Observations on negligence

Swain v Waverley Council [2005] HCA 4

By Ben Zipser

From time to time certain court decisions catch public attention and generate debate reflecting social issues and concerns of the day. *Swain v Waverley Municipal Council*[1] is such a case.

FACTS

In 1997 Mr Swain went swimming at Bondi Beach. He walked out about 15 metres, at which point the water was around waist deep. A wave started coming towards him and he decided to dive through it. He dived into a sandbar and became a quadriplegic. The beach was under the control and management of Waverley Municipal Council ('the Council'). At the time, the beach was being supervised by three lifeguards employed by the Council. Mr Swain commenced an action in the Supreme Court of NSW against the Council claiming damages for breach of duty of care. He alleged that the Council had placed flags on the beach, that the flags induced him to swim where he did and that the Council failed to take reasonable care in positioning the flags.

A judge and jury of four tried the action. The jury found that the Council was negligent, that Mr Swain was guilty of contributory negligence and that his negligence was 25% responsible for the injury that he suffered.

The Supreme Court's decision generated significant media attention. At the time there was public debate about rising insurance premiums and the need for tort reform. The decision was used, by those who were arguing for a winding back of negligence law by statute, as an example of negligence law being overly generous to plaintiffs and out of step with community expectations.

The Council appealed to the Court of Appeal on the ground that there was no evidence of negligence on its part. By majority (Handley and Ipp JJA, Spigelman CJ dissenting), the Court of Appeal agreed, holding that there was no evidence upon which the jury could find that the Council was negligent in placing the flags where it did and that the dangers associated with diving into the surf were so obvious that the jury could not find that the Council had breached its duty by its placement of the flags.[2] On this basis, the Court of Appeal set aside the verdict in favour of Mr Swain and entered a verdict in favour of the Council.

HIGH COURT

The High Court granted Mr Swain special leave to appeal against the orders of the Court of Appeal. The issue in the High Court was whether the Court of Appeal erred when it concluded that there was no evidence upon which a reasonable jury could have found that the Council was in breach of its duty in the placement of the flags.

Gleeson CJ, Gummow and Kirby JJ in the majority held that the Court of Appeal erred. Gleeson CJ and Kirby J noted that there were strong considerations in support of a finding that the Council was not negligent.[3] However, all three judges in the majority stated that the question for an appellate court on an appeal against a jury's finding of negligence was not whether the appellate court agreed with the jury's finding. The question was whether there was evidence on which the jury could reasonably be satisfied that the Council was negligent. The majority held that in the present case there was such evidence, and hence the Court of Appeal should not have interfered with the jury's verdict.

McHugh and Heydon JJ in the minority held that there was no evidence upon which a jury could find that the Council was negligent.

The various judgments in the High Court primarily focus on the circumstances in which an appellate court can interfere with a jury's finding on negligence and whether, based on an analysis of the evidence, the circumstances existed in the present case. However, some of the judgments also contain observations relevant to negligence law principles more generally. Four key observations follow.

First, it is an established principle of negligence law that the plaintiff, in order to prove negligence by the defendant, must show that there was a reasonably practicable alternative course of conduct available to the defendant that would have avoided the plaintiff's injury. McHugh J, although in the minority, provided a useful analysis of this issue[4] and emphasised the need for such evidence to be before

the court. Gummow J also made useful observations on this issue.[5]

Second, McHugh J repeated his concern, initially stated in *Tame v New South Wales*,[6] that, as a result of the Judicial Committee's advice in *The Wagon Mound* (No 2),[7] the concept of reasonable foreseeability has come to be equated with mere physical possibility.[8] McHugh J argued that the term 'reasonable' should be given greater content. Gummow J, however, responded[9] that the concept of reasonable foreseeability cannot be changed unless and until the High Court re-opens the case of *Wyong Shire Council v Shirt*.[10]

Third, Gummow J stated that 'a person who owes a duty of care must take account of the possibility that one or more of the persons to whom the duty is owed might fail to take proper care for his or her own safety'.[11]

Fourth, Gummow J discussed the concept of obvious risks or obvious danger in assessing whether a defendant breached its duty to the plaintiff.[12]

In conclusion, while the High Court's decision in *Swain v Waverley Municipal Council* will not have the same impact on the law of negligence as some other decisions, such as *Brodie v Singleton Shire Council*[13] and *Tame v New South Wales*,[14] the decision is of public interest and makes some useful observations relevant to practitioners and commentators alike. ■

Notes: **1** [2005] HCA 4. **2** See *Waverley Municipal Council v Swain* (2003) Aust Torts Reports, 81-694. **3** *Swain v Waverley Municipal Council* [2005] HCA 4 at [19] and [229]. **4** At [40]-[51]. **5** At [151]-[155]. 6 (2002) 211 CLR 317 at 351-357. **7** [1967] 1 AC 617. **8** At [79]-[80]. **9** At [108]-[109]. **10** (1980) 146 CLR 40. **11** At [137]. **12** At [139]-[143]. **13** (2001) 206 CLR 512. **14** (2002) 211 CLR 317.

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Social host liability and the *Civil Liability Act*

Russell v Edwards and *Parissis v Bourke*

By Bill Madden

Russell v Edwards,[1] a NSW District Court decision of Sidis J, concerned a 16-year-old boy who suffered significant injury[2] after diving into the shallow end of a backyard swimming pool, at a friend's family home during a birthday party. At the time he was affected by alcohol, some of which was found to have been provided by the defendant owner/s of the home, but also and perhaps mostly, by a friend of the plaintiff.

Sidis J indicated that had the case been determined under common law, the plaintiff would have succeeded, albeit with a deduction for contributory negligence, which the court assessed[3] at 25%.

Sidis J was required to consider the High Court's well-known decision in *Cole v South Tweed Heads*.[4] That decision was distinguished: >>