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| PARTIES: | ROMEO, Nadia Anne |
| | v |
| | THE CONSERVATION COMMISSION OF THE NORTHERN TERRITORY |
| TITLE OF COURT: | COURT OF APPEAL |
| JURISDICTION: | SUPREME COURT |
| FILE NO: | No. AP16 of 1994 |
| DELIVERED: | Darwin 8 December 1995 |
| HEARING DATES: | 17, 18 & 19 July 1995 |
| JUDGMENT OF: | Martin CJ., Mildren & Thomas JJ. |

**CATCHWORDS:**

Negligence - General Matters - Duty of Care - Proximity - Breach of Duty - Forseeability of the risk of injury - Nature of the risk - Probability and magnitude of the risk - Response to the risk -

*Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, applied.
*The Council of the Shire of Sutherland v Heyman and Another* (1985) 157 CLR 424, applied.
*Hackshaw v Shaw* (1984) 155 CLR 614, applied.
*Miletic v Capital Territory Health Commission* (1995) 130 ALR 591, considered.
*The Council of the Shire of Wyong v Shirt and Others* (1980) 146 CLR 40, applied.
*Phillis v Daly* (1988) 15 NSWLR 65, considered.
*McLean v Tedman and Another* (1984) 155 CLR 306, considered.
*March v E & EH Stramare Pty Ltd and Another* (1991) 171 CLR 506, distinguished.
*Southern Portland Cement Limited v Cooper* (1972) 129 CLR 295, considered.
*Nagle v Rottnest Island Authority* (1992-3) 177 CLR 423, considered.
*Cekan v Haines* (1990) 21 NSWLR 296, considered.
*Inverell Municipal Council v Pennington* [1993] A Tort R 62,397, considered.
*Gorman v Williams* [1985] A Torts R 69,256, considered.
*Western Suburbs Hospital v Currie* [1987] A Torts R 68,913, considered.
*Overseas Tankships (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound [No.2])* (1967) 1 AC 617, considered.
*Aiken v Municipality of Kingsborough* (1939) 62 CLR 179, considered.

Appeal - Practice and Procedure - Negligence - Questions of fact - Inferences drawn by Trial Judge -

*Devries v Australian National Railway Commission* (1993) 177 CLR 472, applied.
*Warren v Coombes* (1979) 142 CLR 531, applied.
*Norbis v Norbis* (1986) 161 CLR 513, distinguished.
*McHale v Watson and Others* (1966) 115 CLR 199, considered.
*Edwards v Noble* (1971) 125 CLR 296, considered.
*The Council of the Shire of Wyong v Shirt and Others* (1980) 146 CLR 40, applied.

**REPRESENTATION:**

*Counsel:*

Appellant: Mr J Waters
Respondent: Mr T Pauling QC

*Solicitors:*

Appellant: Ms C Spurr
Respondent: Ms R Webb

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP16 of 1994

BETWEEN:

NADIA ANNE ROMEO
Appellant

AND:

THE CONSERVATION COMMISSION OF THE NORTHERN TERRITORY
Respondent

CORAM: MARTIN CJ., MILDREN & THOMAS JJ.

REASONS FOR JUDGMENT

(Delivered 8 December 1995)

MARTIN CJ.

This is an appeal against the decision of Angel J. dismissing the appellant's action against the respondent in a claim for damages for negligence. The following facts were found by his Honour and emerged from his Honour's reasons, or appear from undisputed evidence.

Facts

On or about 24 April 1987 the plaintiff was severely injured when she fell some six and a half metres onto Casuarina beach, near Darwin, from the top of cliffs,

known as the Dripstone Cliffs, adjoining the beach. The beach and cliffs are both within an area known as the Casuarina Coastal Reserve ("the reserve") which his Honour described as being "of natural beauty". Those features, together with others nearby and within the reserve, constitute a popular recreation area immediately adjoining residential suburbs of Darwin.

At the time of the incident the defendant was a public authority statutorily charged with the management and control of the reserve. The land within it had been proclaimed as a reserve under the provision of the *Crown Lands Act* and, consequent upon a government decision, responsibility for the development, management and control of it was given to the respondent in September 1982 pursuant to the provisions of that *Act*. It was established for the designated purpose of the "recreation and amusement of the public". The distinctions between the creation of the reserve and charging the respondent with the responsibility for it under the *Crown Lands Act* and similar procedures under the *Territory Parks and Wildlife Conservation Act* are not raised as an issue in this case. It is accepted that by whatever means the respondent exercised, or was capable of exercising, control over the land comprised within the reserve.

At the time of the plaintiff's fall the cliff top area was open to and visited by members of the public in large numbers throughout the year, but particularly in the

early evening hours to view tropical sunsets. Nearby, and within the reserve, is an area known as Dripstone Park in which there are a range of facilities provided by the defendant, such as barbeques, showers, toilets, car parking, artificial lighting, play equipment, shade and extensive grassed areas. A road leads from Dripstone Park up a hill to the top of the cliffs, but the only facility provided adjacent to the top of the cliffs was a car park, the perimeter of which was fenced with low posts and logs which the defendant had erected. It had also established and maintained a lawned area between the fence and the top of the cliffs and had introduced some plants which it irrigated.

The plaintiff, who was then approaching her sixteenth birthday, went to the area on the evening of 23 April. She firstly went with friends to Dripstone Park, and after a time they proceeded to the car park area adjacent to the top of the cliffs where they met other friends. She had a drink of rum mixed with Coca Cola in the park and another at the car park. His Honour came to the view that the plaintiff was adversely affected by alcohol, but it was not possible to say with any accuracy to what degree her behaviour, concentration and judgment were obviously impaired. The plaintiff walked in and around the car park area talking to friends. For part of the time she was sitting with some of them on the logs which formed the fence between the car park and the cliffs. Both the plaintiff and a friend, Jacinta Hay, were last seen apparently talking together in an area between the log fence and the cliff edge. Nobody

saw them fall and neither of them have any recollection of doing so. Their last recollection of events on that night was at about 11.45pm. They were discovered lying on the beach below the cliff top in the early hours of 24 April.

The night was described as being clear and dark, and the plaintiff's evidence was that visibility was limited to about nine metres; others saw things at a greater distance without commenting on poor visibility. There is no evidence to suggest that the plaintiff had visited the particular area of the cliffs, from which his Honour found she fell, prior to the accident, but she was generally familiar with the area. She had played cricket on the beach below them on about six occasions and had gone to the beach from the car park area on the top of the cliffs by an unmade path at one end of them. There was vegetation of various types and height at the top of the cliffs. Near the point from which it was found the plaintiff fell, it was no more than a metre high and at no relevant place did it obstruct the view from the car park across the top of the cliffs and beach to the open sea. The vegetation was not particularly dense, and there were gaps in it which were not of the defendant's making.

One of those gaps was the subject of much evidence, as was the position in which the plaintiff was observed to be on the beach after she fell. Following a careful review of the whole of the evidence on the point, his Honour found that her position on the beach was directly below a gap in

the vegetation on the edge of the cliff face. Those features are shown in photographs.

His Honour's critical findings in relation to the fall are best put in his own words:

> "It is apparent and I infer that the plaintiff and Jacinta did not realise the location of the cliff edge and walked off and over the cliff edge at the point where there is a gap in the vegetation, some distance from the log fence. Leading to that gap was an area of light coloured bare earth naturally created by surface water running off the cliff. .... In the gloom it had the deceptive appearance to the girls of a footpath leading to a gap in the vegetation. It did not have that appearance in daylight. Nor would it have so appeared to a sober alert person on the night in question. It did not appear so to Mr Henry or to others on the night in question. I infer that the plaintiff and Jacinta were deceived to follow that path to and over the cliff edge. They literally walked over the edge with their heads in the air. They did not slip or at any time apprehend the presence of the cliff edge prior to their fall."

(Mr Henry was one of the witnesses).

The law as applied by the Trial Judge

The plaintiff pleaded her case in her amended Statement of Claim as follows:

> "3. At all material times the Defendant was the occupier of the Casuarina Coastal Reserve.
>
> 4. At all material times the Defendant was responsible for the management, regulation and control of the said Casuarina Coastal Reserve.
>
> (A) The Defendant in and for the purpose of such management, regulation and control carried out landscaping including mowing and irrigation of the reserve, installed roads, car barriers and improved access to the reserve.

(B) The Plaintiff and the class of persons to whom she belonged relied upon the Defendant as a consequence of its regulation and control as set forth in 4(A) hereof in resorting to the area for recreation purposes.

(C) The assumption of responsibility for the purposes set forth in the proclamation of the reserve and as demonstrated by the actions set forth in 4(A) and as a consequence of the Defendant's statutory obligations created a duty of care owed to the Plaintiff and the class of persons to which she belonged.

6. The said cliff was at all material times a concealed danger known to the Defendant and/or an unusual danger of which the Defendant knew, or ought to have known.

7. The said injuries, loss and damage were caused to the Plaintiff as the result of the negligence on the part of the Defendant, its servants or agents."

In his application of the law to the facts, his Honour firstly found that the general principles of negligence apply to public authorities, and that the liability of an occupier of land for those who enter upon it, is to be determined by those principles. He referred to, and cited extracts, from the decisions of the High Court of Australia in *The Council of the Shire of Sutherland v Heyman and Another* (1985) 157 CLR 424; *Schiller v Council of the Shire of Mulgrave* (1972) 129 CLR 116; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *Gala and Others v Preston* (1991) 172 CLR 243; *Hackshaw v Shaw* (1984) 155 CLR 614 in support of his findings that there was a relationship of proximity between the parties, and that the defendant owed the plaintiff a duty of care. At the conclusion of his discussion of the applicable law on these matters, his Honour also referred to the following

passage in the reasons of Dixon J. in *Aiken v Kingborough Corporation* (1939) 62 CLR 179 at 210:

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

He then expressed the opinion that the defendant was under such an obligation. If his Honour was there adopting what was said by Dixon J. as a general principle or rule determinative of the defendant's responsibility in this case, then he would have been in error. But, I do not think that was what his Honour was doing. It would be inconsistent with his earlier discussion and application of the general principles of negligence based on the later High Court authorities. It is more likely that his Honour was fixing upon an example of a case presenting with similar features to this to demonstrate the application of the now generalised notion of negligence to those circumstances.

His Honour held that it was the relationship of proximity established by the respondent's control of the land and the entry of the appellant upon it as a member of the public as of right which gave rise to the duty of care on the part of the respondent. In his opinion, the case did not involve the appellant having been induced to rely on specific conduct of the defendant, or on its having

carefully exercised its powers to protect the plaintiff in circumstances where the failure to do so foreseeably would cause damage. The finding of a common law duty of care did not depend upon specific reliance or on some unfulfilled task undertaken, but upon control. No specific conduct on the part of the defendant in its management of the reserve gave rise to any special duty. The dangers were not created by the defendant; the plaintiff knew of the cliffs and the danger presented by them was "inherent and self evident".

His Honour distinguished *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 as being a case involving a failure to warn of hidden danger and *Wilmott v State of South Australia* [1993] ATR 81-259 on the basis that the land there concerned was un-alienated and had not been set aside as a recreational area dedicated to public use. In the latter case the defendant had done nothing to attract the public to the land, and nor was it under any statutory duty to manage or control the area for the benefit of the public, nor was it there shown to have assumed such a function by active management supervision.

His Honour emphasised the difficulty which he said the appellant had in that any risk of injury reasonably foreseeable to the respondent was equally foreseeable to her and other members of the public who visited the area, notwithstanding the accident had occurred at night. His Honour emphasised that the presence and danger of the cliffs was apparent and known and no positive act of the respondent

had created or increased a risk of injury to the appellant; no conduct on its part had placed it in such a position that the public, including the plaintiff, relied upon it to take care for their safety such that it came under a general duty of care calling for some positive action. "Any risk of injury was foreseeable to the plaintiff, the defendant and the public alike. It follows from this that the defendant was not in breach of the duty of care it owed the plaintiff".

His Honour also held that the appellant could not succeed because of matters involving policy. "The defendant had charge of managing and conserving a natural and beautiful coastal area frequented by members of the public". Questions of public safety in that context, and whether expenditure should occur "in respect of fencing or lighting or setting up signs are matters of policy for the defendant involving multifarious financial and governmental factors", referring particularly to what was said by Mason J. in *Sutherland Shire Council v Heyman* at p468.

Furthermore, in his Honour's view, the plaintiff failed to prove that the alleged breaches of duty on the part of the defendant were causative of the injury to the plaintiff; in his view the provision of fencing at the point from which the plaintiff fell, while acting as a barrier, would not have prevented the plaintiff progressing beyond it; she had already passed beyond a barrier fence. On his Honour's view of the evidence, it could not be said that the plaintiff would probably not have proceeded as she did

beyond the car park fence if there had been a sign or signs nearby.

Grounds of appeal

The grounds of appeal are:

"Having found that the respondent was in control of the coastal reserve and that a duty of care had arisen between appellant and respondent as a result of the relationship of proximity between them and having found that the appellant was deceived by the appearance of the "path" at night the learned trial Judge erred in law and in fact:

1. in finding that the appellant was not induced by the specific conduct of the respondent to rely upon the respondent's duty to protect the appellant;

2. in finding that no positive act on the part of the respondent in its management of the coastal reserve gave rise to an increased risk of injury to the appellant;

3. in finding that the condition of the cliff top with the 'path-like' break in vegetation which disguised the edge of the cliff at night was "equally foreseeable to the appellant and other members of the public who visited the cliff area";

4. in applying a principle of "equal foreseeability" to the determination of the respondent's liability;

5. in finding that the unusual danger constituted by the appearance of the 'path-like' gap in the vegetation at the edge of the cliff at night "made no difference" to the question of the respondent's liability and in doing so misapplied the principles set forth in Nagle v Rottnest Island Authority (1993) 177 CLR 423 and Lipman v Clendinnen (1932) 46 CLR 550 @ 556;

6. in determining the 'path-like' gap in the vegetation at the edge of the cliff at night was "not incongruous with the general character of the area or the use to which it was put by the public";

7. in considering that the liability of the respondent under the duty of care it owed to the

appellant was negatived by the observation that "the danger of the cliffs could have been avoided by the exercise, by the plaintiff (appellant), of ordinary care which she did not exercise on the night in question";

8. in finding that although finding the darkness of the night and the deceptive nature of the gap in the vegetation at the edge of the cliff gave the appearance of a path which deceived the appellant, the danger was a "danger which could have been avoided by the appellant by exercise of ordinary care";

9. in finding that despite the proved deception created by the darkness of the night and the deceptive nature of the gap in the vegetation at the edge of the cliff that the injury was reasonably foreseeable to the appellant and other members of the public and therefore the respondent was not in breach of any duty of care it owed to her;

10. in finding that policy considerations were such as to negative the duty of care owed by the respondent to the appellant;

11. in failing to consider simple and practical steps that could be taken to discharge the respondent's duty of care;

12. despite having found that the plaintiff had never visited the area at night before that the danger posed by the 'path-like' gap in the vegetation at the edge of the cliff was reasonably foreseeable by the appellant or equally foreseeable;

13. in finding that an appropriately placed "log fence", or some other simple barrier across the deceptive 'path-like' gap would not have provided an adequate obstruction to the appellant's fall;

14. in finding that the deceptive 'path-like' gap in the vegetation at the edge of the cliff at night did not raise a reasonable expectation that there was, in fact, a path at that point on the cliffs;

15. in finding that no positive act of the respondent was responsible for accentuating the risk of injury to the appellant;

16. in failing to apply the principles appropriate to the respondent's liability as set forth in:

Sutherland Shire Council v Heyman (1985) 17 CLR 427;
Hackshaw v Shaw (1984) 155 CLR 614;
Parramatta Council v Lutz (1988) 12 NSWLR 293;
March v Stramere (E & M H) Pty Ltd (1990-91) 171 CLR 506

17. in failing to find that the respondent ought to have foreseen that the condition of the pathlike gap could have given rise to an accident of the sort suffered by the appellant.

18. the Learned Trial Judge erred in fact in finding that the area of light coloured bare earth leading up to the gap in the vegetation did not have a deceptive appearance to Mr Henry or others in the night in question in that there was no evidence given at trial by Mr Henry or others as to the appearance of the light coloured bare earth leading to the gap in the vegetation and that the Learned Trial Judge erred in finding, as a consequence, that it would not have appeared deceptive to a sober, alert person on that night."

The appellant's arguments upon appeal were directed at the conduct of the respondent, as the authority controlling the reserve, in providing a vehicular access road and car park in the area adjacent to the top of the cliffs and the other improvements by way of mowing and watering the area between the car park fence and the cliffs. The evidence showed that the area was frequently visited by young people after dark, particularly at weekends, and that many of them drank alcohol whilst there. The respondent knew that. There had been complaints to it owing to rowdy behaviour. An invitation or inducement to people to visit the area at any time of the day or night, coupled with what counsel for the appellant described as the "deceptive path-like gap" in the vegetation, called for action on the part of the respondent; nothing more than a simple warning sign or rudimentary barrier, such as a strand of wire across

the path-like area held in place by star pickets, was required. It was not open to the respondent to assume that all persons who ventured to the car park, and were there during the hours of darkness, were aware of the cliffs; in particular, such an assumption should not be made in respect of young people affected by alcohol. Something by way of a warning or barrier could have been placed across that particular path-like gap readily and cheaply. If that were done then the respondent would have discharged its duty to the appellant and people like her. If the deception was removed by some simple sign, or barrier placed across the gap, then the appellant, in all probability, would not have continued on her way, she would have been disabused about the appearances before her. It would not be right to infer that a person in the position of the appellant would proceed regardless of the effect of even such simple efforts on the part of the respondent to overcome the deception. A path would not be thought likely to lead to a place of danger such as a cliff unless those going along the path were protected by an effective barrier prior to reaching the cliff edge. Alternatively, the so called path would not be thought to lead to the cliff edge, but to some place which did not present a danger, but, since it did not, some effective warning or barrier should have been placed across it. It was the juxtaposition of the path-like gap and the cliff edge which was the danger, and the respondent was under a duty of care to protect the appellant from it. The duty of care arose from the relationship of occupier and person entering of right.

Although questions of inducement, invitation and reliance were raised in the course of argument, I do not understand the appellant to have been seeking to make out proximity based upon any of those matters in themselves, or as distinct from that arising from the relationship established by the respondent's control and the appellant's entry as of right. All of the features relied upon by the appellant arose out of that relationship and were part of the circumstances of the case.

In *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 Mason, Wilson, Deane and Dawson JJ. affirmed that in an action in negligence against an occupier it is only necessary to determine whether, in all the relevant circumstances, including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. Arguments relating to reliance, invitation and inducement are subsumed under the general duty of care which is broad enough to encompass all of the circumstances of the particular case.

Law to be applied

In so far as the grounds of appeal go to decisions of the trial Judge on questions of fact, then any such finding must be set aside if shown to be wrong. However, "when such a finding is wholly or partly based on the trial judge's

assessment of the trustworthiness of witnesses who have given oral testimony, allowance must be made for the advantage which the trial judge has enjoyed in seeing and hearing the witnesses give their evidence". Even in such a case the advantage may be of little significance, or even irrelevant, if the challenged finding of fact is affected by identified error of principle or demonstrated mistake or misapprehension about relevant facts (per Deane and Dawson JJ. in *Devries v Australian National Railway Commission* (1993) 177 CLR 472 at 479-480). As to inferences drawn from established facts, there is no justification for holding that an appellate court, which, after having carefully considered the judgment of the trial Judge, has decided that he was wrong, should nevertheless uphold his erroneous decision:

> "The duty of the appellate court is to decide the case - the facts as well as the law - for itself. ... Further there is, in our opinion, no reason in logic or policy to regard the question whether the facts found do or do not give rise to the inference that a party was negligent as one which should be treated as peculiarly within the province of the trial judge".

Per Gibbs ACJ., Jacobs and Murphy JJ. in *Warren v Coombes* (1979) 142 CLR 531 at 552.

It was suggested by the respondent that the decision in this case depended upon the exercise by the trial Judge of a discretion, and reference was made to *Norbis v Norbis* (1986) 161 CLR 513, a family law case involving the making of orders depending upon what was "just and

equitable". I do not accept there was any element of discretion involved in his Honour's findings or ultimate conclusion.

As the following extracts show, in determining whether a defendant has breached a duty to take reasonable care imposed by the law, a Court must first decide whether a reasonable person in the defendant's position would have foreseen that his or her conduct might pose a risk of injury to the plaintiff or to a class of persons including the plaintiff; if the answer to that question is in the affirmative, then the Court must decide what the reasonable person would have done by way of response to the reasonably foreseeable risk of injury. They are both questions of fact. (*McHale v Watson & Others* (1966) 115 CLR 199 per McTiernan ACJ. at 203; *Edwards v Noble* (1971) 125 CLR 296 at 299 per Barwick CJ; *The Council of the Shire of Wyong v Shirt and Others* (1980) 146 CLR 40 at 47-48 per Mason J. (with whom Stephen and Aickin JJ. agreed)).

The following extracts from recent decisions in the High Court of Australia and elsewhere provide the foundation for the consideration of the substantive issues raised on the appeal.

Proximity is a requirement for establishing liability in negligence. In *Sutherland Shire Council v Heyman* Deane J., having confirmed the requirements, says at p497-8:

"The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connexion or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case. That does not mean that there is scope for decision by reference to idiosyncratic notions of justice or morality or that it is a proper approach to treat the requirement of proximity as a question of fact to be resolved merely by reference to the relationship between the plaintiff and the defendant in the particular circumstances. The requirement of a relationship of proximity serves as a touchstone and control of the *categories* of case in which the common law will adjudge that a duty of care is owed. Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction. On the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is "fair and reasonable" (cf. per Lord Morris of Borth-y-Gest, *Dorset Yacht Co. v. Home Office(89)* and per Lord Keith of Kinkel, *Peabody Fund v. Parkinson(90)*), or from the considerations of public policy which underlie and enlighten the existence and content of the requirement."

In this case the requirement of proximity is met by the physical proximity between the respondent as occupier

of the reserve and the appellant as a member of the public entering upon it as of right.

It is then necessary to determine whether that relationship of proximity gives rise to a duty of care. In *Hackshaw v Shaw*, Deane J. at p662-3 said:

> "... it is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both of a special duty qua occupier and an ordinary duty of care was owed. All that is necessary is to determine whether, in all the relevant circumstances including the fact of the defendant's occupation of premises and the manner of the plaintiff's entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff. A prerequisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of response to the foreseeable risk."

That passage was approved by Mason, Wilson and Dawson JJ., and reaffirmed by Deane J. in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488. What is called for is a determination of "all the relevant circumstances"; just what they are will depend upon the facts of the particular case. The nature of the duty involved will in part depend upon the circumstances giving rise to the relationship of proximity, for example see *Miletic v Capital Territory Health Commission* (1995) 130 ALR 591 at 594.

Turning to the issue of breach of an established duty of care, the statement of Mason J. in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 is of general application:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

It is necessary to first determine what the defendant's position was, before looking to the foreseeability of the reasonable man and what he would do by way of response. Whether there has been a breach of duty of care is to be determined by taking into account not only the matters relating to foreseeable risk of injury but all other relevant factors.

In a case in some respects not unlike this, those factors included the obvious nature of the risk and the expectation that a person coming to it is expected to act reasonably (per Mahoney JA. in *Phillis v Daly* (1988) 15 NSWLR 65 at p74). Speaking of the risk in that case at p72-73, his Honour said:

> "This feature, the fact that the risk was obvious, is of general significance in that it illustrates the extension which, if applied according to their terms, *Australian Safeway* and subsequent cases, have made to the liability of occupiers of premises and their insurers. That extension involves, inter alia, two things. First, under the law as it previously existed: see *Indermaur v Dames* (1866) LR 1 CP 274 at 286; 288 and *Gautret v Egerton* (1867) LR 2 CP 371 at 375; an occupier was liable to a licensee only in respect of "a hidden danger": see *Aiken v Kingborough Corporation* (1939) 62 CLR 179 at 208; or to an invitee only in respect of "an unusual danger": see *Commissioner for Railways (NSW) v Anderson* (1961) 105 CLR 42 at 56. Those limitations have now been removed and an occupier is liable in respect of dangers, that is, risks, whether hidden, unusual or obvious. And, secondly, there were limitations on the occupier's liability by reference to his knowledge of the risks. In the case of a licensee, he was liable only if he actually knew of the danger; in the case of an invitee, he was liable only if he knew or ought to have known of it. Now, his liability is not so limited.
>
> It is not necessary to pursue the precise extent to which the liability of occupiers and their insurers has been extended. The ambit of the liability will be qualified to an extent by the principle enunciated in *Wyong Shire Council v Shirt* that there will be no breach unless the risk is one which a reasonable man would not put aside as far-fetched or fanciful and that what is required of the occupier is what is reasonably to be expected of a defendant".

Commencing at the foot of p73 his Honour continued:

> "There is a duty if the danger is "foreseeable" or the relationship "proximate"; the risk must be dealt with unless it is "far-fetched"; and what is to be done is qualified only by what is "reasonable".

> The result of *Australian Safeway* is that "unusual" or "hidden" are no longer an answer to a plaintiff's claim. But the fact that a danger is not hidden or unusual but obvious remains of significance. As *Wyong Shire Council v Shirt* establishes, the court must identify the risk and decide what the defendant should have done to avoid injury from it. In deciding that, it is to take into account "the magnitude of the risk", "its degree of probability", and "other relevant factors". Those factors include, inter alia, two things: that the risk is ordinary and that it is obvious".

In the eighth edition of his text "The Law of Torts" Professor Flemming at p453 says: "The obviousness of the danger is simply one of the factors relevant in assessing the probability and magnitude of the risk by which the occupier's care falls to be determined".

As Brennan J. pointed out in *Australian Safeway Stores Pty Ltd v Zaluzna* at 490: "The standard of care expected of a person on whom a general duty of care is imposed is usually stated in the terms used by Alderson B. in *Blyth v Birmingham Water Works Co* (1856) 11 EX 781 at 784:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

Consideration of the grounds of appeal

Grounds 1, 2, 14 and 15 relating to inducement, reliance and increased risk of injury due to positive acts on the part of the respondent are to be viewed in the context of the general duty of care found by his Honour to have been owed by the respondent to the appellant. They involved

findings of fact concerning the activities of the respondent in the reserve and particularly adjacent to the tops of the cliffs. The nature of the work which had been carried out has been described, and it is not suggested that any error was made in the findings on that account. The road, car park and other minimal facilities provided and maintained by the respondent enabled people to obtain access to, and park motor vehicles in, the car park, and walk around in the vicinity of the tops of the cliffs whether they arrived by motor vehicle or not. They did not extend to any activities which would induce a visitor to go to the reserve, or create any increased risk of injury to such a visitor, by enticing or encouraging such a person to place himself or herself in a position where he or she might fall over the cliffs. I would not disagree with the inferences drawn by his Honour in regard to those matters.

Grounds 3, 4, 7, 8, 9 and 12 all give rise to considerations of the reasonable expectations on the part of the respondent that visitors to the reserve would take proper care of themselves, especially in the vicinity of the top of the cliffs. However described, the path-like gap in the vegetation was located within a short distance of the top of the cliffs. The relationship between the gap, the vegetation and the top of the cliffs was obvious. His Honour held that the plaintiff was deceived by the appearance of the gap, but that is not enough. It is plain from his Honour's reasons that if the plaintiff had been taking care of herself she would not have been so deceived, and, further,

she would not have proceeded to walk off the cliff tops. His Honour was not wrong to so infer nor was he in error in holding that the duty of care owed by the respondent was discharged by the failure of the appellant to exercise ordinary care for her own safety. That determination depends upon the application of the general proposition of law to the subjective circumstances of this case, that is, that in considering whether the respondent had discharged its duty of care, it was entitled to take into account that the danger was obvious, and that a person in the position of the appellant could be expected to take reasonable care for herself when in an area close to the cliff edge.

It should be remembered that in the making of many findings of fact which gave rise to the inferences drawn by his Honour, his Honour had the benefit of not only the evidence in open court, including a number of photographs, but also of a view of the area to assist his understanding of that evidence.

As to grounds 5 and 6, as I understand his Honour's reasons, he did not find that there was an unusual danger constituted by the appearance of the path-like gap at the edge of the cliff. He noted that the plaintiff had pleaded that it constituted a concealed danger or alternatively an unusual danger and said that in daylight that could not be said to be so. He then turned to consider what difference there may be in the fact that the accident occurred at night, and having referred to what Dixon J. had to say in *Lipman*

*v Clendinnen* (1932) 46 CLR 550 at 556, and his Honour's further discussion on the question, again adverted to the fact that the general presence and danger of the cliffs was apparent, and known to the plaintiff and, thereby, it appears, rejected the case based upon a concealed or unusual danger. It was open to his Honour to find that the physical features of the natural cliffs were not incongruent with the general character of the area.

In ground 17, it is claimed that his Honour erred in failing to find that the respondent ought to have foreseen that the condition of the gap could have given rise to an accident of the sort suffered by the appellant. It is true that his Honour made no such specific finding, but it was not necessary for him to do so since the thrust of his decision was that the respondent was entitled to expect that a person in the position of the appellant would take reasonable care for herself.

Ground 18 was added by amendment during the course of the hearing of the appeal. To come to grips with the point, it is first necessary to refer to his Honour's reasons, as expressed by him, and the evidence surrounding the matter sought to be raised. His Honour said:

> "The plaintiff and Jacinta were affected by alcohol. The plaintiff and Jacinta wandered off from the group of friends who were congregating on the sea-side of the log fence. This group of friends were approximately three metres from the cliffs' nearest edge. It is apparent and I infer that the plaintiff and Jacinta did not realise the location of the cliff edge and walked off and over the cliff edge at the point where there

> is a gap in the vegetation, some distance from the log fence. Leading to that gap was an area of light coloured bare earth naturally created by surface water running off the cliff. This area is to be seen in exhibit P1, and in exhibit P4. In the gloom it had the deceptive appearance to the girls of a footpath leading to the gap in the vegetation. It did not have that appearance in daylight. Nor would it have so appeared to a sober alert person on the night in question. It did not appear so to Mr Henry or to others on the night in question. I infer that the plaintiff and Jacinta were deceived to follow that path to and over the cliff edge. They literally walked over the edge with their heads in the air. They did not slip or at any time apprehend the presence of the cliff edge prior to their fall".

His Honour's finding that the plaintiff and her friend Jacinta were affected by alcohol is not challenged. Nor are his findings as to what they were doing when they were last observed. They have no recollection of how they came to fall and nobody saw them fall. Given the location in which they were found at the foot of the cliff, his Honour found that they went over the cliff at a point immediately adjacent to a gap in the vegetation which appears directly above the position where they were found. I would not disagree with that inference. The inference that the plaintiff and her friend did not realise the location of the cliff edge is the most likely, but it is limited to the specifics of the time at which they fell. There is evidence to support the finding, which is not challenged, that leading to the gap was an area of light coloured bare earth naturally created by surface water running off the cliff. Since there was no direct evidence from the girls, his Honour's finding that in the gloom the gap had the deceptive appearance to them of a footpath leading to the gap in the vegetation, is a finding of fact by way of inference. It is not

challenged by the respondent. It is to be noted that the deceptive appearance related to the path "leading to the gap in the vegetation" and I assume that his Honour also had it in mind that the deceptive path led through the gap so as to bring the girls to the immediate top of the cliffs. The finding that the area of light coloured bare earth did not have the deceptive appearance of a footpath leading to the gap in the vegetation in daylight is not challenged. His Honour goes on to infer that it would not have so appeared to a sober alert person on the night in question. It is apparently his Honour's view that the respondent was entitled to expect that people entering upon the reserve would take care for themselves, that is, knowingly being in close proximity to the top of the cliffs, they would not allow themselves to be so affected by alcohol as to dim the reality of their position, or to be deceived as to what was being presented by the natural features of the landscape. Rather than being alert, as the occasion required, the appellant and her friend had failed to heed the danger of the immediate presence of the top of the cliffs.

One basis of the attack in relation to his Honour's findings in that passage is that there was no evidence given at trial by Mr Henry or others as to the appearance of the light coloured bare earth leading to the gap in the vegetation at night. That finding appears to have been used to support the inference that in the gloom the bare earth would not have had the deceptive appearance of a footpath leading to a gap in the vegetation to a sober alert person on that night.

The appellant's argument proceeded that since there was no direct evidence from any of the witnesses who were able to give it, as to the appearance of the bare patch of earth on that night, then it was not open to his Honour to make the finding that it did not appear to be deceptive to Mr Henry or any of those other witnesses. Mr Henry's evidence is that he had been drinking beer and that at the relevant time he was not sober "but sort of coming down". He had been to the area before, "once in a blue moon to go up there and have a drink" in the car park. Being told that the appellant and her friend had fallen off the cliff, he walked to the cliff face, had a look and saw the appellant on the ground. He then made his way to the beach. He did not speak of being in any way deceived by the patch of bare earth. Kelly Docherty, who gave evidence as to seeing the two girls standing about two metres away from her to the seaward side of the logs talking between themselves, described that from where she was sitting on the logs she could see the edge of the cliff. Her estimate of distance from where she was sitting to the edge of the cliff varied from three metres to five metres. When the alarm was raised, she said that she went to the cliff edge and looked down, but could not see anything. Mr Dexter, an ambulance officer called to the scene, went to the point on the cliffs from whence the two girls had apparently fallen to watch the plaintiff being brought up from the beach on a Stokes litter. Mr Mayo, a fireman, who brought a fire appliance with appropriate equipment to the scene to effect the lifting of the appellant from the beach, was asked in

cross-examination by the appellant to direct his mind to the presence of the gap, and he eventually said that on the evening concerned he could not remember seeing any gap in the vegetation along the cliff, but earlier he had indicated that he had not seen a gap, "it was just a walking pad" (AB 311.5). He also confirmed that when he walked to the edge of the cliff he could see clearly where the persons were working below him on the beach. Mr McLeod, another fire officer, went to the edge of the cliff with other officers with a view to talking about the strategy for raising the appellant from the beach. He mentioned that there were other people in the vicinity. For the most part, these sober witnesses from the St Johns Ambulance and the Fire Service were called to establish where the appellant was lying on the beach with a view to finding the point from which she had fallen. It was by reconstruction, having established where she was lying, that it was open for his Honour to come to the view that the appellant and her friend had walked over the cliff adjacent to the gap. There was no evidence that Mr Henry or any other person on the night in question, sober or otherwise, was deceived by the appearance of the area of light coloured bare earth leading to the gap. It was for the appellant to show, if she could, what the appearance of the area in question was to a person at the scene on that night. In my opinion it makes no difference to the outcome of this appeal that his Honour appears to have made an express finding that the deceptive appearance did not occur to Mr Henry or others, as a fact drawn from evidence to that effect, as opposed to there being no evidence

directed to the point.

Inadvertence by the Appellant

As cited above in *Wyong Shire Council v Shirt*, Mason J. said that even a risk of injury which is quite unlikely to occur may nevertheless be plainly foreseeable, and, unless a risk is "far fetched or fanciful" then it is foreseeable. That the standard of care expected of a reasonable man requires him to take account of the possibility of inadvertent and negligent conduct on the part of others appears in the judgment of Mason, Wilson, Brennan and Dawson JJ. in *Mclean v Tedman & Anor* (1984) 155 CLR 306 at 311. In that regard there may be circumstances whereby a plaintiff's "intoxication and associated carelessness" may bring him or her within a class of people to whom a duty of care is owed, see *March v E & M H Stramare Pty Ltd & Anor* (1991) 171 CLR 506. In that case a truck had been parked in a position where it straddled the centre line of a six lane road at night and was left standing with its parking and hazard lights illuminated. The plaintiff, being under the influence of alcohol and driving at an excessive speed, was injured when his car ran into the truck. The trial Judge found the owner and driver of the truck were negligent, but that the driver of the car was also negligent and apportioned responsibility accordingly. On appeal it was held that the plaintiff's own negligence was the sole effective cause of the accident and the action was dismissed. In the High Court, an appeal against that decision was allowed and the

judgment of the trial Judge restored. In the course of his judgment, Mason CJ., said at p515:

> "The common law tradition is that what was the cause of a particular occurrence is a question of fact which "must be determined by applying common sense to the facts of each particular case" (authority cited).

Deane J. at p522 adopted the common sense approach, and Toohey and Gaudron JJ. agreed. At p524 Deane J. counselled against allowing apportionment legislation to be applied in circumstances where a plaintiff's own negligence was, as a matter of ordinary common sense, the sole real cause of the accident.

This case is clearly distinguishable on the facts from the position in *March v Stramare*. The deliberate positioning of the truck clearly created a hazard for users of the road and it was foreseeable that amongst the users would be some affected by alcohol and inattentive as a result. It was foreseeable that a person or persons affected by alcohol would be driving along the roadway, for that is where people, whether affected by alcohol or not, usually drive motor cars. Here, it was not reasonably foreseeable that a person in the position of the plaintiff, affected by alcohol or not, would venture onto a place, whether it looked like a path or not, which that person knew, and could see, was in the immediate vicinity of the top of cliffs. The risk of a person in the appellant's position doing such a thing was far fetched or fanciful.

Policy and Discretion

His Honour also considered two other matters raised by the respondent at trial. The first goes to the competence of a Court to review the action or inaction of public authorities in the performance of statutory functions in the public interest, in circumstances where the separation of powers requires that the Court abstain. There may be choices or alternatives involved based on a variety of public interests, social, political, environmental and aesthetic, see for example Mason J. in *Sutherland Shire Council v Heyman,* where his Honour, after referring to a number of cases discusses the distinction between policy making decisions and discretionary matters. Just where the dividing line between those two concepts lies is not yet settled, no more is the question as to what, if any, evidence is required as to the making of such decisions. It is not necessary to venture upon that ground for the purposes of this case. These and some other issues attaching to this subject matter are discussed in some detail by Gibbs C.J. in *Heyman* at 444 to 448 and Mason J. at pp467, 464 and 468-9.

Causation of Damage

Finally, his Honour also ruled against the appellant because of her failure to prove that the alleged breach of duty on the part of the respondent was causative of injury to her. For reasons already given, it is not

necessary to deal with the grounds of appeal relating to his Honour's reasons and findings in that regard.

MILDREN J.

The facts and questions to be decided in this appeal are set out in the judgment of Martin CJ, a draft of which I have had the advantage of reading. I agree with his Honour that the appeal in this case must be dismissed. However I would prefer to state my own reasons for arriving at this conclusion.

Angel J found that the requisite relationship of proximity which gave rise to a duty of care existed by virtue of the fact that the respondent was in control of the coastal reserve where the accident occurred and knew that members of the public visited the cliff-top area as of right. That finding is challenged by the appellant. The appellant attacked the trial judge's findings that no positive act of the respondent created or increased a risk of injury to the plaintiff, that no conduct of the respondent placed it in such a position that the public (including the plaintiff) relied on it to take care for their safety such that the respondent thereby came under a general duty of care calling for some positive action, and in characterizing the nature of the relationship as that of a public authority in control of a coastal reserve having a duty of care to members of the public visiting the cliff top area as a right. I do not consider that it has been demonstrated that his Honour was in error in arriving at those findings. The only improvements in the area were an unsealed road leading to a carpark area; a low log fence designed to delineate the

boundaries of the carpark; the establishment and maintenance of a lawned area between the fence and the top of the cliffs and some plants under irrigation. There was no made path leading to the beach in the near vicinity. There were no facilities such as toilets, artificial lighting, play equipment, barbecue equipment, seating, playground equipment or the like to indicate that the area was expected to be used as a picnic area. Rather the spartan facilities indicated an expectation of temporary and casual use of the area by the general public to observe its natural beauty, and an attempt by the respondent to protect and control the area from unwanted intrusion by motor vehicles, with some modest effort being made to improve its natural beauty by the enhancement of its visual amenity. There is nothing in my opinion to indicate that the respondent had done anything to encourage the appellant to assume that it had taken any steps to eliminate the risk that she might fall off the cliff edge. Nor has the appellant shown that the very limited activities undertaken by the respondent did anything to create the risk or to increase the risks of falling of the cliff.

His Honour found that the risk of someone falling off the cliff and suffering injury was reasonably foreseeable. That finding is not challenged. That being so the only question is whether the appellant had established that the respondent was in breach of its duty of care. As Mason J said in Wyong Shire Council v Shirt (1980) 146 CLR 40 at 47:

> "... it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant facts."

Before one can talk about the response to the risk, it is necessary to identify the relevant risk of injury.

The risk which his Honour identified was the risk that a person such as the plaintiff, affected by alcohol and in the vicinity of the carpark at night, may not realise the location of the cliff edge and either walk off and over the cliff edge or fall from it. The appellant's submission is that his Honour failed to correctly identify the relevant risk.

A number of the grounds of appeal refer to a "path-like gap in the vegetation at the edge of the cliff". There was no finding of any such path-like gap by the learned

trial judge. There was no evidence of any such path-like gap. What his Honour found was as follows:

> "The plaintiff and Jacinta were affected by alcohol. The plaintiff and Jacinta wandered off from the group of friends who were congregating on the sea-side of the log fence. This group of friends were approximately three metres from the cliffs' nearest edge. It is apparent and I infer that the plaintiff and Jacinta did not realise the location of the cliff edge and walked off and over the cliff edge at the point where there is a gap in the vegetation some distance from the log fence. Leading to that gap was an area of light coloured bare earth naturally created by surface water running off the cliff. This area is to be seen in Ex P1, and in Ex (P4). In the gloom it had the deceptive appearance to the girls of a footpath leading to the gap in the vegetation. It did not have that appearance in daylight. Nor would it have so appeared to a sober alert person on the night in question. It did not appear so to Mr Henry or to others on the night in question. I infer that the plaintiff and Jacinta were deceived to follow that path to and over the cliff edge. They literally walked over the edge with their heads in the air. They did not slip or at any time apprehend the presence of a cliff edge prior to their fall."

There was evidence which his Honour accepted to support the finding that the girls had fallen over the cliff edge in some way at the point of this gap in the vegetation. I have considerable difficulty, however, with the inferences which his Honour has drawn that the girls were deceived to follow what appeared to them to be a footpath leading to the gap in the vegetation, did not realise the location of the cliff edge and walked off and over the cliff. There were no eyewitnesses. Neither the plaintiff nor Jacinta had any memory of what had happened to them. There was no evidence as to how the girls arrived at the point in the gap in the vegetation at approximately where they fell. It is equally possible that the girls decided to jump over the cliff onto

the sand below and misjudged the height of the cliff. I should point out that the evidence was that the vegetation on either side of the gap was no more than a metre high and at no relevant place obstructed the view from the carpark across the top of the cliffs to the beach and to the open sea.

Be that as it may, the respondent did not seek to contest his Honour's findings of fact and was content to argue the appeal on the basis that the findings of fact in the passage I have quoted ought not to be disturbed. The appellant, however, has sought to attack that part of his Honour's finding that the area of light coloured bare earth would not have appeared to be a footpath leading to the gap in the vegetation to a sober alert person on the night in question, and submitted that his Honour should have made findings to the contrary. It is common ground that there was no evidence from any of the witnesses present at the cliff top on the night in question, sober or otherwise, as to the appearance of the area of light coloured bare earth, and whether or not it looked like a path. The appellant contends that there was, however, some evidence called as to the appearance of the area at other times. The evidence relied upon is that of the appellant's sister, Monica, who visited the area on three occasions over the weekend following the appellant's fall. She had also been at the scene on the night of the accident after the fall and before her sister had been assisted back up to the top of the cliffs by firemen and ambulance attendants. She had seen where

her sister was lying on the beach. She had revisited the scene later to try to establish from where precisely, the appellant had fallen. No evidence was led from this witness about the appearance of the area of bare earth in examination in chief. There was a dispute about precisely where she had fallen. In cross-examination she was asked:

> "Q... I just want to suggest to you that in fact that's where she was and you're mistaken in believing she was where the red cross [in a photograph] is?---No. I'm adamant as to where I saw her and I'm definite as to where I saw her.
>
> You recognise it as important as to where it's established she fell?---No. I - I know where she fell; I don't know what - why you're trying to say she's somewhere different.
>
> You went to, did you not, the gap, the bare patch---?---That's right, up the top.
>
> ---on the cliff and did you think there was any significance in that?---Yes, I did.
>
> What was that?---Well, when we went down there the next day, it's - and when we stood up and looked down it just seemed so obvious that that was obviously where she'd gone over because it looked like the path just kept going and it just - we just assumed that that's where she'd gone over. It just seemed obvious and logical.
>
> But you saw significance, did you, in the fact that you could stand on this point and look straight down?---Yeah.
>
> It's that and what you thought was the appearance of a path that convinced you that must be where she fell over?---Yeah.
>
> And about that you're adamant?---Yeah. I know where I saw her lying, sort of up the top, that correlated the path and where she was lying matched up. I didn't know that path was there until I'd gone over there the next day."

This paragraph is the only reference to a path in this witness' testimony.

The only other witness asked about a "path" was Mr Weribone, a ranger employed by the respondent, who was cross-examined thus:

> "Q... Mr Weribone, during that six months that you were responsible for that area, did you walk along the Dripstone cliffs?---Yes.
>
> They're about a bit under two kilometres?---Where from?
>
> The actual extent of the cliffs, where there are in fact some cliffs arising up out of the sand dunes?---Well, I - yeah, I - I wouldn't say over two kilometres, but yeah, there's approximately two kilometres of undulating land form.
>
> You went yesterday with us to look at the area again?---Yeah.
>
> Did you during the time you were there, walk along that particular edge of the cliffs?---Yes, I have.
>
> Do you remember the paths that had been created along the cliffs?---No, I don't recall any paths.
>
> Do you recall the path running down onto that point from your `86 experience?---No.
>
> Do you recall the gap in the vegetation which has been the subject of these proceedings, where it's been suggested that Ms Romeo fell?---Well, I - it's - no, I can't say it - it was there or I noticed it. The purpose of my walking along the beach was to - to look at things and those gaps appear everywhere so I mean, to recollect one specific point where an assumed path exists, well, no, I didn't take notice.
>
> I'm not talking about walking along the beach?---On the cliff face, yeah. Cliffs' edge, yeah.
>
> You've no specific recollection of having seen that?---No, but then again it all depends what you define as a path.
>
> Can the witness be shown D14.

Now, I've got a copy and I'll show you mine?---Yeah.

What I talk about as a path is this area here which is coloured separately from the - - - ?---Yes, it's marked here, I can see it, yeah.

So you see how the vegetation appears to be beaten down to that angle in the cliff?---Yes.

And indeed that was the angle that we all walked down yesterday, wasn't it?---Yes.

So when I talk about paths, I talk about that sort of thing?---okay.

And when I talk about paths, I also talk about the path which appears to run - - - ?---Down the saddle.

- - - alongside the seaward side of that Sea Hibiscus and down onto the point?---Yes.

And you say that you don't recall those paths from your inspections in `86 or earlier?---Yeah, I - I can recall that land changing, but my interpretation is - of path is, I deal with constructed paths put there for the purpose of foot use, okay?

Yes, I see?---So to me that's not a path; to me that's a natural - - -

How would you describe it so it's clear?---Sorry?

How would you describe it?---It's a natural - an area that may be either done by soil shifts, erosion, or just people use.

Yes. So however you describe it, you recall it then?---I'd describe it as - as a defined break in natural vegetation.

Yes. Made by - - - ?---Not - no, I don't know what it was made by; it wasn't made by Conservation to be for the purpose of foot use. It was there probably naturally or some other person put it there.

Mr Weribone, would you agree that that area, however it was created, was the appearance of a path beaten by people?---Yes, that could - could suggest that.

And the area where there is that gap in the vegetation also looks like a path, does it not?---Yes.

And it looks like a path to you when you went there yesterday?---Then again - okay, if you want to say, `path' yes, but my concept of a path, differed to yours. I mean, I could show you hundreds of paths.

I'm not trying to get away from your definition; you said a natural - - - ?---Yeah.

- - - or something created by people, not by the Conservation Commission?---No, they're people and all elements, yeah.

But you agreed that it looks like a path when you saw it yesterday?---Yeah, it could look like a path, yeah.

And do you know whether it was any different back in `86/`87?---I can't be pacific(?) to it. I know, like I said before, if you look at this map here you can see dozens of places - or a few other places that can assume the same sort of a occurrence. So in my line of duty walking along they were so prominent, they - they were everywhere, that it didn't stand out that you could say, well, yeah, this is a definite path.

They were everywhere, were they?---Oh, well, at different points of it on the cliff faces.

And that you could point to there?---Well, there's one down to your right.

Is that onto the point there?---Two bays away. There's one there.

I'm sorry, perhaps if you could hold it up so we can all see what you're referring to?---There's one there.

Well, that's the one we walked down to get onto the beach, isn't it?---Seemed relatively steep to me, I don't - I'd sort of beg to differ that one. I think we walked further down around.

I suggest to you that's where we stepped down onto the beach?---I think you'll find you're wrong."

His Honour did not expressly refer to this evidence in his reasons for judgment, but it is implicit from his findings that the appearance of the area of brown earth did not appear path-like to a sober person in daylight or at night, that he was not prepared to accept this evidence as establishing the contrary of these propositions. Having regard to the advantages that his Honour enjoyed in visiting the scene before the trial began, and in seeing and hearing the witnesses, as well as the lack of evidence about a

path-like appearance of the area from any of the other witnesses, sober or otherwise, who had been at the scene on the night in question, I do not accept that it has been established that the conclusions his Honour reached were wrong. By the time Monica had re-visited the scene the next day, a considerable number of people had walked over the area to the top of the cliffs to look down to the beach below on the previous evening. This included, on the evidence, Monica herself, police, attendants, fire fighters, and friends of the appellant at the scene. A crane had been used to winch the appellant to the top of the cliffs. The inference that the area had been walked over by quite a number of people is inescapable. None of the witnesses called and who had been at the scene that night spoke of the area as having a path-like appearance, including the appellant's friends who had been in close proximity to the area before the fall. Monica's description of the `path' was not further explored. It is not even clear that she was speaking of a path over the area in question. She may have been referring to another path which follows the cliff. But even if she were referring to a path over this area, she appeared to have noticed it when she got to the cliff edge and looked back in the opposite direction. Mr Weribone described the so-called `paths' in the general area of the cliffs as "natural, - an area that may be either done by soil shifts, erosion, or just people use" and that an area in the vicinity could look like a path when he visited it in 1993, but he could not recall anything as a definite path in 1986 or 1987.

The photographs in my opinion do not assist the appellant. Ext P1 (and a copy, D14) were taken two weeks before the fall. These photographs, which are aerial photographs, show quite an extensive area of bare earth, far too large to be mistaken for a path, as well as the gap in the natural vegetation. There are many such areas shown in that photograph along the cliffs. Photo P4 was taken in June 1993, too long after the accident to be of assistance. There are no photographs taken about the time of the accident looking towards the gap in the vegetation. Photo D27 was taken at the time of the trial and shows, if anything, the degree of alteration which the area has undergone since 1987. The other photos, taken at various times, show how seasonal changes effect the appearance of the area - for example, compare P5 with D12. A matter of two weeks could alter the appearance of an area particularly at the beginning of the dry season.

In my opinion, it was quite open to the learned Trial Judge to find as he did, and I do not think that it has been established that there is any proper basis upon which his findings should be disturbed. In any event it is one thing to say that Angel J ought not to have made the finding he did; it is quite another to make a positive finding to the contrary. Even allowing for the fact that this Court may draw inferences of fact of its own from evidence which is unchallenged, or from findings of fact which are unchallenged, Warren v Coombs (1979) 142 CLR 531 at 551, I would not draw an inference that the area had a path-like

appearance to a sober person in daylight or at night.

Moreover, to establish that there was a hidden trap, the appellant had to show not only that there was something which might be mistaken by a sober person for an unmade path formed by people walking over the area and leading to the cliff edge, but also that it might be mistaken as continuing beyond the cliff edge.

There is no evidence to support such a finding. The edge of the cliff was apparent to anyone with their eyes open and watching where they were going. Angel J's finding that there were no concealed hidden or unusual dangers cannot be disturbed.

The relevant risk therefore is the one that his Honour identified and to which I have previously referred. The question which his Honour then had to decide is whether the plaintiff had established that the defendant was in breach of its duty of care. This involved a determination of what a reasonable man would do by way of response to the risk. The test in Wyong Shire Council v Shirt (1980) 146 CLR 40 at 47 indicates that the perception of the reasonable man's response calls for a consideration of a number of factors which have to be balanced. These include the magnitude of the risk, the degree of probability of its occurrence, whether any alleviating action is likely to be effective to eliminate that risk, the expense difficulty or inconvenience of taking that alleviating action, any other

conflicting responsibilities which the defendant may have had as well as any other relevant factors. The balancing out by the tribunal of the fact of these matters determines what the standard of response is to be ascribed to the reasonable man placed in the respondent's position and from that it can be deduced whether or not the appellant had established a breach of that standard.

When considering what other factors are relevant to be taken into account in determining this standard, I do not think that the authorities have laid down or have purported to lay down an exhaustive list of criteria. As Deane J pointed out in Hackshaw v Shaw (1984) 155 CLR 614 at 663:

> "Whether, when a duty to take reasonable care exists, reasonable care has been taken is a question of fact to be answered in the context of the `all embracing' considerations to which the Judicial Committee referred in Cooper (Southern Portland Cement Limited v Cooper (1972) 129 CLR 295 at 310) and to which Fullagar J had referred in Cardy (1960) 104 CLR at 298."

In Cooper, (which was a trespass case) the Judicial Committee observed that an occupier is entitled to neglect a bare possibility that trespassers may come to a particular place on his land but is bound to at least to give consideration to the matter when he knows facts which show a substantial chance that they may come there. Their Lordships continued at 309:

> "Such consideration should be all-embracing. On the one hand the occupier is entitled to put on the scales

> every kind of disadvantage to him if he takes or refrains from action for the benefit of trespassers. On the other hand he must consider the degree of likelihood of trespasses coming and the degree of hidden or unexpected danger to which they may be exposed if they come. He may have to give more weight to these factors if the potential trespassers are children because generally mere warning is of little value to protect children."

It is clear that the notion of the relationship which creates the duty is a relevant factor. In Hackshaw v Shaw Deane J observed at 656:

> "The general nature of the distinction between the static condition of land and activities upon it may well be material in determining whether the necessary relationship of proximity exists under ordinary principles and, if it does, the content of any relevant duty of care. (emphasis mine)

A similar point is made in the judgment of the majority in Australian Safeways Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 at 487-8:-

> "It is a mistake to think that the failure of an occupier of dangerous premises to take reasonable care does not encompass an act or an omission on the part of the occupier which suffices to attract the general duty. What is reasonable, of course, will vary with the circumstances of the plaintiff's entry upon the premises." (emphasis mine)

In Nagle v Rottnest Island Authority (1992-3) 177 CLR 423 at 440 Brennan J (as he was then) emphasised that the flexibility available in determining the response of the reasonable man to the foreseeable risk should be focused on the nature of the relationship which creates the duty, for example, by considering whether the duty was owed to the public at large or whether it was owed to the plaintiff

or to a class of persons of whom the plaintiff might be one.

The majority in that case also considered the nature of the relationship. At p430 Mason CJ, Deane, Dawson and Gaudron JJ said:

> "In this case, the basis for holding that the Board came under a duty of care may be simply stated: the Board, by encouraging the public to swim in the Basin, brought itself under a duty of care to those members of the public who swam in the Basin. As occupier under the statutory duty already mentioned, the Board, by encouraging persons to engage in an activity, came under a duty to take reasonable care to avoid injury to them and the discharge of that duty would naturally require that they be warned that the foreseeable risks of injury associated with the activity so encouraged." (emphasis mine)

On this point Brennan J was of a similar opinion. At p440 his Honour said:

> "An alternative and more onerous duty can be assumed by a public authority if it gives the public an assurance there are no dangers on its premises or that the only risk of injury is from dangers obvious even to those who do not exercise reasonable care. It is conceivable that the public could be induced to incur a risk of danger in reliance upon such an assurance so that, if the assurance were not fulfilled, an injured plaintiff could recover."

Other relevant factors are the obviousness of the risk, the fact that the risk was a natural one in the sense that it was not created by any activity on the part of the defendant and that it was a consequence of a natural feature of the landscape of such commonality that it is hard to imagine anyone not being aware that the cliffs posed a risk, as well as the plaintiff's knowledge of the risk: see

Phillis v Daly (1988) 15 NSWLR 65 at 68, 74: Fleming The Law of Torts 8th ed., p453.

In cases where the relationship of proximity depends on no more than the fact that the defendant is an authority over land in respect of which the public may enter as of common right, I consider that an occupier is entitled to take into account that, with due allowance for human nature, those that enter on the land will use reasonable care for their own safety: see Phillis v Daly per Mahoney JA at 74; Nagle v Rottnest Island Authority per Brennan J at 438-40. Although, as the majority in Nagle points out, a person who owes a duty of care to others must take into account the possibility that one or more of the persons to whom the duty is owed might fail to take proper care for his or her own safety (p431).

In deciding what is the proper response to the risk of the reasonable man, prevailing community standards may be relevant: see Cekan v Haines (1990) 21 NSWLR 296. Where the risk of danger is posed by a feature of natural beauty, such as the present, the reasonable response may well have to take into account aesthetic factors. I agree with Samuels JA in Phillis v Daly at p68 when his Honour said:

> "... I think that at the present time, when environmental considerations are rightly regarded as an importance, aesthetic factors have their place in the calculus of negligence in circumstances such as this."

Of course the weight to be given to the various factors will vary according to the magnitude of the risk, the degree of probability of its occurrence as well as the expense and difficulty of taking appropriate alleviating action. As McHugh JA pointed out in Phillis v Daly at 77:

> "Negligence, however, is not an economic cost/benefit equation. Values which are not easily quantifiable in terms of money such as justice, health, and freedom of conduct have to be taken into account. Moreover, as Gibbs CJ pointed out in Turner v South Australia (1982) 56 ALJR 839 at 840, even though the chance of the risk occurring may not be great, if the means of eliminating it involve little difficulty or expense, ordinarily the failure to adopt those means constitutes negligence."

Nevertheless at the end of the day the balancing of the relevant considerations may result in a conclusion that a reasonable person would accept the continuance of the risk and the law would not hold him responsible if he did: see Inverell Municipal Council v Pennington (1993) Aus Torts Reps 62,397 at 62,401 per Mahoney JA; Gorman v Williams (1985) Aus Torts Reps 69-256 at 69,270; (1985) 2 NSWLR 662 at 680 per McHugh JA; Western Suburbs Hospital v Currie (1987) Aus Torts Reps 68,913 at 68, 917-18 per Kirby P; Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound [No.2]) (1967) 1 AC 617 at 642 per Lord Reid.

As to the other relevant factors his Honour found that the appellant knew of the risk, the risk was an obvious one and the danger which the cliffs represented could have been avoided by the exercise by the plaintiff of ordinary

care which she in fact did not exercise on the night in question. I consider his Honour was justified in coming to those conclusions. No challenge was made to any of these findings by the appellant.

The appellant complained that his Honour ought to have found that there were simple and cheap steps which could have been taken by the respondent to have alleviated the risk. His Honour considered the possibility of signs, including illuminated signs, to indicate the presence of the cliff. His Honour concluded that a sign warning about the presence of the cliff edge would probably not have deterred the plaintiff from proceeding as she did. There was no evidence upon which a challenge to this finding could succeed. His Honour also considered that the possibility of a log fence closer to the cliff edge. His Honour was unable to find on the balance of probabilities that that would have avoided the appellant's mishap either. His Honour found that such a log fence would have been impractical and amongst other things would have induced people to climb and sit on it so as to create a new and additional hazard to that which the cliffs had already presented. The appellant did not seek to challenge his Honour's findings about the log fence but argued that a simple barrier such as a single strand of wire between two star pickets at the gap in the vegetation would have acted as a sufficient deterrent. The problem with this submission is that there is no particular reason, having regard to the nature of the risk, to provide such a barrier to that area and not elsewhere along the whole

of the cliffs, some two kilometres in length. The appellant did not seek to argue that his Honour should have considered some other kind of fencing along the perimeter of the cliff, but confined his submission to the area near the gap in the vegetation, because that represented the relevant risk. As in my opinion that was not the relevant risk, the submission must fail.

It was submitted that his Honour erred in considering whether there was a breach of duty by applying the test laid down by Dixon J in Aiken v Municipality of Kingsborough (1939) 62 CLR 179 at 210. This test was suggested by Brennan J in Nagle v Rottnest Island Authority, at p440, in circumstances where the plaintiff entered land in the control of a public authority as of common right in circumstances such as Angel J found existed in this case. However Angel J did not confine himself to a consideration of whether the danger was apparent and able to be avoided by the exercise of reasonable care by the appellant. He also considered whether there were simple alleviating measures which were available and appropriate in the circumstances, and which would have prevented the appellant's injury, and decided these issues adversely to the appellant. That being so, it is unnecessary to decide whether the test approved by Brennan J is correct or not.

In these circumstances it is unnecessary to consider the other matters raised by the appellant as the appeal must fail.

Accordingly I would dismiss the appeal with costs.

THOMAS J.

I have read the Reasons for Judgment of Martin CJ. I agree with his Reasons and with his conclusion. I would dismiss the appeal.

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