Journal of APLA Australian Plaintiff Lawyers Association

ISSN 1328 - 9330

Plaintiff

ISSUE 27

JUNE 1998

Romeo case examines issues of risk

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The Northern Territory in recent years has contributed to the development of tort principles, perhaps out of proportion to its litigous size. In ***Papandonakis v Australian Telecommunications Commission***[1]*, the High Court disposed of the old categories which governed the liability of occupiers for negligence and in* ***Northern Territory of Australia v Mengele***[2] *the High Court overturned their earlier and much criticised decision in* ***Beaudesert Shire Council v Smith***[3]*. That emphatic decision probably put paid to "actions on the case" and underscored that liability in tort depends on establishing negligence or evidence of intention to injure.*

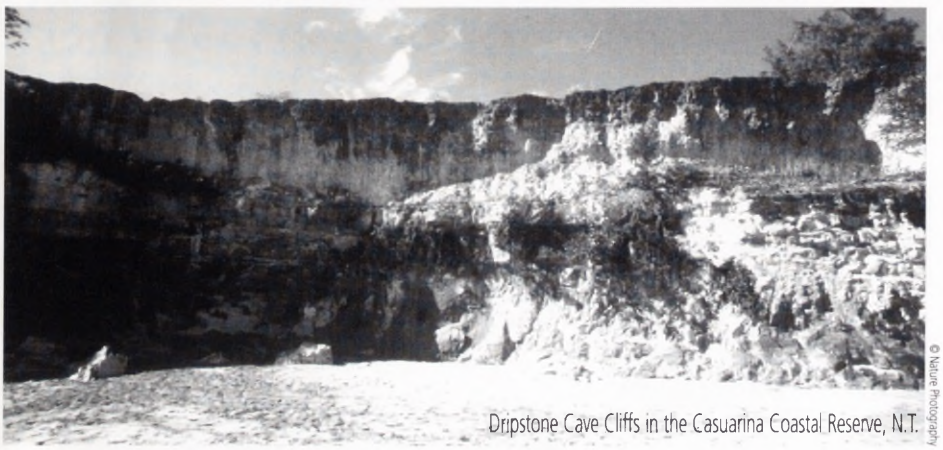
Northern Territory contributions to criminal law have also not been insignificant. See *R v Tuckiar*[4]; *R v Crabbe*[5] and *R v Chamberlain*[6].

Romeo v Northern Territory Conservation Commission[7] might simply be seen as another case which saw off yet another attempt to reinstate or reconcile old tests and classifications for negligence. All save Brennan CJ reinforced the Court's important decision in *Nagle v Rottnest Island Authority*[8]. In *Nagle* Brennan CJ clearly troubled by the universally described "undemanding test" sought to overlay the now simplified test of liability in respect of the role of public authorities and other occupiers by adopting the remarks of Dixon J as he then was in *Aitken v Kingborough*[9]:

"What then is the reasonable measure of precaution for the safety of users of premises, such as a wharf, who come there as of common right? I think the public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such person through dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care".

Brennan CJ in *Nagle* also quoted with approval the following passage by Dixon J:

"The member of the public entering as of common right is entitled to expect care for his safety, measured according to the nature of the premises and the right of access vested, not in one individual but in the public at large."



Dripstone Cave Cliffs in the Casuarina Coastal Reserve, N.T.

© Nature Photography

Dixon J's views were progressive in 1939 (see also his views in *Lippman v Clendinnen*)[10].

Brennan CJ was in a distinct minority in *Nagle* in contending that the foregoing tests in the occupiers context survived the sea change in the law reflected in *Hackshaw v Shaw*[11] and *Australian Safeway Stores Pty Ltd v Zaluzna*[12].

The trial judge (Angel J) in *Romeo*[13] rather bravely followed Brennan CJ's minority opinion in *Nagle* and the Northern Territory Court of Appeal diffidently tried to reconcile those principles with the modern law. Martin CJ sought to justify the trial judge's views on *Aitken v Kingborough* as only "an example of a case presenting similar features".

The Full High Court assembled to determine *Romeo*, Not surprisingly, the Chief Justice maintained there was still life and value in the *Aitken v Kingborough* approach when assessing a public authority's duty of care. The other six judges made a confident reassertion of the extension of the ordinary principles of negligence to non-feasance involving public authorities.

On another level *Romeo* must be seen as a retreat from a high water mark represented by *Nagle*. That retreat was already on as can be seen when the High Court refused leave to appeal from the clear decision of the South Australian Court of Appeal in *SA v Wilmott*[14]. An injured plaintiff in that case was able to convince the trial judge that mere knowledge by the defendant of the fact that an unimproved piece of Crown land was being used by

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...trail bikes and offroad vehicles without any encouragement from the occupiers had breached the "undemanding test" of foreseeability that a mishap would occur. The South Australian Court of Appeal emphatically rejected such a "non incremental" leap.

Romeo along with the recently decided *Pyrenees Shire Council v Day*[15] demonstrate a more cautious approach along with some sympathy at least for plaintiff's lawyers endeavouring to advise on difficult issues of proximity and occupier's responsibility and statutory duty, an area which has been heavily papered by academic and judicial discussion over recent years. Kirby J at page 232 of *Romeo* gives a checklist to the "proper approach" using *Nagle* as a guide.

The facts in Romeo

The 15 year old plaintiff and friends visited a cliff top park late at night. It was a well frequented meeting place for young people and, indeed, for many thousands of others. It was an area controlled by the defendant who had at the very least facilitated access to the cliff top area by landscaping and constructing roads and car parks. At one point a car park bounded by low logs was less than 5 metres from coastal cliffs some 6-7 metres in height. Paths ran down from the parking areas to spurs of land from which access could be gained to the beach below. Unfamiliar with the tops of the cliffs and affected by liquor perhaps for the first time in her young life the plaintiff and her friend, Jacinta (it was inferred by the trial judge), attempted to follow a path like area of bare earth, perhaps to the beach. The trial judge found

"in the gloom it (the path like area) had the ***deceptive*** *appearance to the girls of a footpath. The area would not have been deceptive to a sober alert person, nor would it have appeared so in day light ."*.(my emphasis)

The girls, so deceived, fell to the sand below and the plaintiff sustained a high level paraplegia. Armed with the foregoing facts and findings any plaintiff's lawyer would have scented victory.

Has not the "undemanding test" of foreseeability framed by Mason J in *Wyong Shire Council v Shirt*[16] been met? Do not the ordinary principles of negligence apply to such an occupier as it did in *Hackshaw v Shaw*? Is not the dicta of Deane J in *Sutherland Shire Council v Heyman*[17] duly satisfied? The area (determined by road tapes) had hundreds of thousands of visitations every year. Was not the risk that a young person possibly alcohol affected might stray close to the cliffs startlingly clear? Is not the case on such found facts almost on all fours with *Nagle* or, for that matter, *Shirt*?

It was proposed that the plaintiff and Jacinta would have been disabused of their **deceived state** if a simple three strand fence (not particularly unsightly) was stretched across the deceptive path like feature. Surely that met the plaintiff's obligation to point to reasonable preventative measures appropriate to the foreseeable risk? (*Zaluzna* p 588; see also *Turner v South Australia*[18].)

The plaintiff could only persuade Gaudron J and McHugh J of the 11 judges concerned that she had made out her claim.

What went wrong?

Toohey, Kirby, Gummow and Hayne JJ otherwise resolute in their defence of *Nagle* against the *"Aitken v Kingborough heresy"* found other grounds to deny the claim.

Toohey and Gummow JJ were of the view that the plaintiff did not pass the "undemanding test" that there was "a risk which is not far fetched or fanciful is real and therefore foreseeable" (*Shirt* p 48). The judges were of the view that in "the present case the risk existed only in the case of someone ignoring the obvious". They explained away the obvious rejoinder that it was not obvious at night to a person in the plaintiff's condition and that there had been a finding by the trial judge that "In the gloom it (the bare earth leading to a gap in the vegetation) had the deceptive appearance to the girls of a foot path ..." by explaining the trial judge's findings in these terms:

"We infer therefore that by "deceived" his Honour meant that because of their condition, the appellant and Jacinta did not appreciate what was apparent to others, namely, that there was not a path leading to the edge of the cliff. In that sense they deceived themselves."

It might be argued that this inference[19] was unnecessary. Far from saying the girls deceived themselves is not the trial judge simply saying it was the footpath like appearance of the bare earth that deceived them? Do the words 'deceived themselves' take the matter any further? Of course on the basis of their misapprehension they deceived themselves.

Kirby J:

"insufficient attention has been paid in some cases and by some critics to the practical consideration which must be "balanced out" before a breach of duty of care may be found. It is here in my view that the Courts have both the authority and the responsibility to introduce practical and sensible notions of reasonableness that will put a break on the more extreme and unrealistic claims sometimes referred to by judicial and academic critics of this area of the law. Thus, under the consideration of the magnitude of risk, an occupier would be entitled, in a proper case to accept that the risk of a mishap such as occurred was so remote that a "reasonable man careful of the safety of his neighbour", would think it right to neglect it."

His Honour harked back to the celebrated Wagon Mound No 2[20]

Kirby J then continued:

"Although a reasonably foreseeable risk may indeed give rise to a duty it is the enquiry as to the scope of the duty in the circumstances and the response to the relevant risk by a reasonable person which dictates whether the risk must be guarded against to conform to legal

obligations. The precautions need only be taken when that course is required by the standards of reasonableness."

Insurance company advisers may well seize upon this qualification as providing fresh hope for their cause generally. His Honour recognised the seeming identity of principles between *Romeo* and *Nagle*. In both cases the plaintiffs passed His Honour's more cautious duty of care test but His Honour drew a distinction between the danger of the submerged rocks in *Nagle* which were hidden from ordinary users of the basin and the danger of the cliffs in *Romeo* which were "perfectly obvious to any reasonable person".[21] This adds a further qualification to the law as previously defined. Surely the duty of care arose where a reasonable person could see that the elevation of the cliffs at night to a young person affected with alcohol would not be "perfectly obvious"? His Honour concedes that the defendant in *Romeo* "acting reasonably would have to anticipate a variety of visitors including children, the elderly, the short sighted, the intoxicated and the exuberant". However, when he says the risk was obvious, does he mean obvious to that variety of visitors at night? His Honour further says that because the natural condition of the cliffs was part of their attraction, the suggestion that the cliffs should have been enclosed by a barrier must be tested by the proposition that all the equivalent sites for which the Commission was responsible have to be so fenced. That "proposition ... is simply not reasonable". What about the deception?

There was no evidence that there were any "equivalent sites" with the deceptive characteristics which would have to be so fenced. The entire length of the cliffs (several kilometres) does not appear to be the risk that concerned the trial judge who appeared to be concerned about the deceptive characteristics of a confined "path like" area.

Hayne J: seemed to anticipate the criticism of Kirby J's views set out above but took the view that:

"it is apparent from the photographs of the area ... that the point on the cliffs from which the plaintiff fell is not unique ... thus it is to attribute a false degree of precision to the identification of the foreseeable risk to say that it was this area (and only this area) which needed fencing against the possibility that a person affected by alcohol would be deceived in a way that a sober and alert person would not. "[22]

His Honour seems to have come to his own view of the facts on the basis of the photographs. There was no evidence that there were other areas along the cliff top which could have the deceptive appearance to the girls of a footpath leading to a gap in the vegetation. His Honour questioned the reasonableness of requiring the Commission to fence all areas from which a person affected by alcohol at night might have fallen. The scope of the defendant's duty did not extend that far.

Once again the plaintiff in *Romeo* must be counted very unlucky.

Lessons from Romeo

What can be gleaned by the attitude of the High Court majority? Cases of this sort are bound to emerge with increasing frequency as public authorities assume a greater and more intrusive control over parks, reserves and foreshores.

The acceptance of the decisions in *Heyman* and *Shirt* in recent years has been grudging. See Mahoney JA in *Bardsley v Batemans Bay Bowling Club Ltd*[23] and his Judgment and that of Clarke JA and Meagher JA in *Pennington v Inverell*[24] . There is also insurance solicitors and academic concern. See Masel, "Rulings on Proximity Reasonably Foreseeable", *Insurance Law Journal* Vol 6 p 59 at 66. See also "The Liability of Public Authorities to the Public in Negligence", F A Trindade, *1994 Vol 2 Tort Law Review* 69 at 72.

There are two messages which appear to flow from *Romeo*.

The first and more subliminal message is that many judges are reluctant to embrace solutions to problems of risk which involve considerations of aesthetics. The suggestion in *Romeo* that the fencing solution suggested might disfigure a place of natural beauty did not **seem** to play a prominant part. Plaintiff's lawyers, however, would be well advised to carefully address this issue when providing evidence of how the risk can be remedied. Aesthetics was one of those constellations of possibly relevant factors set out in the famous dicta of Mason J in *Shirt* at p 48. Aesthetic considerations have been frankly acknowledged in the decision of Samuels JA in *Phillis v Daly*[25]:

"I think that at the present time, when environmental considerations are right regarded as important, aesthetic factors have their place in the calculus of negligence in circumstances such as these."

Aesthetics certainly seemed to influence the approach of the Northern Territory Judges in *Romeo*.

Kirby J also alluded to the role they play in his Judgment. But see also his emphatic statements in argument:

"What is your answer to the suggestion that ... it would also be singularly ugly in areas in which people are entitled to go to, to see the natural beauty of the sea and the bush.

"There is an awful lot of coastline and there is an awful lot of beauty points on the coastline. Does this mean that everywhere in our country where there is a beauty point, councils have to go and mar them with these ugly fences?

"Would not that be a horrible rule to lay down, that in every part of Australia's continental coastline which is a beauty spot, you have got to mar it with a fence? I mean that would be a horrible thing to do."

The second and more obvious lesson from *Romeo* may be that Australian Courts are not yet ready to come to terms with demanding solutions to issues of risk which call forth public expenditure, possibly on a large scale. Perhaps the only real difference between *Nagle* and *Romeo* is that one required a simple warning sign and the other required a substantial (but beautiful) fence.

To say that the Courts are universally nervous about this issue is an understatement. See the *Liability and Negligence of Public Authorities: The Divergent Views*[26], Brennan J; *The Liability of Public Authorities: Drawing of the Line,*[27] the Honourable John Sopinka; *Public Authority to What Standard?*[28], Anthony M Dugdale; *The Liability and Responsibility of Local Government Authorities: Trends and Tendencies*[29], Malcolm CJ 1994. See also *Just v British Columbia*[30].

Although the doctrine of general reliance which as a concept rose out of *Heyman* (p 463) has now been fully explained and discounted in *Pyrenees Shire Council v Day*[31] questions of proximity and policy considerations attending the extension of liability remain very much live issues. The Learned Trial Judge in *Romeo* ▶

suggested that it was by virtue of the policy considerations that the defendant was under no common law duty to take the positive steps to rectify the risks as suggested by the plaintiff. Fencing, illumination or sign posting he said was a "policy question for the defendant, not a matter for dictation by a Court". This judicial hot potato was not picked up by the Territory Court of Appeal. Most judges in the High Court were not drawn to the issue because of what they saw as the quite insignificant amount of expenditure needed to remedy the risk. Kirby J in his opening remarks in *Romeo*, however, clearly identified the coming storm about to break over the question of just what limits, if any, are on the Courts to, in effect, dictate solutions to problems which involve expenditure of public funds.[32] His Honour rather indicated that when this issue has to be grasped the High Court may not be quite as positive as it was in *R v Dietrich*[33] which raises similar considerations in the context of the criminal law.

"Reflecting, in a general way, the diminishing functions accepted by modern government and the growing appreciation that the government and its authorities cannot "make the world safe from all dangers" judicial decisions in negligence claims against public authorities both in this country and elsewhere have lately come to address more closely the limited resources available for the execution of the functions and responsibility committed to them by the statute."[34]

His Honour went on to acknowledge that there is still "comparatively little legal authority about (policy considerations) in Australia". His Honour joined the debate by casting doubt upon the distinction sometimes drawn between operational or managerial decisions on the one hand and the other more "pure policy" decisions of public authorities on the other. The issue in the end was avoided by His Honour deciding in any event the wire strand barrier proposed for the cliffs could be "properly classified as an operational or administrative rather than a policy or discretionary decision" in any event. It is clear that McHugh J and Kirby J will not agree to a proposition that a public authority any more than a private individual can preclude itself from liability by virtue of its own pronouncements as to what constitutes a question of policy or discretion. At the *Romeo* special leave application the Commission's counsel adverted to political and policy considerations.[35] McHugh J, clearly scornful said:

"Why should they then say, oh well we cannot (rectify the risk) sorry, our budget considerations do not allow us to eliminate the risk of injury"

Kirby J said:

"It will allow a party to decide itself out of liability; that cannot be the law. I mean the consideration is obviously relevant but it cannot be left to the Council (sic) to decide these matters."

Hayne J on policy was of the view that it did not fall for decision in the context of the case after quoting Mason J in *Heyman*. His Honour gave an indication of where a prudent plaintiff's lawyer should look for a resolution of this unsettled issue.

"The difficulties of drawing such a distinction are emphasised by Lord Hoffman in Stovin v Wise 36 and there is much force in what is said there.... "[37]

Gummow and Toohey JJ also did not find it necessary to review the possible distinction between operational factors and the possible "non justiciability of policy issues". Since *Heyman* and before *Stovin* it is only useful to review the issue as dealt with in *Ceckan v Haynes*[38]. President Kirby as he then was in the New South Wales Court of Appeal and others had to consider the question of State resources that would need to be called upon to provide proper surveillance to vulnerable prisoners in police custody. He identified the problem in these terms:

"It is the failure of the common law to develop a more general notion of the economic consequences of asserting the requirements of reasonable care, that represents in my view one of the chief defects in the law of negligence as it is developed. It is the recognition belatedly of the economic impact of the decisions on the topic which have lately led to something of a retreat from the earlier tendency to impose duties on the public's purse which ignored the economic consequences necessarily following from such imposition."[39]

Kirby J in the end found that the issue need not be disposed of as the standard of police lockups and the procedures for surveillance of prisoners did not at the relevant time evidence the want of any reasonable care. Mahoney J,[40] confronted the issue:

"If a government chooses to provide a voluntary service of this kind prima facie it must take all such precautions against the risk of injury which the provisions of those services will create. And in particular it is prima facie not open to it to plead the lack of resources if it does not do so. A plaintiff may say that, if it has not the resources to make such provisions against risk it should not offer to provide the services."

In a sense the judges in *Ceckan* whilst not answering the question had an easier question to answer. How much more difficult is the policy issue to be determined when dealing with questions of non feasance or the assumption of responsibility for natural hazards as one might find in a park setting.

A discussion of the approach of a fairly evenly divided House of Lords in *Stovin* must be left for another time.

With the operational/policy distinction in doubt and the whole issue of rectification of risk versus governmental discretions on expenditure clearly in play plaintiffs lawyers would be well advised to read the contradictory judgments of England's two leading law Lords Hoffman and Nicholls in *Stovin* for guidance on the direction the High Court may now take. ■

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Notes:

1 Papandonakis v Australian Telecommunications Ltd (1985) 156 CLR
2 Northern Territory of Australia v Mengele (1995) 185 CLR 307
3 Beaudesert Shire Council v Smith (1964) 120 CLR 145
4 R v Tuckiar (1934) 52 CLR 335
5 R v Crabbe (1985) CLR
6 R v Chamberlain (1983) 153 CLR 514
7 Romeo v Northern Territory Conservation Commission (1998) 72 ALJR 208
8 Nagle v Rottnest Island Authority (1992-3) 177 CLR 423. Here a plaintiff quite familiar with "the basin" on Rottnest Island dived from a rock ledge and stuck his head on a submerged rock. The sun was at an angle that obscured the rock. The Board controlling the reserve was found to have failed in its duty to warn. Mr Nagle became quadraplegic.
9 Aitken v Kingborough (1939) 62 CLR 206
10 Lippman v Clendinnen (1932) 46 CLR 550 at 567
11 Hackshaw v Shaw (1984) 155 CLR 615
12 Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479
13 Romeo v NT Conservation Commission NT 1994 FLR 71
14 SA v Wilmott (1993) 62 SASR 562
15 Pyrenees Shire Council v Day (1998) 72

ALJR 152

16 Wyong Shire Council v Shirt (1980) 146 CLR

17 Sutherland Shire Council v Heyman (1985) 157 CLR 424

18 Turner v South Australia (1982) 56 ALJR 840

19 Romeo ALJR p 208

20 Wagon Mound No 2 (1967) 1 AC 617 at 642

21 Romeo p 236

22 Romeo p 242

23 Bardsley v Batemans Bay Bowling Club (1996) NSW Crt App

24 Pennington v Inverell (1993) ART 81.235 Meagher J was particularly scathing "if (the trial judge) is correct the legal result would be surprising to a degree for it would indicate that the law of negligence has travelled such a long way that it has imposed the duties of an insurer upon persons in the position of the appellants (swimming pool operators)"... Meagher J reluctantly admitted the trial judge was right.

25 Phillis v Daly (1988) NSWLR 65 at 68

26 Liability and Negligence of Public Authorities: The Divergent Views, Brennan J (1991) 7 Aust Bar Review p 185

27 The Liability of Public Authority: Drawing of the Line, the Honourable John Sopinka, Tort Law Review July 1993 p 124

28 Public Authority to What Standard?, Anthony M Dugdale 1994 Tort Law Review p 142

29 The Liability and Responsibility of Local Government Authorities: Trends and Tendencies, Malcolm CJ 1994 Aust Bar Review p 209

30 Just v British Columbia (1989) 84 DLR (4th) 689

31 Pyrenees Shire Council v Day (1988) 72 ALJR 152

32 Romeo ALJR 226 His Honour referred to an article in that regard by Gleeson CJ as he then was in NSW "High Court Presents Problems for Park Managers" 1993 10 Environmental and Planning Law Journal 225.

33 Dietrich v R (1992) 177 CLR 292

34 Romeo p 226

35 At the Romeo Special Leave Application 4 November 1996 the Conservation Commission Council suggested that the Court must take into account matters of policy including what he described as "political motives".

36 Stovin v Wise (1996) 3 All ER 801 House of Lords

37 Romeo p 242

38 Ceckan v Haynes (1990) 21 NSWLR 296

39 His Honour quoted Rowling v Takaro Properties Ltd (1988) AC 473; Murphy v Brentwood District Council (1992) All ER 908

40 Ceckan v Haynes p 314