as to the appropriate test for determining when a recreational activity becomes a “dangerous” one.

According to Ipp JA’s reasoning at paras [45] to [50], the application of ss 5K and 5L to the assessment of what constitutes a “dangerous recreational activity” should always be made with regard to “the particular activities engaged in by the plaintiff at the relevant time.” Where a particular act is part of a broader or more general activity, it may become necessary to engage in a “segmenting” exercise, separating particular act from the general activity, to determine whether it is a dangerous recreational activity according to the legislation. By having regard to the particular activity, Ipp JA’s test would therefore be wide enough to “take into account any risks created by the conduct of the plaintiff that would not ordinarily be part of the general activity”, but not so wide as to be vague or uncertain. His Honour used the example of walking to demonstrate that an attempt to apply a test which is too narrow or, alternatively, too

vague would simply be unmanageable when one considers the myriad of risk factors attendant on such a simple recreational activity as walking, each or all of which may have the potential of turning it into a “dangerous” one. In his example, Ipp JA cites such factors such as the location of the walk, the time of the walk, the conditions of the walk, the atmospheric conditions, the walker’s experience, fitness level, and so on.

Ipp JA also expressed the view that the significant risk converting the recreational activity into a dangerous one need not be the obvious risk that materialises. His Honour disagreed with the opinion expressed by Basten JA, who had suggested that s 5L can only be engaged when at least one of those [significant] risks must materialise [as an obvious risk] and result in harm suffered by the plaintiff. Rather, Ipp JA saw nothing in s 5L which required the “obvious” risk to also be one of the “significant” risks of a particular recreational activity.

Basten JA, at paras [139] to [144], considered the idea of risk of harm and the factors elevating such risks to the realm of “significant” for the purposes of s 5L. Although there may exist certain categories of recreational activity which could commonly involve ‘inherent’ risks (such as motorcar racing and sporting activities), the risk would “need to be assessed according to whether incompetence or carelessness on the part of the particular participants rises above the level of a fanciful suggestion and constitutes a significant risk.” Determining which is the case may be a matter for evidence.

Basten JA went on to analyse different ways of determining whether or not a risk of harm was itself “significant”. Merely assuming a risk will be “significant” because of the catastrophic results which would occur if the risk were realised was considered by His Honour to be inappropriate in determining “significant” risk of harm. Basten JA further found there was insufficient evidence to support either an approach which took into account the characteristics of the plaintiff in relation to the particular activity (such as level of competence, sobriety, and reputation for being ‘careful’), or the use of statistical evidence to assist in determining the likelihood of the risks occurring with “sufficient frequency, or whether they are so rare as to constitute an insignificant risk.”

These conflicting views may themselves be the subject of a degree of critical commentary. The views of Ipp JA in relation to the nature of a “dangerous recreational activity” may be thought to extend the definition somewhat too far and render less certain that which is normally clear to most people. In particular, the distinction between an activity which is not the materialisation of a significant risk, but which may well be the materialisation of an obvious risk, is difficult to comprehend. Basten JA, on the other hand, thought that one of the significant risks of a particular activity must materialise as an obvious risk before liability will be excluded. His analysis of the characteristics of a dangerous recreational activity may be objected to the basis that it leaves or generates a good deal of uncertainty itself. One would think, for example, that any recreation involving the use of firearms might, in common parlance, be thought of as a dangerous recreational activity, notwithstanding that safe guards apply.

There are practical significances involved in these points of distinctions. In the area of beach safety, one would have thought that swimming was not, per se, a dangerous recreational activity. According to Ipp JA, it may be dangerous, depending on a great variety of circumstances relating to the particular incident. On the other hand, Basten JA would appear to demand some type of empirical evidence before being so satisfied. The situation is not a model of clarity in either case.

I think a clearer example of the situation that one might expect to find appears in the case of **Smith v Perese**. This case was heard by an experienced trial judge, Studdert J. I have earlier set out the facts. It will be recalled that the plaintiff was engaged in spear fishing at sea when struck by a vessel and injured. As I mentioned earlier, the trial judge concluded that the risk was not obvious in the statutory sense. His Honour however, went on to consider whether the recreational activity itself was dangerous. In a brief passage his Honour said:

“In determining whether a recreational activity is dangerous, that really depends on an assessment of all the circumstances in which that activity is undertaken. It does not seem to me that one could decide that to go spear fishing was always a dangerous activity or that it was never a dangerous activity. To fish alone in an area known to be infested with sharks where some

other fisherman had been taken by a shark earlier that day would plainly involve the undertaking of a dangerous recreational activity. To go spear fishing in company in a netted area exclusively reserved for spear fishermen, with notices displayed prominently notify that activity, would equally obviously not be a dangerous recreational activity. The need is to assess the particular circumstances in which the activity was being undertaken”.

Studdert J concluded that an examination of all the circumstances did not satisfy him that what was involved was a dangerous recreational activity. In particular, he was not satisfied that, in the circumstances, the activity involved a significant risk of physical harm. Finally, he did not accept that the plaintiff was injured as a result of the materialisation of an obvious risk of the activity in which the plaintiff was engaged.

Perhaps the result might have been different had the spear fisherman concerned been relatively inexperienced and the injury occurred in circumstances where one of the spear guns was negligently handled during the fishing expedition, resulting in a spear injury to the plaintiff.

Another relatively clear case was the decision in **Falvo v Australian Oztag Sports Association** (21). Oztag is a type of touch rugby game. The object is to rip a tag from the shorts of the opposing player who is carrying the ball. When that happens the player holding the ball must release it. The degree of physical contact between parties is correspondingly quite limited. Mr Falvo injured his right knee when playing a game of Oztag. The game was organized by the defendant at a local sporting fixture in Sydney. The plaintiff was running towards the opposing team’s try line with the ball in his hands when he moved to an area of the field that was ungrassed. His knee gave away and he collapsed. His evidence was that his foot had gone into an area of sand. Mr Falvo failed in his action because the condition of the field was “obvious to all” and no breach of duty had been established on the part of the defendant. In the course of the decision however, the Court of Appeal had to consider whether Oztag did or did not constitute a dangerous recreational activity. Once again Ipp JA was the voice of the Court. His decision was one in which Hunt AJA and Adams J agreed. His Honour said commencing at [28]:

“In my view, the definition of "dangerous recreational activity" in s 5K has to be read as a whole. This requires due weight to be given to the word "dangerous". It also requires "significant" to be construed as bearing not only on "risk" but on the phrase "physical harm" as well. The expression "significant risk of physical harm" is coloured by the word "dangerous" and the phrase "significant risk" cannot properly be understood without regard being had to the nature and degree of harm that might be suffered, as well as to the likelihood of the risk materialising.

[29] The view that a risk is "significant" when it is dependant on the materiality of the consequences to the person harmed is consistent with the views expressed by the High Court in *Rogers v Whitaker* (1992) 175 CLR 479 at 490.

[30] Thus, in my opinion, the expression should not be construed, for example, as capable of applying to an activity involving a significant risk of sustaining insignificant physical harm (such as, say, a sprained ankle or a minor scratch to the leg). It is difficult to see how a recreational activity could fairly be regarded as dangerous where there is no more than a significant risk of an insignificant injury.

[31] In substance, it seems to me, that the expression constitutes one concept with the risk and the harm mutually informing each other. On this basis the "risk of physical harm" may be "significant" if the risk is low but the potential harm is catastrophic. The "risk of physical harm" may also be "significant" if the likelihood of both the occurrence and the harm is more than trivial. On the other hand, the "risk of physical harm " may not be "significant" if despite the potentially catastrophic nature of the harm the risk is very slight. It will be a matter of judgment in each individual case whether a particular recreational activity is "dangerous".

[32] Oztag, like touch rugby, is not what is normally understood as a contact sport. Oztag, in fact, is designed to reduce the extent of physical contact that might be experienced in ordinary touch rugby.

[33] A "dangerous recreational activity" cannot mean an activity involving everyday risks attendant on games such as Oztag, which involve a degree of

athleticism with no tackling and no risk of being struck by a hard ball. In my opinion, the trial judge erred in finding that Oztag was "a dangerous recreational activity".

In **Lormine Pty Ltd v Xuereb**, the New South Wales Court of Appeal concluded that section 5L of the New South Wales Act was not invoked in circumstances where a plaintiff was injured when standing, by invitation of the crew, on the front deck of a Dolphin Tour vessel. The plaintiff was washed overboard when the vessel was struck by a rogue wave but due to negligence of the master in the way the vessel was handled. The specific activity, Dolphin Spotting, was found not to be a dangerous recreational activity (22).

Finally, may I come back to our old friend **Dederer**. As I indicated at an earlier part of this paper, he failed in the Court of Appeal against the local council. He did so on the basis of the Court of Appeal's finding that the trial judge had erred in relation the relevant matters under Division 5 of the **CLA (NSW)**. All three judges agreed that the particular activity engaged in by Mr Dederer was a dangerous recreational activity and that it should have been obvious to him, even though he was only 14 and a half, that the contemplated dive was dangerous and could lead to catastrophic injuries.

So here we have a clear example of the way in which the **CLA (NSW)** has operated to exempt from liability a statutory body because of its precise terms. The RTA lost its appeal but it, of course, did not have the advantage of the provisions of the **CLA**.

The proof of the pudding, they say, is in the eating. The Court of Appeal decision in **Dederer** demonstrates the efficacy and reach of the Tort Reform provisions. Whether that is a good thing or a bad thing is for others to decide.

For completeness, I should mention that the High Court is, at the time of preparation of this paper (16 August 2007) reserved on the appeal brought by the RTA against the Court of Appeal's decision. It is possible Mr Dederer may lose altogether. My brother-in-law may be proved right yet again (23).

A final overview on “obviousness”

My final remarks on this part of the topic can be best understood in the context of the recent decision of Hislop J in **Bennett v Manly Council & Sydney Corporation** (24). The plaintiff was an experienced swimmer and surfer who sustained injury at Manly Beach at about 3.15pm on 8 October 2000. He was body surfing a wave into the shore when he hit his head on storm water pipes, which extended into the sea. He was surfing outside the designated safe swimming area when he was injured. The plaintiff suffered incomplete quadriplegia as a result of the accident. There was agreement as to the damages. In the ultimate, Hislop J awarded the plaintiff \$1,750,000. This verdict was reached after a deduction for contributory negligence of 50%.

Manly Beach is well known to residents of New South Wales. It may also be well known to some of the people at this Conference. It is a beach set in rather a spectacular position and is very popular with locals and tourists. For many years, there have been two 24-inch diameter storm water drainage pipes extending across the beach and into the water. At times, depending on the conditions of the sea, the pipes are not visible to a person swimming offshore. There were no signs or other markers on the beach or the pipes specifically indicating the position of the pipes to swimmers or surfers. Although the concentration of swimmers was between the flags on the beach, people swam all along the beach, including in the area opposite the pipes.

As I said earlier, the plaintiff was a very experienced swimmer and surfer. He knew Manly Beach well and had swum there on many occasions prior to the accident. On the day of the injury, he was in the company of a group of friends. They were all experienced tri-athletes. The group swam out beyond the breakers and took up a position about 100 metres off shore. Their intention was to do swim training in 200 metres repetitions, i.e. swimming parallel to the beach. It was too crowded to do training in the designated swimming area between the flags. The plaintiff was aware of the position of the pipes generally. Indeed, he warned his companions to keep a watch out for the pipes while they were doing their training. He said in his evidence that he was aware that the pipes were submerged and dangerous because the

actions of waves or current might take a swimmer closer to them. After completing his training repetitions, the plaintiff stopped about 100 metres from the beach. He waited for a brief period of time before deciding to catch a wave in. He saw no dangers in front of him and raced to catch a wave into the beach. This was his usual practice, that is to check that there was no person or board rider or any obstacle in his way before catching a wave into the beach. On this occasion he swam on to the wave, assuming a racing position with his arms above his head and his head tucked down. He did not lift his head as he was carried in towards the beach and he did not see the pipes until his head hit them.

How did this happen? The trial Judge found that the plaintiff had been carried further to the north than he had anticipated. Moreover, he did not take the trouble to look for any precise land marker to determine exactly where he was in relation to the pipes. The trial Judge accepted that, had there been any indicators or markers indicating the position of the pipes, the plaintiff would not have attempted to swim into the beach at that point.

Hislop J made a careful review of the relevant authorities including **Nagle's** case, **Vairy v Wyong Shire Council** and **Mulligan's** case. Hislop J acknowledged that recent case law had placed great emphasis on the personal responsibility of individuals for their own actions. Thus, where a risk was obvious and such that a normal adult would not incur it, this would be, he thought, a factor to be taken into account in determining the reasonableness of the defendant's response.

Hislop J found specifically that the risk in the present case was not that posed by a natural hazard commonly occurring at most Australian beaches. On the contrary, the risk of injury posed by the pipes was an unusual risk to encounter on an Australian beach. There was evidence to show that a similar storm water outlet existed only on two other Australian beaches. The pipes were a hazard that had been created by the actions of the defendants in constructing or agreeing to the construction of the pipes. Hislop J determined that the risk of injury was foreseeable; the magnitude of the risk was great; the degree of probability of injury occurring was not insignificant and the expense of erecting a sign was minimal. In those circumstances, the duty to take reasonable care required the provision of an appropriate sign or marker by each

defendant. The trial Judge apportioned liability equally between the defendants. As to contributory negligence, the plaintiff was found guilty of contributory negligence for the following reasons: -

- (a) He was swimming outside the designated safe swimming area.
- (b) He was aware of the existence of the pipes, that they entered the surf and were concealed or rendered difficult to see. He was aware that if he hit them he could sustain serious injury.
- (c) He was reminded of the presence of the pipes when he observed them in the surf.
- (d) He knew that there was a rip moving him to the north and that his position could also be altered by wave action. His method of judging accurately where he was imprecise.
- (e) It should have been apparent to him, if he had acted with reasonable care, that he may not have returned to his starting position at the end of each repetition and that he needed to orientate himself by reference to a marker on the beach before catching a wave in.
- (f) Additionally, he should have monitored his position as he surfed in by keeping his head up after he had caught the wave. If he had adopted this precaution, again it is probable he would not have sustained injury.

As I have said, contributory negligence led to a substantial reduction in the damages of some 50%. There was no appeal from Hislop J's decision.

The points I want to make about **Bennett's** case can be made very briefly. First, the Tort Reform legislation did not apply to this piece of litigation. Secondly, Hislop J correctly identified generally the role of "obviousness" in the particular circumstances of the litigation. Thirdly, the pipes, which the plaintiff struck on his way into the beach, were not "obvious". In fact, they were a concealed hazard. Fourthly, the plaintiff

knew there were pipes on the beach and that they represented a hazard but he did not know where they were in relation to his own position as he caught the wave into the beach. Fifthly, he was guilty of contributory negligence because, amongst other things, he did not take the time and care to line up his position with the flags on the beach or some other identifiable object, either on the beach or close to it.

Now, would it have made any difference if the reform legislation had applied to Mr Bennett's litigation? Minds could differ about this, I admit. But, it seems to me, that neither Mr Bennett's training for the triathlon in the sea or his catching a wave back into shore could, in the circumstances, be classified as a dangerous recreational activity. He was an experienced swimmer and there was nothing unusual about the conditions of the surf at that time. I suppose one could argue that swimming in the ocean well away from the flagged area involves, or could possibly involve, a significant risk of physical risk of harm. But it seems to me to be stretching it to suggest that this was a dangerous recreational activity. Secondly, I cannot imagine that the plaintiff's striking his head on the pipes could, in the circumstances, be classified as the materialisation of an obvious risk of a dangerous recreational activity, even if I were wrong about the nature of the activity itself. Thirdly, I would argue that the defendants were plainly in breach of their duty to the plaintiff by not placing some type of marker or sign on the pipes. The reasoning of Hislop J seems to be impeccable in this regard whether one examines the situation through the prism of the common law or the Tort Reform legislation.

Volunteers and good Samaritans

At common law, a volunteer enjoys no special position in negligence matters. The law will enquire as to whether, in the particular situation, a duty of care existed. If it did, the enquiry will then be whether that duty has been breached. Again, at common law, there exists no duty upon a person to come to the aid of another unless the first person has placed the other at a position of risk. There are some relationships, which may give rise to a duty to rescue, even where the rescuer did not cause the incident. But there is no need for these to be considered in this paper.

The **CLA 2002 (NSW)** deals with the voluntary actions of people in three ways. First, section 57 provides that a Good Samaritan does not incur any personal civil liability in respect of any act or omission done or made by the Good Samaritan in an emergency when assisting a person who was apparently injured or at risk of being injured. Section 56 provides that a Good Samaritan is a person who, in good faith and without expectation or payment or other reward, comes to the assistance of a person who is apparently injured or at risk of being injured. Section 58 excludes from protection the situation where it is the good Samaritan's intentional or negligent act or omission that caused the injury or risk of injury in respect of which the good Samaritan comes to the assistance of the person. The protection from personal liability does not apply if the ability of the good Samaritan to exercise reasonable care and skill was significantly impaired by reason of being under the influence of alcohol or a drug voluntarily consumed (whether or not it was consumed for medication) and the good Samaritan failed to exercise reasonable care and skill in connection with the act or omission.

Secondly, section 58C protects food donors in certain circumstances. Thirdly, section 61 provides that a volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work organised by a community organisation, or as an officer holder of a community organisation. A volunteer is a person who does community work on a voluntary basis. A community organisation is one that organises the doing of community work by volunteers and is a body corporate, a church or other religious organisation, or an authority of the State. Community works means work that is not for private financial gain and it is done for a charitable benevolent, philanthropic, sporting, educational or cultural purpose.

A volunteer is not protected from personal liability if it is established at the time of the act or omission the volunteer was engaged in conduct that constitutes a criminal offence. Similarly, the protection will not apply if the ability of the volunteer to exercise reasonable care and skill when doing the work was significantly impaired by reason of the volunteer being under the influence of a drug voluntarily consumed, and the volunteer failed to exercise reasonable care and skill when doing the work. Finally, the protection is not available in respect of an act or omission of a volunteer if

the volunteer knew or reasonably to have known that he or she was acting outside the scope of the activities authorised by the community organisation, or contrary to instructions given by the community organisation.

In Queensland, the important sections are, first, sections 26 and 27. Section 26 protects persons performing duties for entities to enhance public safety. Section 27 protects the prescribed entities themselves. I shall set out section 26(1) of the **CLA 2003 (Qld)**:

“(1) Civil liability does not attach to a person in relation to an act done or omitted in the course of rendering first aid or other aid or assistance to a person in distress if--

- (a) the first aid or other aid or assistance is given by the person while performing duties to enhance public safety for an entity prescribed under a regulation that provides services to enhance public safety; and
- (b) the first aid or other aid or assistance is given in circumstances of emergency; and
- (c) the act is done or omitted in good faith and without reckless disregard for the safety of the person in distress or someone else.

Section 27(1) is in similar terms in relation to the provision of services by an entity prescribed under a regulation.

The entities for the purposes of section 26(1) are set out in Schedule 1 to the legislation. The entities for the purposes of section 27 are set out in Schedule 2. They include, for example, Surf Lifesaving Queensland and affiliated bodies; and the Royal Lifesaving Society Queensland Incorporated and affiliated bodies, providing services at places specified in the Schedule (including public swimming pools).

Sections 38 and 39 of the **CLA 2003 (Qld)** are provisions, which reflect, in general terms, the provision of the New South Wales legislation in relation the protection of volunteers.

It is satisfying, I suppose, that matters of this kind are codified in the Tort Reform legislation. In truth, however, the provisions do not create protection from liability, which differs very significantly from the position at common law. A lack of care, for example, still has to play a part in the statutory equation.

CONCLUSION

As this paper draws to a close, I remind myself that there are probably hundreds of people, if not more, out enjoying the sunshine and the beauty of Gold Coast beaches even as we speak. With the approach of summer, there will be thousands of people on these beaches, people from countries all over the world and from every walk of life. There will be children, teenagers, adults, the aged and the infirm. There will be people with adequate regard for their own safety and there will be the foolish. The task of guarding these beaches and the safety and lives of others will fall, at it has done for many years, on the shoulders of lifesavers and lifeguards. Many of those, as I understand it, are volunteers while others are employed by local councils or other statutory bodies. There will be surfing carnivals and recreational surfing events held on many of these beaches from time to time.

In all these areas of enjoyment, there will remain the undoubted fact that the seas surrounding Australia can very dangerous. The sea is cruel and people, even those who take the utmost regard for their own safety, can drown in these waters. Marine creatures, such as sharks and stingers can inflict serious, if not fatal, injuries on people enjoying the waters. Once again, the responsibility of patrolling and assuring the safety of our beaches falls on men and women whose busy days may leave little time for reading papers such as this, even if they had the inclination to do so.

What can one say? My firm view is that one should not be overly seduced by the raft of Tort Reform legislation. In particular, those concerned with public safety and the well-being of others should not think that the rules have so far changed that carelessness will be ignored or, for that matter, rewarded. Just as in matters of medical care, there is a strong need for those in control of lifesaving operations to assess and re-assess continually the protocols and safe guards in force that protect

the public, often as it happens, from their own folly. There is a passage well known to lawyers in the famous case of **Donoghue v Stevenson** (25) It is one of my favourite passages. It has a biblical echo to it that is both deeply felt and apposite to the questions raised in this paper. Lord Atken observed: -

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee that are likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.

Whatever criticisms might be made these days of those words and the concepts that lie behind them, we do all have a duty to our neighbours. We are, to an extent, our brothers’ keepers, whether we like it or not. In the context of this Conference, those responsible for the safety of our beaches continue to have a responsibility to the multitude of visitors who pour onto our golden sands on an annual basis. The responsibility will be discharged, in the ultimate, only by reasonable vigilance and constant attention to the dangers that the sea poses for beach goers and visitors to our waters.

ENDNOTES

1. Waverley Municipal Council v Swain [2002] NSWCA 240
2. Swain v Waverley Municipal Council (2005) 220 CLR 517
3. Australia. Department of the Treasury, Review of the Law of Negligence Final Report 2002 ('Ipp Report')
4. Wyong Shire Council v Shirt (1980) 146 CLR 40
5. Tame v New South Wales (2002) 211 CLR 317; Annetts & Anor v Australian Stations Pty Ltd [2000] WASC 104
6. Great Lakes Shire Council v Dederer & Anor; Roads Traffic Authority of NSW [2006] NSWCA 101; Great Lakes Shire Council v Dederer & Anor; Roads Traffic Authority of NSW v Dederer & Anor [No 2] [2006] NSWCA 336
7. Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380
8. Barbara McDonald, "The impact of the Civil Liability legislation on fundamental policies of the Common Law of negligence" [2006] 14 *Torts Law Journal* 3, 268 at 283
9. Mulligan v Coffs Harbour City Council (2005) 223 CLR 486
10. Enright v Coolum Resort Pty Ltd & Ors [2002] QSC 394
11. Prast v Town of Cottosloe [2000] WASC 274
12. Lynch v Kinney Shoes (Australia) Ltd & Ors [2005] QCA 326
13. Doubleday v Kelly [2005] NSWCA 151
14. C G Maloney Pty Ltd v Hutton-Potts and Another [2006] NSWCA 136
15. Smith v Perese Ors [2006] NSWSC 288
16. Vairy v Wyong Shire Council (2005) 223 CLR 422
17. Chotiputhsilpa v Waterhouse & Ors [2005] NSWCA 295
18. Randwick City Council v Muzic [2006] NSWCA 66
19. Lexis Nexis, Civil Liability Australia/Richard John Douglas, Gerard Raymond Mullins, Simon Richard Grant, 1 (July 2007)
20. Fallas v Mourlas [2006] NSWCA 32
21. Falvo v Australian Oztag Sports Association & Anor [2006] NSWCA 17

22. Lormine Pty Ltd Anor v Xuereb [2006] NSWCA 200; Lormine Pty Ltd & Anor v Xuereb (No 2) [2006] NSWCA 267
23. As indeed he was! See Roads & Traffic Authority v Dederer [2007] 234 CLR 330
24. Bennett v Manly Council & Sydney Corporation BC 200602069; (2006) NSWSC 242
25. Donoghue v Stevenson (1932) AC 562
