the court. Gummow J also made useful observations on this issue.[5]

Second, McHugh J repeated his concern, initially stated in *Tame v New South Wales*,[6] that, as a result of the Judicial Committee's advice in *The Wagon Mound* (No 2),[7] the concept of reasonable foreseeability has come to be equated with mere physical possibility.[8] McHugh J argued that the term 'reasonable' should be given greater content. Gummow J, however, responded[9] that the concept of reasonable foreseeability cannot be changed unless and until the High Court re-opens the case of *Wyong Shire Council v Shirt*.[10]

Third, Gummow J stated that 'a person who owes a duty of care must take account of 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'.[11]

Fourth, Gummow J discussed the concept of obvious risks or obvious danger in assessing whether a defendant breached its duty to the plaintiff.[12]

In conclusion, while the High Court's decision in *Swain v Waverley Municipal Council* will not have the same impact on the law of negligence as some other decisions, such as *Brodie v Singleton Shire Council*[13] and *Tame v New South Wales*,[14] the decision is of public interest and makes some useful observations relevant to practitioners and commentators alike. ■

Notes: **1** [2005] HCA 4. **2** See *Waverley Municipal Council v Swain* (2003) Aust Torts Reports, 81-694. **3** *Swain v Waverley Municipal Council* [2005] HCA 4 at [19] and [229]. **4** At [40]-[51]. **5** At [151]-[155]. 6 (2002) 211 CLR 317 at 351-357. **7** [1967] 1 AC 617. **8** At [79]-[80]. **9** At [108]-[109]. **10** (1980) 146 CLR 40. **11** At [137]. **12** At [139]-[143]. **13** (2001) 206 CLR 512. **14** (2002) 211 CLR 317.

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Social host liability and the *Civil Liability Act*

Russell v Edwards and *Parissis v Bourke*

By Bill Madden

Russell v Edwards,[1] a NSW District Court decision of Sidis J, concerned a 16-year-old boy who suffered significant injury[2] after diving into the shallow end of a backyard swimming pool, at a friend's family home during a birthday party. At the time he was affected by alcohol, some of which was found to have been provided by the defendant owner/s of the home, but also and perhaps mostly, by a friend of the plaintiff.

Sidis J indicated that had the case been determined under common law, the plaintiff would have succeeded, albeit with a deduction for contributory negligence, which the court assessed[3] at 25%.

Sidis J was required to consider the High Court's well-known decision in *Cole v South Tweed Heads*.[4] That decision was distinguished: >>

'In *Cole* the Court was considering the circumstances where a plaintiff of mature years indulged in an over consumption of alcohol and subsequently on different premises suffered injury…

The current circumstances involved the defendants entertaining on their premises young persons who required, by reason not only of their age but also by reason of the fact that they were permitted to consume alcohol, a considerably greater degree of supervision than the evidence established was made available to them. It is my considered view that the defendants being in a position to control the activities on their premises on that night were under an obligation, at law, to do so and that they failed in that obligation. The risk to the plaintiff in circumstances where alcohol and a swimming pool were involved, in my view, were foreseeable. The risk was such that a reasonable person in the position of the defendants ought to have recognised that preventative action should have been taken. The preventative action, in my view, would have been to have closed the swimming pool. In those circumstances on the ordinary common law basis the defendants would be responsible to the plaintiff in negligence.'

It appears that Sidis J did not have the benefit of the NSW Court of Appeal judgment in the matter of *Parissis v Bourke*,[5] a decision delivered by coincidence on precisely the same day at *Russell v Edwards*. That case also involved a party at a family home. However, in *Parissis*, the behaviour that led to the plaintiff's injury was that of someone other than the plaintiff himself. That other person was not a minor, even though the plaintiff was, and there were other persons aged over 18 present. Those circumstances may again have provided a basis for distinguishing *Parissis* from *Russell v Edwards*.

THE *CIVIL LIABILITY ACT* ISSUES

The plaintiff sustained injury at such a time as to fall under the *Civil Liability Act* NSW 2002 ('the Act'). Part 6 of the Act sets out a number of provisions regarding intoxication, which became relevant given the court's finding that the plaintiff was affected by alcohol to the extent that he had been unable to make a proper judgement concerning the depth of the water into which he dived, before he struck his head on the bottom of the pool.[6] Relevantly, Sidis J observed:[7]

'Section 50 denies recovery to a person when it is established that the person at the time of the act or omission that caused his injury was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired. I have already made a finding that the plaintiff's level of intoxication led directly to his misjudging the depth of the pool when he dived into it and thus to his injury. It appears therefore on the face of it that s50 applies to his circumstances.'

However, the plaintiff could not call upon the s50(5) exemption, as the intoxication was 'self-induced'. There were two paths open to the court under Part 6, one providing a complete defence and the other a reduction for contributory negligence of at least 25%.

Sidis J held, in language treating section 50(2) as an exception:

'The first is where it is established that the injury was likely to have occurred even if the person had not been intoxicated. In my view that has not been established in this case. One would not ordinarily anticipate a risk that a 16 year old, having all his faculties, using a backyard pool would misjudge the depth of the pool to the point where he would suffer injury.'

Section 50(2) provides that a court is not to award damages unless satisfied that the death, injury or damage to property is likely to have occurred even if the person had not been intoxicated. So, as a consequence of s50(2) the plaintiff's claim failed entirely.

Sidis J was clearly concerned at the outcome in the circumstances of this case, which she felt had not been considered by those who drafted the legislation. She observed[8] that there were:

'…no degrees of impairment specified in s50 and there are no exceptions provided in that section for minors or for persons inexperienced in the consumption of alcohol. Nor does it appear to allow for circumstances where the impairment resulting in intoxication is but one of a number of elements leading to the occurrence of an incident causing injury.'

Interestingly, the approach taken by the *Civil Liability Act* in respect of intoxication is one of the areas where the Act departs from the Review report[9] upon which it is otherwise largely based.[10] The court's comment in this matter clearly echoes the Review Panel's prescient fear that any fixed reduction for intoxication could result in injustice in some cases.

A holding appeal had been lodged as at the time of writing. ■

Notes: **1** 165/03 – *Ashley James Russell v Mark and Joanne Edwards*; unreported, NSW District Court at Newcastle, judgment delivered 23 November 2004. **2** Non-economic loss assessed at 40% of a most extreme case. **3** Judgment, p32. **4** *Cole v South Tweed Heads Rugby League Football Club Limited* [2004] HCA 29, 15 June 2004. **5** [2004] NSWCA 373. **6** Judgment, pp18-19. **7** Judgment, p21. **8** Judgment, p22. **9** Review of the Law of Negligence, http://revofneg.treasury.gov.au/content/home.asp. **10** Paras 8.14 – 8.18.

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