plaintiff's need for care and that need alone.[12] No cognisance should have been taken as to whether or how the plaintiff would receive care.

CONCLUSION

The decision in *Henderson* is instructive because it demonstrates how, in large and complex cases involving numerous heads of damage, sight may easily be lost of the overarching principle of the assessment of damages. On one hand, it is clear that the heads of available damages is not closed. Indeed, new heads of damage are continuously being identified and which are necessary to consider in order to provide fair compensation. For example, *Griffiths v Kerkemeyer*[13] damages emerged in Australia as a separate head in 1956.[14] On the other hand, care must be taken to ensure that new heads of damage are not discovered which, whilst perhaps morally justifiable and even logically sensible, fail to conform to the compensation principle.

ENDNOTES:

1 At [30].

2 At [31].

3 At [64].

4 [1977] 139 CLR 161.

5 At [62].

6 *Todorovic v Waller* [1981] 150 CLR 402 at 412 per Gibbs CJ and Wilson J, at 427 per Stephen J, at 442 per Mason J and at 463 per Brennan J; Luntz, H., (2002), *Assessment of Damages for Personal Injury and Death* (4th ed.), Butterworths, Sydney, p. 4.

7 [1966] 115 CLR 94.

8 At 128.

9 [1977] 139 CLR 161.

10 *Todorovic v Waller* [1981] 150 CLR 420 at 412 per Gibbs CJ and Wilson J.

11 Luntz, H., (2002), above n7, p.248.

12 *Van Gervan v Fenton* (1992) 175 CLR 327 at 338 per Mason CJ, Toohey and McHugh JJ.

13 [1977] 139 CLR 161.

14 See *Blundell v Musgrave* [1956] 96 CLR 73.

BRETT CHARRINGTON, QLD

Wife fails in dependency action arising out of husband's surf drowning:

Enright v Coolum Resort Pty Ltd [2002] QSC 394

On 29 November 2002, Moynihan J of the Supreme Court of Queensland delivered the much anticipated judgment in a dependency action brought by the wife of an American executive who drowned at Yaroomba Beach near Coolum on 3 March 1993.

Robert Steven Enright arrived in Australia on 3 March 1993 from the Philippines to attend a conference at the Hyatt Coolum Regency Resort. This conference related to his employment with PepsiCo Inc. at which he held the position of Vice President of World Tax.

Mr Enright arrived at Brisbane Airport at 5:00am, having left the Philippines at 11:00pm local time the previous night. He was picked up by a chauffeured hire car that left Brisbane Airport at 9:20am, arriving at the resort between 11:00am and 11:30am. On the way, he expressed an interest in body-surfing to the driver, Mr Fleming. Mr Fleming gave Mr Enright a brief tour of the local beaches, and crucially warned him of the dangers associated with swimming at Yaroomba Beach. Mr Fleming recommended swimming at Coolum Beach instead.

Mr Enright attended the conference immediately upon his arrival at the resort, until 4:30pm. At this time, he and a colleague decided to go body-surfing. The evidence at trial showed that a significant amount of literature and information was available about the local beaches, and particularly about a beach club facility conducted by the resort. Mr Enright and his colleague, however, did not consult this material, but rather embarked upon their own journey without enquiry of resort staff.

They found themselves on the main road passing the resort, and there were ▶

Brett Charrington is a Barrister at Ronan Chambers **PHONE** 07 3236 1923 **EMAIL** charrington@qldbar.asn.au

able to obtain a lift from a Mr Cliff, the driver of a bus which operated between the resort and airport. Mr Cliff transported the two men to Birrahl Park, where there was access to Yaroomba Beach.

The two swimmers accessed the beach and went into the surf, even though it was unpatrolled at the time. They swam for approximately 30 to 40 minutes before realising they had been taken a considerable distance out to sea, approximately 80 metres. Unfortunately, Mr Enright was unable to make his way to shore. Despite efforts by his colleague to gain assistance from local surfers and others in the vicinity, Mr Enright could not be rescued and drowned.

A number of parties connected with the resort were included as defendants in the action. Mr Cliff was also a defendant. The allegations against these defendants were essentially of failing to warn Mr Enright of the risks associated with Yaroomba Beach.

The local council was also included as a defendant primarily because of an alleged failure to provide adequate or appropriate signage warning of the risks at Yaroomba Beach.

In dismissing the plaintiff's claim, Moynihan J identified a number of relevant factors, including Mr Enright's experience in water activities such as diving and swimming; his determination on the day in question to swim in the surf despite the chauffer's warning; his absence of enquiry of resort staff or use of the resort's facility; and his lack of fitness combined with his overnight travel and immediate attendance at the conference without rest.

Another important consideration in Moynihan J's judgment was the obviousness of the risks associated with swimming in the surf, particularly by way of rips, undercurrents and the like. The obviousness of these risks diminished the need, or at least the effectiveness, of warnings. Moynihan J stated:

'A sign which said, for example, "Surfing Dangerous, It is Dangerous to Get Out of Your Depth" is simply a statement of what already ought to have been obvious to Enright.'[1]

Moynihan J held that the plaintiff had failed to establish a breach of duty by any defendant causing Enright's death. Accordingly, it is apparent that the plaintiff's case failed both in respect of breach of duty and causation.

ENDNOTE:

1 At para 91.

TRACEY CARVER, QLD

Causation, apportionment of liability, and the interplay between contract and tort:

Kim & Anor v Cole & Ors [2002] QCA 176, Supreme Court of Queensland, Court of Appeal, 24 May 2002

Tracey Carver is an Associate Lecturer at the Faculty of Law, Queensland University of Technology
PHONE 07 3864 4341
EMAIL t.carver@qut.edu.au

Whilst as a general rule, 'a contract between A and B does not exhaust or otherwise affect A's liability to C,'[1] the existence of a contract may operate to shape liability in tort not only as between the contract's parties, but also as against outsiders. An adaptation of this principle was recently applied in *Kim & Anor v Cole & Ors*, where the Queensland Court of Appeal[2] was called upon to determine the statutory apportionment of liability between two concurrent tortfeasors, in circumstances where one of the defendants was also liable to the other in contract.

THE FACTS

The plaintiff's (Kim's) building was destroyed by an explosion originating