

*Greg  
Unwin  
Bob.*

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### Wilkins v Council of the City of Broken Hill

Citation: [2004] NSWSC 503<sup>[RTF]</sup>  
 Court: Supreme Court of New South Wales (NSW)  
 Judges: Bell  
 Judgment Date: 22/6/2004

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councils - adequacy of warning signs in municipal swimming pool - foreseeability of risk of injury - credibility of witness evidence - causation

Was the council liable for the injuries sustained by the plaintiff?

The plaintiff suffered a spinal cord injury after diving into a municipal swimming pool and striking his head on the tiled floor. The plaintiff claimed that any warning about the danger of diving was undermined by the failure of the pool attendants employed by the defendant to enforce the prohibition conveyed by the sign.

Held: (dismissing the claim)

- (1) The risk of sustaining a spinal injury from diving into the shallow end of the pool was a foreseeable one that was neither far-fetched nor fanciful.
- (2) The absence of a sign bearing the words "no diving" displayed above or below the no diving pictograph, did not detract from the effectiveness of the no diving pictograph as a sign warning against diving. *Language / age / In firm.*
- (3) It was common for pool users to dive into the pool at both the shallow and the deep end without reprimand from the pool attendants in the years up to and including the year of the plaintiff's accident. The defendant was in breach of the duty that it owed to the plaintiff by its failure to enforce the prohibition on diving at the shallow end of the pool with greater consistency.
- (4) The plaintiff had a disinclination to comply with rules. Had the plaintiff seen a sign bearing the words "no diving", it is unlikely he would have heeded the prohibition. The evidence did not support the inference that the repeated failure by the attendants to enforce the prohibition on diving led the plaintiff to believe that it was safe for him to dive.
- (5) In the present case, the defendant's breach of duty in failing to enforce with greater consistency the prohibition on diving into the pool at the shallow end did not materially contribute to the plaintiff's injury.

*Imp.*

*It can depend on facts*

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liability of councils - contractual entrant to municipal swimming pool - adequacy of warning signs around pool - existence of implied warranty concerning state of premises - credibility of witness evidence - causation

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Later Proceedings of [Wilkins v Council of the City of Broken Hill, [2004] NSWSC 503]

- \* Affirmed by - Wilkins v Broken Hill City Council [2005] NSWCA 468<sup>[RTF]</sup>
  - Special leave to appeal refused by - Wilkins v Council of the City of Broken Hill [2006] HCATrans 524

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*He saw / Didnt read sign / obvious one / would have done it anyway. / was sign adequate. / Control of diving / warnings.*

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- *Chappel v Hart* (1998) 195 CLR 232<sup>[PDF]</sup>, 72 ALJR 1344, 156 ALR 517, [1998] HCA 55, [1999] Lloyd's Rep Me 223, [1998] Aust Torts Reports 65,378 (81-492)
- *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431<sup>[PDF]</sup>, 72 ALJR 208, 96 LGRA 410<sup>[PDF]</sup>, 151 ALR 263, [1998] HCA 5, [1998] Aust Torts Reports 64,737 (81-457)
- *Bennett v Minister of Community Welfare* (1992) 176 CLR 408<sup>[PDF]</sup>, 66 ALJR 550, 107 ALR 617, [1992] HCA 27, [1992] Aust Torts Reports 61,283 (81-163)
- *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33<sup>[PDF]</sup>, 65 ALJR 426, 100 ALR 746, [1991] Aust Torts Reports 60,004, [1991] HCA 23
- *Sutherland Shire Council v Heyman* (1985) 157 CLR 424<sup>[PDF]</sup>, 59 ALJR 564, 56 LGRA 120<sup>[PDF]</sup>, 60 ALR 1, [1985] NSW ConvR 55-251, [1985] Aust Torts Reports 80-322, [1985] HCA 41, 1 BCL 327, 1 BCL 327, 2 BCL 119, 2 BCL 119, [1955-95] PNLR 238, (1986) 2 Const. L.J. 161
- *Prast v Town of Cottesloe* (2000) 22 WAR 474, 111 LGRA 253<sup>[PDF]</sup>, [2000] WASCA 274, [2000] Aust Torts Reports 64,178 (81-579)
- *Inverell Municipal Council v Pennington* (1993) 82 LGRA 268<sup>[PDF]</sup>, [1993] Aust Torts Reports 62,397 (81-234)
- *Hornberg v Horrobin* [1998] QCA 283

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- *Betts v Whittingslowe* (1945) 71 CLR 637<sup>[PDF]</sup>, [1945] HCA 31, 19 ALJ 322
- *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307, 14 NSWCCR 661, [1997] Aust Torts Reports 64,402 (81-438)

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Paul Jonathon Keith WILKINS by his next friend Eileen Beverley WILKINS, COUNCIL Of The City of BROKEN HILL

NEW SOUTH WALES SUPREME COURT

CITATION: Paul Jonathon Keith WILKINS v COUNCIL Of The City of BROKEN HILL [2004] NSWSC 503

CURRENT JURISDICTION:

FILE NUMBER(S): 20222/98

HEARING DATE(S): 12/5/03, 13/5/03, 14/5/03, 15/5/03, 17/11/03, 18/11/03, 19/11/03

JUDGMENT DATE: 22/06/2004

PARTIES:

Paul Jonathon Keith WILKINS by his next friend Eileen Beverley WILKINS (Plaintiff)  
COUNCIL Of The City of BROKEN HILL (Defendant)

JUDGMENT OF: Bell J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:

B. Gross QC / D. Williams / R. Wilkins (Plaintiff)  
J. Maconachie QC / C. Adamson SC (Defendant)

SOLICITORS:

Doyle Kingston & Swift (Plaintiff)  
Tress Cocks & Maddox (Defendants)

CATCHWORDS:

ACTS CITED:

Local Government Act 1993  
Supreme Court Rules 1970

DECISION:

1. Verdict and judgment for the defendant
2. The plaintiff is to pay the defendant's costs.

JUDGMENT:

**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION**

**BELL J**

**Tuesday 22 June 2004**

**20222/98 Paul Jonathon Keith WILKINS v COUNCIL of the City of BROKEN HILL**

**JUDGMENT**

1 **BELL J:** On 6 January 1996 the plaintiff dived into the North Family Play Centre heated pool (the North Pool) located in McCulloch Street, North Broken Hill striking his head on the tiled floor. He suffered a spinal cord injury at C5/6 with incomplete C5 quadriplegia.

2 The North Pool was subject to the control and management of the defendant, the Council of the City of Broken Hill (the Council).

3 The incident occurred on the plaintiff's 14th birthday.

4 In July 1998 the plaintiff commenced these proceedings by his next friend, Eileen Beverly Wilkins. His claim is pleaded in negligence and in contract. The particulars of breach of the duty owed to the plaintiff both in tort and contract are the same.

5 On 4 July 2002 Master Harrison made an order pursuant to Pt 31 r 2 of the *Supreme Court Rules* 1970 (the *SCR*) that the issue of liability be determined separately from the trial of quantum. She directed that the hearing of the issue liability be expedited and that it be held at Broken Hill.

6 The trial on the issue of liability commenced at Broken Hill on 12 May 2003. The evidence of the plaintiff and of a number of his witnesses was taken over the next 4 days. At the conclusion of the hearing in Broken Hill I was informed that both parties sought to have the further hearing stood over to a date to be fixed in Sydney and that both parties anticipated referring the evidence that had been taken thus far to their respective experts for additional report if necessary. I stood the proceedings over to a date to be fixed. The first date convenient to counsel for the resumed hearing was 17 November 2003. Further evidence was taken on that day and on 18 November 2003. Oral submissions were heard on 19 November 2003. I reserved judgment on that date.

7 Subsequently, by consent, I granted leave to the plaintiff to file supplementary submissions on the question of causation. Mr Gross QC, who with Mr Wilkins and Mr Williams appeared on behalf of the plaintiff, provided these on 12 December 2003. I was informed of an arrangement between Mr Gross and Mr Maconachie QC, who with Mr Adamson SC appeared on behalf of the defendant, that the defendant might file supplementary submissions in reply during January 2004. In the event the defendant did not file further submissions on causation in reply.

**The municipal pools in Broken Hill**

8 The City of Broken Hill is divided by the central mine into North Broken Hill and South Broken Hill. As at January 1996 there were two municipal swimming pools in Broken Hill; an Olympic size pool located in South Broken Hill (the South Pool) and the North Pool. Evidence was led in the plaintiff's case concerning the signage and the supervision by pool attendants at both the North Pool and the South Pool. The Council admitted by its defence that at all material times it was the occupier of the North Pool and that it had the care and management of the pool and its surroundings. It was not in issue that it also had the care and management of the South Pool.

9 The South Pool had starting blocks located at both the shallow and the deep end of the pool. The water depth at the shallow end of the South Pool was 1.15m.

depth

### The North Pool

10 The North Pool is a facility that consists of three pools, dressing sheds, office and first aid room. The main pool (the pool) runs lengthwise roughly from west to east. It is 25m by 14m. The western end is the shallow end. The water at this end is 1.15m deep. The bottom of the pool slopes downwards at a gentle angle to the eastern end. The water at the eastern end is approximately 1.4m. There is thus a drop of approximately 25cm between the shallow end and the deeper end. The pool is rectangular save for a "dog leg" at the northeastern end, at the base of a waterslide. It has a tiled surface and is bordered by a raised tiled edge. A circular babies' pool is located at the southwest corner of the facility. It is approximately 7m in diameter and holds water to a depth of a few centimetres only. Also to the south of the pool and towards eastern end of the facility is an oval shaped learners' pool approximately 14m by 8m.

11 A wide concrete walkway with brick inlays at intervals surrounds the three pools. A semi-circular bench seat is located between the pool and the babies' pool. There is an area of grass to the northwest of the complex shaded by trees along the inside of the perimeter fence.

12 There is only one entrance to the North Pool located in a cul-de-sac on the southern boundary. Entry is gained through turnstiles. As at January 1996 the price of admission was the insertion of a \$1 coin into the turnstile.

13 A notice was fixed to the right-hand wall of the entry alcove stating that any person not complying with or offending against any of the provisions of the *Local Government Act 1993* (the LGA) or of the terms of any notice, order, direction, warning or signal exhibited, issued or given thereunder was subject to removal from the facility by an employee of the Council.

14 Near the entry to the complex, painted on the concrete, was a sign reading: "Walk Don't Run".

15 At the date of the plaintiff's accident there were two warning signs attached to a metal light pole at the northwest end of the pool (Sign 1). The light pole was located on the concrete surround close to the lawn. It was almost in line with the northern edge of the pool. The two warning signs that comprise Sign 1 were attached to the light pole immediately below a timing clock. The first was a sign measuring 400mm by 600mm bearing the words "SHALLOW WATER" printed in black print against a white background surrounded by a black border. Immediately above this sign was a sign measuring 600mm by 600mm depicting a diver about to enter the water. The picture of the diver was contained within a red circle. The background was painted in white. A red bar transected the circle. I will refer to this as "the no diving pictograph". The no diving pictograph is seen in photograph 11 of Exhibit C. A photograph of a "Shallow Water" sign identical to that forming part of Sign 1 is seen in photograph 13 of Exhibit C. Photograph 21 of Exhibit C shows the appearance of Sign 1 and the timing clock. The base of the "SHALLOW WATER" sign is 2.45m above the concrete.

*What way signs face.  
How big.*

16 At the north-eastern, deeper end of the pool in line with the light pole that I have described above was a second metal light pole to which was attached a "SHALLOW WATER" warning sign of the same appearance as the "SHALLOW WATER" sign at the north-western end. I will refer to this second sign as Sign 2.

17 Sign 1 and Sign 2 faced towards the main pool.

18 There was a no diving pictograph attached to a metal light pole located on the concrete surround to the south of the learners' pool, just east of the centre line (Sign 3). This sign was angled slightly and faced the centre of the learners' pool.

19 Inlaid depth markers located at the north and south ends of the eastern wall of the pool recorded the water depth as 1.4m. The depth marker at the northern end was almost in line with the light pole bearing Sign 2. Depth markers were also located at the north and south ends of the western wall of the pool recording the water depth as 1.15m. The printing on the depth markers was white on a black background. They were set into the blue tiled walls of the pool above the water level. They were clearly visible.

20 The ladies' and mens' change rooms were located on the southwestern corner of the complex and formed part of the western boundary. An office and first aid room was located adjacent to the mens' change room on the southern boundary of the complex.

#### **The day of the plaintiff's accident**

21 6 January 1996 was the plaintiff's 14th birthday. It was a Saturday. The plaintiff, his mother and her husband, Craig Penemann, went to a local park for a birthday lunch. Following lunch they went to visit a family friend who lived in Jamison Street, South Broken Hill. Shortly before 4:00pm Craig Penemann drove the plaintiff to pick up two of his friends, a cousin Terry Delbridge and Leigh Hoskins. They were both aged around the same age as the plaintiff. It was a sunny day. Terry Delbridge suggested that they go to the North Pool. Craig Penemann dropped the three boys off outside the entry to the North Pool. He planned to pick up his children and join them there. The plaintiff and his two companions entered the North Pool. Each paid the \$1 price of admission.

22 Once inside, the facility the plaintiff and the two other boys walked to the grass area at the western end of the complex. They put their belongings under a tree near the northern boundary of the complex. The plaintiff and Leigh Hoskins were both wearing their swimming trunks. Terry Delbridge left the two of them to go the mens' changing sheds to put on his swimming trunks. There had been some discussion among the boys about having a cigarette. Leigh Hoskins lit one. The plaintiff wanted to get straight into the pool. He took off his shirt and immediately headed towards the pool. He had been inside the complex for not more than 1 or 2 minutes.

23 The plaintiff executed a running dive into the shallow end of the pool. The path that he took from his position under the tree to the western wall of the pool from which he dived is marked in black on Exhibit B (T30-31). There was some question about where he commenced his run. In evidence-in-chief he said, "I just ran and dived" (T32). In cross-examination he said that he had walked on the grass and that he had run across the concrete. He said that he had started running before he got to the concrete.

24 Leigh Hoskins was standing under a tree on the lawn at the western end of the facility watching the plaintiff. He said the plaintiff "start walking and then into a jog, then dived into the pool" (T144). He agreed that the plaintiff had been running by the time he got at or near the side of the pool. In my view nothing of moment turns on the precise point at which the plaintiff commenced to run. He ran across the concrete surround immediately prior to diving into the pool. He was running "pretty fast" (T32).

25 Prior to commencing the dive the plaintiff's left foot was on the raised border of the pool. He described himself as being "left-footed". He said that he jumped one footed at the commencement of the dive. There were other people in the pool at the time. There was no one in the water in the immediate vicinity of the point at which the plaintiff dived.

26 The plaintiff described his dive as being a normal dive. He had no recall of doing anything differently to the way in which he normally dived. The plaintiff's normal dive was one executed with his arms stretched out in front of him at the commencement of the dive. On entering the water he would bring his arms back in a scooping motion. On this occasion he said that he dived with his arms stretched out in the normal fashion. His intention in diving had been to "just get in the water" (T34). He denied that he was trying to show off or to do anything special at the time of the dive. In cross-examination the plaintiff reiterated that his dive had been a normal "running jump". When tested on the question of whether he had his arms stretched out in front of him he maintained that he was "pretty certain" that he did. He remembered leaving the edge of the pool. He did not recall entering the water. His next memory was of floating in the water.

27 The plaintiff did not suffer any abrasion or other injury to his hands or arms in the course of the dive. A mark consistent with being the imprint of a tile was visible on his head a few inches above his left ear.

28 The plaintiff dived into the pool from the western border from a position north of the midpoint and south of the light pole on which Sign 1 was displayed. He did not collide with any person before or after entering the water.

29 No expert evidence was led concerning the mechanics of the plaintiff's dive.

30 The plaintiff was cross-examined about a style of dive known as a "pin dive". This is a dive executed head first with the arms kept to the diver's side. The plaintiff said that he had tried doing pin dives once or twice at the deep end of the South Pool. He was asked if he had been attempting a pin dive on the day of his accident. He replied "not that I remember, no" (T94).

31 Leigh Hoskins said that the plaintiff executed a "normal" dive (T144). His arms had been above his head, but not brought together so as to form a point. Leigh Hoskins observed that as the plaintiff entered the water his body was "tilted a little bit" (T145). He explained this saying, "one shoulder was to one side a little bit, but nothing unregular" (T145).

32 Leigh Hoskins made a statement on 23 March 1996. It is a six page narrative account of the events of the day, made shortly after the incident, when he was 14 years of age. In that statement he said:

"From where we were standing on the grass Paul ran towards the pool. He ran across the grass, then across the concrete strip, past the big light pole, to the edge of the pool and dived into the shallow end. It started as a normal dive, with his body arched and his hands stretched out in front of him. When he was in the air I saw his left shoulder sort of twist down and his body partially turn on the side, not all the way, just a bit of a turn. I do not know if he meant to do it or not. I have never seen this happen at other times when he dived."

33 Leigh Hoskins was watching the plaintiff from behind. He saw him leave the ground at the commencement of the dive. He saw that his foot was on the side of the pool. He was firm in his recall that the plaintiff's arms were stretched out at the commencement of the dive. He was unable to say where they were at the point at which he entered the water (T152). In cross-examination Leigh Hoskins agreed that he had seen the plaintiff's left shoulder sort of twist down and his body partially turn on the side. He had not previously seen this happen on occasions when he had seen the plaintiff executing a dive.



34 On Leigh Hoskins' account of the plaintiff's dive, the extent to which it departed from a "normal dive" was in the movement of his body after he left the tiled edge of the pool and before he entered the water. This was when he observed the downward twist of the shoulder and the partial turn to the side. Leigh Hoskins' evidence, that the plaintiff commenced the dive with his hands stretched out ahead of him, was not shaken. The suggestion that the plaintiff executed a pin dive, as earlier described, is inconsistent with acceptance of Leigh Hoskins' account.

35 Terry Delbridge walked out of the mens' change room immediately before the plaintiff dived into the pool. He saw the plaintiff execute the dive. In evidence-in-chief he said:

"As I walked out I saw him diving into the pool. It wasn't like a real flat dive. It was a little bit steeper than usual" (T163).

36 In cross-examination Terry Delbridge said that he had not taken much notice of the plaintiff's dive. He was looking at him from a position side on and slightly behind him. He did not recall seeing the plaintiff's arms. He had not taken any notice. When further tested on this he said:

"Like I said, I don't recall seeing his arms. They could have been in front of him or they might not of" (T171).

37 Terry Delbridge was cross-examined concerning earlier accounts given by him of the plaintiff's accident. Prior to giving evidence he had read a statement that he made on 23 March 1996 concerning the events of this day. He was cross-examined about the contents of a statement made on another occasion when he spoke with a Mr Morris. He was shown a document, Exhibit 5, a handwritten document, with a roughly drawn plan. He agreed the document bore his signature, but did not recall who Mr Morris was or when he had spoken with him.

38 The defendant relied on the statement Exhibit 5 as a prior inconsistent statement made by Terry Delbridge. The document bears the signature of a person apparently named Morris as well as that of Terry Delbridge. It has the appearance of being notes in point form of things said by Terry Delbridge to the author. The first page is a pro forma statement form, provision is made for a claim and a policy number and the details of the maker of the statement. It is undated and records the following:

"6. I was at the pool the day of Paul's accident. Details were as follows:

- (a) It was his birthday.
- (b) I went to the pool with him.
- (c) I think we arrived at the pool around 3:30 pm or so.
- (d) We were sitting down near the pool. Leigh Hoskins was with us. He lives at 4 South Street, Broken Hill 80885021.
- (e) Leigh & I went into the change rooms to get changed. Paul had his swimmers on.
- (f) As we came out of the change room saw Paul dive into the pool. He did a high dive headfirst.

(g) He was at the shallow end.

(h) He was on his own at the time.”

39 Tendered in the plaintiff’s case was the statement made by Terry Delbridge on 23 March 1996. This is a five page narrative account of the events signed by Terry Delbridge and witnessed by a person named John Whelan. In this account, made less than 3 weeks after the event, Terry Delbridge recorded:

“When I came out the door of the change room a few minutes later, I saw Paul run to the edge of the pool, at the shallow end, and dive in. His back was arched but he seemed to come down steeper than usual, not a flat dive into the pool, but steeper than that. I cannot remember seeing his arms out in front of him but I was looking at him from the back and side and I might have missed seeing his arms.

I did not think anything was wrong and just walked over to the side of the pool where Leigh was standing. I pushed Leigh in and then jumped in myself. We were standing in the water at the end of the pool when Leigh said ‘Paul hasn’t come up from under the water yet’. I said ‘bullshit’ and Leigh said ‘no it’s not’.”

40 The statement made by Terry Delbridge on 23 March 1996 was consistent with his evidence.

41 The plaintiff was approximately 6 ft tall at the date of his accident. He weighed 65kgs. The water at the shallow end of the pool into which he dived was 1.15m in depth. The plaintiff’s head struck the tiled bottom of the pool as the result of the dive. The point of impact was on the left-hand side of the head above the line of the top of the ear and behind the ear.

42 The plaintiff had just arrived at the pool. He wanted to get into the water immediately. He ran to the edge of the pool and projected himself into the air with his left foot. In the event, the dive was a steeper one than he usually executed. This was how Terry Delbridge described it. It serves to explain the observation that Mr Hoskins made of the unusual drop of the left shoulder and twist. This is not to say that the plaintiff intended to do anything out of the ordinary. The dive was a running one. He volunteered that he had been travelling at a fast pace. I am satisfied that it was his intention to enter the water executing a conventional dive such as he had on previous occasions, but that on this occasion he projected himself into the air at a steeper trajectory than he had intended or than was usual.

43 I reject the suggestion that the plaintiff executed a pin dive. I find that at the commencement of the dive his arms were stretched in front of him in the manner described by Leigh Hoskins. I am not able to say where they were at the point he entered the water.

44 The plaintiff said that after the dive he observed two arms floating in front of him. He was not able to move. He thought the two arms belonged to someone else. He bit the thumb of one hand in an effort to get that person’s attention. It was then that he realised that the thumb was his. He started to panic. He kept trying to move but was unable to do so.

45 He was rescued from the water and taken by ambulance to Broken Hill Hospital. Shortly thereafter he was transported by air to the Royal Adelaide Hospital. He remained in the Royal Adelaide Hospital for 6 weeks. Thereafter he was transferred to the Hampstead Rehabilitation Centre, Adelaide. He spent some 9 months at that centre before returning to the family home.

**The plaintiff’s experience and competence as a swimmer**

46 The plaintiff learnt to swim around the age of 7 years. He was not a particularly keen swimmer. He was proficient without being particularly good at it. It was not an everyday occurrence for him to go swimming during the summer months.

47 When the plaintiff was in year 7 or year 8 at the Broken Hill High School he attended the South Pool regularly with members of his class for swimming lessons. The classes were designed to improve swimming technique. School teachers supervised these classes. The plaintiff was taught free-style. He did not remember receiving any instruction in pool safety. During the course of his swimming classes the plaintiff dived into the South Pool at from both the shallow and the deep ends. No one said anything to him about the risks of so doing.

48 When the plaintiff was a primary school student he had been a member of a swimming club based at the South Pool for a couple of months. Once or twice as a member of the club he had trained or attended events at the North Pool. He was not an enthusiastic member of the club; he had found it pretty boring.

49 On one occasion about 1 or 2 years prior to his accident the plaintiff scraped his nose on the bottom of the pool when executing a normal dive with his arms in front of him.

50 The plaintiff had not received any instruction concerning the risks of injury from diving. Prior to the date of his accident he had been unaware of the risk of sustaining severe head or neck injury as the result of diving into a pool.

51 The plaintiff was aware that the water at the shallow end of the South Pool was about 1.15m deep. He was aware that this was the same depth of water as was found at the shallow end of the pool. He had seen people dive into the South Pool from the starting blocks at the shallow end of the pool during races and in swimming classes. On other occasions he had seen people diving into the shallow end of the South Pool every now and then but not often.

52 The plaintiff had dived into the shallow end of the pool on occasions before his accident.

53 The plaintiff was familiar with the depth of water at the shallow end of the pool and at the deeper end. He had not taken particular note of the depth markers but he knew the depth of the water. He had stood in the pool at both the shallow and deeper ends and he was aware of how far the water came up his body.

#### **The plaintiff's knowledge of the signs at the North Pool**

54 On the day of his accident the plaintiff did not take any notice of Sign 1. From the position where he commenced to run before making his dive he could not see it. He had seen Sign 1 on other occasions. He said that had the no diving pictograph been facing him as he ran to dive into the water that day it would have made no difference to his conduct because he knew it was there.

55 The plaintiff said that he understood the no diving pictograph to mean, "no deep diving". When first questioned in chief about his understanding of the no diving pictograph he said this:

"Q. I have actually identified a type of sign and I am showing you a picture of it. I actually said 'having a red line through it'. But on those occasions when you had seen any sign like this sign that I have described, that is the swimmer entering the water inside the red circle with the diagonal red line through it, what did you interpret that sign as meaning?"

A. No diving.

Q. What do mean by that?

A. No diving deeply" (T35-36).

56 I will return to the question of the plaintiff's understanding of the no diving pictograph.

**Conduct at the North Pool: evidence of the pool users**

57 It is the plaintiff's case that any warning about the danger of diving that might have been conveyed by the no diving pictograph was undermined by the failure of the pool attendants employed by the Council to enforce the prohibition conveyed by the sign. In the plaintiff's submission the practice of diving into the shallow end of the pool was widespread and tolerated by the pool attendants.

58 There was an issue as to the extent to which the pool attendants took steps to prevent pool users from diving into the shallow end of the pool.

59 The plaintiff called a number of witnesses who were users of the North Pool as at January 1966.

**Melanie Thompson**

60 Melanie Thompson was aged 13 at the date of the plaintiff's accident. She had started going to the North Pool when she was a toddler aged around 2 years. In the years that followed she spent several hours a day, approximately 4 days per week at the complex during the summer months. By the time she was aged 10 years she was allowed to go to the pool accompanied by her sister, Bianca. She was not a strong swimmer. Bianca was giving her lessons, including lessons in diving. These lessons took place over a period of a few days when Melanie was aged around 12 years. She could not recall whether the diving lessons took place in the 1994-95 swimming season or the 1995-96 season. I am satisfied that they took place in the 1995-1996 season. Bianca was 2 years older than Melanie. She demonstrated how to dive by herself diving in at the shallow end of the pool. Melanie would watch and then attempt to dive. The diving instruction was on each occasion was of short duration, lasting not more than 10 minutes.

61 Melanie Thompson had noticed other people diving into the shallow end of the pool. In January 1996 she did not know that people were not supposed to dive into the shallow end of the pool. She had not noticed the no diving pictographs. She had never been reprimanded by pool attendants for diving into the pool. She was not aware of any person being spoken to by pool staff in this respect. Some time after the plaintiff's accident she noticed the no diving pictographs at the North Pool.

62 Melanie Thompson remembered seeing the pool attendants walking around the pool and, at times, sitting on the semi-circular bench between the pool and the babies' pool. She recalled that commonly one of the attendants was to be found in the office. She had not had occasion to take particular note of the pool attendants because she and her friends were focussed on enjoying themselves, chatting, reading and the like.

63 There was a loudspeaker system in use at the North Pool. Melanie Thompson heard announcements being made over it from time to time. She had not heard announcements over the loud speaker system warning pool users not to dive into the pool. She recollected the system being used in connection with the use of the waterslide. A number of witnesses recalled announcements being made over the loud speaker system about proper conduct on the waterslide.

64 Melanie Thompson had seen pool attendants speaking to swimmers over incidents of “bombing” in the pool. If a person persisted in “bombing” other swimmers after a reprimand, he or she would be asked to leave the complex.

### **Bianca Thomas**

65 Melanie Thompson’s sister, Bianca Thomas, recalled spending a great deal of time at the North Pool during the summer months of 1994 and 1995. Mainly she went to the pool with Melanie and her friend, Tristan Symonds. The North Pool was usually crowded. It was common for her to dive into the pool. She did so at both the shallow and the deep end. A lot of people dived into the pool at both the shallow and the deep end.

66 Bianca Thomas recalled that Melanie’s swimming lessons had taken place over December 1995 to January 1996. Melanie was scared of the deep end because she could not touch the bottom of the pool with her feet. The lessons were conducted at the shallow end. Melanie attempted to dive into the pool but she was not very good at it.

67 Bianca Thomas said it was common for youths to make running dives into the pool. She had seen them doing this from both ends of the pool. On occasions more than one of them would run and dive together. She had no recall of ever being aware of the pool attendants reprimanding young men for this behaviour, although she had seen their parents do so.

68 Bianca Thomas had not been cautioned by pool staff about diving into the pool at the shallow end. She was not aware of anyone being reprimanded for diving into the pool at the shallow end. She had not paid much attention to the pool attendants. She agreed that the principal focus of her trips to the North Pool had been on enjoyment.

69 Bianca Thomas recalled the loudspeaker system being used to reprimand swimmers. There were occasions when she heard people reprimanded for “bombing” and for jumping into the pool in a manner that generated a large splash. She did not hear the loudspeaker system used to reprimand people for diving into the pool. She acknowledged that, on occasions, she had seen people being spoken to by pool attendants and apparently being asked to leave the complex. She agreed that she had no means of knowing what the person had done to bring this about. I accepted Bianca Thomas’ evidence that she saw nothing to convey to her that diving into the shallow end of the pool was conduct that would attract a reprimand from the pool attendants.

### **Jason Channing**

70 Jason Channing was a member of the Alma Swimming Club, which was based at the South Pool. The South Pool was closed between March and November of each year. During these months swimming training was conducted at the North Pool. By March 1994 when he was aged 13 Jason Channing was an enthusiastic member of the club, attending training sessions on mornings and afternoons.

71 During the winter months training sessions at the North Pool commenced after the general public left the pool. Jason Channing would get into the pool by diving. Usually he dived in at the shallow end because it was the end closest to the showers. When Jason Channing and any other members of the swimming club dived into the shallow end of the pool they were subject to the supervision of members of the Alma Swimming Club and not the pool attendants employed by the Council.

72 When Jason Channing dived in at the shallow end of the pool he executed a racing dive. He had received instruction in diving technique.

73 During the winter months when he arrived at the North Pool for training sessions Jason Channing saw members of the public using the pool before it closed. He had seen people diving in at the shallow end. He had not seen anyone spoken to in connection with simply diving into the pool. He was aware of people being spoken to by the pool staff for other reasons, including diving too close to other people and dive-bombing.

#### **Kenneth Kemp**

74 Kenneth Kemp grew up in Broken Hill. He was born in October 1980. During summer months of 1995–96 he regularly attended the North Pool. He had been a frequent visitor to the pool in earlier summers.

75 Kenneth Kemp recalled that either one or two pool attendants were in attendance at the complex. He recalled the attendants as mainly being in the office and as sometimes patrolling around the pools.

76 Kenneth Kemp got into the pool by jumping in or diving. He had never been spoken to about diving into the pool. No one had been spoken to about diving into the pool in his presence. It was his recall that a significant number of pool users dived into the pool at the shallow end.

77 Kenneth Kemp said that when the waterslide was in operation it was common to see a pool attendant in the vicinity of it. He also saw pool attendants walking around the pool. He had seen pool attendants sitting outside the office at the western end of the complex. He had observed them speaking to people from time to time. Kenneth Kemp agreed that people were “pulled up” for running at the complex. He had not seen anyone pulled up specifically for diving.

#### **Leigh Hoskins**

78 Leigh Hoskins was born in September 1981. He was aged 14 years at the date of the plaintiff's accident. In the years before the accident he had attended the North Pool nearly every weekend during the summer months. On occasions he had visited the pool with the plaintiff. He had seen the plaintiff diving into the North Pool.

79 Leigh Hoskins had observed people diving into both the shallow end and the deep end of the pool regularly. He had not observed pool attendants reprimanding people in this connection. In chief Leigh Hoskins said that sometimes he had dived into the pool at the shallow end. In cross-examination he agreed that in 1996 he had not been able to swim. He had not executed a proper dive when getting into the pool at that time.

80 Leigh Hoskins had not seen any person cautioned for diving into the North Pool over the period 1994–96. He had been reprimanded by pool attendants on one or two occasions for “bombing” and in connection with his use of the waterslide. He recalled the loudspeaker system being used to reprimand people over the use of the waterslide. He also recalled announcements being made over the loudspeaker directing people not to “bomb” other pool users. He had not heard instructions broadcast over the loud speaker about diving.

#### **Terry Delbridge**

81 Terry Delbridge was born on the 7 March 1982. He was aged 13 years at the date of the plaintiff's accident.

82 Terry Delbridge had dived into the shallow end of the North Pool. This was the means that he used to get into the pool. He had seen other people diving into the pool at the shallow end. These included people of all sizes. He had seen males running up and diving into the pool. It was also common for people to enter the pool by the stairs or steps.

83 Terry Delbridge had not seen pool attendants speaking to swimmers who executed a dive at the shallow end of the pool. He had seen people being reprimanded for other conduct. He instanced people executing a "rail slide" on the water slide. He was not able to recall other conduct that attracted the sanction of the pool attendants. He had not observed anyone being spoken to by the pool attendants for "bombing", although he had seen people engaging in that conduct.

84 Terry Delbridge had heard the loudspeaker system in use at the pool but he had no recall of it being employed to reprimand people for any form of misconduct. He had seen pool attendants asking people to leave the complex from time to time. Apart from his belief that people were asked to leave the pool in connection with the use of the waterslide, he was not aware of the other reason for disciplinary action of this nature being taken by staff at the complex.

### **Nathan Gageler**

85 Nathan Gageler has lived in Broken Hill all his life. He started visiting the North Pool from the age of 5 or 6 years. In summer he would visit the complex 3 or 4 days a week. This was the pattern of his attendance in the years 1994 and 1995.

86 Nathan Gageler entered the pool by running up and diving into it. He estimated that 90% of the time he would dive in at the shallow end of the pool. This was the closest point of entry for him. He had seen other people diving in at the shallow end.

87 Nathan Gageler turned 14 in August 1994. He was 6 ft tall at that time.

88 Nathan Gageler and his companions would race from the back fence at the western end of the complex and dive into the pool at the shallow end. He had not been reprimanded for diving. The conduct that he remembered as attracting adverse attention from the pool staff was misbehaviour on the waterslide.

89 In cross-examination Nathan Gageler agreed that he was a friend of the plaintiff. It was put to him that he was motivated by a desire to assist the plaintiff with his case. He denied that proposition. I accepted Nathan Gageler that it was common for him to dive into the pool at the shallow end. I also accepted that he had not been reprimanded for this behaviour. He had been reprimanded on a number of occasions over his behaviour on the waterslide.

90 Nathan Gageler was not able to recall whether he had heard the loudspeaker system used at the pool prior to January 1996. He had not heard a pool attendant reprimanding people for "bombing", although he had seen that sort of conduct at the pool.

### **Tristan Symonds**

91 Tristan Symonds was born in December 1980. He grew up in Broken Hill. He started visiting the North Pool when he was about 6 or 7 years old and he spent a fair amount of time there over the following years. He was a regular visitor to the pool in summer of 1994-95.

92 Tristan Symonds would commonly leave his belongings on the lawn and dive into the pool at the shallow end because it was the closest part of the pool. He saw lots of people diving into the pool at the

shallow end. He was not aware of people being reprimanded for diving into the shallow end by the pool attendants. He had no recall of seeing pool staff reprimanding people in connection with any activity.

### **Carol Lance**

93 Carol Lance was at the North Pool with her young children on the day of the plaintiff's accident. It was her daughter, Tegan's, 7th birthday. Ms Lance is the mother of five children. She has lived in the North Broken Hill area for around 20 years and was a regular user of the North Pool. In addition to her family responsibilities she is the proprietor of two small businesses in Broken Hill.

94 Ms Lance was accustomed to diving into the pool at the shallow end. She had seen other people diving into the pool. She had never been spoken to by a pool attendant about diving into the pool and was not aware of any person being spoken to in this connection.

95 In January 1996, Ms Lance's eldest child, Holly, was aged 13. Her daughter Rachel was close to 11 years, she had two 7 year olds and a daughter who was going on 6 years. The two eldest children were accustomed to diving into the pool. They did so from any point around its perimeter including at the shallow end.

96 Ms Lance took her children to the pool regularly in during the summer of 1994–95. She was also a regular visitor in the last 2 months of 1995. She said that people entered the pool by jumping into it, diving into it and stepping into it. A lot of people dived into the pool including at the shallow end.

97 On the day of the plaintiff's accident, Ms Lance was sitting on the lawn close to the concrete surround at the western end of the pool. She saw the plaintiff being lifted out of the pool. There were a group of people around him. She did not go over to the group. She was able to see that he appeared to be in good hands. She kept her children with her. At least one pool attendant was present at the scene as the plaintiff was removed from the pool.

98 Ms Lance had been at the pool for about an hour before she observed the aftermath of the plaintiff's accident. She did not recall seeing a pool attendant prior to observing the group of people around the plaintiff, however she accepted that she might have done so.

99 Ms Lance had seen no reason not to dive into the pool. She had seen no reason to instruct her children not to dive into the pool. In the course of cross-examination she was shown the photograph of the no diving pictograph (forming part of Exhibit C). She had no recall of having seen the sign at the pool. She thought that if she had seen the sign she probably would not have dived into the pool or that she would not have allowed her children to do so.

### **The evidence of the pool attendants**

100 The defendant called Diane Remmert and Steven De Bono in its case. Both had been employed over the summer of 1995–96 as attendants at the North Pool.

### **Diane Remmert**

101 Ms Remmert commenced her training with the defendant as a pool attendant in January 1995. The training was conducted at the South Pool over a period of several weeks. She undertook the Bronze Medallion and she received instruction in resuscitation techniques. Generally, she said that she had been taught "duty of care, occupational health and safety, yeah, all the issues of sort of managing a swimming

pool” (T255). In explaining the content of her training with respect to the duty of care Ms Remmert described it as embracing pool maintenance, water quality, water testing, being able to talk to the public and control crowds and behaviour at the pool. After completing her training Ms Remmert took up duties as a call-in casual pool attendant at the North Pool. She was also employed by the Council as a cleaner at the South Pool.

102 Ms Remmert was called in as a casual pool attendant at the North Pool every couple of days during the remainder of the summer of 1995. On occasions she worked an entire 9 hour shift at the North Pool, on other occasions she was called in for shorter periods. Whenever Ms Remmert worked at the North Pool there was always a second pool attendant rostered on duty with her.

103 In the late summer of 1995 Ms Remmert was working at the North Pool on average four times a week. She had seen the plaintiff during the early months of 1995 with a group of young boys a couple of times a week. She did not know him by name, but recognised him as being one of a group of five to six boys. The composition of the group changed from time to time.

104 Ms Remmert recalled an occasion in the first few months of 1995 when she spoke to a group of young boys, of whom the plaintiff was one, over an incident involving wrestling on the lawn. The group were, “carrying on, they were swearing and just pushing and shoving. I could see somebody was going to get hurt. I then walked over” (T258). Ms Remmert said to the group, “we have other public here and somebody’s going to get hurt” (T258–9). As she walked away from the group she heard some smart remarks. She went back to her position on the semi-circular bench between the pool and the babies’ pool. She noticed that the group continued to be very boisterous. She saw a fellow pool attendant approach the group and speak to them. She observed a change in the group’s behaviour for a time following this second intervention.

105 There was another occasion in the early months of 1995 when Ms Remmert spoke to a group of young boys that included the plaintiff. On this occasion the group was mucking around by the northern side of the pool, towards the shallow end. They were pushing one another into the pool. She told them not to do that. One of the boys said, “we didn’t know we weren’t allowed to do it”. She replied with words to the effect, “you know the rules. Do it again and you’re out” (T266–7). In Ms Remmert’s opinion the boys were being “just smart-mouthed and rowdy” (T267).

106 Apart from these two occasions when she spoke to the group that included the plaintiff in 1995, Ms Remmert recalled a fellow pool attendant approaching the group on more than one occasion. She remembered that they had been “wrestling, mucking around and being out of order” (T268). She had not heard anything passing between the attendant and the group on these occasions.

107 As noted above, prior to the plaintiff’s accident Ms Remmert attended the North Pool during the summer of 1995–96 as a call-in pool attendant at least 5 days a week for some hours. She had seen the plaintiff over this period around twice a week. She attended the North Pool in the course of her employment as a cleaner and call-in pool attendant and also in a private capacity. She was a keen swimmer who visited the pool to socialise with the pool attendants who worked on different shifts and because she was a member of the swimming club.

108 Ms Remmert had no recall of ever speaking to the plaintiff by himself. She had spoken to him as one of a member of a group of young boys more than once during the summer of 1995–96. There were several occasions on which she spoke to the group. The last of these occasions was the day before the plaintiff’s accident. She was unable to recall what she had seen that prompted her to speak to the group or what she had said to them on this occasion.

109 The plaintiff did not recall a female pool attendant named Diane. He did not recall being spoken to as one of a group by a female pool attendant on any occasion. He had not been at the North Pool on the day before his accident. The plaintiff acknowledged that he had from time to time been spoken to by pool

attendants. There was no reason for him to recall Ms Remnert in particular. I accept that Ms Remnert did speak to the group of which he was a member on occasions, including shortly before his accident. She did so in her capacity as a pool attendant and I am satisfied that on these occasions she drew the attention of the group to the need to conform with the rules for behaviour at the North Pool.

110 The plaintiff did not stand out from the group of young lads as particularly memorable. He had merely been one of them. As many as 400 children might pass through the North Pool during the course of a day in summer. It was suggested to Ms Remnert that prior to the plaintiff's accident she had no reason to remember him or his friends. She did not accept that to be the case. The plaintiff's group stood out and had to be monitored with extra caution. I did not understand Ms Remnert to be saying that the plaintiff's group was the only group that fell into this category. I accept that the plaintiff's group was one of a number of groups of youngsters of whom Ms Remnert had occasion to take particular note because of the group's generally boisterous and disobedient behaviour.

111 Ms Remnert said that there were always two pool attendants on duty at the North Pool. They had access to additional call-in staff if that were needed. Staff would be called in if there was concern about behaviour at the pool or if there were large numbers of children and relatively few adults in attendance. On the occasions when she had requested additional staff her requests had been met.

112 When Ms Remnert was on duty it was usual for one pool attendant to be stationed near the waterslide. This attendant had a view of the whole pool. The second attendant would be stationed in the vicinity of the semi-circular bench between the pool and the babies' pool. Pool attendants would rotate, by which she meant each attendant would walk around the pool from time to time, keeping an eye on pool users and, if appropriate, instructing people not to run or not to jump or the like. It was necessary to speak to the younger patrons about swearing and rough play both in and out of the water. Children would be instructed "no diving", "no bombing", and to "stay out of the lap lane because that's the only lane for swimmers" (T275).

113 Ms Remnert was concerned about "bombing". She had noted that once a child left the ground they would sometimes flick themselves backwards. She was concerned that a child might hit his or her head on the pool wall on entering the water. When she saw behaviour of this type she approached the child immediately, saying, "don't do it again". Ms Remnert had on occasions directed people to leave the pool because of misconduct.

114 If Ms Remnert saw a person diving into the pool she would run over, saying words to the effect, "You know the rules". She would point to the no diving pictographs saying, "Do it again you're out" (T276). Ms Remnert was accustomed to directing attention to the no diving pictographs, the "walk don't run" sign on the concrete and to the sign near the waterslide instructing users not to block the slide.

115 Ms Remnert was a member of the swimming club that was based at the South Pool. She agreed that there were diving blocks located both at the deep and the shallow end of the South Pool. She had seen swimmers in relay races dive off the diving blocks at both ends of the South Pool. This occurred in the context of events organised by the swimming club. Ms Remnert did not agree that members of the public dived into the shallow end of the South Pool from the starting blocks. She maintained that this only occurred in connection with the swimming club's events and not on occasions when the pool was open to the public. I am satisfied that it was not common for members of the public to dive off the blocks at the shallow end of the South Pool, but that on occasions people did so. I accept that the plaintiff had seen people dive from the diving blocks at the shallow end of the South Pool on occasions.

116 Ms Remnert agreed that she had seen people diving in at the shallow end of the pool during training with the swimming club. It was her recall that generally the deeper end of the pool was used by people training with the swimming club to dive into the pool.

117 It was put to Ms Remnert that swimmers wanting to practise at the pool would swim up and down in the lap lanes and that they would dive in from both ends of the pool to do so. She said this:

“No, I wouldn’t say that’s correct. I have actually seen the odd occasion but also on the same token we asked specifically for those people not to do so. The normal way to get into the pool is just to slide themselves in and then go” (T300–1).

118 Ms Remnert agreed that members of the public could see swimmers training with the swimming club diving into the pool from the shallow end. She observed, “they had been taught to dive properly” (T301).

119 On the plaintiff’s behalf it was put to Ms Remnert that if she saw people diving into the pool in circumstances in which it did not appear that they were a danger to themselves or others that she would not approach them. She rejected this proposition saying, “It is not acceptable”. While Ms Remnert was on duty she would instruct any person whom she saw diving into the pool that diving was not allowed. She acknowledged that people did dive into the pool while she was on duty; she had lost count of the number of occasions when that had happened.

120 Ms Remnert stopped working with the defendant in March 2002. She had a workers’ compensation claim pending against the Council at the date of giving evidence. She denied that this circumstance had caused her any concern in the context of giving evidence. I accepted that to be the case.

121 Ms Remnert was shown photographs, including photograph 5 in Exhibit H. This depicts the new warning signs attached to the light pole at the pool. These signs had not been installed at the time when she ceased her employment at the North Pool.

### **Steven De Bono**

122 Steven De Bono resides in Sydney and is currently employed with the Department of Correctional Services. In the years 1993–96 he was employed with the Council as a permanent seasonal pool attendant. He worked during the summer months from November to March.

123 Before obtaining the job as a pool attendant Mr De Bono was required to obtain qualifications in life saving and first aid. New pool attendants were placed under the supervision of experienced attendants from whom they received instruction in the operation of the pumps, water safety checks and the monitoring of the pool and its surrounds for safety.

124 Mr De Bono worked at both the South Pool and the North Pool. Predominantly his duties were at the North Pool.

125 Mr De Bono was on duty on the day of the plaintiff’s accident. He had seen the plaintiff at the pool on occasions prior to this day. He was not able to say how frequently he had seen him, save to observe, “Only occasionally. There were so many faces” (T313). Mr De Bono had no recall of speaking to a group that included the plaintiff on any occasion.

126 Mr De Bono’s regular duties included checking the pump and chlorine levels. He would walk between the pools making sure that patrons were behaving properly and he monitored the waterslide. He said that he frequently had occasion to speak to pool users about diving into the pool. This would have occurred on a daily basis prior to 6 January 1996. He had asked people to leave the pool on occasions prior to January 1996. The things that had prompted him to do so included, “their behaviour, causing other

problems to patrons, diving in where they shouldn't, inappropriate use of the slide, just general unruly behaviour" (T317).

127 On the day of the plaintiff's accident Mr De Bono commenced work at 3:30pm. When he arrived John Watts, the supervisor of the pool attendants, and Leon Gusling were both on duty. At about 4:00pm Mr Watts completed his shift and left the complex.

128 When Mr De Bono started duty on 6 January 1996 he saw a group of teenagers behaving recklessly, jumping into the pool headfirst. He instructed them to stop this behaviour, pointing out that the water was too shallow. He remained in the area for about approximately 5 minutes. The conversation with the teenagers occurred around 4:00pm, shortly after he commenced duty. At this time Mr Gusling was monitoring the water slide. After this Mr Gosling came over and spoke to Mr De Bono and Mr De Bono took over monitoring the waterslide. Mr Gusling left and went to the office area.

129 Mr De Bono was watching the pool and the waterslide. After about 5–10 minutes he noticed a boy being helped out of the pool in a state of distress. Mr De Bono put the closed sign on the waterslide and went and assisted in taking the plaintiff out of the pool.

130 By the time Mr De Bono arrived the plaintiff was half out of the water. He was being helped by a young friend.

131 Mr De Bono agreed that there had been a fair bit of diving into the pool prior to the plaintiff's accident. He denied that he had seen people diving into the pool without reprimand by the pool attendants. Generally he denied that he had observed people misbehaving in circumstances in which they were not spoken to by pool attendants.

#### **The plaintiff's attitude towards authority**

132 The plaintiff had been spoken to on occasions by pool attendants at the North Pool for misbehaviour, such as climbing on the back of a swimmer in the pool, blocking the waterslide and running. Blocking the water slide enabled the user to slide down faster. The plaintiff understood this was the reason that blocking the slide was not permitted. He had heard announcements over the loud speaker system about people blocking the waterslide and climbing on people's backs.

133 The plaintiff was aware of the sign that read, "walk don't run", which was painted on the concrete at the entrance of the North Pool. This sign conveyed to him that he was not to run at any time in the complex. He acknowledged that he had run while inside the complex. He had been instructed by pool attendants not to run on occasions prior to his accident. He agreed that he had been told many times that he should not run anywhere within the complex.

134 The plaintiff knew a pool attendant named Steve. Steve had instructed him not to do things that were not permitted. When asked if he obeyed Steve the plaintiff frankly responded, "a little bit". It was put to him:

"Q. You then did it again?

A. Did it again." (T66)

135 On two occasions the plaintiff had been asked to leave the North Pool because of his behaviour. On one occasion this came about as the result of blocking the waterslide and on another occasion because he climbed on a friend's back.

136 The plaintiff was cross-examined at some length concerning his behaviour at school. He agreed that he had regularly misbehaved at school. He had been counselled about misbehaviour and his mother had been asked to come to the school to discuss his misconduct. Despite this record he continued to misbehave. He was suspended from school on two occasions in 1995. These resulted in one case from talking, joking and mucking around in class and on another occasion for smoking.

137 In the course of cross-examination on the topic of his pre-accident behaviour at school the plaintiff acknowledged that he had been a young boy who was going to do what he wanted regardless of the instructions and orders that were given to him. He had been disrespectful on occasions at school. It was put to him, again in the context of his school experience, that:

“You were not going to be told what to do if you didn’t want to do it, that was your attitude, wasn’t it?”

A. Not always, but, yes.” (T83)

138 The plaintiff’s school reports were tendered in the defendant’s case. Generally they were consistent with the view that the plaintiff in the early years of high school was a talkative, disruptive boy in class who consistently failed to perform at a level that his teachers considered to be within his ability. Notwithstanding his acknowledged poor behaviour, the plaintiff succeeded in obtaining creditable results in a number of subjects.

139 The plaintiff was also cross-examined about his conduct following his injury while he was a patient at the Royal Adelaide Hospital. He agreed that he threatened to tip his wheelchair over if he was left in it for more than 1½ hours. He had been advised to drink a lot of fluids but he had refused to do so. He agreed that throughout the period he was at the Royal Adelaide Hospital he was determined to do what he wanted to do rather than what he was asked to do. In re-examination when asked how he had been feeling about himself at the time of his refusal to cooperate with the staff of the hospital he responded, “sad, upset” (T103). I do not find the plaintiff’s conduct after his accident to be of assistance in determining his probable response to warning signs or instructions at the date of the accident.

#### **The Council’s duty to the plaintiff**

140 The Council admits that it was the occupier of the North Pool and that it had the control and management of the pool and its surroundings.

141 As I have noted the claim is brought in negligence and in contract. The common law of negligence imposed a duty on the Council to take reasonable care to avoid a foreseeable risk of injury to users of the North Pool: *Nagle v Rottnest Island Authority* (1992-1993) 177 CLR 423; *Inverell Municipal Council v Pennington* (1993) Aust Torts Reports ¶81-234 per Mahoney J at 62,399.

142 With respect to the claim in contract, the plaintiff contends that he was a contractual entrant to the North Pool and that as such he was entitled to use the complex for the mutually contemplated purpose in accordance with an implied warranty that the premises were as safe for that purpose as reasonable care and skill could make them: *Watson v George* (1953) 89 CLR 409 at 424; *Woods v Multi-Sport Holdings Pty Ltd* per Kirby J at [106].

143 Mr Maconachie submitted that *Watson v George* cannot stand with the development of the law of occupiers’ liability principally as stated by the High Court in *Australian Safeway Stores Pty Limited v Zaluzna* (1987) 162 CLR 479. In written submissions he contended:

“The proper approach is to recognise a general duty of care owed by an occupier to an entrant who enters premises on payment of a sum, and particularly a nominal sum, of money — that circumstance, together with all of the other circumstances of the case, including the expectation of the occupier that the entrant will take reasonable care for his own safety, inform the duty which is to take reasonable care in all of the circumstances of the case.

It is accepted that this Court is bound by *Watson v George* and *Astley v Austrust Limited* (1999) 197 CLR 1; the submission is put formally only.”

144 In *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 38 Mason CJ, Deane, Toohey and McHugh JJ observed:

“The appellant submits that the trial judge should have directed the jury on the footing that, if an occupier of premises agrees for reward to allow a person to enter the premises for some purpose, the occupier impliedly warrants that the premises are as safe for the purpose as the exercise of reasonable skill and care can make them. There is substantial authority in support of this proposition. More recently, in *Australian Safeway Stores Pty Ltd v Zaluzna*, this Court held, by majority (Mason, Wilson, Deane and Dawson JJ, Brennan J dissenting), that, in an action for negligence against an occupier, it is necessary to determine only whether, in all the relevant circumstances, including the fact of the defendant’s occupation of the premises and the manner of the plaintiff’s entry upon them, the defendant owes a duty of care under the general principles of negligence. In other words, it is not necessary to consider whether a special duty is owed to a particular class of entrant. However, the Court had no occasion to examine, and did not examine, the principles of the common law governing the liability of an occupier of premises who agrees for reward to allow a person to enter the premises for some purpose. In this situation, it would not be right to treat *Zaluzna* and the decisions which preceded it as authorities which overruled the principle established in *Watson v George*.” (Footnotes omitted).

145 I approach the matter upon the basis that the plaintiff was present at the North Pool as a contractual entrant and that the Council was under a duty to ensure that the premises were as safe as the exercise of reasonable care and skill could make them. In the way the plaintiff’s case was particularised and argued there was no focus on any distinction between the content of the duty owed to him in negligence and as a contractual entrant.

146 I am satisfied that the risk of sustaining spinal injury as the result of diving into the shallow end of the pool was a foreseeable one that was neither far-fetched nor fanciful.

147 The question of whether the plaintiff has proved on balance that the Council was in breach of the duty that it owed him in tort is to be determined by reference to the principles enunciated by Mason J in *Wyong Shire Council v Shirt* (1979-1980) 146 CLR 40 at 47-8. It is necessary to consider whether a reasonable council having the control and management of a municipal swimming pool would have foreseen that the operation of the pool involved a risk of injury to a class of persons that included the plaintiff. If the answer to this is “yes”, it is for the court to determine what a reasonable occupier in the position of the council would do in response to that risk. This latter inquiry requires consideration of the magnitude of the risk, the degree of the probability of its occurrence, together with the expense, difficulty and inconvenience of taking action to avoid it along with any other conflicting responsibilities to which the Council may have been subject: *Wyong Shire Council* at 47-8.

### The content of the duty

148 In *Inverell Municipal Council v Pennington* the content of the duty owed by the Inverell Council to the respondent was accepted as the need to bring to his immediate attention that diving into the pool at the point at which he dived was dangerous. In that case Mahoney JA observed (at 62, 402):

“The danger from diving into shallow water is well recognised: it is the kind of thing of which a public pool owner must be conscious. The damage apt to result from the danger, if it eventuates, is apt to be very great: it is well known as a source of paraplegia or quadriplegia. The precautions which may be taken are simple and involve no great cost: warning signs and depth markings will often be sufficient. In these circumstances, the response of a reasonable person who has set up or conducts a pool facility would, in my opinion, be to guard against the risk of inadvertence in this way.”

149 The plaintiff was present at the North Pool on this occasion for a very short interval before his accident. He did not see Sign 1 as he ran from the lawn across the concrete surround and dived into the pool but he had seen it on other occasions. In written submissions, at para 90, Mr Gross conceded that the Council could not be said to have been negligent if the focus of the inquiry were to be limited to the period between his arrival at the pool and his dive. It was accepted that the Council’s pool attendants had no opportunity in this short interval to have prevented him from diving.

150 It is the plaintiff’s case that the failure of the Council, in the months and years prior to his accident, to enforce the prohibition against diving at the shallow end of the pool that was conveyed by Sign 1, fell below the standard of care reasonably required of it. Sign 1, in the absence of reinforcement of the prohibition conveyed by it, was said to be an inadequate means of bringing to the plaintiff’s attention that diving was dangerous.

151 In the second amended statement of claim, particulars of the breach of the duty owed to the plaintiff by the Council in tort and in contract were identified in the four respects set out in paragraph 5(a) to (e):

“(a) Failure to provide appropriate warning around the pool having regard to the dangers of diving.

(b) Failure by its employees known as pool attendants to prohibit diving at the shallow end or to enforce the prohibition thereof.

(c) Failure to place warning signs in prominent positions so that they could be plainly seen by people who were at the shallow end of the pool.

(d) deleted


(e) Allowing a practice to grow up amongst young people of diving into the shallow end of the pool in spite of the signs prohibiting this when no attempt was made by pool attendants to stop this from happening.”

152 It is convenient to deal with particulars (a) and (c), which both deal with the adequacy of warning signs together.

153 In the plaintiff’s submission the capacity of the no diving pictograph located at the shallow end of the pool to convey that diving was prohibited, or to warn of the danger of diving, was reduced by three

circumstances. Firstly, the message conveyed by the pictograph lacked the reinforcement of the words “no diving”. Secondly, it was displayed immediately above the “SHALLOW WATER” sign at the shallow end of the pool. A “SHALLOW WATER” sign was attached to the light pole at the deeper end of the pool but there was no pictograph prohibiting diving at that end of the pool. There was thus no reason for a pool user who observed the signs to associate the fact of shallow water with any risk associated with diving. Thirdly, in January 1996 the no diving pictograph faced the pool. It was not visible to persons approaching the pool from the lawn.

154 The suggested deficiencies in the warning signs at the North Pool are said to have been recognised by the Council and remedied by the installation of new signs. The new signs were erected sometime after Diane Remmert left the Council’s employ in early 2002. As at 21 May 2003 when further photographs of the North Pool were taken (Exhibit H), signs comprising a no diving pictograph above the words “no diving” surround the light poles at both the western and eastern ends of the pool. The signs contain further pictograms of prohibited activities and are accompanied by a “SHALLOW WATER” sign.

  
OK  
LLA

155 The signs in place as at May 2003 are more conspicuous than Sign 1. They form a triangle around the light pole and are able to be seen by a person looking at the pole from any direction. Pool users sitting on the lawn at the western end of the pool might be expected to readily observe the no diving pictograph and the “no diving” sign as they look towards the pool.

156 The defendant submits that the circumstance that it has, since the date of the plaintiff’s accident, erected new and more prominent warning signs does not carry with it a conclusion that its conduct in displaying Sign 1 as at January 1996 fell below the standard of care required of a reasonable council operating a municipal pool.

157 The fact that new signs were erected some time in 2002 or early 2003 may be relevant to a consideration of the measures that were open to the Council to have adopted in 1996. It does not constitute an admission by the defendant that Sign 1 was insufficient to discharge the duty of care that it owed to pool users including the plaintiff: *Western Suburbs Hospital v Currie* (1987) 9 NSWLR 511 per McHugh JA at 523D; *Ryan v Electricity Trust (SA) [No 1]* (1987) 47 SASR 220.

158 I am not persuaded that the absence of a sign bearing the words, “no diving” displayed above or below the no diving pictograph detracted from the effectiveness of the no diving pictograph as a sign warning against diving. A sign depicting an activity within a red circle transected by a red bar seems to me to be a means of conveying graphically that the activity is a prohibited one. While a sign reading “no diving” may operate to reinforce the message conveyed by the no diving pictograph to persons literate in the English language I see no reason to conclude that the pictograph unaccompanied by a statement in writing of the prohibition is an inadequate means of conveying the warning.

159 In written submissions Mr Gross referred to the “no diving pictograph” as depicting a diver entering “at a significant angle into the water”. The no diving pictograph is shown in photograph 11. The angle of the diver relative to the wavy line representing the surface of the water does not impress me as a matter of moment. The question of the plaintiff’s interpretation of the no diving pictograph is a matter to which I will return. There was no evidence to suggest that the no diving pictograph was not an appropriate means of graphically depicting that the activity of diving is prohibited by reference to any applicable standard for such signs.

160 As noted, the no diving pictograph was located at the shallow end of the pool. There was no like pictograph at the deeper end of the pool. Depth markers identified the water depth at both ends of the pool. It was apparent to any person seeing the depth markers at each end that the water at the eastern end was 25cm deeper than the water at the western end. Having regard to the depth of water at the eastern end of the pool it is unsurprising that the Council placed a sign at that end of the pool warning that the water was shallow. I do not find that message conveyed by the no diving pictograph was undermined by the circumstance that the “SHALLOW WATER” sign displayed immediately beneath it was mirrored at the

deeper end of the pool by a "SHALLOW WATER" sign that was not accompanied by a no diving pictograph. Sign 1 was located at the shallow end of the pool and conveyed both that the water was shallow and that diving was a prohibited activity. Sign 2 conveyed that the water at the deeper end was also shallow.

161 The final criticism of the adequacy of Sign 1 is that it faced the pool and was not visible to persons who approached the pool from the western lawn. The light pole to which Sign 1 was attached was located close to the point where the concrete pool surround meets the lawn. The distance between the pole and the western edge of the pool is 4.5m. Sign 1 was displayed immediately below the timing clock. Together they were a prominent feature of the light pole. However, it is possible that persons unfamiliar with the pool may have entered it from the western end without seeing Sign 1. This risk has been reduced by the 360° display of the signs that have been installed since the plaintiff's accident. Nothing turns on this.

162 The plaintiff concedes that the suggested inadequacy of the siting of the Sign 1 cannot be said to have been a legal cause of his accident since he was aware of the sign. He frankly acknowledged that had he seen it on the day of his accident he would have dived in the same way that he did.

163 The plaintiff particularises as negligent both the failure to prohibit diving at the shallow end of the pool and that the Council permitted a practice of diving into the pool at the shallow end to develop. It is the plaintiff's case that as a matter of fact, regardless of the prohibition conveyed by Sign 1, diving into the pool from the shallow end was common. Any warning conveyed by Sign 1 is submitted to have been neutralised by the attitude of the pool attendants in allowing persons of all ages and heights to dive into the pool without reprimand.

164 There was a deal of evidence in the plaintiff's case that pointed to it being common for pool users to dive into the pool including at the shallow end. No one called in the plaintiff's case was aware of an instance in which a member of the public had been reprimanded by pool staff for diving. This evidence was in contrast to that of the two pool attendants.

165 The defendant submitted that the evidence of the plaintiff's witnesses was to be assessed in the context that they were pool users whose prime focus in each case was on enjoyment at the pool. Each was recalling his or her impression of the nature and extent of the supervision by pool attendants some 6 or more years earlier. At the time none had any reason to pay particular regard to the conduct of the pool attendants. This is a consideration to be taken into account. It is illustrated by the evidence of Tristan Symonds who had no recall of the pool attendants reprimanding pool users in relation to any form of misconduct on any occasion. I accepted Mr Symonds as a truthful witness. He had regularly spent time at the North Pool. The evidence that the pool attendants did take action to reprimand pool users over certain types of misconduct seemed to me overwhelming. It happened not to be a matter that impressed itself on Mr Symonds.

166 Nathan Gageler who was also a regular use of the pool had no recall of pool attendants ever reprimanding persons for "bombing". He recalled only that misconduct on the waterslide attracted adverse notice from the attendants. I am satisfied that a deal of the focus of the attention of the attendants when the waterslide was open was on supervising its use. However, the evidence taken as a whole pointed strongly to the enforcement of a prohibition by the pool attendants of "bombing". The likelihood is that they did so on occasions when Nathan Gageler was at the North Pool. I considered him to be a truthful witness. His attention happened not to have been caught by occasions when attendants reprimanded users for "bombing". Terry Delbridge, whom I also accepted, happened not to recall instances of the pool attendants reprimanding pool users for "bombing".

167 All of the witnesses called in the plaintiff's case, save for Ms Lance were persons broadly of his age, who generally were acquainted with him or with his brother. Bianca Thomas said that she and her sister, Melanie, and Melanie's friend, Tristan Symonds, had discussed their evidence. These discussions included their recollections that pool users had not been reprimanded for diving. I have recorded my acceptance of Tristan Symonds, Nathan Gageler and Terry Delbridge. I accepted the remainder of the

plaintiff's witnesses as persons who were doing their best to give a truthful account of the practice adopted by staff at the North Pool in the period prior to the plaintiff's accident.

168 Ms Lance had no connection with the plaintiff. She was a woman of mature years who had spent a good deal of time at the North Pool over the 20 years prior to 1996. She was a credible and impressive witness who had no reason to favour the plaintiff's case even at an unconscious level.

169 Both Ms Remnert and Mr De Bono impressed me as honest witnesses. I am satisfied that neither had a motive to colour her or his evidence to suit the case being made by their former employer.

170 I accept that Ms Remnert and Mr De Bono instructed pool users not to dive when they were on duty at the North Pool. Sign 1 was located at the shallow end of the pool. Ms Remnert and Mr De Bono enforced a prohibition on diving into the pool from any position.

171 The differing picture as to the practice that prevailed may be in part explained by the circumstance that the plaintiff and his witnesses did not have occasion to take particular note of pool attendants reprimanding pool users for diving.

172 As at 1996 there was a relatively small complement of pool attendants working at the North Pool. The defendant's failure to call Mr Watts, the supervisor of the pool attendants in January 1996, and other attendants including Leon Gusling was unexplained. In Mr Gross' submission I should draw the inference that their evidence would not have assisted the defendant's case. Mr Maconachie submitted that I would not draw such an inference. Two pool attendants who had occasion to speak with the plaintiff or his group (Mr De Bono had no such recollection but the plaintiff agreed he had been spoken to by an attendant named Steve) had been called in the defendant's case. Mr Watts had left the complex at the time of the plaintiff's accident and Mr Gusling was inside the office. In these circumstances it was submitted that there was no reason to infer that either had any relevant evidence to give.

173 Given that the plaintiff's case was particularised as including the conduct of the pool attendants in allowing a practice to grow up whereby young people dived into the pool at the shallow end without reprimand, I reject the submission that I should not draw an inference that the evidence of Mr Watts and Mr Gusling would not have assisted the defendant's case on the issue of the enforcement of the prohibition on diving at the shallow end of the pool. There was evidence that suggested that it was common for pool users to dive into the pool at the shallow end without being reprimanded. I consider that I can more readily accept the evidence called in the plaintiff's case that was suggestive of a want of enforcement of any prohibition on diving because the Council did not call Mr Watts, Leon Gusling or other pool attendants who were employed at the North Pool in the period 1994 – January 1996.

174 I am satisfied that it was common for pool users to dive into the pool at both the shallow and the deep end without reprimand from the pool attendants in the years up to and including January 1996.

175 Did the discharge of the Council's duty of care require that diving into the pool at the shallow end be prohibited and that the prohibition be enforced? In Mr Maconachie's submission the fact that the Council displayed a pictograph proscribing diving and that it sought to enforce that prohibition did not carry with it that it was under a legal duty either to prohibit diving or to enforce such a prohibition. I accept that is so. The question of whether the defendant has fallen below the standard of care required of it is a matter for the Court to determine: *Francis v Lewis* [2003] NSWCA 152 per Mason P at [42]–[43]; *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] 1 AC 46 per Hoffman LJ at [43].

176 There was no evidence to suggest that any person had suffered serious injury as the result of diving into the pool at the shallow end prior to the date of the plaintiff's accident. It was common for members of the swimming club to dive into the pool at the shallow end in the course of supervised training sessions. Jason Channing did so. He was 6 ft tall. It is likely that other members of the club who dived into the pool



were 6 ft tall or taller. The depth of water at the shallow end of the South Pool was the same as the depth of water at the shallow end of the pool. Members of the swimming club competed in races at the South Pool in which they dived from starting blocks into the shallow end of that pool. There is no reason to conclude that persons including those 6 ft tall or taller may not execute a shallow dive into water of 1.15m safely. This is not to say that there does not exist a risk of serious injury in the case of a person of 6 ft in height diving into water 1.15m deep.

177 Mr Maconachie pointed to the depth markers that drew the attention of pool users to the depth of water at the shallow end of the pool. It had a tiled floor and clear blue water. In his submission the Council's duty did not extend to warning of the risks of diving into the shallow end of the pool much less prohibiting diving. There was no hidden or unusual danger which gave rise to a duty to warn. The risks of diving into clear, shallow water were obvious.

*obvious risk*

178 In *Romeo v Conservation Commission* (NT) (1998) 192 CLR 431 Kirby J at 478 [123] observed:

“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”.

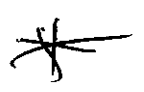
*Romeo* concerned the duty owed by a public authority to persons visiting a public reserve the subject of its control and management. However it is not in issue that the obviousness of risk is a relevant matter to take into account in determining whether a duty has been breached and whether there existed a causal relationship between any breach and injury (plaintiff's written submissions para 95).

179 I accept that the dangers of diving into shallow water in a swimming pool may be characterised as obvious to an adult possessed of ordinary powers of perception and reasoning. However, I am also satisfied that many children used the pool. Kenneth Kemp estimated that two thirds of the patrons of the North Pool were aged less than 18 years. As noted, Ms Remmert estimated that up to 400 children would visit the North Pool on a summer's day. I am satisfied that it was common for children and youths of the plaintiff's age to attend the North Pool unaccompanied by a parent or other responsible adult.

180 The Council submitted that in the absence of any evidence as to a standard I would not find either that it was incumbent on it to prohibit diving or to enforce any prohibition on diving to any greater degree than it did.

181 It is a question of determining the reasonable response of the Council to the foreseeable risk that a person such as the plaintiff might suffer injury as the result of diving into the shallow end of the pool. The touchstone is the reasonableness of the Council's response. This is to be judged in the light of current community standards: *Tame v New South Wales* [2002] HCA 35; 211 CLR 317 per Gleeson CJ at 332 [14].

182 In a recent decision Steytler J in *Usabeaga v Town of Cottesloe* [2004] WASCA 57 commented on the greater emphasis in recent times in the law of negligence on the acceptance by individuals of personal responsibility for their conduct. His Honour referred both to the observations of Spigelman CJ in *Waverley Municipal Council v Swain* (2003) A Tort Rep 81-694 at 63,778 and to the judgment of the House of Lords in *Tomlinson v Congleton Borough Council* in this respect. These cases involved claims for damages arising out of spinal injuries sustained as the result of diving into the ocean or a lake, the subject of the control and management of a public authority. Somewhat different considerations may be thought to govern the reasonable response of a public authority to the foreseeable risk of injury to children using a public swimming pool operated by the authority.



183 The Council must be taken to have been aware that a significant number of unsupervised children frequented the pool. Despite the prohibition conveyed by Sign 1 it was common for children to dive into the shallow end of the pool. It seems to me that the risk of a tall child of the age of the plaintiff misjudging a dive and sustaining severe injury required that the Council take steps to enforce the prohibition on diving that it signified by Sign 1.

184 *Hornberg v Horrobin* [1998] QCA 283 was a case in which the appellant had sustained catastrophic injury as the result of diving into a municipal swimming pool. She was a tall and immature seventeen year old girl accustomed to playing a game with younger children called "cut the corner". The trial judge found that she had dived across a corner of the pool striking her head on the side of the pool wall although at the time of the dive she was not playing the game of cut the corner. Chesterman J (in a judgment with which Pincus JA agreed) rejected the contention that the respondents had fallen below the standard of care reasonably required of them in not providing constant supervision over the appellant (and therefore every non-adult pool user).

185 At the North Pool there may have been little in the way of notice to a pool attendant that a person was about to dive. The enforcement of an effective prohibition on diving may have required a very high level of supervision. It may have required that pool attendants be stationed at intervals around each of the four sides of the pool so as to be able to stop users from diving. The cost of providing such supervision might be thought to be considerable. The plaintiff did not plead that there were an insufficient number of pool attendants rostered on duty at the North Pool when it was open to the public.

186 Mr Gross did not submit that a reasonable level of supervision required that the pool attendants watch each and every child continuously while they were in and around the pool. He accepted that from time to time persons might dive into the pool without attracting the attention of the pool attendants. He also accepted that from time to time it was possible that pool attendants had reprimanded persons for diving into the pool. His complaint was of allowing the practice of entering the shallow end of the pool by diving to develop with no apparent attempt to stop it.

187 In written submissions Mr Gross put it this way (at para 87):

"The negligence of the defendant in the present case was that the pool attendants habitually ignored and were repetitively observed to treat as unimportant, diving into shallow water at the pool and the risks of injury that this entailed. This caused children to learn a dangerous and misleading lesson that the message in the pictograph warning sign and the words "shallow water" could be safely ignored."

188 I do not consider that the evidence admits of the stark finding that the pool attendants habitually ignored persons diving into the pool. This does not sit with my acceptance of the evidence of Ms Remnert and Mr De Bono. Ms Remnert and Mr De Bono did not always work the same shifts at the North Pool. It is reasonable to consider that each had worked on occasions with other of the relatively small number of pool attendants employed at the North Pool. Each gave evidence of her or his own practice but neither described instances in which fellow pool attendants failed to reprimand pool users for diving. There was no evidence of pool users diving in circumstances in which it was apparent that a pool attendant was treating the matter as of no importance.

189 The lack of enforcement that is the subject of complaint is the failure of the pool attendants to reprimand pool users for having dived (the occasions on which a pool attendant might be on hand to prevent a pool user from executing a dive may not have been many). Notwithstanding the evidence of Ms Remnert and Mr De Bono concerning their efforts to enforce the prohibition on diving I find that it is probable that some pool attendants did not reprimand people whom they had seen diving into the pool without incident.

190 In the years and months prior to 6 January 1996 it was common for children to dive into the shallow end of the pool when the complex was open to the public generally. Any enforcement of the prohibition on diving conveyed by Sign 1 was not consistent. This was in contrast with the apparent enforcement by the pool attendants of the prohibition on other forms of potentially dangerous behaviour such as running, “bombing” and blocking the waterslide. In this respect the effectiveness of the prohibition conveyed by Sign 1 was significantly weakened. The Council could not reasonably be expected to prevent every pool user from executing a dive into the shallow end of the pool but more consistent enforcement would have served to bring to the attention of persons such as the plaintiff that this was conduct that if detected would not be tolerated.

191 The failure to take steps to ensure more consistent enforcement of the prohibition on diving conveyed by Sign 1 with respect to young pool users seems to me to have fallen below the standard of care that the Council owed to the plaintiff in tort and as a contractual entrant to the North Pool.

### Causation

192 It is necessary to consider whether the Council’s breach of the duty that it owed to the plaintiff was the cause of his injury. The plaintiff bears the onus of proving that his injuries were caused or materially contributed to by the Council’s breach of duty. The question of whether the Council’s negligence was causative of the plaintiff’s damage is a factual one to be determined by common sense considerations: *March v E & M H Stramare* (1990-1991) 17 CLR 506 per Mason CJ at 514-15 and Deane J at 523.

193 The plaintiff was aware of Sign 1. As I have noted, when asked in chief about his understanding of the no diving pictograph he responded that it meant, “no diving” and in answer to a further question he qualified that answer saying that he understood the sign to mean “no deep diving”. I accepted the plaintiff as an essentially honest witness. However his evidence on this topic seemed to me to need to be assessed with some circumspection. He was aware that a pictograph depicting an activity within a red circle transected by a red bar conveys that the activity is prohibited. He acknowledged his understanding of a “no smoking” pictograph in this respect.

194 The plaintiff said that had the no diving pictograph been accompanied by a sign bearing the words “no diving” he would not have dived into the pool. Had signs such as those that are now on display on the light pole at the shallow end of the pool been installed in January 1996 he said that he would have heeded the prohibition on diving.

195 The question of whether the defendant’s breach of duty was causative of the plaintiff’s injury is to be determined subjectively. In discussing causation in the context of a medical negligence failure to warn case *McHugh J in Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232 at 246 (fn 64) observed:

“Human nature being what it is, most plaintiffs will genuinely believe that, if he or she had been given an option that would or might have avoided the injury, the option would have been taken. In determining the reliability of the plaintiff’s evidence in jurisdictions where the subjective test operates, therefore, demeanour can play little part in accepting the plaintiff’s evidence. It may be a ground for rejecting the plaintiff’s evidence. But given that most plaintiffs will genuinely believe that they would have taken another option, if presented to them, the reliability of their evidence can only be demonstrated by reference to objective factors, particularly the attitude and conduct of the plaintiff at or about the time when the breach of duty occurred.”

In *Chappel Kirby J* referring to the subjective criterion of causation referred to the danger of the “malleability of the recollection” of even an upright witness in this connection (at 272).

196 In *Prast v Town of Cottesloe* (2000) 22 WAR 474 at 489, [62] and [63] Parker J observed of evidence of a plaintiff's belief as to the effect of a warning sign in a diving case:

“[62] It was not evidence of the appellant's recollection of his actual past conduct. It was a deduction by the appellant as to what he would have done if faced with a hypothetical situation. A witness who is both honest and compelling may, nevertheless, be led into deductive error, especially under the unconscious influence of the tragic consequences of his decision to body-surf on 25 February 1995.

[63] It is because the evidence is deductive, being founded in a hypothetical situation, that the objective circumstances including the nature and experience of the appellant are so material to an assessment of the reliability of the evidence. What is necessary is an assessment of the reliability of the deductive process which underlies the honest and compelling evidence. The observations in *Chappel v Hart* (1998) 195 CLR 232 of McHugh J (at 246) and Kirby J (at 272), which have been noted by Ipp J, in my respectful view serve to illuminate this feature of evidence of this nature.”

197 It is necessary to look to the evidence concerning the attitude and conduct of the plaintiff as at January 1996 in order to determine whether the Council's failure to enforce a prohibition on diving at the shallow end of the pool was causative of his injury.

198 The plaintiff was a high-spirited young teenager who conceded in the course of his evidence that he was not compliant with instructions given to him by pool attendants. He acknowledged that he had been instructed by pool attendants not to climb onto other people's backs in the pool. He had continued to engage in that activity after he had been told not to do it on a couple of occasions. It was put to him:

“Q. Notwithstanding that, you were told not to do it?

A. Yes.

Q. You did it anyway?

A. Yes.

Q. And were you told why you should not do it?

A. I think so, yes.

Q. You were told that it was dangerous for you?

A. Yes, it was dangerous.

Q. But notwithstanding that you were told that it was dangerous and you knew you shouldn't do it, you did it anyway?

A. Yes.”

“Q. But you had seen the sign at the western shallower end of the pool?

A. Yes.

Q. And you tell us that it had underneath it the words, ‘shallow water’?

A. Yes.

Q. And you knew without seeing a sign of any kind that it would be dangerous to dive into shallow water. You knew that, didn’t you?

A. Yes.

Q. Because you knew that if you dived into shallow water, you might hurt yourself, you knew that?

A. Yes.

Q. And you knew, didn’t you, at fourteen, that you might hurt yourself very seriously if you dived in a shallow water and struck the bottom, you knew that?

A. I didn’t really think about it, no.

Q. But it was pretty obvious, wasn’t it?

A. Pretty obvious.

Q. You knew from one prior experience that you had hurt your nose diving into the pool, had you not?

A. Yes.

Q. When was that?

A. A year or two before, maybe.

Q. Yes, and you scraped your nose, I think you told us that?

A. Yes.

Q. And that was after executing a dive?

A. Yes.

Q. What kind of a dive?

A. Normal dive.

Q. With your arms in front of you?

A. Yes.

Q. And that dive brought you into contact with the bottom of the pool?

A. Yes.

...

Q. But it was plainly obvious to you, as a result of that experience, was it not, that if in diving you came into contact with the bottom of a pool, you could do very serious injury to yourself; that was obvious, wasn't it?

A. Yes.

Q. And, accordingly, you knew then that if you dived into shallow water, that carried with it a risk that you might come into contact with the bottom of the pool; you knew that, didn't you?

A. Yes.

Q. And you, therefore, knew, didn't you, that diving into a pool where the water was shallow was dangerous.

A. Yes.

Q. Notwithstanding that, you tell us you continued to dive into water that you knew to be shallow?

A. Yes.

Q. Knowing that there was a risk that you could seriously hurt yourself?

A. Never thought I'd break my neck.

Q. You may not have thought you would break your neck, but you knew it would carry a serious risk of injury, didn't you?

A. Yes.

...

Q. So that you knew from that time, a year or two before your accident, that if you dived into shallow water, you ran the risk that you might seriously hurt your head; you knew that, didn't you?

A. Yes.

Q. And you continued to do it?

A. Yes." (T62-4)

200 I have referred to the evidence of the plaintiff's school performance. The Council tendered a number of his school reports in its case. Mr Gross submitted that in considering the question of causation the focus should not be upon the plaintiff's school reports. The criticisms made of him by teachers in these reports related to his consistency of effort and concentration in his schoolwork. It was apparent that prior to his accident he was a gregarious, talkative youth who was not achieving optimum performance in schoolwork. This, it was submitted, provided little assistance in determining the likelihood of him diving into the shallow end of the pool had the Council taken reasonable care for his safety consistent enforcement of the prohibition on diving at the shallow end of the pool.

201 The plaintiff's evidence concerning his school performance and the contents of the school reports is evidence of his behaviour around the time of his accident. It is not without significance in deciding whether to accept his evidence that had he seen a no diving pictograph accompanied by the words "no diving" at the shallow end of the pool he would not have dived into it.

202 On the occasion of his accident the plaintiff had been at the North Pool for a very short interval of time before he ran across the concrete pool surround and dived into the pool. In evidence-in-chief he was asked about his observations of people making running dives:

"Q. Had you seen any of those persons doing running dives?

A. Yes.

Q. So far as running was concerned around the pool, did anything happen that you ever saw where people said anything about that?

A. Running around the pool or running into a dive?

Q. Running around the pool?

A. Yes, they would get told off for that." (T38.45-55)

203 It was not clear whether the plaintiff was suggesting that there was in his mind a distinction between running around the concrete pool surround, which he knew to be against the rules, and running across the pool surround to execute a dive, which he did not know to be against the rules. I am satisfied that the plaintiff knew that pool users were not permitted to run on the concrete pool surround in any circumstances.

204 The plaintiff's case is that it is no answer to say that he was a strong willed and disobedient youth and to infer from this that he would not have been deterred from diving despite more active enforcement of the prohibition on it nor to point to his acknowledgment that he knew that diving into shallow water could be dangerous. In Mr Gross' submission he was a child who lacked appreciation of the risk of severe injury. In the event that the Council had taken more active steps to enforce the prohibition on diving there is no

reason to conclude that he would still have dived on this day. His decision to do so reflected an accepted practice of entering the pool at the shallow end by diving.

205 Mr Gross relied on the decision of the Alberta Court of Appeal in *McCabe v Westlock Roman Catholic Separate School District No 110* [2002] 1 WWR 610. In that case the plaintiff was rendered quadriplegic following an accident in her high school gymnastics class. She brought proceedings against the gymnastics teacher, the principal and the school district. The judgment of the Court was delivered by Wittmann JA (the Court was constituted by Wittmann, McFadyen and Picard JJA) who found no error in the trial judge's reasoning on the question of causation. She found that each of a number of identified shortcomings in supervision amounting to breaches of the duty owed to the plaintiff were sufficient to have caused the accident. The breaches had been combined in an "additive and synergistic" manner such that each augmented the other, thereby increasing the risk of injury.

206 The plaintiff in *McCabe* sustained her injury as the result of an attempt to carry out a partial back salto onto a crash mat from a box horse. She under-rotated landing on her neck. The primary judge's findings of fact included that the activities being performed by students on the box horse were inappropriate given their level of experience and training, that the teacher failed to ensure that proper progressions were learned by the students for all of the moves that they were attempting to complete. The configuration of the box horse at full height and the presence of the crash mat were inappropriate for a high school gymnastics class and no warnings had been given concerning this inherently dangerous configuration. The teacher had failed to adequately supervise the students at the box horse station and he had, wrongly, encouraged his students to be "creative" in order to obtain higher marks.

207 In Mr Gross' submission the repeated supervisory failures by the pool attendants had an additive and synergistic effect. He contended that the plaintiff became increasingly assured that it was reasonable and safe to dive into the shallow end of the pool. The belief became progressively more entrenched and produced a growing confidence in his ability to do so. He was said to be vulnerable to error because of a lack of appreciation of the significance, in terms of safety, of the rapid increase in his height and weight that he had undergone in the previous year at the age of 13. The evidence in this respect was that given by the plaintiff in chief:

"Q. As at the time of your accident on Saturday 6 January 1996, what was your approximate height?

A. 6 foot.

Q. During the preceding calendar year, that is 1995, when you had been in year 8 and you were aged 13, had you experienced any increase or spurt in your height and weight?

A. Probably, yeah." (T 18).

The plaintiff's evidence that he considered that it was "fine" to dive into the pool at the shallow end was the evidence relied upon in support of the submission that it was the Council's repeated supervisory failures that led to his increased assurance that it was safe to dive.

208 In his supplementary written submissions Mr Gross contended that:

"There is insufficient evidence to support a conclusion that in the absence of the many repeated breaches of duty by the pool attendants over a long period, the plaintiff would still have been injured in the same manner." (WS paragraph 32).

He invited the Court to draw an inference of causation relying on the judgment of Dixon J in *Betts v Whittingslowe* (1945) 71 CLR 637 at 649:

“... The breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty.”

209 Mr Gross noted that although *Betts* was a case concerning an employer’s breach of statutory duty the principle stated by Dixon J has been relied upon in cases concerned with a breach of a common law duty of care: *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 per Gaudron J at 420; *Chappel v Hart* [1998] HCA 55; 195 CLR 232 per Gaudron J at 238-239 and Kirby J at 273; *Commonwealth v McLean* (1996) 41 NSWLR 389 at 408-9; *Council of the Municipality of Waverly v Bloom* (1999) Aust Torts Reports 81-517 at 66,146 (Mason P, with whom Sheller JA agreed).

210 In further support of this submission Mr Gross referred to the judgment of Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 467:

“When there is a duty to take a precaution against damage occurring to others through the default of third parties or through accident, breach of duty may be regarded as materially causing or materially contributing to that damage, should it occur, subject of course to the question whether performance of the duty would have averted the harm.”

and to the judgment of Gaudron J in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 420-21:

“... Generally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect ... it will be taken that the breach of the common law duty caused or materially contributed to the injury.”

211 It is the plaintiff’s submission that the evidential onus does shift and *prima facie* causation is established by showing an accident that falls within the range of the risk created by the defendant’s negligence. In support of this contention Mr Gross referred to the judgment of Mason P in *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 at 316 submitting that his Honour had there observed that the question of whether there is a possible shift of the onus of proof in these situations is an open question which still awaits resolution. In that case after reviewing the authorities Mason P concluded that it was not open to an intermediate court of appeal to take the path indicated by Mason J in *Heyman* or Gaudron J in *Bennett*.

212 Further consideration was given to this question in *Chappel*. Gaudron J cited Dixon J’s judgment in *Betts* with approval at 238 [8] in the context of failure to warn in a medical negligence case. Kirby J, who with Gaudron J and Gummow J was in the majority in the result in that case, observed at 273 [93(8)]:

“Nevertheless, the realistic appreciation of the imprecision and uncertainty of causation in many cases – including those involving alleged medical negligence – has driven courts in this country, as in England, to accept that the evidentiary onus may shift during the hearing. Once the plaintiff demonstrates that a breach

of duty has occurred which is closely followed by damage, a prima facie causal connection will have been established (*Betts v Whittingslowe*). It is then for the defendant to show, by evidence and argument, that the patient should *not* recover damages.”

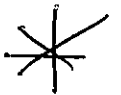
His Honour went on to express his view that Lord Wilberforce’s exposition in *McGhee v National Coal Board* [1973] 1 WLR 1 at 6 was compelling.

213 McHugh J who was in dissent in *Chappel* observed at 247–8, [34]:

“[T]he onus of proving that the failure to warn was causally connected with the plaintiff’s harm lies on the plaintiff. However, once the plaintiff proves that the defendant breached a duty to warn of a risk and that the risk eventuated and caused harm to the plaintiff, the plaintiff has made out a prima facie case of causal connection. An evidentiary onus then rests on the defendant to point to other evidence suggesting that no causal connection exists. Examples of such evidence are: evidence which indicates that the plaintiff would not have acted on the warning because of lack of choice or personal inclination ... Once the defendant points to such evidence, the onus lies on the plaintiff to prove that in all the circumstances a causal connection existed between the failure to warn and the injury suffered by the plaintiff.”

214 This case does not give rise to difficulties in proof of causation of the sort with which the Courts were concerned in *Betts*, *McGhee* or in *Bendix*. The plaintiff’s accident is not an unexplained event. He dived into the pool knowing the depth of water at the shallow end and being aware of Sign 1. However, I have found that the Council was in breach of the duty that it owed to the plaintiff by its failure to enforce the prohibition on diving at the shallow end of the pool with greater consistency. Gaudron J in *Bennett* observed that a case based on a failure to act may fall for analysis in a different way to a case based upon a positive act where questions of causation are answered by what, in fact, happened (at 420). Her Honour went on to refer to Mason J’s judgment in *Heyman* to which I have referred.

215 Upon an acceptance for present purposes that the observations of McHugh J in *Chappel* that I have set out at [213] above (upon which Mr Gross relied in his supplementary submissions), expressed in the context of a medical negligence failure to warn case, are apt to proof of causation in the present case, it seems to me that the evidence of the plaintiff’s disinclination to comply with rules makes it difficult for him to prove the causal link between the failure to enforce the diving prohibition with greater consistency and his injury on this day.



216 The plaintiff was aware of the sign saying, “walk don’t run” near the entry to the North Pool. He understood that he was not to run around the pool. He had previously been admonished by pool attendants for running at the pool and on one occasion he had been asked to leave because of this conduct. He understood that the prohibition on running on the concrete pool surround was because of the risk of injury from falling. Nonetheless from time to time he did run on the concrete pool surround.

217 On occasions the plaintiff engaged in other activities that he knew to be prohibited including blocking the water slide and climbing onto the back of other swimmers. He understood that this was behaviour for which one could be asked to leave the pool complex.

218 I do not accept that had the plaintiff seen a sign such as those subsequently installed at the North Pool bearing the words “no diving” he would have heeded the prohibition. Had the prohibition on diving been enforced with the same consistency as the prohibition on “bombing”, climbing on the backs of



swimmers and on running was enforced by the pool attendants, I am not persuaded that it is likely that that the plaintiff would not have dived into the shallow end of the pool on this day. The dive was a running dive. I am satisfied both that running across the concrete pool surround was prohibited by notice and that the prohibition was actively enforced by the pool attendants.

219 I am unpersuaded that the evidence supports the inference that the repeated failure to enforce the prohibition on diving can be said to have led the plaintiff to believe that it was safe for him to dive. While some of those who gave evidence were not aware of the no diving pictograph at the shallow end of the pool, the plaintiff was not one of them. I am satisfied that at the age of 14 he understood the sign to mean that diving was prohibited.

220 I have concluded that the Council's breach of duty in failing to enforce with greater consistency the prohibition on diving into the pool at the shallow end did not materially contribute to his injury. This conclusion disposes of the plaintiff's claim in negligence. It was not submitted that a finding adverse to the plaintiff on the question of causation did not also dispose of his claim based upon the breach of the duty owed to him as a contractual entrant to the North Pool.

221 In case I am in error in concluding that the plaintiff has failed to prove that the Council's breach of duty caused his damage it is appropriate for me to deal with two defences upon which the Council relied.

### **Volenti**

222 The Council pleads that it is not liable to the plaintiff in any event because he voluntarily accepted the risk of injury by diving into the shallow end of the pool when he knew the depth of the water and that it was unsafe to dive into water of that depth.

223 In *Moore v Woodforth* [2003] NSWCA 9 Mason P (in a judgment with which Meagher and Heydon JJA agreed) approved the following statement of the principles applicable to the defence of Volenti made by the primary judge:

"The defendant has to establish that the plaintiff knew of the risk or danger or that he fully comprehended the nature and extent of the risk and accepted the whole risk. (*Roggenkamp v Bennett* (1950) 80 CLR 292).

There are three elements that must be established by the defendant:

- (a) That the plaintiff knew of the danger;
- (b) that he fully appreciated the risk of injury created by the danger; and
- (c) he voluntarily agreed to accept the risk and its consequences.

This last element is an objective test to be inferred from the plaintiff's words or in this case his conduct (*Insurance Commissioner v Joyce* (1948) 77 CLR 39). What the third element means is that the plaintiff fully accepted the risks (*McPherson v Whitfield* (1996) 1 Qd R 474 at 480). His Honour Mr Justice Lee said in that case at 481, that where acceptance of the risk is to be implied 'from the mere fact that the plaintiff has undertaken the activity which is said to give rise to the risk, it will, in my opinion, often be difficult if not impossible to infer that the plaintiff has taken the legal risk of injury upon himself.'

224 *Moore v Woodford* was a case in which the appellant, a spear fisherman, suffered injury when struck by the propeller of a motorboat. Mason P observed at [32]:

“This was not a case where it was proved that the plaintiff fully comprehended the extent of the risk and chose to accept or ignore it (cf *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9 at [125]) or otherwise conducted himself so as to attract the very demanding standards of this ill-defined defence.”

225 In this case the Council submits that the plaintiff knew everything he needed to know as to the dangers of diving in the shallow end of the pool, having regard to his familiarity with the pool and the circumstance that on a previous occasion he had scraped his nose when diving into it.

226 The Council submits that it has established the second element of the defence by the plaintiff's admission in cross-examination of his awareness that serious injury might attend a dive. In the Council's submission with this knowledge the plaintiff freely, and voluntarily executed a dive that was steeper than usual into the shallow end of the pool.

227 The evidence upon which the defendant relied in the cross-examination of the plaintiff is extracted at [199] above.

228 I accept that the plaintiff may have understood that there was some risk of injury associated with diving into the pool at the shallow end, however, I do not find that he appreciated that he risked permanent injury of the kind that he sustained as the result of diving into the pool or that he agreed to accept that risk and bear the legal consequences of such an injury. In this respect I am mindful that the plaintiff had just attained his fourteenth birthday. While not of tender years he was nonetheless a child. His ability to appreciate the risk and to voluntarily accept the legal consequences of doing so seem to me to have been reduced because of his immaturity.

229 I am not persuaded that the Council has made good its defence of *Volenti*.

### **Contributory negligence**

230 The Council pleads that the plaintiff contributed to his own injuries.

231 In *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 the Court observed at 494:

“The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage; *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42–49 and *Broadhurst v Millman* [1976] VR 208 at 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance.”

232 In considering contributory negligence it is again important to have regard to the plaintiff's age. In *Joslyn v Berryman* [2003] HCA 34; 77 ALJR 1233 McHugh J said at 1240 [32]:

“The test of contributory negligence is an objective one. Contributory negligence, like negligence, “eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question” (*Glasgow Corporation v Muir* [1943] AC 448 at 457). One exception to that rule is that, in considering whether a child is guilty of contributory negligence, the standard of care is tailored to the age of the child (*McHale v Watson* (1966) 115 CLR 199).

233 In the defendant’s submission the plaintiff’s failure to take care for his own safety and the causative influence of that failure vastly outweighs any breach that might be found against the Council. It is contended that having regard to the immediacy of the plaintiff’s action, the steepness of his dive and the impracticability of the Council being able to influence what he did means that the apportionment should favour the plaintiff bearing not less than 80% of the responsibility for his injuries. The plaintiff submits that if he is to be found to have failed to take care for his own safety by, for example, not executing a shallow dive or running to make the dive, the extent of his contribution should not exceed 20%. In his written submissions Mr Gross placed emphasis on the plaintiff’s youth and that his failure to carry out a shallow dive was not the result of any intention on his part.

234 Taking into account the plaintiff’s youth and immaturity, I nonetheless consider that his failure to take care for his own safety by executing a running dive into the shallow end of the pool to have been a significant cause of his injury and if he were entitled to a verdict that it would be necessary for it to be reduced by a contribution of 50%.

#### **ORDERS**

235 For these reasons I have concluded that there should be a verdict for the defendant and judgment accordingly. There appears to be no reason why costs should not follow the event.

1. Verdict and judgment for the defendant.
2. The plaintiff is to pay the defendant’s costs.

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LAST UPDATED: 22/06/2004