



## Bennett v Manly Council [2006] NSWSC 242

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This is a decision of Hislop J of the Supreme Court of New South Wales, delivered on 4 April 2006.

The case involved a claim for negligence brought by Mr Bennett (“the Plaintiff”) against the Manly Council as First Defendant and Sydney Water Corporation as Second Defendant.

### Main Facts

- The Plaintiff was a 20 year old professional triathlete who struck his head against a partially submerged stormwater pipe whilst swimming at Manly beach on 8 October 2000 as a result of which he suffered incomplete paraplegia.
- At the time of the incident there were two pipes, with each Defendant being responsible for one of them. Pipes had been present at the location for over 100 years. The pipes in place at the time of the injury had been installed in 1974. The pipes were located within an easement owned by the Second Defendant and they arguably extended beyond the land controlled by the First Defendant.
- The two pipes were generally concealed by the sea (except at low tide) and so were not generally visible to someone in the water beyond the pipes.
- There were no signs or markers indicating the location of the pipes.
- The Plaintiff knew the beach extremely well and was an experienced swimmer. He knew of the presence of the pipes and that they posed a potential risk. In fact, he had warned his friends about them on the day he was injured.
- When injured he was swimming outside the patrolled area, although many other people were also in the practice of doing this at this beach.
- On the day in question the Plaintiff had been training with friends. This involved swimming parallel to the shore for 200 metre repetitions. He said he timed out 3-4 minutes to judge the 200 metres (although he wasn’t wearing a watch). He swam past the pipes on each lap but did not see them as he did so. He gave evidence that he did not look at any land markers to judge his position but certainly would have noticed a flag or indicator to mark where the pipes were.
- The Plaintiff caught a wave in to shore and gave evidence that he followed his usual practice to look for any dangers before he commenced on the wave. The Plaintiff did not lift his head as he caught the wave and



did not see the pipe before he struck it. His Honour accepted the Plaintiff's evidence.

- The Plaintiff relied upon evidence of an engineer who said the easiest option for the Defendants to protect against such injuries would have been to signpost the location of the pipes with a tall marker placed at the end of the pipes. The Defendants argued signpost measures would either not withstand the conditions, or would attract children and create a further hazard. His Honour accepted that a sign of the type proposed by the Plaintiff's engineer was practical.
- The Civil Liability Act 2002 did not apply.

### The Decision

- His Honour disposed of the duty of care issue without much trouble.
- His Honour accepted the Plaintiff's evidence that he probably would have paused before catching a wave, noticed a marker indicating where the pipes were, and aborted the swim. He therefore found that causation was established.
- He also noted that the High Court's recent decisions (*Vairy v Wyong Shire Council* (2005) 221 ALR 271 and *Mulligan v Coffs Harbour City Council* (2005) 221 ALR 764) had demonstrated a shift in thinking about the degree of care reasonable members of the public must take for their own safety when confronted with obvious risks.
- However he distinguished this case from *Vairy* and *Mulligan*. The fact the First and/or the Second Defendant had installed the pipes meant they had intervened to make the risk greater. What's more the First Defendant only had to mark one point where the pipes were, rather than every point along the entire beach (see *Vairy*), therefore it was feasible and reasonable for either the First Defendant or the Second Defendant to have installed a sign.
- His Honour accepted that cost and inconvenience in the removal, extending or shortening of either pipe would have been disproportionate to the risk and therefore this was not a basis for negligence against either Defendant.
- He dismissed the Defendants' arguments that the Plaintiff had voluntarily assumed the risk. He found that while the Plaintiff had accepted some risk by body surfing outside patrolled areas, he did not know he was swimming into the pipes at the time of the injury and therefore did not fully appreciate the risk of injury.



- Quantum had already been agreed between the parties at \$3,500,000. His Honour deducted 50% for contributory negligence and found the Defendants to share equal responsibility for the injury.

### Implications and discussion about the ‘obviousness of risk argument’

This case is illustrative of the manner in which judges are dealing with obviousness of risk and effectively watering down the impact of *Vairy and Mulligan*.

The concept of obviousness of risk has been given close attention by the New South Wales Court of Appeal over recent months.

There have been different approaches as to whether, the obviousness of the risk is relevant to the existence of a duty of care or whether it goes only to breach of duty.

### Edson v Roads & Traffic Authority

Recently, in *Edson v Roads & Traffic Authority* [2006] NSWCA 68, Ipp JA (with whom Hunt JA and Beazley JA agreed) attempted to clarify the issue and settle the debate. Ipp noted that in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 the High Court held that the non-feasance immunity was not good law in Australia. Gaudron, McHugh and Gummow JJ at 581 opined:

“The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in *Ghantous*, the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface”.

Defendants enjoyed success in many cases in the wake of this comment where Courts effectively held that a defendant only owed a duty of care to a pedestrian who himself was taking reasonable care for their own safety. If a defect in a roadway or footpath could have been observed by an ordinary reasonable pedestrian, then the claim failed (eg *Burwood Council v Byrnes* [2002] NSWCA 434 and *Richmond Valley Council v Standing* (2002) Aust Torts Reports 81-679). Ironically, defendants were seemingly “better off” without the non feasance immunity, as the Courts disregarded whether or not the defect was created by council.

In *Edson*, Ipp JA reiterated that there is no absolute category of cases in which it can be said that obviousness of the risk determines the existence of a duty of care. In his view, what was said in *Brodie* on the issue can only be regarded as general guidelines.



However, Ipp stated that claims involving pedestrians walking along footpaths or participating in recreational activities in large areas of open land and water fall into a different factual category than others. One of the reasons for this is the often considerable expense (borne by the community) in taking steps to make areas safe for people who do not take proper care for themselves.

### **Randwick City Council v Muzic**

In *Randwick City Council v Muzic* [2006] NSWCA 66, the Court of Appeal recently pointed out that a finding that a risk of injury was obvious is not a substitute for “the careful analysis a court is required to perform” in order to assess liability. This assessment is usually performed in accordance with the oft quoted decision in *Wyong Shire Council v Shirt* (1980) 146 CLR 40. What has become known as the “Shirt analysis” requires consideration of whether:

- the particular risk of injury was reasonably foreseeable (in the sense of not being farfetched or fanciful) and if so,
- the response of the reasonable person to the risk (which calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action, and any other conflicting responsibility the defendants may have).

### **Overview**

All this probably suggests the tide has turned against defendants. While they initially enjoyed success in cases following *Brodie*, the Courts have returned to the “Shirt analysis” to determine whether or not there has been a breach of a duty of care. Even if a particular risk is known to a plaintiff, the Court is likely to still apply the *Shirt* analysis to determine liability.

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