

High Court on Negligence The Duty of Care

There is already a paper, published in 2004, on this topic¹. Since then there has been a splash of new negligence cases in the High Court in 2005 and 2006. This further study is designed to supplement the earlier study by analysis of the later cases. In that earlier work, it was noticed that, in deciding on the existence and/or scope of any duty of care, the Court would identify and gather the relevant factors on both sides of each issue and attribute to each factor a weight that was appropriate to the circumstances of the particular case. The matter would be decided according to the preponderance of weight of one side or the other.

Before examining the recent cases in detail, it is desirable to recall some principles of law. The rules as to the presence of actionable negligence in a given set of circumstances are clear:

1. The harm must have been, objectively, reasonably foreseeable, but the presence of reasonable foreseeability alone is not enough. In its absence, there is no cause of action. If it is present, other elements must also be present to support a cause of action. In that case, its degree may be a factor in determining the scope of any duty of care².
2. There must also have been a duty of care by the defendant not to cause the harm that was inflicted. The imposition of this duty is determined by the application of a variety of competing factors some of which are mentioned below.
3. When there is such a duty, the standard of care required of the defendant is one that is reasonable in the circumstances. It is not absolute.
4. There must have been a breach of that duty by the defendant's failure to attain that standard of care.
5. The breach must have caused the harm upon which the plaintiff seeks to recover³.

We are here to discuss only those elements concerning the existence and the extent of the duty of care. Whether a defendant was in breach of the duty is usually answered by asking whether the defendant complied with the precautions found to have been necessary in discharge of the duty⁴. In considering a particular case in practice, when the existence of the duty is established, it is better to consider its extent before considering

¹ See the article by the author in (2004) 78 ALJ 595. It does not seem necessary to retract any part of it in the light of recent decisions, which, if anything, appear to fortify its conclusions.

² Refinements of authority as to reasonable foreseeability are outside the scope of this discussion. It will be seen below that the foreseeability of harm in a situation may be a factor exalting or diminishing the scope of the precautions demanded, depending on the degree of likelihood of harm. In this context, it is merely a factor to be taken into consideration with other relevant factors.

³ Causation is a matter of fact. It, with the principles relating to it, does not come within this discussion of the duty of care.

⁴ Usually, the issue of breach of the duty follows on from the identification of the scope of the duty. It is also a factual matter whether the defendant complied with the requirements predicated by the definition of its scope.

whether there has been a breach of it⁵. Generally, this is less controversial. Once the content of the duty is established in the form of the precautions necessary to respond to it, it is simply a matter of fact as to whether the defendant has complied with them.

The first, whether there was a duty of care by the defendant to the plaintiff in the circumstances of a particular case, is a matter of law. Whether the defendant was in breach of the duty is a matter of fact.

The Court's reasoning on matters of fact is only reasoning. As such, it is entitled to great respect, but it is not an authoritative pronouncement of a principle of law⁶. All such reasoning must depend on the underlying facts and their combination, and as these may be infinitely variable, the conclusion from reasoning in one case may be totally contrary to the conclusion in a very similar case because of some subtle difference in the circumstances or in the comparative weight of the competing factors.

In addition, some of the factors are normative, particularly when there is a question as to what is reasonable. In that respect, there is a modest division in the Court between the conservative, the liberal and the middle views, and on some occasions, the result may depend on the composition of the particular Court. While this may have some disadvantages as to certainty for a practitioner's prediction as to the result, it also has the advantage of revealing a full range of reasoning that has a modifying tendency in general.

The Court has been critical of arguments before it that have appeared to elevate statements of reasoning to the level of precedential legal principle. This is not altogether kind, since the Court itself sometimes appears to do this itself, for example, when it speaks of the classic collection of factors relevant to the reasonableness of precautions enunciated in *Wyong Shire Council v Shirt*⁷. Yet that was merely reasoning on an issue of fact, but its logic is so clear as to invite acceptance almost to the level of a matter of principle. Because of the terms in which it is framed, it is unlikely that circumstances will ever be thrown up that require its qualification.

It would be brave counsel who would argue, for example, that it erred in its reasoning that the magnitude of the risk and a readily foreseeable possibility of catastrophic harm are not relevant factors to be taken into account in determining the scope of a duty of care. However, it is open to argue that some or all of those factors are absent in the case before the Court, and that other factors with greater weight in the instant circumstances should prevail.

Despite this unavailability of convenient binding precedent on such issues, and the danger of finding that a seemingly good analogous case turns out to be less than it seemed, the profession benefits greatly from noting supporting judicial reasoning on

⁵ *Koehler v Cerebos (Aust) Ltd* [2005] HCA 15, which is discussed below.

⁶ *Vairy*, which is discussed below, per McHugh J at [29] – [32].

⁷ This is discussed more fully below, but its ubiquity and fame remove any need for further identification.

facts, and citing it in other cases⁸. It fails when it is suggested that broadly similar factual situations should necessarily produce the same finding as to what is 'reasonable'. Some critical variation of the combinations of relevant facts may defeat any successful transport of the process from one to the other⁹.

For this reason, variations in the results to be found in the judgments of the Court do not stem from departure from principle. The principles are constant.

For example, a public authority's omission to provide a warning to swimmers of a hidden hazard at popular swimming spots within the area of its control may or may not lead to any necessary finding that there was a breach of the duty. Or a motorist, who has a general duty of care towards pedestrians not to cause injury through the use of the dangerous instrument under his or her control, may or may not be in breach of the duty, depending on a variety of circumstances. The determination of the result in each case requires the application of a rigorous process in the manner discussed below.

Of the elements described above, the following issues, which relate to the duty of care will be discussed here¹⁰ –

- Whether, in respect of an allegation of negligence against a defendant, any duty of care at all was owed by the defendant to the plaintiff; and, if so, and
- the content of the duty, that is, the extent of the precautions necessary to meet that duty in the relevant circumstantial context;

Although it is necessary to recognize the distinction between them, these are cognate issues that are inter-related¹¹. They are not isolated from each other since they are bound together in the final issue, namely, whether in the circumstances that existed, the defendant was in breach of a duty to take reasonable care to avoid harm of the general kind that was suffered by the victim?

In respect of the scope of the duty, the enquiry becomes more specific. Logically, the specific detail of the content of the duty, such as the identification of specific precautions that it demands in a particular set of circumstances, attracts criteria of a more special nature. The introduction of these matters into the issue of the existence of the duty can

⁸ The reasoning to be found in a minority judgment in a precedent may be useful for citation as being free of the usual weakness of minority judgments. The implied error inherent in dissent may be due to an error in assessing the overall comparative weight of the competing factors while leaving a finding as to the relevance and/or weight of a particular factor supportable by its own logic.

⁹ The identification of 'relevance' is an important part of this discussion.

¹⁰ See the abstraction by Glass JA in *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631, 639, which has been cited with approval in the High Court on several occasions.

¹¹ If it is found that, in relation to the extent of any duty that may exist, there was no duty to take a precaution that would have avoided the harm that occurred, there was no duty to avoid that harm and the duty to avoid other harm is irrelevant. And the determination of the scope of the precautions that a duty, if it existed, would require may influence the question whether there was any duty related to the circumstances of the occurrence of harm. In *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 555, Gleeson CJ observed that, if it is not possible to identify the content of an asserted duty of care, this may cast doubt upon the existence of the duty, repeating his earlier comment in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 13 {5}. Cf. *Agar v Hyde* (2000) 201 CLR 552, 578-582.

sometimes lead to unfortunate results. Consequently, while remembering the relationship between the two, it is best to discuss first and separately those features relating to the existence of the duty. The precautions that are necessary to respond to the duty, that is, the specific contents of the duty relating to the danger relevant to the case, will depend on the circumstances.

In practice, it is desirable to approach these issues in proper order to avoid confusion in the use of the material that is germane to one issue by introducing it inappropriately in consideration of another. The issue as to whether there is a general duty in the first instance is distinct from the issue as to what, in the circumstances, it requires of the party on whom it is imposed. The Court has observed that in argument before it, there is a tendency to confuse the two¹². For example, within the general duty at common law to take reasonable care to avoid causing reasonably foreseeable harm to another, there may be a duty to avoid harm by certain precautions within the range of what is reasonable, but no duty to do so by other means. It is unprofitable to speak in generalities¹³.

In a particular case under consideration, the enquiry, both as to the existence of a duty of care and as to its content, is naturally confined to the range of activity involving the cause of the actual injury and focuses on its relevant features¹⁴. This does not mean that the particular circumstances must be considered without regard to the general circumstantial context in which they are set, if that wider context admits relevant persuasive factors¹⁵.

Some examples of a duty of care have already been mentioned. A person who drives a dangerous thing like a motor car on a public road has a general duty of care to others who are using the road, and a party who has control of premises has a general duty of care to those who enter by right or invitation.

The existence of a duty of care?

When there is a possibility of reasonably foreseeable harm to another, the duty to avoid it does not lie on all persons who may be able to foresee it: the duty falls only those with responsibility at law.

¹² For example, see the remarks of Gummow J in *Vairy* (which is discussed below) at [54]. See, also, the remarks of Kirby J in *Neindorf v Junkovic*[2005] HCA 75 at [49]. For example, in *Romeo v The Conservation Commission of The Northern Territory* (1998) 192 CLR 431, 478, there was no doubt that in the circumstances, the Commission owed certain duties of care to the plaintiff to take precautions to prevent injury to her, but that duty did not extend to such precautions as would have prevented her fall off the precipice.

¹³ See also his further remarks at [50].

¹⁴ See *Vairy* (infra) per Hayne J at 122. Reflections on the general duty on such a public authority that applies to its avoidance of causing harm to an entrant's car tyres in a parking reserve is hardly productive in an enquiry as to its duty not to cause injury by its failure to warn of a hidden danger in a swimming spot.

¹⁵ For example, as it will be seen below, in respect of a diving accident at a location within a public authority's control, the enquiry will focus on the precautions required of it at that place in respect of that activity, but it will not exclude the consideration of the influence of the factor consisting of the Authority's competing obligations for the whole of its area.

When there is a duty of care¹⁶ is a notion of a general nature attracting broad and general elements¹⁷, and there is no settled methodology or universal test for determining its existence¹⁸. The issue is to be considered prospectively at a time before the injury, and should not be influenced by hindsight that is generated by the occurrence of the harm¹⁹.

Factors supporting the existence of the duty may be summarized as follows –

- Foresight of the likelihood of harm²⁰.
- Knowledge or means of knowledge of an ascertainable class of vulnerable persons unable to protect themselves from harm.
- Special control of the occurrence of activity from which the damage might flow.

Factors that will often point against its existence include²¹ –

- The duty's cutting across other legal rules and interfering with the coherency of other legal principles, or of a statutory scheme that governs certain conduct relationships.
- The incompatibility of the duty's assertion with other duties owed by the defendant, particularly as to matters of statutory and professional obligations;
- Exposure of the defendant to indeterminate liability.
- The difficulty of confining the class of persons to whom the duty may be owed within reasonable limits²².
- The duty's impeding the legitimate pursuit by the defendant of its commercial activity.

Other factors may be –

- Difficulty as to how the postulated duty might be discharged.
- The type or nature of damage to which it relates that, on the one hand, may not be legally cognisable²³ or, alternatively, may support the existence of a duty²⁴.

¹⁶ The general principle as to this is conveniently found in the judgment of Gummow J in *Vairy v Wyong Shire Council* [2005] HCA 62 at [65] – [73] and that of Kirby J in *Harriton v Stephens* [2006] HCA 15 at [62] et seq..

¹⁷ *Ibid* at [69].

¹⁸ *Sullivan v Moody* (2001) 207 CLR 562, 578; *Harriton v Stephens* (supra) at [62].

¹⁹ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 611 – 12; *Vairy v Wyong Shire Council* [2005] HCA 62. See also *Neindorf v Junkovic* (infra) per Hayne J at [97]; *New South Wales v Bujdos* (infra) at [51]. This reasoning also applies to the determination of the precautions required, and is discussed further under that topic.

²⁰ Although satisfying this test will not necessarily establish the existence of a duty, it will ordinarily provide guidance as to when a duty is owed, particularly in the case of physical injury: *Harriton v Stephens* (supra) at [63]. 'Foreseeability' in this context is to be taken as of a more general nature, a higher level of abstraction, than the factor of 'foreseeability' in the catalogue of factors relevant to the scope of precautions necessary to meet the duty of care. Then, the consideration is more localized to the circumstances in which the actual injury took place, and the issue as to what precautions should have been put in place may be plainly influenced by the foreseeability or probability of the harm of the general kind suffered by the plaintiff.

²¹ *Harriton v Stephens* (supra) at [64].

²² Which is similar to indeterminacy.

- The nature of the harm suffered by the plaintiff²⁵.
- The impossibility of assessing the damages to be awarded²⁶.
- Whether the duty postulated can be recognized by the law as a matter of principle;
- That the defendant is the repository of a statutory power or discretion.
- Policy and public policy considerations²⁷.

Another criterion that gained popularity for a while was ‘proximity’, but its application to the cases found that it was difficult to define in a way that contributed to the result²⁸. It came to be recognized that it was not the case that a party owed the duty to others because they were ‘proximate’: it was that they were proximate because the duty was owed. But this was determined by the presence and influence of factors that varied from case to case²⁹. However, this theoretical exercise did have the virtue of demonstrating that some form of proximity in the relationship between the parties could be a factor to be taken into account, along with others, in determining the issue³⁰.

There is naturally a shifting element in respect of relevant normative factors, particularly when they are associated with policy. When they have particular influence in an earlier decision as to a category of the duty of care, a change in social values may eventually lead to a change as to the existence of a duty³¹. For example, a former view, that a duty cannot be owed to a person before that person is born, is no longer valid³².

This may be compared with the position in a ‘wrongful life’ case³³. The Court has found that there was no duty of care by a doctor to a foetus that was catastrophically disabled by

²³ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 487; *Sullivan v Moody* (2001) 207 CLR 562, 579; *Harriton v Stephens* (supra) at [68], [225], where the damage was said to be the difference between a life of suffering and non-existence, which could not be evaluated.

²⁴ As, for example, in the case of personal injury.

²⁵ For example, where its direct cause is the criminal conduct of some third party: *Sullivan v Moody* (supra) at 579; *Harriton v Stephens* (supra) at [241].

²⁶ This was a significant matter in some of the judgments in the ‘wrongful life’ cases discussed below.

²⁷ Some of these were discussed by Callinan J in respect of a ‘wrongful life’ case in *Harriton v Stephens* (supra) at [205].

²⁸ For example, the relationship of driver and passenger in a motor car was found to be ‘proximate’, but not if they were joyriding in a stolen car. Policy considerations, of course, dictated the result, but it could hardly be said to have made any difference to the proximity of the parties.

²⁹ In *Hackshaw v Shaw* (1984) 155 CLR 614, 662, Deane J put it another way by saying that the touchstone of proximity is that there be reasonable foreseeability of a real risk of injury to the victim or to the class of persons of which the victim was a member, which is the standard element of foreseeability. ‘Proximity’ was disposed of in *Perre v Apand* (1999) 198 CLR 180, 231.

³⁰ Its presence in various aspects is to be found in the first of the factors referred to by Gummow J in *Vairy*, referred to above. See, too, *Harriton v Stephens* (supra) per Kirby J at [69].

³¹ The same applies to the determination of the content of the duty. The view in some quarters as to a higher degree of self responsibility of the injured party may lead to a finding that the extent of precautions called for is reduced because of the entitlement of the party owing the duty to rely on the other’s responsibility for his/her own safety.

³² *Harriton v Stephens* (supra) at [66].

³³ *Ibid.* This decision was handed down at the same time as those in two other ‘wrongful life’ cases, *Waller v James*; *Waller v Hoolihan* [2006]HCA 16, where the same reasoning was applied.

rubella when, it was alleged, he failed to afford the mother the opportunity to have an abortion. Although there may have been duties of care as to other kinds of harm, there was no duty of care of this nature. A number of policy considerations were discussed, and there was some variation as to those relied on by the majority; but the major factors were the difficulty of confining the duty of care to grievously disabled persons, and, particularly, that the nature of the damage alleged is not such as to be legally cognisable. Kirby J was of the view that the foreseeability of the harm, the plaintiff's vulnerability, and the defendant's control over the circumstances supported a finding of a duty of care.

It will be noticed that there are some specific rules or categories that may be decisive, but that this does not cover the field. There may be cases where it will be necessary to balance competing considerations that have been recognized, or even to advance fresh considerations that are generally in harmony with the style of reasoning adopted by the Court

The standard of care

First, some general observations:

- When a general duty of care exists, its content is only to take reasonable care to avoid such harm as may be reasonably foreseeable. There is no absolute duty to prevent it³⁴.
- Because of its nature, the duty of care is sometimes owed to a class rather than to the individual who is injured; but of course, it will be owed to those individuals who are members of the class³⁵.
- The precautions that the duty requires are to be considered prospectively in the light of the circumstances that should have been known to the defendant at the time immediately prior to the harm. Hindsight, having the advantage of knowing of that occurrence, should not intrude. Knowledge of the particular harm inflicted in the occurrence is useful only to focus attention on the relevant area of enquiry and to show that the harm was possible. It should not suggest that it deserved special attention because it has occurred³⁶. In other words, in considering the content of the duty, the court will consider the pre-accident position of the defendant and formulate the content of the duty prospectively. It will not

³⁴ *Sullivan v Moody* (2001) 207 CLR 562, 576; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 555; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 524; *D v East Berkshire Community Health NHS Trust* [2005] 2 WLR 993, 1023-4, 1025; cited in *Vairy v Wyong Shire Council* [2005] HCA 62 at [66]

³⁵ Such as, for example, in the case of a public authority, a duty to members of the public who enter upon land under its control as of right. A matter might turn on the issue whether the plaintiff is a member of the class to whom the suggested duty is owed; or, to put it in another way, it might turn on whether and what duty is owed to the class to whom the plaintiff belongs.

³⁶ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 611 – 12; *Vairy v Wyong Shire Council* [2005] HCA 62. See also *Neindorf v Junkovic* (infra) per Hayne J at [97]; *New South Wales v Bujdos* (infra) at [51].

retrospectively look to the harm sustained by the plaintiff or to any alleged want of care by the defendant in that regard³⁷.

The universal measure is reasonableness in the circumstances. This is the mantra that the law has adopted to provide the flexibility necessary to cope with the infinite variety that emerges in the complex web of human affairs. Because of this variability, and even the variability of matters of degree and relative weight of common components, it is not possible to use findings as to the scope of a duty of care in one case as a precedent for another. The proper use of precedent is to identify the legal principles to apply to the facts as found. Precedent may give guidance in identifying the issues to be resolved and the correct legal approach to the resolution of those issues; but conclusions of reasonableness cannot be laid down by precedent in such a fact-sensitive area³⁸.

For this reason, it is impossible to lay down categorical rules to accommodate all the problems that can arise. Attempts have been made to do so, only to be explained away by later Courts that have been faced with the absurdities and injustices thrown up by the earlier categorical formulations.

So it was in relation to occupiers' liability. In my student days, we had to learn the strict categorical rules relating to occupier's liability that turned absolutely on the relationship between the occupier of and the entrant. But exceptions and variations were appearing thickly, even in those far away days. Then came *Australian Safeway Stores Pty Ltd v Zaluzna*³⁹ and *Woods v Multi-Sport Holdings Pty Ltd*⁴⁰, and justice, rather than illogical technicality with a large dose of complexity, prevailed. The status of the entrant to the premises is still relevant, but it is only a factor to be considered with all other relevant factors in determining the extent of the duty. It justifies its place on the basis of reasonableness.

Commonsense is a handy talent for judging what is relevant and what is reasonable, but such a blunt tool alone would be unsatisfactory for competent lawyers, particularly in respect of normative issues, and its refinement for this purpose is achieved only by study and thought. In the Australian Law Journal article referred to, the explanation of the High Court's use of the process is set out.

It is necessary to collect all the relevant factors relating to the particular circumstances, allocate to each a weight appropriate to its degree and comparative value in the combination of factors, and then see which way the balance is tipped. The process can be described in another way with equal accuracy. It is the collecting of all the relevant arguments on both sides of the issues, and coming down on the side that is most persuasive overall⁴¹. This has a certain familiar ring. The rub lies elsewhere.

³⁷ See *Vairy*, discussed more fully below, per Gummow J at [60] – [61] and Hayne J.

³⁸ *Vairy v Wyong Shire Council*, which is discussed below, per Gleeson CJ and Kirby J at [2] – [3].

³⁹ (1987) 162 CLR 479, 488.

⁴⁰ (2002) 208 CLR 460.

⁴¹ To refer to 'factors' may encourage precision and clarification of the arguments they represent. It is convenient to use that somewhat pedestrian expression for the explanation of the process and for the understanding of those to whom it is explained. Professor Wittgenstein might approve.

The identification of relevant factors and the evaluation of their respective weights have presented the greatest difficulties, but the Court has given us many examples that can instruct any good lawyer who does the necessary case reading. Some of the reasoning has a wide application so that it may often be used, but it is essential to remember that none is absolute in its utility or weight. There are other examples of unusual specific instances that may found infrequently, but the Court's identification and explanation of them are still instructive as to the process and the correct way of thinking about them. This is useful for other cases though the factors and their comparative weights may be different. Spotting the differences is the third major difficulty.

In the seminal case, *Shirt v Wyong Shire Council*⁴², the High Court identified a short catalogue of some of the more common and influential factors, though the list was not meant to be exhaustive or universally applicable. They were –

- the magnitude of the risk;
- the degree of probability of its occurrence;
- the expense, difficulty and inconvenience of taking alleviating action; and
- any other conflicting responsibilities of the defendant.

Gummow J has described this as a ‘calculus’⁴³, but The Chief Justice and Kirby J have made it clear⁴⁴, if ever it were in doubt, that the process is not a matter of precise calculation. It is one of judgment, which is appropriate to something as insusceptible of precise definition as the idea of negligence⁴⁵. They observed further that what was said in *Shirt* was not an inflexible formula: that other considerations may apply⁴⁶.

These factors have been complemented and refined in later cases where, for example, competing demands on the limited funds of public authorities have been taken into account in measuring their duty of care⁴⁷.

Another example of the development relates to “the.. difficulty .. of taking alleviating action..”. It is necessary to have regard to effectiveness of any specific precaution suggested as the answer to the required standard of care. A precaution is not ‘reasonable’ unless it can be said that it would, in the ordinary course of events, avert the risk that called for it⁴⁸. A want of effectiveness of a precaution, or its low degree of effectiveness, or its high cost, will be relevant considerations. Conversely, but with a contrary influence, so too would a high degree of effectiveness and/or low cost. If, within the

⁴² (1980) 146 CLR 40 at 47-48.

⁴³ In *Mulligan v Coffs Harbour City Council* [2005] HCA 63 at [39]. He and Hayne J (at [120]) made similar references in *Vairy*.

⁴⁴ *Ibid.*, at [2].

⁴⁵ They were disinclined to refer to the process as a ‘calculus’, , but Gummow J was plainly not suggesting that it was a precise calculation.

⁴⁶ *Ibid* at [2].

⁴⁷ These have been referred to in my article appearing in (2004) 78 ALJ 595. This discussion investigates the case law development of that process since that article was written.

⁴⁸ *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 422.

limitations imposed by other considerations, no reasonably effective precaution can be identified, it may mean that any duty does not extend to taking precautions.

It is useful to repeat that these matters are all only the result of logical reasoning. The analysis of the cases below will reveal this further.

The factors relevant to the particular hazard will indicate the nature and degree of the precautions that were required. Further, the circumstances may determine the basis on which the required precautions are to be formulated⁴⁹, particularly as to whether the circumstances of the particular plaintiff, or the plaintiff's class of persons, should be the starting point.

For example, in assessing the standard of care that is owed by a public authority to persons who are using public facilities under its control, it must be measured by the duty owed to the public at large or at least that section of the public entitled to enter as of right, rather than by any duty owed to the plaintiff as an individual⁵⁰. While the precautions under scrutiny would need to include reference to special cases that should reasonably be expected, if the plaintiff is not of that kind, then the relevant precautions are those that should be taken with the general public in mind. By way of contrast, in the case of a motorist who is conveying a particularly vulnerable passenger, although the general duty of care is related to all whom the plaintiff's vehicle may injure, the measure of the duty, the necessary precautions, should be considered specifically insofar as it relates to that passenger. This is no more than reasoning according to the exigencies of the circumstances.

It is now useful to analyse the most recent cases and extract from each the details of the various factors that contributed to the result. Prudence suggests repetition of the caution that none of these is absolute in its force, nor as to its right to be taken into account, nor as a standard of comparative weight, nor even necessarily as relevant for its application in a case that might bear some resemblance.

It is instructive, first, to bring together three diving cases involving the duty of care of public authorities. The plaintiff in each action was seriously injured by striking his head while diving in a public recreation spot under the control of the authority. These should be considered in the context that there was a relatively recent precedent of the Court, *Nagle v Rottnest Island Authority*⁵¹. There, the plaintiff had recovered damages for serious injury caused by his diving onto submerged rocks at a swimming spot promoted by the defendant, which had failed to provide any warning of the concealed danger.

⁴⁹ See the examples given by Gummow J in *Vairy* at [77].

⁵⁰ See the explanation of this in *Mulligan v Coffs Harbour City Council* [2005] HCA 63 at [15] – [18].

⁵¹ (1993) 177 CLR 423. One ground on which this authority was distinguished in the later cases was that it had applied the 'proximity' doctrine, but a more relevant ground in this discussion was that in *Nagle*, the Court had emphasized that the defendant had promoted the activity at the place where the danger was concealed: *Vairy* (infra) at [56] – [57].

In *Swain v Waverley Municipal Council*⁵², the plaintiff was swimming between the flags at Bondi Beach, and dived into a sandbank that he did not see and could not have been expected to see. But it was a hazard of which the public in general should generally have been aware. He argued that he was led into believing that the water was safe for his act because of the presence of the flags, but the flags were not a warranty of safety. There was no evidence that, if all matters of safety were taken into account, there was any part of the beach that was safer. It was accepted that it would not have been reasonable to close the beach in the mild conditions prevailing. The Council did not lead evidence that this hazard could not have been avoided by a placement of the flags at another part of the beach.

The jury found for the plaintiff, and the difficulty in reversing a jury's verdict constrained a full discussion of matters of present interest. The plaintiff was successful because most of the Court's attention was directed to the principles associated with an appellate court's approach to a jury's verdict and, more controversially, with the onus of proof. The result turned on these issues. However, there was some discussion as to the factors, particularly those associated with the content of the duty in those circumstances.

Gleeson CJ made some preliminary observations to emphasize that the standard of the precautions required is only one of reasonableness. He observed that life is risky. People do not expect, and are not entitled to expect, to live in a risk-free environment. The measure of careful behaviour is reasonableness, not the elimination of risk. To some extent, the duty, when present, makes people their neighbours' keepers, but not their insurers. Nevertheless he found that the onus of proving the absence of safe alternative sites for the positioning of the flags was on the Council, which had failed to discharge it; and he allowed the jury's verdict for the plaintiff to stand.

He took notice of the following factors relating to the issue of reasonable precautions in those circumstances –

- The Council's control and promotion of the area.
- Its undertaking the task of identifying a suitable area for the activity, though the content of its message as to the extent and nature of the safety of the chosen area was at best equivocal.
- The range of competing duties owed by the Council to others – the risks were more extensive than that which caused the plaintiff's injury, and the sandbank may have added to the safety of others.
- That the plaintiff was swimming between the flags was a factor in his favour, but it was not conclusive.
- Whether moving the flags would have made a material difference to the risk.

McHugh J found that there was no evidence of breach of the duty because there was no evidence of a reasonably practical means of avoiding the risk, and that the plaintiff had not discharged his onus of proof on the point. He noted the following relevant factors on the issue of the content of the duty –

⁵² [2005] HCA 4.

- Reasonable foreseeability of the risk.
- The degree of probability of the danger and the gravity of the possible harm.
- The time when it had come into existence and its duration, both of which would have affected its detection⁵³.
- The availability of reasonably practical means of avoiding the risk.
- The impracticability of avoiding the risk because of the possibility of similar or other hazards at alternative places, and the unreasonableness of closing the beach.
- The plaintiff accepted that the defendant was not under an obligation to warn him of the relevant risk, and so a warning was not a required precaution.
- The plaintiff's knowledge of possible danger from sandbanks.

Gummow J would have restored the jury's verdict on principles relating to an appellate court's treatment of such verdicts, and he disclaimed any authoritative discussion on the scope of the duty of care. He made no comment relating to the trial judge's unchallenged directions to the jury that the Council owed a duty of care to beachgoers by reason of its care, control and management of the beach. He adverted in passing to some factors relating to the determination of the scope of the duty –

- The need to take into consideration bathers' inadvertence or carelessness as to safety and as to the significance of the flags, but not to guard against risks to a far-fetched or fanciful degree.
- The notorious and obvious inherent danger posed by sandbanks⁵⁴.
- Risks need not be unusual or unique to be relevant in this exercise, but common hazards may be obvious because they are common.
- The availability of reasonably practical alternative precautions.

Kirby J referred to the *Shirt* factors and the other matters discussed by Gummow J, but directed the force of his judgment to the issue of an appeal court's treatment of the jury's verdict, and to the effect of the evidence.

Heydon J agreed with McHugh J as to the onus of proof and the absence of evidence of reasonably practical alternative precautions that were available. He also found⁵⁵ that the risk was not reasonably foreseeable

In *Mulligan v Coffs Harbour City Council*⁵⁶, the Chief Justice and Kirby J observed that what had been said in *Shirt* was not an inflexible formula: that other considerations may apply⁵⁷. As a duty of care was acknowledged by the defendant, they had only to deal with what the reasonable standard of care required of an authority that had control of a

⁵³ As the plaintiff had not proved these things, it was open whether the defendant's representative could have detected it, and whether there was an effective precaution to overcome his want of knowledge.

⁵⁴ While this goes to the issue as to the scope of the duty of care in the particular circumstances, because the issue is one of fact precedential findings have no value on the issue of whether the danger is obvious: Gummow J at [140].

⁵⁵ On this, he disagreed with McHugh J.

⁵⁶ [2005] HCA 63 at [2].

⁵⁷ *Ibid* at [2].

swimming spot in a flowing waterway where the hazard consisted of undulating submerged sandy banks, some of them in cloudy shallow water. The plaintiff was injured when he dived onto one of them.

They noted that the cost of a warning sign at the relevant location would have involved negligible expense, difficulty or inconvenience, but that there was no reason why this site, with its dangers, should have been specially selected for such a warning. The hazard was the result of natural causes - one of a kind that was well known and commonly and widely encountered⁵⁸, which was not one of the factors referred to in *Shirt*.

McHugh J found that the standard was to be assessed according to the conditions, given the character, as a class, of the entrants on land under the authority's control, but not having regard to extreme situations and not requiring protection of every imaginable entrant. These limitations follow from the element of reasonableness.

In respect of the circumstances before the Court, and particularly the claim that the authority should have erected a warning sign, he referred to the following factors –

- Whether the authority knew or ought to have known of relevant special hazardous conditions, of unsafe practices by swimmers, or of the likely knowledge of the users of the place⁵⁹.
- General knowledge of hazards of this kind that is possessed by swimmers.
- The impracticability of eliminating the risk satisfactorily.
- If a warning were considered, the extent of the burden generally because of the widespread incidence of common and ordinary dangers in the defendant's area.
- The magnitude or remoteness of the risk.

Gummow J referred to the following factors –

- The land was occupied by the authority for public, not private, use.

⁵⁸ In this context, Gleeson, CJ, and Kirby J referred by analogy to community standards of reasonable behaviour in relation to the absence of need for householders to place notices at their front doors warning entrants of the ordinary dangers that await them if they fail to take reasonable care for their own safety. This, of course, refers to the normative test of reasonableness in the required standard of care when such a duty is owed. It would still be necessary to point to the factors that demonstrate such compliance in the particular case, such as in the analogue the community standard concerned the warning to be given to those entering ordinary domestic premises as to the normal hazards that would be encountered. In *Mulligan*, the content of the relevant community standard related to warnings as to commonly encountered natural hazards. But in both cases, the prevailing factor was the ordinary commonplace and expected nature of the hazard, which in *Mulligan* prevailed over the potential for grave physical injury. Once the dominant features are decided, it is then that community standards can be applied, but that is just another description of the test of reasonableness, as confirmed by 'community standards'. If the Court were to find that they were not reasonable on a critical issue, and that the defendant's fault was not excused by their existence, it is unlikely that it would defer to them. The judicial interpretation of reasonableness will usually accord to the vague notion of 'community standards', but it is not necessarily so, and it is more likely that they will be taken to conform to the judicial understanding of what is reasonable. Still, these cases demonstrate that there are occasions when they can conveniently be used to underline the accuracy of the Court's evaluation of what is reasonable.

⁵⁹ The knowledge of the plaintiff was not relevant to this point except insofar as it might indicate the extent of knowledge of the class, but it could be relevant to contributory negligence if that had been an issue.

- The obviousness of the hazard.
- The possibility of inadvertence and carelessness, even on the part of experienced swimmers.
- The practicality and efficacy of the suggested precautions.
- Post-accident precautions taken by the defendant⁶⁰.

Hayne J noted that a statutory authority, having the control and management of land to which the public has access, has a duty of reasonable care to each member of the public who enters. On the scope of the precautions predicated by that duty, he warned against hindsight that is enlightened by the events that had occurred to the plaintiff. He referred to the factors set out in *Shirt*, and acknowledged that the answer to the issue depended on all the circumstances. He catalogued the relevant factors peculiar to that case as including –

- The steps taken by the authorities that had care, control and management of nearby reserves to encourage, or at least facilitate, the use of the swimming facility.
- The knowledge that the defendant had, or ought reasonably to have had, that the area was used as a place to swim.
- The knowledge that it had, or ought reasonably to have had, as to the presence and extent of the relevant danger.
- The knowledge that it had, or ought reasonably to have had, that its works had assisted in creating the conditions that led to the general activity of diving into the water as the plaintiff had done.
- Requiring an authority to respond to the risk, that a swimmer might plunge into the water at a point that was too shallow, by erecting warning signs against it was not reasonable⁶¹.

Callinan and Heydon JJ discussed the following factors in addition to those identified in *Shirt* –

- The obviousness of the danger, which may be decisive in some cases⁶².
- The expectation that people will take elementary precautions at least for their own safety against obvious risks, and will behave with common sense⁶³.

⁶⁰ Citing *Nelson v John Lysaght (Aust) Ltd* (1975) 132 CLR 201, 215.

⁶¹ He did not depend for this conclusion on the obviousness of the risk, but referred to his discussion of the point in *Vairy*, which is analysed below.

⁶² This factor is used against the need for precautions in respect of the obvious danger in that it should not be necessary to warn a person against a danger that is obvious. That a danger is obvious may be a factor that is very powerful so that it prevails in the particular circumstances where it is effectively conclusive, such as in *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; but it is not necessarily generally conclusive. It is a matter of degree and its place in respect of competing factors. Organisers of robust sports do not have the duty to warn participants of the obvious danger that they might be injured through any of the ordinary risks associated with that activity: *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 509. It was an important factor in this case.

⁶³ Although it did not play an important part in the reasoning in this case, this is the factor, the expectation of personal responsibility in the victim, that will attract the most disagreement. In this context, it relates to the scope of the duty of care, whether the defendant was entitled to rely on the plaintiff's personal responsibility in limiting the precautions to be taken, rather than to contributory negligence.

- The variability of human attributes, sensibilities, and vulnerability both as to the dangers and to warning signs, including inadvertence and carelessness.
- The creation of the hazard may have been contributed to by the defendant's works, but they would have been present naturally in any case.
- The promotion of the area for the relevant activity and the proximity of a safer place.
- The defendant's superior knowledge of the area and its dangers.

Although there were several factors favouring the plaintiff's case, the obvious and commonplace nature of the hazard, and the reasonable limitations of the burden of warning the public against all such dangers in its area, were so powerful in these circumstances as to prevail. The plaintiff failed.

The desirable flexibility of this method in achieving refined discrimination in suitable cases is demonstrated in *Vairy v Wyong Shire Council*⁶⁴. This too was a case of a swimmer's serious injury as the result of his diving onto a hidden hazard in shallow water in a recreational swimming area controlled by a public authority⁶⁵. But because of the mix of the identity and weight of relevant factors, although the result was the same, it was supported by only a bare majority of the Court.

The principal differences in circumstances were suggested to be that –

- The authority was aware of the danger of shallow water due to fluctuations in the water level and the conformation of the underlying submerged surface, and that many people dived from the rock shelf above the water.
- Many others were engaged in the activity; giving it an appearance of safety.
- The danger was most unusual in a combination of factors that distinguished it from other dangers in the defendant's area.

In addition to these, and the *Shirt* factors, the Court adverted to the following further considerations –

Gleeson CJ and Kirby J –

- Many forms of outdoor recreation involve a range of risk of physical injury, and while the risk may be small, the consequences may be severe.
- The level of risk varies according to the locality, the conditions at any given time, and the capabilities of the actor.
- The practicality and the deleterious impact of the precautions suggested by the plaintiff.
- Control of the area was invested in the public authority.

⁶⁴ [2005] HCA 62, which was handed down on the same day as *Mulligan*.

⁶⁵ The plaintiff placed considerable reliance on *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, but the majority of the Court's view in that case assumed that the content of the duty of care in the circumstances was to provide a warning; and in any case, there were differences in the respective weights of the influential factors.

- The nature and extent of the area that it has to control, and the rights of the public to enter it.
- Warning signs in such areas serve a limited purpose, the difficulty in finding a suitable content for them in the choice of adverting to one danger rather than another, and the undesirability and counter-productivity of a proliferation of signs.
- Reasonableness sometimes requires an authority to erect warning signs as to hazards, but there is community acceptance of the view that an obvious danger does not always require it.
- The degree of risk, and its unusual nature⁶⁶.
- The obviousness of the danger and the expectation that persons will take reasonable care for their own safety.
- Conversely, the hidden nature of the risk, enlarged perhaps by the engagement of many others in the common practice of the same activity.

McHugh J remarked on the following –

- The relationship between the defendant authority and the plaintiff entrant on land under its control.
- The high risk and the seriousness of the possible harm.
- The number of people who were diving in the place, which increased the danger, and the appearance of safety produced by the number of people who engaged in the activity without incident.
- The authority's knowledge of the intensity of use and the gravity of the danger.
- The danger's overall pre-eminence in the range of such dangers in the authority's area.
- The simplicity and ease of the proposed precaution, which would have been effective.
- Obviousness of the risk, but in this case it was insufficient to excuse an omission to give warning.
- The age and maturity of those exposed to the risk, their actual and imputed knowledge, the likelihood of their inadvertence, and their familiarity with the area or constant exposure to the risk that would make them careless of their own safety.

Gummow J discussed the following factors, in addition to those catalogued in *Shirt* -

- Obviousness of the danger to both the plaintiff and the defendant, which, however, may not be decisive in some cases where its weight, which may vary in degree according to the circumstances, is not such as to prevail over competing factors.
- The nature of the danger, as it should have been assessed prior to the accident.
- The functions of the public authority, the size of its area over which it had control and management, and the wide incidence of hazards of various degrees of risk throughout its area.

⁶⁶ Two unusual features distinguished it from the multitude of other hazards in the area of the authority's control and, with other factors, tended to elevate it to a danger that deserved a warning sign.

- The care ordinarily to be expected from members of the public, exercising reasonable care for their own safety⁶⁷.
- The plaintiff was entitled to enter on the premises and to dive and swim there as of right, but the authority did not promote diving at that place nor gain revenues from that activity. Indeed, it had tried to deter it⁶⁸.
- The site from which the plaintiff dived as a recreational pursuit was of a different character from a workplace, the roads, the marketplace, and similar areas into which the plaintiff must venture, virtually of necessity⁶⁹.
- The common incidence of natural and other dangers, including similar hazards at other locations, that would compete for the defendant's attention; whether there was anything distinctive or unusual about the location in relation to relevant hazards; and whether accessibility was a factor in this respect.
- The common incidence of danger associated with the many forms of common recreational activity practiced in the defendant's area that would equally merit a warning sign, if one were merited here.
- The defendant had not created nor enlarged the hazard, which was due entirely to natural causes.
- It was **not** a relevant factor that, opposed to any limitation on the obligations of public authorities, there were "vulnerable victims" who were unlikely to have protection by insurance against the risk of serious injury in recreational pursuits.

A party's control and management of an area on which another enters as of right may, with other factors, sometimes lead to the existence of a particular duty of care by the party to that other⁷⁰. But in this case, the authority's control over the plaintiff and the area of danger, which was necessarily the only basis for any suggested obligation to give a warning, did not give rise to such a level of precautions as to require that action.

Hayne J acknowledged the analogy of the defendant's position to that of the owner of private land, but pointed out that the analogy was not perfect because of distinguishing factors. For example, the defendant had limited authority to control entry onto its land in the same way as a private occupier, such as by closing off and denying entry to part of the land under its control⁷¹.

⁶⁷ *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 581, where the issue was the degree of care required of a public authority towards a member of the public who was using a public road as of right.

⁶⁸ It had not used its powers to prohibit it, but could not be held accountable in negligence for failing to exercise its quasi-legislative powers: at [86].

⁶⁹ *Agar v Hyde* (2000) 201 CLR 552 per Callinan J at 600.

⁷⁰ At [81]. For example, the promotion by the former of the activity undertaken by the latter may then in all the circumstances create a duty to take reasonable precautions, such as by warnings of hidden hazards associated with that activity, to prevent harm through that activity: *Nagle v Rottmest Island Authority* (1993) 177 CLR 423.

⁷¹ In the exercise of gathering relevant factors and attributing weight to them, this might be loosely regarded as a sub-factor going to the weight that should be attributed to the factor that the Authority had control of the location where the danger existed. This observation has no technical significance: it merely places the point in the logical structure of the exercise for convenience of understanding.

He emphasized the need to consider the duty of care and its content from a prospective view at a time immediately prior to the accident, and not with hindsight focused on its particular events. In this, he regarded the factor of ‘obviousness’ as less suited to the issue of the defendant’s duty to deal with prospective harm than to the issue of contributory negligence. Its place was to be taken by the factor of probability of harm as it would have prospectively appeared to the defendant prior to the accident, which was not the same thing⁷².

In addition to the *Shirt* factors, he also referred to –

- The many and varied obligations competing for the Authority’s attention.
- The wide incidence of hazards of this general nature, both naturally occurring and inherent in the physical recreational activities carried on in its area.
- The Authority’s knowledge of the relevant activity by the public, and of the danger and its degree.
- Whether the Authority encouraged the activity.
- It had not done anything to create or increase the natural risk.
- Whether there were hidden dangers of which the Authority was, or should have been, aware but of which the public would not be aware.
- The unavailability of suitable precautions. Prohibition of the activity was not a practical remedy.
- Compliance with the duty of care is not measured by reference to the reasonableness of imposing on the occupier of land an obligation to warn members of the public about the obvious risks of the land

Callinan and Heydon JJ did not attribute any value to the factor that the plaintiff had been misled into a belief of the safety of his action because he had seen others doing the same thing safely, a practice that was known to the defendant. They particularly noticed the following factors in addition to the *Shirt* factors –

- The presence of a multiplicity of other serious dangers of a similar or other kinds that could not all be answered by warnings or other precautions.
- The effectiveness of the suggested warning to a public who already knew generally of the danger, or the erection of a fence;
- The plaintiff’s voluntary undertaking of a typically and notoriously risky physical activity.
- The wide variety of dangers associated with the activity to which the defendant would have had to direct its attention.
- The reasonable expectation of the defendant that a person of the plaintiff’s age, knowledge and experience would not need a warning that his action would be a dangerous thing to do⁷³.
- The plaintiff was not compelled to have resort to the location nor to participate in relevant physical activity.

⁷² He found that, although the obviousness was high, the probability of the harm was low.

⁷³ It is not easy to understand why this does not depart from the general rule, discussed above, that the Court should not look at the particular circumstances of the plaintiff, but rather at those of the general class of which he was a member; and that would include children and others of greater vulnerability.

- The exercise of the Authority's power of prohibition of recreational conduct that is not likely to harm others should not be lightly used; and in any case may be ineffective.
- The obviousness of the danger⁷⁴ and, conversely, the need for protection against inadvertence.
- The capacity of the plaintiff to protect himself in a voluntary recreational activity, in contrast to the possible position of an employee in a workplace⁷⁵.
- The different and less critical treatment given to omission than to commission⁷⁶.

The application of this process may be observed in two further recent judgments, also involving occupier's liability, that were also handed down on the same day as each other.

In *Neindorf v Junkovic*⁷⁷, the plaintiff fell because of unevenness in the surface of the defendant's driveway while attending the latter's garage sale, which of course carried an implied invitation to the plaintiff to enter for the purpose of minor commerce. The plaintiff failed.

Factors relevant to those circumstances were identified by Gleeson, CJ. He referred to the following factors -

- Within certain limits, ordinarily a person should be able to do with his or her land what that person pleases;
- Very few occupiers keep their land in perfect repair; people are permitted to occupy, and some people can only afford to occupy, premises that are in some state of disrepair. In fact, nobody lives in premises that are risk-free.
- Concrete pathways often crack and unpaved surfaces become slippery or uneven.
- The premises involved were an ordinary dwelling house. Ordinary dwelling houses contain many hazards that give rise to a real risk of injury.
- Most householders do not attempt to eliminate or warn against all such hazards.
- Extensive legislative incursions into a landholder's right have never required people to remove all potential hazards from their land, since it would be impossible to comply with.
- People enter dwelling houses for a variety of purposes, and in many different circumstances.
- Entrants may have differing capacities to observe and appreciate risks, and to take care for their own safety.

⁷⁴ They referred to their view on this factor stated in *Mulligan* (supra).

⁷⁵ Cf. *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

⁷⁶ The authority cited, a statement by Alderson B in *Blyth v Birmingham Waterworks Co* 156 ER 1047, 1049, certainly recognizes the distinction, but the suggestion of an inference of a different critical approach is more controversial.

⁷⁷ [2005] HCA 75.

- A garage sale in a suburban home must be close to the borderline between commercial and social activity⁷⁸.
- The unevenness of the surface on which the plaintiff tripped was very ordinary and quite visible.

Kirby J dealt mainly with the effect of legislation⁷⁹, but he observed some factors that are pertinent here –

- The location of the hazard near the entrance to the premises that enlarged its danger.
- The hazard was more apparent to the defendant than one in a remote corner of the premises.
- The risk was obvious to the plaintiff⁸⁰.
- The fact that persons do not always take proper care for their own safety.
- The absence of prior harm from the same cause.
- Suitable precautions to avoid the danger were available and would not have been unduly burdensome on the defendant.
- The nature and extent of the danger.
- The defendant's awareness of the danger compared to the plaintiff's unfamiliarity with it.
- The possibility, as was the case, that an entrant such as the plaintiff may have some infirmity or disability that would reduce perception of the danger.
- The further possibility of distraction from the activity for which the entrant was invited onto the premises.
- The defendant's total failure to consider the danger or to take relevant precautions⁸¹.
- The commercial aspect of the defendant's invitation to the plaintiff to enter the premises and the relationship that this created⁸².
- The limited area of the premises under the control of the defendant, as compared with that under the control of such as public authorities. Additionally, such authorities usually do not have the same proximity of commercial relationship with the victim as the defendant did in this case.
- The importance to the community of accident prevention by such as employers, and inviters to business premises for trade and commerce.

⁷⁸ It is interesting to note that the use of this factor did not turn on the strict identification of the activity as one form rather than the other: rather the emphasis was placed on the degree of the commercial element, so far as it was present, which seriously limited its influence in the total comparative exercise.

⁷⁹ This affected the matter to varying degrees according to the views of the members of the Court.

⁸⁰ Kirby J pointed out the limits of this factor at [71] – [76].

⁸¹ Of course, if the standard of any duty that existed did not require the taking of precautions that would have prevented the accident, then these omissions of the defendant would not have had any causal effect that would have created liability in the defendant.

⁸² Although His Honour did not disagree that the commercial aspect in this case was very modest, his reasoning was directed to the terms of the controlling statute, which, he found, was not identical with the common law in this respect, and so the latter escaped direct discussion.

- The community standards of reasonable behaviour that do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of the dangers that await them⁸³.

Hayne, Callinan and Heydon JJ referred mainly to the factor that the relevant hazard was of a kind and of a minor a degree such as is commonly found in suburban homes. In those circumstances, it would not be reasonable to require the occupier to remove the hazard or to warn the plaintiff of its presence. Otherwise, their discussion was devoted to matters related to the statute.

A different result was reached in *Thompson v Woolworths (Q'land) Pty Ltd*⁸⁴. The plaintiff, a small lady who was delivering bread to a supermarket under a commercial arrangement, hurt her back on the defendant's premises when moving a large rubbish bin that was obstructing her way to the loading dock. It had done so on many prior occasions, but assistance was usually, but not always, provided by the defendant's employees. On the relevant occasion, none was immediately available. The plaintiff tried to move the bin alone in order to save a little time, which was sometimes her practice and that of others who were making deliveries. The defendant knew or should have known this. It made no attempt to reorganize its affairs in a way that would prevent the obstruction. The plaintiff had had a recent back injury, but this was unknown to the defendant.

It was accepted that there was a duty of care, and the only issue was whether its content required the defendant to avoid causing the danger posed by the plaintiff's possible attempt to move the bin alone. The Court discussed the following factors –

- The obviousness of the risk and the defendant's reasonable expectation that other people would take care for their own safety⁸⁵. These are relevant factors, but not conclusive⁸⁶.
- The probability of injury was relatively high if someone tried to move the bin alone.
- The remoteness of the risk that people such as the plaintiff would fail to observe and avoid the danger inherent in moving the heavy bin alone.
- The plaintiff, and other delivery persons who might be affected by the obstruction, were regular visitors to the premises.
- The defendant knew that the delivery drivers would frequently move the bins to save time, and that not all drivers were capable of doing that without risk of injury.

⁸³ Citing *Thompson v Woolworths (Q'land) Pty Ltd* (2005) 79 ALJR 904, 911.

⁸⁴ [2005] HCA 19.

⁸⁵ The weight to be given to this factor is a factual judgment that may depend on the circumstances. A motorist at a city intersection controlled by lights may justifiably expect that the assembled pedestrians will obey the traffic lights, but when driving generally, while expecting other road users to be reasonably careful, should reasonably make allowance for the possibility that they may be inattentive or negligent: [35].

⁸⁶ Otherwise, there would be little room for the doctrine of contributory negligence.

- The defendant was the occupier of and in control of the premises and had invited the plaintiff onto the premises for mutually commercial purposes⁸⁷. This required the defendant to have a proper delivery system in place, and particularly to have made arrangements for removing the bins in order to provide clear access to the loading dock.
- The defendant had the power and responsibility to do this, and the plaintiff and other delivery drivers had no such power or responsibility in respect of the premises.
- The risk came from the way the defendant ran its own business.
- The plaintiff was required to conform to a delivery system established by the defendant, which directed when, where and by what method she was to deliver. This required the defendant to take care, not only as to the static condition of the premises, but also as to the system of delivery.
- The plaintiff was an independent contractor with some independent discretion, rather than an employee.
- The defendant's removal of the risk would not have been significantly expensive or problematic.
- This was not a case of failure to warn, but a warning in an appropriate case may not be necessary or sufficient, since it should not be assumed that those to whom it is addressed will take notice of it and exercise care⁸⁸;

The Court also found that there was contributory negligence because the plaintiff knew of the heightened risk arising from her earlier injury, and because her gain in time by undertaking the risk was not very large.

It is interesting to compare the factors identified here with the reasoning adopted in some cases of an employee's claim against the employer in relation to the latter's duty of care in the provision of a safe system of work.

That issue arose in *Czatyko v Edith Cowan University*⁸⁹, the Court said that the appeal raised no questions of general principle and depended on its own facts, but it made some statements on the duty of care. It confirmed that –

- An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury⁹⁰.
- If there is a real risk of injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards in the form of equipment or otherwise.

⁸⁷ The purpose for which the plaintiff was on the premises and the circumstances in which she was there constituted a significant aspect of their relationship: [26].

⁸⁸ There is no purpose in issuing a warning unless it were reasonable to expect that people would modify their behaviour in response to it: [36]

⁸⁹ [2005] HCA 14.

⁹⁰ This relates to the existence of the duty. The remaining factors go to its extent.

- The employer must reasonably provide employees with suitable plant and equipment to enable them to carry out their work safely, as to which the simplicity and inexpensiveness of a precaution will be relevant to reasonableness.
- The employer must take into account the possibility of thoughtlessness, inadvertence or carelessness, particularly in a case of repetitive work.

In a contrasting employment case, *Koehler v Cerebos (Aust) Ltd*⁹¹, the defendant employer, although under a duty of care to the plaintiff employee, was found not to be liable for her psychiatric injury. It was caused by her distress because she could not, during the three days per week for which she was employed, cope with the amount of work specified in her contract of employment.

After entering into the contract, she had complained to the defendant that it was excessive. Although the defendant could have reduced her workload by employing her for an additional day per week or by assigning some of her work to another employee, it had not done so.

However, she did not make any complaints that suggested the danger of psychiatric injury, and it was held not to be reasonably foreseeable in the circumstances.

That effectively concluded the matter, but the Court went on to discuss the content of the duty of care and referred to the following factors –

- The obligations, other than the performance of the employee's work and the payment of the wage, that the parties owe one another under the contract of employment; the obligations arising from that relationship which equity would enforce; and any applicable statutory provisions.
- Under the contract, the employee specifically undertook to perform the relevant work for the agreed wage⁹².
- Whether the construction of the contract admitted any implied qualification or limitation of the work agreed by the employee to be performed.
- Whether different questions arise in a case where an employee's duties are fixed by the contract, from one where they can be varied by mutual agreement or at the will of the employer,
- Whether an employer's duty to take reasonable care to avoid psychiatric injury to an employee requires it to modify the amount of work to be performed by the employee.
- Whether an employer is bound to engage additional employees to help a distressed employee.
- Whether the employer may reduce the employee's wage if the employee's work is reduced in order to avoid the risk of psychiatric injury.
- The employer's options if the employee does not wish to vary the contract of employment.

⁹¹ [2005] HCA 15

⁹² The significance of this factor will vary: [29].

- Whether an employer may dismiss an employee rather than run the risk of psychiatric injury if the employee is known to be at risk.
- Whether dismissing an employee in such circumstances would contravene general anti-discrimination legislation.
- The nature and extent of the employee's work.
- Signs, or the absence of signs, from the employee of developing problems, whether in the form of express warnings or implicitly by other signs⁹³.
- The difficulty in recognizing that the plaintiff was suffering from psychiatric injury⁹⁴.
- Normal fortitude is not a pre-condition to liability for inflicting psychiatric injury⁹⁵.
- Whether the cause of the psychiatric injury is a matter of common general knowledge⁹⁶.
- Whether the particular kind of harm to the particular employee was reasonably foreseeable⁹⁷.
- Whether the cause of the psychiatric injury was the plaintiff's way of performance of her duties rather than the work she was required to do.
- Pressure and stress are a normal part of work in several fields, and the choice of accepting work of that nature lies with the employee.
- Insistence on performance of a contract cannot be a breach of a duty of care, and interference with contractual arrangements by the imposition of a duty of care would offend legal coherence.

A completely different set of circumstances was to be found in *New South Wales v Bujdoso*⁹⁸. In issue was the scope of the duty of prison authorities to protect the safety of prisoners under its control. It was admitted that there was a duty of care to do so, and the only issue was the scope of the precautions that the duty demanded. The plaintiff had been assaulted by other prisoners, and the prison authorities knew of threats that had been made to him. In addition to these factors, the Court noted –

- That the control vested in the prison authority was the basis of a special relationship that extends to a duty to take reasonable care to prevent harm stemming from the unlawful activities of third parties⁹⁹.

⁹³ Such as uncharacteristic frequent or prolonged absences.

⁹⁴ She displayed no personality changes or symptoms before she became ill. Neither the plaintiff nor her general medical practitioner recognized her problems as of that nature for some time.

⁹⁵ [33]. Cf. *Tame v New South Wales*; *Annetts v Aust Stations Pty Ltd* (2002) 211 CLR 317; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

⁹⁶ Although it is generally known that stress may precipitate psychiatric injury, that is a far step from saying that employers must recognize that all employees are at risk of psychiatric injury from stress at work: [34].

⁹⁷ The duty of care owed to an employee relates to the particular employee, so attention must be directed to the nature and extent of the work, and the other relevant circumstances, related to the particular employee: [36].

⁹⁸ [2005] HCA 76.

⁹⁹ At [32], citing *Howard v Jarvis* (1958) 98 CLR 177, 183; *Morgan v Attorney-General* [1965] NZLR 134, 138; *Cekan v Hayes* (1990) 21 NSWLR 296, 308, 310; *State of New South Wales v Napier* [2002] NSWCA 402 at [75]

- That the defendant was in a unique position to defend the plaintiff from the conduct of others.
- That the authorities knew of the threats, which exposed the risk, and this was not reduced because they had the plaintiff sign a document saying that he did not believe that he was in danger.
- That there had been prior episodes of similar occurrences of varying seriousness.
- That the authorities did not take any additional precautions but rather effectively reduced them.
- That the degree of danger and the extent of the possible physical harm to the plaintiff were seriously enlarged.
- That relevant matters did not need the talent of hindsight to be plain.
- That competing considerations of cost¹⁰⁰ or the difficulty of reasonable efficacy were not demonstrated.

The result was that the defendant's precautions did not attain the standard of care required in the circumstances.

This is an example of a case where the defendant's general duty to the class to which the plaintiff belonged is affected by his special position or vulnerability.

Fortunately, there is also a sample of a claim of negligence in the control of a motor vehicle. In *Manley v Alexander*¹⁰¹, a motorist was held to be liable to a drunken pedestrian who, in dark clothes at nighttime, was lying on the roadway when he was struck by the defendant's vehicle. He was lying there as the defendant approached, and the range of the defendant's lights was not impeded by the contour of the road surface. The defendant's attention was diverted to the figure of the plaintiff's companion, who was hovering around in a drunken manner on the side of the road at the time. The defendant maintained his speed of about 55-60 kph and took his eyes off the road ahead for some two to three seconds. He veered towards the centre of the road, away from the standing figure. His responsibility was apportioned at 30%.

His duty of care was not challenged. On the issue of the standard of care, the majority, Gummow, Kirby and Hayne JJ found that he was negligent in continuing to drive ahead at the same speed for some seconds while his eyes were averted towards the source of the distraction. They noted the following factors particularly –

- The defendant's attention was distracted by the hovering figure and he properly noted its presence.
- The recognition of one possible source of danger does not justify a driver's giving exclusive attention to it.
- Driving requires reasonable attention to all that is happening on or near the roadway that may present a source of danger, and it will sometimes require

¹⁰⁰ *Cekan v Hayes (supra)* at 306, 314.

¹⁰¹ [2005] HCA 79.

- simultaneous attention to, and consideration of, a number of different features of what is already, or may later come to be, ahead of the vehicle's path.
- The possibility of someone's lying on the roadway in that area at that time was remote, but reasonable care requires that the driver control the speed and direction of the vehicle in such a way that he/she may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events.
 - When driving at night, a driver must take account of how well the road is illuminated, both by street lights and by the vehicle's lights.
 - Despite the plaintiff's dark clothing and his lying on the roadway, he should still have been visible as an obstruction when he came within the range of the vehicle's lights.

Callinan and Heydon JJ would have exonerated the defendant. Apart from matters of evidence, they found that the defendant was not able to see the plaintiff sooner than he did because of the distraction caused by the other pedestrian. Not unreasonably, this engaged his attention; and a motorist is entitled to give attention to a particular and potentially dangerous emergency situation in priority to an apparently benign one¹⁰².

In *Nominal Defendant v GLG Aust Pty Ltd* [2006] HCA 11; (2006) 14 ANZ Ins Cas 61-689, the High Court discussed the issue of contributory negligence of the plaintiff, an employee of the defendant. While driving a fork-lift in the course of his work, he failed to observe the dangerous movement of boxes above him as he drove the vehicle up a ramp in accordance with the system of work devised by his employer. The Court referred to the absence of evidence of the plaintiff's point of view as to the magnitude of the risk, the degree of probability of its occurrence, the difficulties that faced him in taking alleviating action, or as to any other responsibilities he had.

This is useful in demonstrating that the same process, though not necessarily the same factors or the same comparative weight of different factors, may be used in determining contributory negligence.

It is interesting to observe how this process is followed in the United States. In *Business to Business Markets Inc v Zurich Specialties*¹⁰³, the question arose as to whether an insurance broker owed a duty of care to obtain effective insurance¹⁰⁴ in the form of a performance bond, not to the insured who had engaged the broker, but to the party who was intended to have the benefit of the bond¹⁰⁵. The question came alive when the

¹⁰² It was said to be benign because of the unlikelihood of encountering a danger of this nature at that time and place, so the state of the situation ahead was justifiably regarded as benign. It might be questioned whether this affords sufficient respect to the points made by the majority.

¹⁰³ 2005 Cal App LEXIS 1971.

¹⁰⁴ The policy contained an exclusion that operated in the circumstances known to exist in the performance of the contract to which the bond applied.

¹⁰⁵ The insured had contracted with the beneficiary to obtain a performance bond to cover work that the insured had contracted to perform. The point of a performance bond is to provide a fund for the beneficiary in the event that the work would not be performed in accordance with the contract, and if the insured is not

insured failed to perform the contract to which the bond applied and could not meet the damages; but the insurance company had failed.

The broker owed a duty in contract to the insured who engaged it, but there was no contractual relationship between the broker and the beneficiary. The latter's only remedy against it was in tort, and the issue was whether a common law duty of care was owed.

The broker knew that the beneficiary could suffer loss if the insurer did not answer to the bond to meet any dereliction of the insured in the performance of the covered contract, since it of the nature of such instruments to provide protection in such circumstances. The beneficiary's loss on any failure of the insurance cover was plainly foreseeable. The broker voluntarily assumed the responsibility of finding secure insurance cover for the insured to answer the insured's contractual duty. The beneficiary was an intended, as distinct from incidental, beneficiary under the cover. And the broker, who of course held itself out as a specialist in providing professional services, was well placed to prevent injury to the beneficiary by selecting a secure insurer.

The court referred to *Biakanja v Irving*¹⁰⁶, where a notary was held liable to a beneficiary under a will that was not properly attested. There, the court noticed several factors touching on the existence of a duty of care¹⁰⁷ –

- The extent to which the transaction was intended to affect the beneficiary, as the broker well knew.
- The foreseeability of the harm to that person.
- The degree of probability of injury that would flow from a breach.
- The closeness of the connection between the notary's conduct and the injury suffered.
- The moral blame attached to his conduct.
- The Court's policy of preventing future harm by encouraging notaries to meet their clients' needs.

In *Business to Business*, the Court adopted these factors, and recognized some others –

- The extent to which the transaction was intended to affect the beneficiary, as distinct from the contracting insured, which was contractually obliged to buy the policy to protect the beneficiary, as the broker knew.
- On foreseeability of harm as a factor in determining whether a duty of care existed, although the insured's breach of the contract was not expected or intended, it was a possibility, and therefore foreseeable, and the kind of risk to which the practice of insurance was directed.
- The degree of certainty of the injury actually suffered by the beneficiary.
- The substantial size of the potential loss.

sufficiently in funds to meet damages awarded for the breach. This predicated the probability of loss to the beneficiary in such circumstances if the policy did not cover the insured's breach.

¹⁰⁶ (1958) 49 Cal 2d 647; 320 P 2d 16.

¹⁰⁷ The breach of any such duty was not in issue. The only issue was whether the broker owed any such duty to the beneficiary.

- The degree of connection¹⁰⁸ between the broker and the beneficiary was enhanced because the beneficiary was an intended beneficiary, rather than an incidental one¹⁰⁹.
- The broker was a professional entity, rendering specialized services¹¹⁰.
- The degree to which clients and third parties ordinarily relinquish control for decision making to the professional service provider.
- The degree to which a professional works under professional standards established and maintained by the profession.
- The professional's ability to spread its costs by raising its fees or buying liability insurance, particularly if the professional's marketplace is broad and well-developed, permitting market participants to charge prices that reflect their costs and risks.
- The expected and customary reliance by clients and others on the skillfulness and expertise of the professional who is engaged.

It must be emphasized once more that the presentation of these factors is not intended to suggest that they would all necessarily be adopted here, or that they would be afforded the same respective weights given to them in California. Its purpose is to demonstrate the process, the gathering the countervailing factors that are relevant in the circumstances, weighing them comparatively, and determining where the balance lies in the judgment of a reasonable person. A second purpose is to demonstrate the thinking of the Courts in seeking out the relevant factors that are appropriate to the particular circumstances under scrutiny.

Summary

When face to face with an issue of alleged negligence –

- Approach the issues in the proper order.
- Keep all the relevant factors related to their correct issues.
- In respect of each issue, find all the relevant factors, attribute to each its relative weight
- Judge which side is weightier in the totality.

This simply means that the most persuasive argument overall, based on relevant matters, wins the day in respect of the particular circumstances.

¹⁰⁸ The 'degree of connection' is identical with our 'proximity', and in these cases, this is correctly treated as a factor to be brought into the equation, rather as a decisive issue. This has also been the position in Australia for some time.

¹⁰⁹ The mark of an incidental beneficiary is explained in *Jones v Aetna Casualty & Surety Co* (1994) 26 Cal App 4th 1717, but this is not germane to the present discussion. An intended beneficiary need not be specifically named as long as it comes within the class of persons intended to be benefited: *Harper v Wausau Insce Co* (1997) 56 Cal App 4th 1079.

¹¹⁰ On the authorities cited, this applies to accountants and real estate agents also.