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Surf related litigation: *Keeping your case between the flags*

An in-depth look at the recent – and highly controversial – NSW surf related decisions, including an analysis of relevant sections of the Panel of Imminent Persons' Review of the Law of Negligence and consequences for future litigation in the area.

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If Lord Denning's homily on village cricket in *Miller v Jackson*[1] is the quintessential judicial description of the English way of life, Ipp J has produced an Australian equivalent in *Prast v Town of Cottesloe*[2] with the following observation:

"Body-surfing is a traditional Australian pastime that has been indulged in by citizens of this country for a very long time. There must be few who have never thrown themselves upon a wave in the hope of being carried by the rush of water to the shore..."[3]

Given the prominence of beach life and culture in our society, it is not surprising that those engaged in the campaign to restrict common law access to damages for personal injury have seized on the recent decision of *Swain v Waverley Municipal Council*[4] as evidencing the risk such litigation poses to "the Australian way of life". *The Age* reported the case in its archives under the heading "$3.75 Million Judgment Puts Lifesaving at Risk". *Swain* could become a standard bearer for those pushing for a greater emphasis on "personal responsibility" in personal injury litigation.

But to what extent is this concern about the risk to beach life as we know it valid? A review of the authorities in this area shows that injured beachgoers are generally swimming against the tide in seeking to find lifesavers and councils liable for surf related injuries. The decisions certainly do not suggest surf clubs or councils are being swamped by a tidal wave of successful litigation. Equally though, as *Swain* itself shows, such organisations are not sacrosanct, and will, in appropriate conditions, be liable for injuries occurring on their "watch".

The following review concerns principles of common law only. But at first instance in *Prast*, and in the Queensland decision of *Fitzpatrick v Maroochy Shire Council*[5], it was held that local bylaws regulating the obligations and duties of the surf lifesaving authorities did not materially alter the common law position.

It is important to note that any recent state amendments to common law access to damages in personal injury litigation have been excluded from consideration. Practitioners will therefore need to consider any provisions relating to waiver or acceptance of risk that may appear in amending legislation. However, the recommendations of the Panel of Eminent Persons' Review of the Law of Negligence have been considered.

Who is responsible for injuries occurring on our beaches?

In *Kukovec v Sutherland Shire Council & Anor*[6], Dodd DCJ at first instance examined the relationship between the local authority in control of a beach, and the surf life saving club and its members (presumably volunteers) patrolling it. ▶

Mr Kukovec brought an action against the council and the surf club. In both instances he relied upon allegations of negligence against the lifesavers on duty, and claimed both defendants were vicariously liable. It was contended that the club was liable for the negligence of its members, and that the council was vicariously liable because the club and its members were the council's agents in keeping the beach safe.

Dodd DCJ, after finding the lifesavers negligent, upheld the plaintiff's contentions in respect of vicarious liability against both defendants. In the Court of Appeal[7], the council contended it was not vicariously liable for the actions of the club or its members. The club contended it was not vicariously liable for the actions of its members. However the court in its judgment proceeded on the "assumption" that both defendants were vicarious liable for any negligence by club members[8].

Most of the reported authorities were commenced against the relevant local authority, rather than the individual surf clubs concerned. In *Fitzpatrick*, the relevant surf club was not included as a party to the proceeding, notwithstanding the beach inspector concerned was a member of the Maroochydore Surf Life Saving Club. But *Kukovec* illustrates that, subject to statute, both parties are appropriate defendants.

Beach litigation – A new threat?

Despite the adverse reaction of the media, governments and sections of the surf lifesaving community to the decision in *Swain*, it is well established that those in charge of beaches owe a duty of care to swimmers using beaches under their control[9].

The decided cases show three major areas of potential negligence:

- Inadequate supervision of designated swimming areas, including the exclusion of surf craft from these areas;
- Failing to warn of hidden or unusual naturally occurring dangers; and
- Failing to warn of hazardous surf conditions.

It should be observed from this list that the decided cases do not deal with unsuccessful rescues or similar emergency activities.

Inadequate supervision

Having established a defined swimming area for members of the public to utilise for recreational purposes, a local government authority and/or surf club then has a duty to adequately supervise this area. This includes the provision of adequate personnel and monitoring of external risks to swimmers such as surf boards or other water craft which might enter the designated swimming area[10].

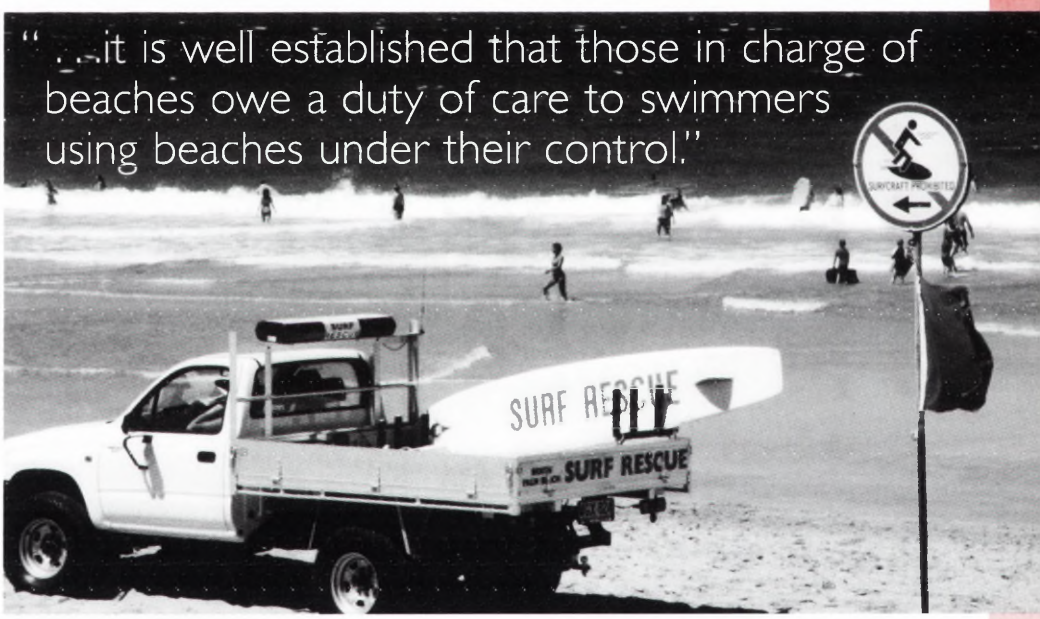
In *Glasheen v The Council of the Municipality of Waverley*[11], Sharpe J was required to determine whether the council could be liable for injury sustained in the surf at a public beach, or whether it was protected by policy considerations. He also examined whether the council owed a duty which sustained a private cause of action. Both questions were determined in the plaintiff's favour.

Rebecca Glasheen was 14 years of age when she went to Bondi Beach with two friends on 9 May 1983. Sharpe J found that Miss Glasheen was sitting on a 'coolite' or foam surfboard in waist deep water, preparing to catch the white water of a wave, when she was either struck in the head by a fibreglass surfboard, or required to take extreme action to avoid the board and in doing so hit her head on the sea bed below. As a consequence, Miss Glasheen suffered quadriplegia.

Sharpe J accepted evidence that a number of fibreglass surfboards were in the vicinity of the area flagged for swimmers. The lifeguard on duty at the time of the incident, Mr Quigley, accepted it was the primary duty of lifeguards to ensure vigilant surveillance of swimmers in flagged areas, which included keeping 'hard' surfboards out of this area. Mr Quigley admitted he was the only lifeguard on duty at the relevant time, and that he had not seen any board riders in the area. Crucially, at the time of the incident he had walked down to the southern end of the flagged area.

Because of his factual finding that the board riders were indeed in the area, Sharpe J held Mr Quigley had failed to keep the area under adequate surveillance. He had not observed the obvious risk of the board riders, and therefore failed to take appropriate action.

A similar set of facts occurred in *The Council of the Municipality of Waverley v Bloom*[12]. Philip Bloom was swimming between the flags at Tamarama Beach on Saturday afternoon, 5 February 1994, approximately 60 to 70 metres offshore, when he was struck in the neck by a fibreglass surfboard. There was no evidence as to how long the board rider had been in the area.



Tamarama Beach had two beach inspectors employed by the defendant on duty that day. There were also five members of the local surf club and a number of students from Scots College, Bellevue Hill, patrolling the beach. However, at the time of Mr Bloom's injury, one of the students, 13-year-old Timothy Lindsay, was the only person keeping watch, and his evidence was of not seeing any fibreglass boards in the area.

Solomon DCJ at first instance found the defendant liable for failing to adequately supervise the flagged area, and thereby prevent a fibreglass surf board from entering the area designated for swimmers. The Court of Appeal affirmed this decision by a 2:1 majority.

In addition to finding the requisite causal connection between the inadequate supervision and the presence of the board riders in the flagged area, Mason P, with whom Sheller JA agreed, held that the breach of duty combined with the kind of accident that might result from the breach was sufficient to establish an inference of causation, *in the absence of any sufficient reason to the contrary*[13]. However, Powell JA dissented, relevantly because he was not satisfied that the lifesavers would have been able to prevent the injury if the board rider had been observed, given the exact location of Mr Bloom in relation to the shore.

Similar reasoning was adopted by the Court of Appeal in *Kukovec*. Joseph Kukovec was one of approximately 400 beachgoers swimming between the flags at Elouera Beach on 9 February 1997. He was with his two children, standing in knee-deep water, approximately three to four metres within the area marked by flags as designated for swimming.

A child of about 13 years of age was making his way out of the surf, carrying a fibreglass surfboard, which should not have been in the area set aside for swimmers. Mr Kukovec did not ascertain any ▶

imminent threat, as the boy was carrying his board under his arm. However, the boy suddenly threw his board forward, and leaped onto it. The boy fell backwards, and the board was jettisoned forward and upward. Unfortunately, it flew directly at Mr Kukovec and struck him in the eye.

As noted previously, Dodd DCJ found the defendant council liable, based on the presence of the teenaged board rider in the flagged swimming area. In doing so, his Honour drew a number of inferences concerning the boy's experience as a board rider, and the reason for him being in the flagged area.

However, Ipp AJA, with whom Meagher and Hodgson JJA agreed, held that it could not be inferred how long he had been in the flagged area. Several hypotheses were proffered, including him merely wading through the area.

Importantly though, in upholding the appeal by both defendants, the court held there was nothing in the behaviour of the boy wading to shore carrying his board which should have put the lifeguards on notice. Nor did his behaviour warrant any intervention by the lifeguards at that point.

In *Fitzpatrick*, Dodds DCJ examined the potential liability of the defendant council in respect of a collision between a swimmer and a youth on a body or "boogie" board.

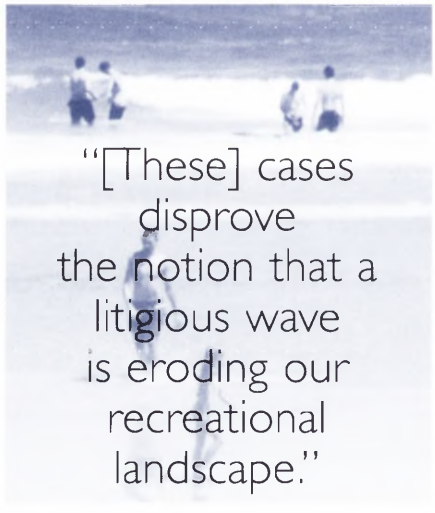
At approximately 8:30 a.m. on 20 December 1996, Mrs Gladys Fitzpatrick, a 73-year-old woman, entered the surf at Maroochydore Beach, and commenced wading out to the surf break. She turned side-on to a breaking wave, and was suddenly struck by a boogie board. In endeavouring to protect herself she instinctively raised her left arm, which took the force of the blow. As a result, she suffered a displaced fracture of the left humerus and radial neck.

The collision occurred between the flags. However, the evidence before his Honour was that boogie boards, unlike surfboards, were commonly permitted in the designated swimming areas of beaches.

Two different types of boogie boards were admitted into evidence. They were a cloth covered "cheaper" type, and a performance board with a hard plastic underside and a hard edge at the front.

The evidence of the plaintiff's son and the lifesaver on duty conflicted about which type of board had been involved in the collision with Mrs Fitzpatrick, however this distinction proved unimportant. His Honour accepted that the board in question was the performance type, and further that pursuant to the relevant bylaws, the defendant had the power to regulate the use of such boards, to designate separate areas for them, and if necessary to confiscate them.

The particulars of negligence alleged against the council included, relevantly, failure to provide a separate designated area for boogie boards, and allowing or permitting the plaintiff to swim in an area where boogie boards posed a risk of injury.



The defendant's evidence conceded the idea of a separate area for boogie boards had been considered, but not adopted. Dodds DCJ discussed the possible practical difficulties in both expense and logistics. He noted many users of boogie boards were children, and that concerns about their safety might resist the idea of a separate area away from adequate supervision. His Honour also noted the absence of any documented history of injuries arising from collisions between boogie boards and swimmers. There was no evidence of a greater risk of injury than with collisions between two swimmers.

In a broader philosophical sense, Dodds DCJ noted the obviousness of the risk of injury occurring in collisions between swimmers in flagged areas, seemingly suggesting this was a necessary consequence of having people "herded" into safe areas where the risk of drowning is diminished.

The above authorities illustrate that such cases will turn on their peculiar facts. Crucial to this determination will be the extent of supervision in place at the time the injury occurs, and the evidence concerning the proximity of craft to swimmers prior to any incident, the type of craft, and the duration such craft are in or near a flagged swimming area.

Hidden dangers

The extent to which those operating public beaches are required to warn swimmers of hidden "natural" dangers, and to protect them accordingly, has been more controversial, as evidenced by the recent reaction to *Swain*.

Mr Swain and two friends went to Bondi Beach. It was a calm day, with small surf. About an hour before his accident he consumed a 750ml bottle of beer. The night before, he had consumed one tablet of ecstasy.

The three friends entered the water, between the flags set up by the lifesavers. Mr Swain went in last. Mr Swain waded into waste-deep water. A small wave came toward him, and he decided to dive under it. Unfortunately, he struck his head on a sandbar which was not readily visible at his level. As a result, he suffered quadriplegia.

It is important to note the evidence showed that the sandbar was visible from the vantage point of the lifesavers on duty. However, it was conceded those on duty had not seen it, either before or after the flags were positioned.

Interestingly, the case for the defence concentrated on Mr Swain's drug and alcohol consumption, and his position vis-a-vie the flags. There was no submission by the defendant that

there was insufficient evidence of breach of duty to allow the matter to go to the jury. On day four of the trial, damages were agreed at $5,000,000.00, although this amount was not put to the jury. The jury found the defendant council had breached its duty of care, but found contributory negligence of 25% against Mr Swain.

It should be noted an appeal has been lodged, on the ground of the decision being against the weight of evidence. The difficulties ahead for this appeal have already been identified by Giles JA, in an application for a stay of proceedings brought by the appellant council[14].

In contrast to *Swain*, the plaintiff failed in *Bizaca v Manly City Council*[15]. Zeljko Bizaca went swimming at Manly Beach at about 6 p.m. on 19 December 1998. Alcohol was again at issue. In his youth, Mr Bizaca had played water polo in his native Croatia, and he was a strong swimmer.

In the eight or nine months preceding Mr Bizaca's injury, the local council had been undertaking reconstruction works on the foreshore. This included digging holes to reinforce the concrete wall. As a result of this work, rocks were protruding from the surface of the beach. People were encouraged to remove any rocks located. The council also had a machine for this purpose.

The plaintiff had been in the water about an hour, and was standing in thigh-deep water between the flags, when a wave unbalanced him. His knee struck a rock protruding by between four and eight inches.

Mr Bizaca brought an action against the council alleging it was negligent in allowing rocks to escape onto the surface of the beach, and failing to check for rocks before putting the flags up.

O'Reilly DCJ accepted the plaintiff evidence in his findings of fact, but in dismissing the claim, held that the plaintiff's particulars of negligence placed too high a duty of care on the defendant council. His Honour considered checking for rocks manually or with a machine went beyond reasonable care in the circumstances. At the time of writing an appeal has not been filed.

These two recent high profile decisions are difficult to reconcile. There is little doubt both hazards were indeed hidden, and posed a foreseeable risk of injury. Perhaps the extent to which the respective hazards were visible is the main distinguishing feature of the two cases. Unfortunately for plaintiff lawyers, the decision in *Swain* is of limited use for wider application, being a jury verdict, and thus *Bizaca* represents the stronger authority.

The potential liability of local authorities and surf clubs does not end at waters edge however, as shown by *The Council of The Municipality of* ▶

Shellharbour v Carter [16]. Mrs Carter was walking along Shellharbour Beach at 4:30 p.m. on 17 January 1978, when her foot went into a hole two or three feet deep. The hole had been covered with newspaper and then a coat of sand, as a trap.

Hodgson J at first instance allowed the claim, after inferring, because of the conditions on the day, that the hole had been dug during the watch of the lifesaver on duty at the time of Mrs Carter's injury, and being a substantial operation, it should have attracted his attention. The hole was an unusual danger of which the defendant ought to have known and prevented.

The Court of Appeal allowed the council's appeal. Priestley JA, with whom the other members of the court agreed, stated that an inference of negligence could not be drawn from the lifesaver's failure to observe the hole being dug, especially as his primary duty was to look out at sea to observe swimmers. Indeed, his Honour suggested a mischievous person attempting to conceal a hole was likely to dig it in such a way as to not be seen.

Surf conditions

Whilst hazards such as rocks and sandbars might be hidden, there can be no doubt that the surf itself contains hazards. Rips, undercurrents, stingers, and sharks are to varying degrees an accepted risk of surfing life. For body-surfers in particular, the risk of being dumped is prevalent. So to what extent might beach authorities be liable for failing to warn swimmers of hazardous surf conditions?

In *Prast*, like *Glasheen*, the parties agreed to obtain a determination on liability. The decision at first instance, and on appeal, was in favour of the defendant council.

David Prast was a 29-year-old sales executive, who had swum in the ocean "many times" in his life, including numerous occasions at Cottesloe Beach. He had an intermediate level swimming certificate, and described himself as an average swimmer.

At about 5:00 p.m. on Saturday 25 February 1995 he was swimming in "calm and mild conditions", with waves of between one and two feet. He and his girlfriend both caught several waves and body-surfed toward the shore, before heading back out to the surf break. Eventually Mr Prast decided to go back to the beach, and in doing so caught another wave of the same appearance. Unfortunately, this wave was a "dumper", and Mr Prast lost control of his motion, was dumped head-first into the sea bed, and suffered tetraplegia.

Mr Prast brought an action against the local authority for not warning him of the "hidden danger" of the waves being dumpers. At first instance he failed, the trial judge deciding the council was not in breach of its duty of care by failing to erect warning signs, because the force of a wave was not a "hidden danger", but obvious and inherent. Further, her Honour held that such warning signs would not have been likely to prevent Mr Prast from body-surfing given the conditions existing on the day in question.

The Full Court of the Supreme Court of Western Australia agreed. The court went further and declined the appellant's invitation to distinguish warnings of being dumped from warnings about the risk of suffering spinal injury. Further, the court held that because of the obviousness of the risks inherent in body-surfing, the respondent council could assume visitors to the beach would exercise due care when undertaking this activity.

In *Pacheco v United States*[17] the Federal Circuit Court overturned a District Court decision dismissing the plaintiff's claim. In that case, 11-year-old Ivy Pacheco went swimming with her family at Pfeiffer Beach, in a National Park on the US Pacific Coast. At the entry to the park the authorities charged an entry fee, and provided children with sand buckets. Ivy Pacheco was playing at the edge of the water when she was swamped by a wave and swept out to sea. She drowned. Hers was not the first drowning there.

A number of warnings and instructions were issued to patrons, but none relating to surf conditions at the beach. However, Pfeiffer Beach was well known for strong riptides and undercurrents, which quickly took people from the shore into the ocean.

At first instance the District Court ruled that the federal government had not represented that "the ocean adjacent to the Beach was safe for swimming", nor was it under a duty "to warn or guard against the naturally occurring dangers in the ocean adjacent to the Beach" because, under Californian law, adjacent land owners cannot control the ocean.

The appeals court held that the advertising publications and internet material listing the attributes of Pfeiffer Beach as a swimming venue, and the handing out of sand buckets, constituted a representation as to the safety of the beach for swimming. On the question of duty, it held that in the context of sand buckets being given to children to play near the water's edge, and no warning being given about the dangers associated with rips, there was sufficient evidence of negligence for the matter to go to a jury.

Review of the Law of Negligence

On Monday 2 September 2002, the "Panel of Eminent Persons" handed its first stage recommendations to the Minister for Revenue and Assistant Treasurer, Senator Helen Coonan. This review contains several recommendations of relevance to negligence actions arising from surf related incidents.

Firstly, Recommendation 10 is that not-for-profit organisations (NPOs), should not be exempt, or have their liability diminished, in respect of actions for negligently caused personal injury or death, principally because of the scope of activities conducted by NPOs. For similar reasons, the panel rejected the notion that NPOs should be exempt from liability for negligence actions arising out of recreational activities only.

More generally however, Recommendation 11 states that a recreational service provider is not liable for personal injury or death suffered by

a voluntary participant and resulting from the materialisation of an obvious risk. Obvious risk is defined objectively, and would include risks which are "patent or matters of common knowledge ... even though of low probability". However the risk must be obvious to "a reasonable person in the position of the participant". The panel suggests this subjective test will apply to children, and others not fully capable of taking care for their own safety or discerning risks associated with activities they are engaged in.

Relevantly to surf lifesaving operations, recreational service is defined as any service "providing facilities for participation in a recreational activity", or "supervising ... guiding or otherwise assisting a person's participation in a recreational activity". Recreational activity is "any activity undertaken for the purpose of recreation, enjoyment or leisure which involves a significant degree of physical risk".

It seems that swimming and surfing activities on public beaches would be included within the definition of "recreational activity", and councils/clubs establishing surf life saving patrols on such beaches would be "recreational service" providers. Accordingly, the provisions of Recommendation 11 would probably apply to injuries sustained in surf related incidents.

The panel suggests the effect of Recommendation 11 is to re-introduce into negligence actions in a meaningful way the principle of *voluntary assumption of risk*. However, as noted in paragraph 4.20, the test would apply objectively rather than in circumstances where the injured party actually appreciated the risk at the time in question.

Recommendation 14 applies the same principles concerning "obvious risks" to the duty of occupiers to warn of such dangers. It states that a person does not breach a "proactive" duty by failing to warn of obvious dangers. The panel suggests the effect of this wording would be to reverse the decision in *Nagle v Rottnest Island Authority*[18]. Whilst noting the general application of this provision to occupiers liability actions, the panel specified particular relevance to NPOs.

The purported effect of Recommendations 11 and 14 is therefore exclusion of liability of recreational services in respect of failing to remove obvious risks or warn of their presence.

The extent to which the concept of obvious risk will impact upon surf related injuries will of course need to be tested. It will certainly be argued that risks such as being struck by a stray surfboard between the flags, or diving into a hidden rock or sandbar, are obvious risks (that is, common knowledge) of swimming in the surf at public beaches. Risks associated with dangerous surf conditions such as dumping waves or rips are perhaps even more likely to be deemed obvious. Thus, all of the ▶

reviewed decisions favourable to plaintiffs would be at serious risk under the proposed regime.

The counter argument would be that the provision of flagged areas for "safe swimming" may be sufficient to remove such risks from being obvious. Such risks may not be visible, and one would not expect flags to be set up in areas where such natural risks existed. Nor would it be expected that properly patrolled areas would be subject to encroachment by board riders.

Whilst the review panel suggests the reasonable person test has application to other than "fully capable adults", the inclusion of this rider on obviousness may allow judicial interpretation to arrive at a similar position to the present common law, irrespective of the age of the injured beachgoer. However, recent trends in public liability actions in all jurisdictions provide little encouragement for adult plaintiffs in this regard.

Conclusion

There is no doubt that swimming in the surf involves significant risk. Australians, having lost a serving political leader to the surf, probably know this better than anyone else. Millions of us flock to famous stretches of golden sand despite the risk of sharks, drowning, rips, "dumpers", stingers, collisions with other swimmers and extreme UV readings, for the relief of diving into cool water on a hot day, and the thrill of flying to the shore on the crest of a powerful wave.

The response by government and media to *Swain* suggests a current of thought that knowledge of these risks should prohibit beachgoers from being compensated for injuries sustained at the beach. But driving a motor vehicle involves risk. So too does performing manual labour, or undergoing surgery. Yet society generally accepts that despite our awareness of these risks, in appropriate cases people injured in these activities should be entitled to compensation from those who caused the injury, or were in a position to prevent it from occurring. Surely the same should apply to using our beaches.

The above cases disprove the notion that a litigious wave is eroding our recreational landscape. Nor do they suggest the tide has even turned toward plaintiffs. In my view, the cases illustrate the propriety of leaving to the courts the task of balancing the rights, duties and responsibilities of all parties concerned. If anything, they show that considerable restraint has been exercised by judges in applying the general principles of negligence to surf related injuries.

The challenge facing plaintiff lawyers is to respond to ill informed comment, misinformation and hysteria with the facts of cases such as *Swain* and an accurate explanation of the state of the common law. Otherwise legislative changes such as those proposed by the review panel will make conditions dangerous for plaintiffs at best. At worst, such rights may be red-flagged. PL

Footnotes:

1. [1977] QBD 966, at 976.
2. [2000] WASCA 274.
3. (supra) at para. 33 per Ipp J.
4. Supreme Court of New South Wales, No. 20261 of 2000.
5. [1999] QDC 236.
6. Unreported: District Court of New South Wales, Dodd DCJ, No. 4756 of 1997.
7. [2001] NSWCA 165.
8. (supra) at para. [4] per Ipp AJA.
9. *Glasheen v The Council of the Municipality of Waverley* (1990) Aust.Torts Reports 81-016.
10. (supra); see also *Ftzpatrick*; *Kukovec*.
11. (1990) Aust.Torts Reports 81-016.
12. [1999] NSWCA 229.
13. *Betts v Whittingslowe* [1945] 71 CLR 637, at 649, per Dixon J.
14. [2002] NSWCA 240.
15. Unreported: District Court of New South Wales, O'Reilly DCJ, No. 3528 of 2001.
16. Unreported: Supreme Court of New South Wales, Court of Appeal, CA 217 of 1984, per Hope, Samuels & Priestley JJA, 5 February 1985.
17. No. 99-15421 (9th Cir. 2000)
18. [1993] 177 CLR 423.