

INSURANCE ALERT

FEBRUARY 2005

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SWAIN -v- WAVERLEY MUNICIPAL COUNCIL [2005] HCA4

BRIEF FACTS

The appellant (Mr Swain) dived into a sandbar while attempting to dive through a wave at Bondi Beach, Sydney. As a result, the appellant became a quadriplegic. The beach was under the care of the Waverley Municipal Council (Council). At the time of the incident, the beach was supervised by three lifeguards employed by the Council.

THE COURT PROCESS

The appellant originally commenced an action in the Supreme Court of New South Wales against the Council. The Council owed the appellant a duty of care. This was not a contested issue. The appellant sought damages for an alleged breach of this duty of care. Specifically, the appellant alleged the Council had placed the flags on the beach, the appellant was induced to swim between the flags and so the Council failed to take reasonable care in positioning the flags near a sandbar. Alternatively, the appellant alleged the Council was negligent in failing to warn swimmers of the dangers of the sandbar. The case was tried before a judge and civil jury. The jury found the Council had been negligent and the appellant was 25% responsible for the injury he had sustained.

The Council appealed to the New South Wales Court of Appeal on the ground there was no evidence of negligence on the Council's part. Under s108(3) *Supreme Court Act 1970 (NSW)*, the Court of Appeal, as a matter of law, has the power to overturn the jury's verdict in favour of the defendant, if there is no evidence to support the jury's decision. The Court of Appeal set aside the decision of the Supreme Court of NSW on this ground and entered into a verdict and judgement in favour of the Council. The majority of the Court of Appeal held (Spigelman CJ dissenting):

- There was no evidence upon which the jury could find the Council negligent in placing the flags where they did;
- It was not open to the jury to find the flags suggested the patrolled swimming area between the flags was safe for diving;
- The dangers associated with diving into the surf were so obvious the jury could not find the Council had breached its duty by its placement of the flags.
- There was no evidence the Council could have avoided the injury by taking an alternative action.

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In addition, all Judges of the Court of Appeal held there was no evidence to support the verdict against the Council on the ground of its failure to warn.

As a result of the Court of Appeal decision, the appellant sought special leave to the High Court for correction of an alleged interference by the New South Wales Court of Appeal with a jury verdict. The High Court granted special leave to the appellant.

THE HIGH COURT DECISION

The only contested issue for the High Court was whether the Court of Appeal correctly applied settled principles in setting aside the jury's verdict in the NSW Supreme Court under s108(3) *Supreme Court Act 1970 (NSW)*. The appellant alleged the Court of Appeal erred in its decision there was no evidence for the jury to find the Council negligent in placing the flags on the beach.

The case was a 3:2 majority. Gleeson CJ, Gummow J, and Kirby J were the majority judges and McHugh J and Heydon J were the minority judges. The majority judges concluded the Court of Appeal did err in its decision. This was because the Court of Appeal based their decision on what they determined was the more favourable decision, given the evidence. The Court of Appeal did not have the power to make this type of decision under s108(3) *Supreme Court Act 1970 (NSW)*.

The decision by Gleeson CJ refers to the principles of a trial process before a judge and a civil jury, specifically with regards to the principles of negligence. Gleeson CJ explains in a trial by jury, the functions of a judge and jury are clearly delineated. A judge decides issues of law, the jury decides issues of fact. To be successful in a negligence claim, the plaintiff will need to establish a duty of care, conduct on the part of the defendant in breach of that duty of care, and consequential damage. The judge, if necessary, will determine, as a matter of law, whether there is evidence which is capable of giving rise to a duty of care owed by the defendant to the plaintiff.

The central concept defining the duty of care owed and the standard of care is reasonableness. The duty of care is usually expressed in terms of protecting another against unreasonable risk of harm, or some kind of harm. The standard of conduct is usually expressed in terms of what would be expected of a reasonable person, both as to the foresight of the possibility of harm and as to the taking precautions against such harm. It is a question of fact for the jury to determine whether the conduct of the defendant has departed from this standard of reasonableness.

Gleeson CJ then explored these principles to the present case. He thought it was clearly open to the jury to accept the appellant's version of

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how the appellant came to suffer his injury. There was evidence given in the case as to the appellant's conduct as well as the conduct of the respondent. However, there was no evidence given as to whether it would have been possible to move the flags so that the hazard (i.e. the sandbar) was removed without compromising other safety aspects. The witnesses provided evidence as to the general practice in relation to placing and moving flags at beaches but did not address this particular question. Despite this, Gleeson CJ did find that the question of reasonableness of the respondent's conduct could be determined by the verdict of the jury. He further stated the question for the appellate court is not whether the appellate court agrees with the decision of the NSW Supreme Court but whether it was reasonably open to the jury to make an assessment unfavourable to the respondent given the evidence.

Gummow J agreed with Gleeson CJ that the Court of Appeal decision was a decision based on the more preferable outcome based on the evidence of the jury. This was insufficient grounds for overturning the decision of the NSW Supreme Court. Gummow J reviewed the evidence and the Court of Appeal decision to conclude:

- It was open to the jury to conclude, that whilst it may have been foolish for the appellant to dive where he did, the standard of care that was required by the Council did extend to taking steps to take account of the possibility of such behaviour.
- He disagreed as to the Court of Appeal's mode in coming to the conclusion that the hazard posed by the sandbar was both "notorious and obvious". The Court of Appeal relied on a previous similar case called *Praff v Town of Cottisloe*. Gummow J stated that whether or not a risk is obvious is a question of fact for the jury and the Court of Appeal should not have relied on a case to determine this issue.
- In relation to the Court of Appeal's decision there was no evidence that could sustain a finding of negligence on the part of the Council in placement of the flags because the appropriate place was opposite a sandbank, Gummow J failed to maintain this argument. He thought it was open to the jury to infer from the evidence that the lifeguard had failed to respond to a known hazard by moving the flags.

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Kirby J explored the principles behind an appellant court interfering with jury verdicts. Kirby J, agreeing with Gleeson CJ and Gummow J, held the question for the Court of Appeal was not how the Court of Appeal interpreted the evidence and hence corrected the decision based on the evidence. The principal question was whether it was open to the jury to consider the evidence. Kirby J found there was enough evidence to reasonably satisfy a jury in providing a verdict in favour of the appellant.

McHugh J and Heydon J affirmed the decision of the Court of Appeal. They found there was no evidence upon which a jury could find the Council to be negligent. Before a case of negligence can be submitted to a jury for determination, there must be evidence upon which the jury can find:-

1. The risk of injury to the plaintiff was reasonably foreseeable.
2. That a reasonably practical means of eliminating that risk existed.
3. That there was a causal connection between the defendant's failure to eliminate the risk of injury and the sustaining of the plaintiff's injury.

McHugh J agreed with the other majority judges. That is, it was probably open to the jury to find that on the day of the incident, swimming between the flags at the beach exposed a swimmer to a risk of injury that was reasonably foreseeable. The possible risk arose from a swimmer diving through a wave and striking an unseen sandbar. McHugh J used the term probably as there was no evidence which indicated how long the risk had existed. The risk may have been confined to only a small part of the flagged area and may have existed for a short period. Heydon J did not agree with McHugh J on this point.

Both McHugh J and Heydon J agreed that as there was no evidence the risk was not also present at the other parts of the beach outside the flagged area, they concluded there was no evidence that there was a reasonably practicable means available to avoid this risk. It was the plaintiff's onus to prove that not only was there a practical alternative place where the flags could have been situated but the appellant also needed to prove that placing these flags in another location would not expose swimmers to similar or other risks.