

Wyong Shire Council v Vairy [2004] NSWCA 247

This recent decision of the New South Wales Court of Appeal is good news for public liability insurers. The New South Wales Court of Appeal exhibits use of common sense regarding personal injuries litigation where the risk of injury is obvious to the reasonable person. In the past, the approach taken by the courts has not been so defendant savvy and some sympathy has been apparent for the injured party who risked their life, in circumstances where it was obvious that they could be badly injured.

Facts

On 27 July 2004 the New South Wales Court of Appeal overturned a \$5 million injury payout to a tetraplegic. Ernest Vairy was rendered a tetraplegic after diving off a rock platform into the sea at Soldier's Beach, on the Central Coast. Although, Vairy had never dived from the platform before, on previous occasions he had seen numerous others do so without injury or mishap. Vairy took no steps to determine the depth before diving and could not be ascertained from his position on the platform. Evidence that a person known to Vairy had suffered severe spinal injuries, at another location, in close proximity to the platform, in a diving accident years previously, was revealed at the hearing.

Care, control and management of the platform was the responsibility of Wyong Shire Council. They were aware of the variations in sea depth in that area as a consequence of sands moving up and down the coast.

Mr Vairy claimed that he should have been warned of the dangers of diving from the platform by Wyong Shire Council. He was successful in the Supreme Court and was awarded \$5 million in compensation.

The Decision

In the appeal overturning the Supreme Court's decision, it was held that regarding the breach of duty on behalf of Wyong Shire Council:

1. *A danger is obvious where both the condition and the risk are, in the circumstances of the case, apparent to, and would be recognised by, a reasonable person in the position of the plaintiff exercising ordinary perception, intelligence and judgement.*
2. *In the present case the risk or danger facing the plaintiff was the risk of significant injury resulting from diving into water unknown and variable depth, which turned out to be too shallow.*

INSURANCE ALERT

OCTOBER 2004

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3. *In Vairy the primary judge erred by defining the risk at too narrow a level of abstraction.*
4. *The danger in the circumstances was obvious.*
5. *In the application of the Shirt calculus the fact that a danger is obvious is merely one factor to be considered when determining the scope of the duty owed. However, in a given circumstance, the presence of an obvious danger may be determinative especially where the only breach alleged is a failure to warn.*
6. *In the present case the circumstances were such that the knowledge of the occupier-defendants (actual or assumed) was neutralised by the obviousness of the risk of injury attached to diving into water of variable and unknown depth which risk was apparent to the plaintiff. In these circumstances the failure to warn, or to take any other steps, did not constitute a breach of any owed duty of care. The plaintiff failed to take proper care for his own safety in the face of a risk that was obvious in the circumstances.*

Beazley JA thoroughly considers the various authorities and the judge's reasonings in relation to the liability of parties allowing the public onto their property. In doing so, he considers such well known authorities as Nagle and Shirt. He discusses in depth the duty to warn entrants on premises of risks and in what circumstances there is an obligation to provide warning.

He acknowledged that Nagle was authority for the proposition that there was a general duty of care at common law to take reasonable care to avoid foreseeable risk of injury to visitors. Fulfilment of this duty included undertaking appropriate methods of notification and warning of foreseeable risks. However, he considered that the obviousness of the risk was not a factor considered appropriately in Nagle. Beazley noted that more recent authorities in this area of negligence, have considered the obviousness or hidden nature of the risk as relevant in their decision making. For example in the well known decision of Romeo it was considered that there was a "risk" which only existed in the case of someone ignoring the obviousness and the defendant was not required to take steps to discharge their duty of care in relation to that obvious risk of injury. The facts of Romeo distinguished it from Nagle in that the danger in Nagle was hidden from ordinary users. In Romeo the presence of the obvious danger was determinative in deciding there was no breach of duty where there was a failure to warn.

In the circumstances of the present case, the risk of injury in diving into water of variable depth and unknown depth was obvious to Vairy. He also had knowledge of another person injuring themselves severely in similar circumstances.

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Conclusion

This decision is encouraging for public liability insurers. However, Beazley JA's reasoning further highlights the difficulty in establishing with certainty how the courts determine the scope of the duty of care and fulfilment of that duty. There is certainty that a general duty of care is owed to take reasonable care to avoid foreseeable risk of injury. What is considered fulfilment of the duty is less certain for example how much notification of risks is required and in fact which risks required warning. There may also be great numbers of risks that are foreseeable, does there need to be notification of every risk? It appears, that there is no easy answer and that each individual matter will be considered on the merits of individual case. However, for the time being Beazley considers there may be a shift in favour of personal responsibility for one's actions. This would lead one to believe that the obviousness of a risk to a reasonable person exercising ordinary perception, intelligence and judgement is an important consideration. How long the pendulum will swing in this direction is unknown but again it is encouraging.