jottings on the bar

Liability for obvious risks

By Tom Pauling QC, Solicitor-General*

In his judgment in Romeo V *Conservation Commission (NT)*[1] Kirby J made a comment which when read in context is unexceptionable but in isolation looks like a universally applicable rule of law about obvious risks. He said:[2]

> "Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about the risk is neither reasonable nor just."

The risk in that case was the presence of the Dripstone Cliffs from which Ms Romeo fell at night while intoxicated. The "reasonable nor just" formulation comes from a line of English authority which attracted Kirby J (and Brennan CJ) and which sought to keep in check "an all devouring negligence monster consuming all other torts..."[3] It applied a third step of reasonableness to control the mechanical determination of duty and breach. This aspect of Kirby J's "comment" was not readily perceived.

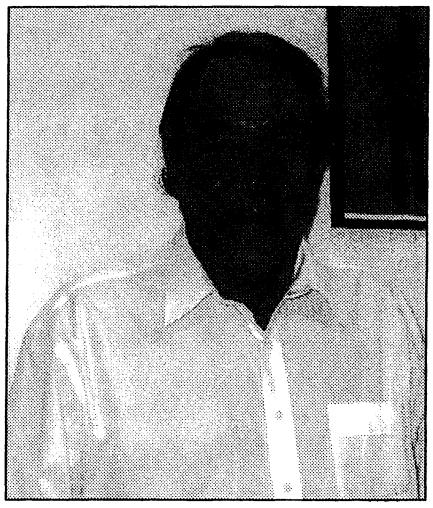
It was not long before counsel for insurers saw in this comment proof of the pendulum swinging away from almost absolute liability (once the "undemanding" tests of foreseeability was satisfied and some ingenious warning of precaution had with hindsight been imagined) towards a test requiring more care by the entrant and less of the occupier.

The Commission had argued in Romeo that the reasoning and test applied in *Nagle V Rottnest Island Authority*[4] be reconsidered and that the duty of occupiers of places to which the public had access was no greater than that described by Dixon J in *Aiken V Kingborough Corporation*,[5] namely a duty "to take reasonable care to prevent injury... through dangers... which are not apparent and are not to be avoided by the exercise of ordinary care". In the result of *Romeo*, only Brennan CJ adopted that view (as he had in dissent in *Nagel*) and *Nagel* remains undisturbed. But this did not deter those who took up Kirby J's comment as a mantra to be intoned whenever the question was asked why particular steps were not taken to avert the risk of injury: "Because the risk was obvious!!!"

In the course of argument in Romeo, following a submission as to obviousness, McHugh J interjected, saying "...the fact that the risk is obvious cannot discharge the duty. Indeed in many cases it may be a reason why extra precautions are required." His Honour's statement is a reflection of his strongly held view that employers cannot ignore risks simply because they are obvious. When met with the above mantra, his Honour often refers counsel to the passage from the judgment of Taylor J in *Smith V BHP*:[6]

"This does not mean, of course, that where an injury has been caused to an employee by his own negligence he may seek to hold his employer liable but, rather, that the duty of the latter is not fully discharged unless, in the provision of safeguards, he has taken into account, not only that particular tasks necessarily involve particular risks, but that inadvertence and inattention, short of positive negligence, are common concomitant of everyday work. The latter factors may be considerable cogency where the work of an employee exposes him constantly to the risk of injury unless there is unremitting care on his part."

It is clear that an occupier needs to take into account inadvertence or inattention on the part of the entrant, but Kirby J did just that in *Romeo* shortly before his "comment". So was the comment a universally application rule of law formulated by a wise judge, "a Daniel come to judgment"?[7] Whatever it might have been, his Honour has recanted and not just once but repeatedly. Recently, on appeal in *Swain V Waverly Municipal Council*[8] (the Bondi beach diving case), counsel quoted the Chief Justice of NSW, saying that a swimmer about to dive under the water "could see the breaking wave and realise that whatever was underneath was hidden". This exchange followed:



> McHugh J: Yes, but so what? One of the real problems that has crept into the law of negligence, and Justice Kirby's response to this in Romeo, is that whenever there is a mention of [sic] – they say, 'The risk is obvious; therefore that is the end of the plaintiff's case'. People who say that should read what Justice Taylor said in *Smith V BHP* that inadvertence is a matter that has to be taken into account. It is a variable factor. The fact that the risk is obvious does not mean the end of the plaintiff's case. It is a fact. Inadvertence is a factor that has to be taken into account.
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> Kirby J: Like Archbishop Cranmer,[9] I have tried so many times to recant and put my hand first into the flames. I did so in Wood, as was noted here. I was overstated, but it has been overblown and used everywhere.

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The reference to *Wood* is to *Woods V Multi-Sport Holdings P/L*,[10] an interesting case which both McHugh and Kirby JJ dissented and would have allowed an appeal by a competent outdoor cricketer who lost the sight of one eye playing an expansive shot in his first game of indoor cricket. McHugh J found the venue providers to be negligent in not supplying helmets with masks and would not have permitted the plaintiff to play if he wore one. Both their Honours found it negligent not to have erected a sign warning, *inter alia*, that indoor cricket is played in a confined space with a soft ball that can enter the eye-socket. Kirby J's recantation is at [127].

I leave the last word on the "comment" to Gleeson CJ[11] who having referred to the criticism of the Full Court of WA for adopting it said:

> "It is right to describe that observation as a comment. It is not a proposition of law. What reasonableness requires by way of warning for an occupier to an entrant is a question of fact, not law, and depends on all the circumstances, of which the obviousness of a risk may be only one. And, as proposition of fact, it is not of universal validity. Further more, the description of a risk as obvious may require closer analysis in a given case. Reasonableness would not ordinarily require the proprietor of an ice skating rink to warn adults that there is a danger of falling; but there may be some skater to whom such a warning ought to be given. Nevertheless, as a generalisation, what Kirby J said is, with respect, fair comment. That is how Judge French and the Full Court understood it, and they did no more than indicate that they regarded it as apposite to the present case. There is no error in that."

Assessing liability for obvious risks is a factual assessment to be made bearing in mind many factors not least the wonderful benefit of hindsight. It never was simple. For a brief moment it looked like it might be.

Endnotes

1 (1998) 192 CLR 431. The author appeared with Raelene Webb and Rosalie Balkin for the Commission.

2 At 478 [123].

3 See Balkin and Davis Law of Torts 3rd Edition [7.11]. Kirby J discarded that line in Graham Barclay Oysters Pty Ltd v Ryan, (2002) 211 CLR 540 at 628-629.

4 (1993) 177 CLR 423.

5 (1939) 62 CLR 179 at 210.

6 (1957) 97 CLR 337 at 342.

7 The Merchant of Venice, Act 4 Sc 1, | 218

8 [2004] HCA Trans 170 (27 May 2004).

9 Archbishop Cranmer was the first Archbishop of Canterbury of the Reformed Church of England who found in canon law a justification for Henry VIII to invalidate his marriage to Catherine of Aragon. Following Henry's death his involvement in politics was disastrous. He backed the wrong side (Lady Jane Gray who had nine days on the throne before being beheaded) and was forced to recant his beliefs. Later at the stake he recanted his recantation and held his hands in the flames until it was consumed. He died soon after minus the hand that "had offended".

10 (2002) 208 CLR 460 at 499-500

11 Woods at 474. appeared with Raelene Webb and Rosalie Balkin for the Commission.①

Pressure to work at a 'healthy legal culture' cont...

of Law - the single 'legal profession' could dissolve into a multiplicity of 'legal occupations', with no-one taking responsibility for the whole."

Professor Weisbrot has called for the establishment of an Australian Academy of Law "as a high priority, to bring together the various strands of an increasingly fragmented profession".

The Australian Academy of Law would bring together judges, barristers, large firm solicitors, small firm solicitors, professional associations, students and academics to focus attention on issues of professional identity, ethics and public service, he said.

"Law Deans have responded enthusiastically to the proposed Australian Academy of Law, but it will need the support of the entire profession to become a real unifying force".

Prof Weisbrot said the ALRC spent four years investigating the federal civil justice system, and paid significant attention to legal education, training and accountability in its landmark report, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89).

"Since the release of that report there have been some very positive developments. Courts, tribunals and professional organisations have moved quickly to pick up many of the ALRC's key recommendations. The Australian Government has facilitated the establishment of a National Pro Bono Resource Centre and a National Judicial College, and is currently refining its civil justice strategy.

"But with some notable exceptions, university legal education has been left behind—there's still far too much 'talk and chalk', and too little focus on practical skills and professional responsibility", Prof Weisbrot said.①