High Court of Australia

Wyong Shire Council v Shirt [1980] HCA 12; (1980) 146 CLR 40 (1 May 1980)

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WYONG SHIRE COUNCIL v. SHIRT [1980] HCA 12; (1980) 146 CLR 40

Negligence

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Stephen(1), Mason(2), Murphy(3), Aickin(4) and Wilson(5) JJ.

CATCHWORDS

Negligence - Duty of care - Breach of duty - Foreseeability of risk of injury - Likelihood of harm occurring - Erection of sign "deep water" in vicinity of shallow water - Whether foreseeable that inexperienced water-skier would fall and suffer injury.

HEARING

Sydney, 1979, October 30, 31; 1980, May 1. 1:5:1980

APPEAL from the Supreme Court of New South Wales.

DECISION

1980, May 1.

The following written judgments were delivered: -

STEPHEN J. I have had the advantage of reading the judgment of my brother
MASON J. According to Lord Atkin's statement of principle in Donoghue v. Stevenson [1931] UKHL 3; (1932) AC 562, at p 580 , as it has been refined in later decisions, prima facie a duty of care arises on the part of a defendant to a plaintiff when there exists between them a sufficient relationship of proximity, such that a reasonable man in the defendant's position would foresee that carelessness on his part may be likely to cause damage to the plaintiff (Home Office v. Dorset Yacht Co. Ltd. [1970] UKHL 2[1970] UKHL 2; ; (1970) AC 1004, at pp 1027, 1034, 1054, 1060 ; Anns v. Merton London Borough Council [1977] UKHL 4; (1978) AC 728, at pp 751-752). It has not been suggested that there were present in the instant case any considerations which negated the duty. Indeed, the appellant Council conceded in this Court that it was under a duty of care to persons water skiing in that part of the lake in which the plaintiff sustained injury. (at p44)

2. The issue, then, is whether it was reasonably open to the jury to conclude, as they did, that the Council was in breach of its duty to take care. The majority in the Court of Appeal thought that this question should be answered in the affirmative when, as Glass J.A. put it, "allowance is made for the undemanding test of foreseeability" (1978) 1 NSWLR, at p 641 . (at p44)

3. Glass J.A. described the test as "undemanding" because in his view in its application to breach of duty the test involves the defendant in liability for injury which, though foreseeable, is extremely unlikely and may be described as "only a remote possibility" (1978) 1 NSWLR, at p 642 . His Honour specifically rejected the notion that the test denotes only events which are "likely to happen" or "not unlikely to happen" (1978) 1 NSWLR, at p 641 . He relied on Lord Reid's observations in Koufos v. C. Czarnikow Ltd. [1967] UKHL 4; (1969) 1 AC 350 and

comments made by the Judicial Committee in The "Wagon Mound" (No. 2) [1966] UKPC 1; (1967) 1 AC 617 . But he made no reference to the opposing view expressed by Barwick C.J. in Caterson v. Commissioner for Railways [1973] HCA 12; (1973) 128 CLR 99, at pp 101-102 , where the Chief Justice stated his preference for the "not unlikely to occur" formulation. (at p44)

4. Despite the comment by the Chief Justice in Caterson (1973) 128 CLR, at p 102 on Lord Reid's observations in Koufos (1969) 1 AC, at pp 385-386 , Lord Reid there asserted that liability in tort extended to "any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case". A later passage in Lord Reid's speech (1969) 1 AC, at p 389 makes it plain that his Lordship was using the expression "liable to happen", not in the sense of "not unlikely to happen", but so as to include an event which may be described as "a very improbable result". (at p45)

5. So understood, his Lordship's comments are entirely consistent with what his Lordship had earlier said in delivering the opinion of the Judicial Committee in The "Wagon Mound" (No. 2) (1967) AC, at pp 642-643 . I venture to think that some confusion has arisen as to what was said and decided in that case by reason of the quotation of a single sentence from the opinion which appears at p. 642. This sentence, when read in isolation and divorced from the discussion which precedes and succeeds it, is apt to convey an impression different from that expressed by the opinion when read in its entirety, as it should be. The sentence is in these terms:

"In their Lordships' judgment Bolton v. Stone [1951] UKHL 2; (1951) AC 850 did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man."

Taken in isolation this observation may lend itself to the interpretation that foreseeability extends only to that which is not unlikely to occur. (at p45)

6. His Lordship's discussion of the foreseeability doctrine began earlier with a classification of the cases which preceded Bolton v. Stone [1951] UKHL 2; (1951) AC 850 , and continued with an examination of that case. The examination was designed to show that the case raised a new problem, the problem being that posed by a risk of injury which was foreseeable, notwithstanding that "the chance of its happening in the foreseeable future was infinitesimal", so infinitesimal "that it was only likely to happen once in so many thousand years" (1967) AC, at p 642 . The House of Lords held that there was no breach of duty, not because the risk of injury was not foreseeable, but because the risk, though foreseeable, was so small that a reasonable man would have been justified in disregarding it and taking no steps to eliminate it. Lord Reid then went on to observe that a reasonable man would only neglect such a small risk if he had some valid reason for doing so, "e.g. that it would involve considerable expense to eliminate the risk". (at p45)

7. Following the critical sentence which I have quoted above, Lord Reid said (1967) AC, at pp 642-643 :

"What that decision" (Bolton v. Stone) "did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it."

In this sentence his Lordship characterizes the risk in Bolton v. Stone, earlier described as "infinitesimal" yet one which could not be described as "a fantastic or far-fetched possibility", as none the less constituting "a real risk". (at p46)

8. Finally, Lord Reid went on to deal with the facts as they had been established in The "Wagon Mound" (No. 2). He said (1967) AC, at pp 643-644 :

"In their Lordships' view a properly qualified and alert chief engineer would have realised there was a real risk here and they do not understand Walsh J. to deny that. But he appears to have held that if a real risk can properly be described as remote it must then be held to be not reasonably foreseeable. That is a possible interpretation of some of the authorities. But this is still an open question and on principle their Lordships cannot accept this view. If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense." (at p46)

9. It is beyond question that their Lordships positively rejected the view that a risk of injury which is remote is of necessity not a real risk and that it falls outside the concept of foreseeability. What is more, as I read the opinion, the rejection of this view was essential to the decision in the case. Although this Court is no longer bound by a decision of the Privy Council, we will accord it great weight (see Viro v. The Queen [1978] HCA 9; (1978) 141 CLR 88), especially when it is unanimous and it has been given on appeal from an Australian court. (at p46)

10. However, it is of some significance that this Court in Chapman v. Hearse [1961] HCA 46; (1961) 106 CLR 112, at p 120 , though acknowledging the importance of the question under consideration, refrained from deciding it. Since then, by way of contrast to the observations of Barwick C.J. in Caterson (1973) 128 CLR, at pp 101-102 , we have seen the acceptance and application by Windeyer and Walsh JJ. in Mount Isa Mines Ltd. v. Pusey [1970] HCA 60; (1970) 125 CLR 383, at pp 398-400, 413 of the concept of foreseeability as explained in The "Wagon Mound" (No. 2) (1967) AC, at pp 642-643 . This is not to say that Barwick C.J. is without support on the point. On the contrary, it seems that Dixon C.J. (1961) 106 CLR, at p 115 was inclined to a somewhat similar view - see Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR, at p 398 , and we know that earlier Walsh J. had based his judgment at first instance on a similar view in The "Wagon Mound" (No. 2). (at p47)

11. Notwithstanding this Australian support for a narrower version of the foreseeability doctrine as applied to breach of duty, this Court would be well advised to accept that the law upon the point was correctly stated and applied by the Judicial Committee in The "Wagon Mound" (No. 2.). I say this not only because The "Wagon Mound" (No.2) was a unanimous decision given on appeal from the Supreme Court of New South Wales, but also because there are sound reasons for accepting it as a correct statement of the law. (at p47)

12. In essence its correctness depends upon a recognition of the general proposition that foreseeability of the risk of injury and the likelihood of that risk occurring are two different things. I am of course referring to foreseeability in the context of breach of duty, the concept of foreseeability in connexion with the existence of the duty of care involving a more generalized enquiry. (at p47)

13. A risk of injury which is quite unlikely to occur, such as that which happened in Bolton v. Stone [1951] UKHL 2; (1951) AC 850 , may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable. (at p47)

14. In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of

injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position. (at p48)

15. The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors. (at p48)

16. In this case, however, the argument was aimed at the foreseeability of the risk. I need not restate the facts as they have been conveniently set out by Wilson J. It was contended that the jury could not reasonably find that a reasonable man in McPhan's circumstances would have foreseen that the message conveyed by the sign placed in the position in which it was fixed might lead to a risk of injury by inducing an inexperienced water-skier unfamiliar with the area to ski in the water immediately beyond the sign in the mistaken belief that it was deep whereas in fact the depth was only three feet six inches. (at p48)

17. Despite the force of Mr. McHugh's argument I am not persuaded that a finding of breach of duty was beyond the jury's competence. A reasonable man might well have concluded that the sign was ambiguous and that it could be read as an indication that there was a zone of deep water beyond, rather than in front of, the sign. A reasonable man might also have concluded that a water-skier, so reading the sign, might be induced to ski in that zone of water, mistakenly believing it to be deep. The possibility might also have occurred to a reasonable man that it would be unsafe for an inexperienced water-skier to ski in water having a depth of three feet six inches and no more. He might well contemplate the possibility of a skier being projected into the water at a relatively high speed in consequence of a mishap and thereby sustaining injury in striking the bed of the lake. (at p48)

18. As this is not an appeal against a finding of fact it is not for me to find that a reasonable man in McPhan's position would necessarily have foreseen the risk of injury. It is sufficient for me to say that the jury's conclusion that there was a foreseeable risk of injury was not unreasonable and that it was conclusion which was open on the evidence. In saying this I am mindful that the foreseeability of the risk in the instant case is a question on which minds may well differ, as indeed they have done. It is not a question which a judge is necessarily better equipped to answer than a layman. (at p49)

19. I would therefore dismiss the appeal. (at p49)

20. There remains for consideration the application for special leave to appeal made by the two individual respondents who were joined as defendants to represent The Entrance Aquatic Club. The trial judge directed the jury to return a verdict in their favour in the action itself and in the Council's cross-claim against them. However, the Court of Appeal, by majority, set aside the judgment and verdict on the cross-claim and ordered a new trail. It is from this order that the two respondents seek special leave to appeal. In my opinion the case is not one in which special leave should be granted. (at p49)

21. In the result I would dismiss the appeal and refuse the application for special leave to appeal. (at p49)

MURPHY J. In the trial of this negligence action, the verdict for the plaintiff was open on the evidence and the directions. The jury were directed in accordance with the classical notions of duty, which have been strongly

criticized (for example, see Julius Stone, Legal System and Lawyers' Reasonings (1964), pp. 258-260). (at p49)

2. In this Court, the appellant argued that liability in negligence should be confined to those events which can be foreseen as "not unlikely to happen", relying upon Barwick C.J.'s statement in Caterson v. Commissioner for Railways [1973] HCA 12; (1973) 128 CLR 99, at p 102 . "Not unlikely to happen", as a matter of language, excludes that which is "unlikely to happen". There is no requirement that the harm-causing event must be foreseeable as "likely to happen" or "not unlikely to happen". The vast majority of events which now ground successful negligence actions would not meet a test of being foreseeable as "not unlikely to happen" and if that test were adopted, the action's scope would be reduced almost to instances of deliberate harm. (at p49)

3. Most traffic and industrial accidents result from circumstances in which the chance of an accident occurring is extremely slight. Under modern urban conditions, most people habitually drive carelessly. One needs only to observe peak-hour traffic in and out of a city to notice that almost every car is driven unsafely close to the car in front; speed limits are also habitually exceeded. The chances of an accident from any breach of traffic rules is very slight, but, if harm does result (and if the court concerns itself with "foreseeability"), it is treated as foreseeable. In other areas, different considerations have prevailed. An extreme instance is the decision in Bolton v. Stone [1951] UKHL 2; (1951) AC 850 which suggests that if the chances of harm are very slight, the event is not foreseeable. Policy considerations concerning English cricket seem to have been paramount in that case which, in my opinion, is not a guideline for negligence law in Australia. (at p50)

4. The appeal should be dismissed. Two respondents sought leave to appeal but no basis for granting leave was established. Leave should be refused. (at p50)

AICKIN J. I have had the advantage of reading the reasons for judgment of Mason J. and am in complete agreement with what he has said. (at p50)

WILSON J. This is an appeal from the majority decision of the Court of Appeal of the Supreme Court of New South Wales (Glass and Samuels JJ.A., Reynolds J.A. dissenting) upholding the verdict and judgment in favour of Brian Kenneth Shirt against the Council of the Shire of Wyong for damages for personal injury suffered by Mr. Shirt in a water-skiing accident (1978) 1 NSWLR 631 . The accident occurred at Tuggerah Lakes in New South Wales in January 1967. At the time Mr. Shirt was skiing in a circuit which was habitually used by water-skiers when he fell and struck his head on the bed of the lake thereby suffering quadriplegic paralysis. The depth of water in the lake at the point where he fell was between three feet six inches and four feet. (at p50)

2. Mr. Shirt claimed that, being an inexperienced skier, he wanted deep water in which to ski, and that he believed that the part of the lake in which he fell satisfied that description. The basis for his belief, so he claimed, was his interpretation of a sign projecting above the water in the vicinity of his fall which bore the words "DEEP WATER". He described the sign as facing the shoreline of the lake, and explained that he understood it to mean that all the water beyond and beside the sign to an indeterminate distance was deep water, and that he was thereby encouraged to ski where he did, believing it was safe to do so. (at p50)

3. If one accepts his evidence in this regard, as the jury must have done, he made a tragic mistake because the sign was not intended to mean anything of the kind. It was one of three or four signs which Mr. McPhan, an engineer employed by the Shire, erected on the completion of dredging works in the lake in May 1966. These works consisted of the opening up of a creek, called Saltwater Creek, which flowed into the lake, and the widening and deepening of a channel which ran from the shore out into the lake. When the work was completed the latter channel was about 900 ft long. It was located alongside a jetty which had been provided by and for the purposes of The Entrance Aquatic Club, an unincorporated association devoted to the promotion of water sports in the area. The club enjoyed a right of permissive occupancy of that portion of the lake on which the jetty was erected. It had in earlier years also held a right of permissive occupancy of the bed

of the lake adjacent to the jetty for a distance of thirty feet for the purpose of constructing and maintaining a channel along which the power-boats, which were a necessary feature of the water-sports, could gain access from the land to the deeper water towards the centre of the lake. The channel which the members of the club themselves provided was barely adequate, and the Shire had been requested to undertake the dredging of an adequate channel, and offered a small contribution towards the cost of the work. The club's right of occupancy in respect of the area of the channel expired in November 1965, and was not renewed. (at p51)

4. The Shire executed the work of dredging between November 1965 and May 1966. As I have already said, it opened up Saltwater Creek with a channel which led from the creek to join the channel adjacent to the jetty about half-way along its length. It also completed a substantial widening and deepening of the channel alongside the jetty, resulting in it being about 60 feet wide and six to seven feet deep. On the completion of the work, Mr. McPhan erected four wooden signs in the bed of the lake, one adjacent to the Saltwater Creek channel, and three adjacent to the channel alongside the jetty. The latter were spaced along its length, the one furthest from the shore being located opposite to the end of the jetty. In each case, the sign was erected at the further edge of the channel from the jetty, it faced the jetty, and carried the words "DEEP WATER" in red paint on a white background. They were warning signs intended to alert children and other members of the public who might be swimming in the vicinity of the jetty to the existence of the channel and the deep water therein. (at p51)

5. It remains to observe that at the material time the lake, which was the southern of the three Tuggerah Lakes was very shallow. Its bottom, broadly speaking, formed a saucer, the water deepening very gradually from the edge of the lake to a depth of between six and ten feet at the centre. Its features were such that the shallowness of the water for some distance from the shore was evident to even the most casual observer. (at p51)

6. It might be thought that Mr. Shirt's story as to how he was misled by the furthermost sign and that but for it he would not have skied where he did, notwithstanding that it was the recognized circuit followed by other skiers, is one that would tax the credulity of even a sympathetic jury. Nevertheless the evidence was given, and in the absence of any argument by the appellant that the verdict was against the evidence and the weight of evidence, the conclusion follows that the jury was entitled to accept that evidence. (at p52)

7. But even if that be the case, Mr. Shirt must further show that the erection of the sign in the manner in which it was done was an act of negligence for which the Shire was liable to him in damages. This brings me to the central issue in the appeal. The appellant concedes that in undertaking the task of erecting the warning signs adjacent to the channel the Shire was brought into such a relation to those who might be in the vicinity, including water-skiers, as to give rise to a duty of care to such persons in the manner in which it discharged that task. The vital question is whether there was any evidence of a breach of that duty. (at p52)

8. The Shire's principal submission is that in the circumstances of the case there was no evidence fit to be considered by the jury in support of the conclusion that the Shire was in breach of its duty of care. (at p52)

9. Reasonable foreseeability of consequences is the accepted test for determining such a breach. Indeed, in recent years that test "has become the foundation on which the whole law of negligence is raised": Mount Isa Mines Ltd. v. Pusey [1970] HCA 60; (1970) 125 CLR 383, at p 397 , per Windeyer J. In his reasons for judgment in the Court of Appeal, Glass J.A. refers to the "undemanding test of foreseeability" (1978) 1 NSWLR, at p 641 which has now become received doctrine in the law of negligence, and credits the decision in The "Wagon Mound" (No. 2) [1966] UKPC 1; (1967) 1 AC 617 with the consequence that: "it is sufficient to make out the foreseeability element of a breach of duty to take care, if injury to a class of which the plaintiff is a member is shown to be foreseeable as a possibility, even though it be only a remote possibility" (1978) 1 NSWLR, at p 642 . In my respectful opinion these statements may be rather too sweeping. Their Lordships in The "Wagon Mound" (No. 2) affirmed: "the general principle that a person must be regarded as negligent if he does not

take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man" (1967) AC, at p 642 . It may be that in this area of discourse semantic difficulties will occur whatever words are used, and one must heed the warning of Windeyer J. in the Mount Isa Mines Ltd. Case to which I have referred that "we must always beware lest words used in one case become tyrants over the facts of another case" (1970) 125 CLR, at p 400 . Nevertheless, I must confess, with all respect that I am unable to equate the idea of "a real risk" with that of "a remote possibility". The latter phrase, notwithstanding that it depends on the foresight of a reasonable man, tends to credit such a man with an extraordinary capacity for foresight, extending to "possibilities" which are highly speculative and largely theoretical. It will be recalled that Barwick C.J. touched on this subject in Caterson v. Commissioner for Railways [1973] HCA 12; (1973) 128 CLR 99, at pp 101-102 . Although I have some misgiving as to the use of the term "not unlikely to occur" which in my opinion is patently obscure, I would respectfully endorse the thrust of his Honour's observations, directed as they are to preserving some substance in the requirement of foreseeability as a condition precedent to liability for negligence. (at p53)

10. I have had the advantage of reading in draft the reasons of Mason J. in this case, and would observe, with respect to his discussion of the views of Barwick C.J. in Caterson, that for myself I do not understand the Chief Justice to be adopting a standard significantly different to that enunciated in The "Wagon Mound" (No. 2). (at p53)

11. Before one can uphold the finding of the jury in the present case that McPhan, and therefore the Shire, was in breach of a duty of care there must be an affirmative answer to the question whether there is any evidence which, if accepted, enables it to be said that a reasonable man in the position of McPhan would have foreseen a real risk that to erect the signs in the manner that he did would lead a person in the position of Mr. Shirt to ski where he would not otherwise have done, and thereby risk personal injury. The possibility must be "a real risk . . . which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched" (The "Wagon Mound" (No. 2) (1967) AC, at p 643). I use these words of Lord Ried in order to emphasize that I indorse fully the test of foreseeability established in that case. But I digress to add the comment that in my opinion that test is better understood if the word "real" is omitted from the passage I have quoted. It seems to me that what is being said is that if a risk is one which a reasonable man would brush aside as farfetched, then it is not a real risk as that term is explained elsewhere in the judgment, for example, where it is distinguished from "a mere possibility which would never influence the mind of a reasonable man" (1967) AC, at p 642 . (at p54)

12. In my respectful opinion, the evidence does not enable the question which I have posed to be answered in favour of Mr. Shirt. Mr. McPhan was engaged in directing the work of dredging the channel between November 1965 and May 1966. For some years prior thereto the lake had been used for water skiing, despite the fact that it was so shallow. The circuit commonly used during the time that the work was being carried out on the channel was the same circuit as that used by Mr. Shirt at the time of the accident. In part it traversed an area of the lake where the water was no more than three feet six inches to four feet deep. There was nothing to suggest to Mr. McPhan that water of this depth rendered the circuit dangerous to inexperienced skiers and encouraged them to ski elsewhere in the lake where the water was deeper. On completion of the channel, he was responsible for the erection of the three warning signs along the channel. In each case the sign was erected on the bank of the channel furthermost from the jetty, and faced the jetty. In my opinion, all three signs were clearly directed to persons who might be bathing in the shallow water in the immediate vicinity of the jetty, and who might, but for the warning, unwittingly move into the deeper water in the channel. I should add that I do not think that Mr. Shirt's testimony that when he was at the lake in January 1967, the outermost sign was facing the shore is material to the question of what should have been present to the mind of a reasonable person in the position of Mr. McPhan. The case against the Shire is based on negligence arising from the erection of the sign. The lake is not vested in the Shire, and it has no specific responsibilities in relation to it.

The question of its liability is therefore to be determined in the light of the circumstances when the work was completed in May 1966. (at p54)

13. In my opinion there is no evidence that Mr. McPhan, or the Shire, was guilty of negligence. The sign in fact bore no relation to the sport of water-skiing as it had been and was thereafter practised on the lake. The possibility that it might be misconstrued as Mr. Shirt claims to have done was not a real risk which ought to have been present to Mr. McPhan's mind. In the result, therefore, I agree with the conclusion of Reynolds J.A. in the Court of Appeal. (at p54)

14. I would allow the appeal, set aside the verdict and judgment in favour of the respondent, and enter judgment for the appellant. (at p54)

15. Associated with the hearing of the appeal in this matter was the hearing of an application for special leave by two of the original defendants, Robert Deakes and R. T. Chevell, who were sued as representing the members of The Entrance Aquatic Club. They were also defendants to a cross-claim by the Shire. In the course of the trial, the trial judge directed the jury to return a verdict in their favour and he entered judgment accordingly in respect both of the plaintiff's claim, and the Shire's cross-claim. In the Court of Appeal the appellant successfully attacked the decision on the cross-claim, with the result that the Court, by majority, set aside that verdict and ordered a new trial on the cross-claim. The conclusion to which I have come on the appeal necesarily disposes of the issues raised by the cross-claim. It therefore follows that special leave should be granted, the appeal allowed, the decision of the Court of Appeal set aside and the judgment in favour of the applicants restored. (at p55)

16. In any event, even if the present appeal by the Shire had failed, I would have been unable to support the majority decision of the Court of Appeal concerning the club, for the reason that it is founded on a cause of action which is quite different from that which was litigated at the trial. With all respect, I find it analogous to the undesirable practice to which Barwick C.J. drew attention in the decision of this Court in Maloney v. Commissioner for Railways (1978) 52 ALJR 292; 18 ALR 147, at p 149 . (at p55)

ORDER

Appeal dismissed with costs.
Application for special leave to appeal refused with costs.