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## **LAW OF THE SURF**

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As the weather heats up and thoughts turn to a trip to the beach for a refreshing swim and bodysurf one cannot help but think of the series of cases over the last ten years concerning surf related injuries. It is timely especially in light of the current review of the law of negligence to consider the difficult question of liability and the surf.

### ***The Parties***

“The beach” as we might colloquially describe it, attracts a unique mix of people: beach walkers, sunbathers, athletes, families, swimmers, bodysurfers, boogie-board riders, surfboard riders, kite surfers, sailboard riders and lifesavers to name a few. On a hot Australian summer day the beach is inundated with beach goers wishing to escape the discomfort of a heat wave.

The beach is part of Australian folklore and beach going is without doubt a leading Australian pastime. Accidents that occur at the beach are similar in many respects to accidents that occur elsewhere although identification and location of the defendant in surfing related accidents has sometimes been an issue. The actions we have seen in large part involve an injured swimmer suing a local authority and/or lifesaving organisation. In a number of these cases the local authority is alleged to be vicariously liable for the actions of the lifesaving clubs.<sup>1</sup>

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<sup>1</sup> B. Charrington, “Surf Related Litigation: Keeping Your Case Between the Flags” (2002) 53 *PLAINTIFF* 6. On liability for the acts of third parties consider: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61

## *Outdoors and Sporting Cases*

The case that has brought attention to this topic most recently is *Swain v Waverley Municipal Council*<sup>2</sup>. The plaintiff in this case was rendered an incomplete quadriplegic as a result of diving into the surf and striking a sandbar in a flagged area at Bondi beach. The evidence showed the sandbar was visible from the vantage point of the lifesavers on duty. Following a jury verdict Swain was awarded an amount of \$3.75 million in damages.<sup>3</sup> However on 22 July 2002, Giles JA in the matter of *Waverley Municipal Council v Swain*<sup>4</sup> ordered a stay of proceedings on the judgement in the light of the pending appeal.

The law of negligence has developed significantly over the 22 years since the decision in *Wyong Shire Council v Shirt*<sup>5</sup>. That case concerned an accident at Tuggerah Lakes in New South Wales in 1967. Mr Shirt was water skiing when he fell and struck his head on the bed of the lake rendering him a quadriplegic. Mr Shirt claimed that he had believed that the part of the lake in which he fell was deeper than he appreciated. The basis of his belief, he alleged, was his interpretation of a sign that projected above the water in the vicinity of where he fell which bore the words "DEEP WATER". He explained that the sign faced the shoreline of the lake and that he understood this to mean that all the water beyond and beside the sign was deep water and thereby he was encouraged to ski in the manner that caused his accident. The sign actually referred to water in front of the sign. The High Court in this case held that it was open for a jury to find that the Council had been negligent.

Since that case was decided there has been a series of cases concerning liability for people in the surf and also for people in natural surrounds. Mostly recently in *Romeo v Conservation Commission of the Northern Territory*<sup>6</sup> the High Court refused to impose liability on the Conservation Commission of the Northern Territory in circumstances where a 16-year-old girl adversely affected by alcohol was seriously

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<sup>2</sup> NSWSC No 20261/2000

<sup>3</sup> This amount reflects an allowance for contributory negligence of twenty five per cent. About one hour before the accident Swain had consumed a 750ml bottle of beer and the night before had taken one tablet of ecstasy.

<sup>4</sup> NSWCA No 40419/2002.

<sup>5</sup> (1980) 146 CLR 40

<sup>6</sup> (1998) 192 CLR 431

injured after falling 6.5 metres from the top of Dripstone Cliffs onto Casurina Beach in suburban Darwin late at night. The girl had fallen off the cliff after having surmounted a small barrier at the perimeter of the car park. It was argued that the Conservation Commission was negligent in failing to warn of the presence of the cliff or to erect a fence or other barrier at the edge of the cliff. The Court held that there was no reason in this instance why the Conservation Commission should carry the blame as the risk was obvious and to hold otherwise would have untold effects on access to the natural environment throughout the country.

A significant case especially in relation to surf related liability is that of *Nagle v Rottnest Island Authority*<sup>7</sup> where the High Court held that the Rottnest Island Authority was liable for injury sustained by Nagle who had been injured in a diving accident and suffered severe spinal injury becoming a quadriplegic. Nagle had dived into an area of Rottnest Island known as the Basin and in diving into the water had hit a partially-submerged rock-ledge. The Basin was described as small sand-bottom u-shaped bathing area on the northern coast of the island surrounded on all sides except the north by a flat-rock area known as a wave-platform, approximately 25cm above low-tide level.

In this instance, it was held that the Rottnest Island Authority should have erected a sign to warn of the dangers. The High Court explained that it was clear that the rocks existed and that the Authority knew of this hidden danger, therefore, a warning sign should have been erected, especially in a context where the Authority encouraged people to use the Basin as a swimming facility.

The recent High Court decision of *Brodie v Singleton Shire Council*<sup>8</sup> should also be mentioned. This decision concerned the repair of highways and the abolition of an “immunity” from liability held by authorities having responsibilities for highways for failing to act to repair such highways. The Court held that whether an authority is liable for damage arising from accidents occurring from a highway that is not adequately repaired, should no longer be contingent on a non-feasance/misfeasance

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<sup>7</sup> (1993) 177 CLR 423

<sup>8</sup> [2001] HCA 29

dichotomy, but more generally on the test of whether the authority had failed to exercise the due standard of care.

In *Woods v Multi-Sport Holdings Pty Ltd*<sup>9</sup> the plaintiff had injured an eye while playing indoor cricket. The High Court held that the defendant was not negligent in failing to provide signs warning of the dangers of indoor cricket and/or protective equipment (such as a helmet with a face guard) to players, as the danger was part of the normal risk of playing the sport. Interestingly, Kirby J in dissent explained that his judgement in *Romeo* should not be taken out of context and that “obviousness of risk” *per se* will not wipe away a duty to warn.<sup>10</sup>

### ***Surf Related Cases***

This series of cases involves claims of inadequate supervision of a patrolled area and lack of adequate signage warning of hidden or natural dangers including dangerous surf conditions and sandbars.

*Fitzpatrick v Maroochy Shire Council*<sup>11</sup> involved a 73-year-old plaintiff, who had suffered a displaced fracture of her left humerus and a fracture of her left radial neck after being hit by a body-board or boogie-board in the flagged areas at Maroochydore on the Sunshine Coast, north of Brisbane. Dodds DCJ refused to find the Maroochy Shire Council liable; largely on the basis he was unconvinced on the evidence before him, that to allow the riding of body-boards in the flagged area would significantly increase the risk of injury.

*Fitzpatrick* can be compared with the New South Wales Supreme Court cases of *Glasheen v The Council of the Municipality of Waverley*<sup>12</sup> and *Municipality of Waverley v Bloom*<sup>13</sup>. Rebecca Glasheen, a 14 year old, was injured while surfing on a foam surfboard in white water between the flags at Bondi Beach. She was rendered a quadriplegic by either being hit by a fibre glass surfboard or by hitting her head on the

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<sup>9</sup> [2002] HCA 9

<sup>10</sup> *Ibid.*, at paras [127] – [128]

<sup>11</sup> [1999] QDC 236. See further P. Tully “Should We Swim Between the Flags?” (1999) 19 *Proctor* 22; K Tronc, “A Plaintiff Lawyer’s Guide For Board Injuries to Swimmers” (2000) 38 *PLAINTIFF* 6

<sup>12</sup> (1990) *Aust. Torts Reports* 81-016

<sup>13</sup> [1999] NSWCA 229

seabed in taking evasive action. One lifesaver was on duty at the time and said that he had not seen any surfboard riders in the flagged area. As there were found to be surfboard riders in the flagged area in fact, Sharpe J held that the lifesaver had failed to adequately supervise the flagged area.<sup>14</sup>

Bloom was injured in the surf at Tamarama Beach in February 1994 where he was body-surfing between the flags, some 60 or 70 metres from the beach. As Bloom rode a wave, he was struck in the neck by a fibreglass surfboard. The surfboard-rider paddled off, Bloom struggled to the beach and collapsed in the sand. Bloom was awarded an amount of \$39,911.81 plus costs on the basis of the local authority's negligence. The Court of Appeal confirming the decision of the trial judge held that negligence had been established on the basis that there were no beach inspectors on the beach at the time of the accident and that there were insufficient patrol members on the beach at the time of the accident.

In contrast to *Bloom*, is the case of *Sutherland Shire Council v Kukovec; Elouera Surf Lifesaving Club Inc v Kukovec*<sup>15</sup> where the Court of Appeal refused to hold the local authority and lifesaving club liable in an instance where Kukovec, while bathing in knee deep water between the flags at Elouera Beach, was hit in the eye by a fibre glass surfboard being carried towards the beach by a 10 to 13 year old child. The court was not convinced that a child wading towards shore with a surfboard under their arm should have put the lifesavers on notice and as such there was no need for intervention at that point.

Ipp AJA (with whom Meagher and Hodgson JJA agreed) explained:

In my opinion, at the stage the boy was seen to be walking out of the surf with his surfboard under his arm there was no foreseeable risk of injury. A reasonable person charged with the duty of ensuring safety on the beach and in the sea in the area in question would not have taken any steps in regard to the

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<sup>14</sup> On the assessment of damages see: *Glasheen v The Council of the Municipality of Waverley* (NSWSC, unreported 17 August 1990, Master Greenwood)

<sup>15</sup> [2001] NSWCA 165.

boy's presence. Further, in my opinion, Mr Kukovec did not discharge the onus of proving that, before the accident, the boy had surfed in the flagged area or the buffer zone for sufficiently long a period for members of the club on duty to have noticed him as a potential source of danger. Indeed, as I have indicated, Mr Kukovec did not prove that, before the accident, the boy had surfed in the flagged area or the buffer zone for sufficiently long a period for members of the club on duty to have noticed him as a potential source of danger. Indeed, as I have indicated, Mr Kukovec did not prove that, before the accident, the boy had surfed in the flagged area or the buffer zone at all.<sup>16</sup>

A case that suggests a trend of things to come especially in light of the Panel of Eminent Persons' *Review of the Law of Negligence*<sup>17</sup> is *Prast v The Town of Cottesloe*.<sup>18</sup> In this case, the Plaintiff had been dumped by a wave while body surfing at Cottesloe Beach in Perth. He was thrown on his head on the ocean bed very near the shoreline and sustained several injuries which rendered him a tetraplegic. Prast sued the local authority for failing to warn of the hidden danger of "dumpers". The local authority responded by saying that the risk was so obvious it was not obliged to give a warning.

The Full Court of the Western Australian Supreme Court rejected the claim that the town of Cottesloe should be liable for this injury. Justice Ipp (with whom Wallwork<sup>19</sup> and Parker JJ agreed) explained:

In my opinion the learned Judge was entirely correct in distinguishing between circumstances of the diving cases and the circumstances of this case. In the diving cases there were hidden dangers that caused there to be serious risks in performing an act that would otherwise be relatively safe. The risks of striking one's head on a submerged rock obscured by the glare of the sun, or on a misleadingly shallow bottom, are not an inherent part of diving. Those were hidden dangers that brought about the need to warn. They are to be

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<sup>16</sup> *Ibid.*, at para. [27]

<sup>17</sup> (2002) AGPS Canberra

<sup>18</sup> [2000] WASCA 274

<sup>19</sup> Justice Wallwork at para [57] added that "although there is no legal duty to do so, it would be beneficial to erect signs at popular beaches warning of the dangers of bodysurfing."

contrasted with the risk facing all body surfers, that is, the risk of being hurled onto the seabed out of control by a wave that turns out to be a dumper. The risk of so being dumped is inherent in body surfing itself, cannot be avoided and is well known.<sup>20</sup>

Justice Ipp went onto explain the role of body surfing as part of the fabric of Australian society:

Body surfing is a traditional Australian pastime that has been indulged in by citizens of this country for a very long time. There must be few who have never thrown themselves upon a wave in the hope of being carried by the rush of water to the shore and there must be few who do not know (from hearsay at least, if not personal experience) what a dumper is, and how it can throw a helpless surfer about. This knowledge is generally learned relatively early in childhood and, in any event, is common sense.<sup>21</sup>

The judge then referred to Chief Justice Gleeson in *Agar v Hyde*<sup>22</sup>: “people who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports.” Following on from this reasoning Justice Ipp explained:

The risks of being dumped by the surf and thereby sustaining serious bodily injury are endemic to and part and parcel of the recreation of body surfing. .... Sea conditions often change. Currents, rips and surges unexpectedly materialise. Large and unexpected waves materialise out of the deep. These phenomena are all capable of causing serious injury or death. The currents and rips can take an unsuspecting swimmer far out to sea and can result in drowning. Surges and unexpected large waves can hurl an unsuspecting swimming against rocks or onto the seashore, with serious damage to body and limb.

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<sup>20</sup> [2000] WASCA 274 at para [32]

<sup>21</sup> *Ibid.*, at para [33]

<sup>22</sup> [2000] HCA 41

Yet, to suggest that signs should be placed on all beaches in Australia indicating that swimming in the sea could lead to serious injury or death would, I suggest, be absurd. The absurdity lies in the obviousness of the danger that attaches to the common, everyday, activity of swimming in the sea. There is no need to warn of the ordinary risks that are so involved, and it would be absurd to require that to be done. In my opinion, the risks attending upon body surfing fall under the same category. Of course, where there are dangerous currents, or rips or surges or rocks or the possibility of the occasional king waves or other dangers that are peculiar to a particular beach, or part of a beach, special warnings may be called for, but that is not this case.<sup>23</sup>

The plaintiff in *Bizaca v Manly City Council*<sup>24</sup> also failed to convince the Court that the Council had been negligent. The Council had been repairing a concrete wall on the foreshore for some months and it was alleged this resulted in rocks being embedded in the sand along the beach. Zeljko Bizaca while swimming between the flags was unbalanced by a wave and struck a protruding rock. It was argued that by placing the flags in the area in question it invited the public to swim there and also the lifesavers should have seen the rocks at low tide. O'Reilly DCJ held that to require the Council to check for rocks manually or with a machine before and after the flags were set up, was too onerous.<sup>25</sup>

There is also litigation in progress in the Supreme Court of Queensland commenced by the family of an American man who drowned in the surf at Yaroomba Beach while attending a conference at the Hyatt Coolum Resort.<sup>26</sup> Maureen Enright of Connecticut claims Coolum Resort Pty Ltd and the Maroochy Shire Council are liable for the death of her husband. It will be alleged that lack of signage warning of the

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<sup>23</sup> [2000] WASCA 274 at paras [42]-[43].

<sup>24</sup> Unreported District Court of NSW, O'Reilly DCJ, No 3528 of 2001

<sup>25</sup> Cf. *Manly Council v Boylan* NSWCA 15/6/95

<sup>26</sup> *Enright v Hyatt Coolum* WRT 2710/95 pending before Moynihan J of the Qld Supreme Court; see also *Princess Hotels Int'l v Pearson* 39 Cal. Rptr. 2d 457 (Cal. 1<sup>st</sup> Dist. Ct. App. 1995); *Tarshis v Lahaina Investments Corp.* 480 F. 2d 1019 (9th Cir. 1973). [Postscript] See *Enright v Coolum Resort Pty Ltd* [2002] QSC 394 where the plaintiff's claims were unsuccessful.

dangers of the surf on the pathways to the beach which is adjacent to the resort contributed to the death.<sup>27</sup>

There is another series of cases relating to liability for injuries occurring on or near the beach.<sup>28</sup>

### ***Comparative Case Law: The US***

In terms of comparative law it is interesting to consider the United States case of *Fleuhr v City of Cape May*<sup>29</sup>. This was a case where a surfer had been injured in the ocean off the shore of a public beach at which lifeguards were stationed. The injured person was an experienced surfer and had been surfing at First Avenue Beach on a day on which hurricane watches and warnings had been issued across the eastern seaboard. The surfer was struck by large waves and tossed about in the surf, struck his head on the ocean floor and suffered a severe spinal injury. Fleuhr sued Cape May on the grounds of negligent supervision, failure to warn of the dangerous ocean conditions and failure to protect him from the dangerous conditions.

The trial judge held that the City was immune from liability under the Unimproved Public Property Immunity doctrine embodied in the New Jersey *Tort Claims Act*. The Supreme Court found that a reasonable jury could find that the surfer's accident was caused by the natural conditions of the ocean, a situation for which a public entity was immune and that any negligence by the lifeguards was not a proximate cause of the accident.

The Supreme Court explained that the surfer knew of the conditions of the ocean and appreciated the risks associated with surfing in such conditions. The two lifeguards

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<sup>27</sup> M. Wilson, "Surf victim unaware of beach's dangers" *Courier Mail*, May 28, 2002, 7; "\$120m suit over drowning" *Gold Coast Bulletin* May 28, 2002. See also the pending litigation in *Mulligan v Coffs Harbour City Council*: "Dive Victim 'Smoked Pot'", *Daily Telegraph* (Sydney) July 9, 2002, where an Irish national is suing the Coffs Harbour City Council for injuries sustained after diving into Coffs Creek. It is claimed that that the Council did not provide an adequate warning.

<sup>28</sup> *Waverley Council v Lodge* [2001] NSWCA 438 (29 November 2001); *The Council of the Municipality of Shellharbour v Carter* NSWCA 5/2/85.

<sup>29</sup> 159 N.J. 532 (Supreme Court of New Jersey, 1999)

had approximately 20 years of experience as lifeguards with more than half of that time at the beach in question and found no reason to close the beach to swimming either before or after the surfer's accident. Any alleged negligence, the Court explained, on behalf of the lifeguards, is too remotely or insignificantly related to the accident to be considered a legal or proximate cause of the accident.<sup>30</sup>

There are a number of decisions from across the United States dealing with the notion of the Unimproved Public Property Immunity which is a notion that local municipalities should not be held liable for injury resulting from events that occur in nature or in places or areas they supervise in which dangerous natural conditions may arise that are beyond the control of the municipality.<sup>31</sup>

The relevant sections of the New Jersey *Tort Claims Act* provide:

Neither a public entity nor public employee is liable for an injury caused by a condition of any unimproved public property including but not limited to any natural condition of any lake, stream, bay, river or beach: N.J.S.A. 59:4-8

Neither a public entity nor a public employee is liable for any injury caused by condition of the unimproved and unoccupied portions of the tidelands and submerged lands and beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits owned by the State: N.J.S.A. 59:4-9

The comment on these sections expresses the policy determination underlying the Unimproved Public Property Immunity as follows:

It is desirable to permit the members of the public to use public property in its natural condition, and that the burdens and expenses of putting such a property in such condition as well as expense of defending claims for injuries would

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<sup>30</sup> *Ibid.*, 544-5.

<sup>31</sup> See: *Kowalsky v Long Beach Township* 72 F. 3D 385 (3rd Cir. 1995); *State v Oliver* 320 N.J. Super. 405 (App. Div. 1999); *Gonzales v City of San Diego* 130 Cal. App. 3D882 (CT.App.1982); *Knight v City of Capitola* 6 Cal. Rptr 2d 874 (Ct. App. 1992); *Pacheco v US* 220 F.3d 1126 (9<sup>th</sup> Cir. 2000); D. Connaughton, J Spengler, B. Burket, "Liability and Warnings in Natural Aquatic Environments: A Case Law Analysis" (2002) 12 *Journal of Legal Aspects of Sport* 61.

probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes it is not unreasonable to expect persons who voluntarily use unimproved public property to assume the risk of injuries arising therefrom as part of the price to be paid for the benefits received.<sup>32</sup>

An *amicus curiae* brief filed by Surfers' Environmental Alliance – New Jersey (SEA-NJ), and Surfrider Foundation argued that the lifeguard should not be held liable in this situation and they maintained that the action of the ocean, particularly the waves, could not be predicted with any certainty in advance. “For that reason, even the most vigilant lifeguards are not guarantors of the safety of those who venture into the ocean.”<sup>33</sup>

*Fleuhr* suggests that when a person engages with the natural conditions of the ocean – nature - in physical and sporting endeavours, or recreational pastimes, they should accept the inherent risk of injury as part of the price of enjoyment of the activity.<sup>34</sup> Therefore, a body surfer going into the waves and suffering injury should not have the right to sue a local government or a surf lifesaving organisation. The difference between *Swain* and *Fleuhr*, is that in *Swain* it was successfully argued at first instance that fault arose from the placement of the flags in a position where a sandbar was invisible. The same argument would be made for distinguishing *Swain* and *Prast*; that the human intervention in *Swain* took this beyond a simple case of a human engaging with nature as in *Prast*.

A general theme arising from these cases is that the liability of local authorities and surf lifesaving clubs in the instance of personal injury to body surfers will depend to some extent upon whether the natural conditions of the environment have played a major role in causing injury. Following the United States doctrine of Unimproved Public Property Immunity we may see the courts much more willing to say, as in

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<sup>32</sup> 159 N.J. 532 at 541 (Supreme Court of New Jersey, 1999)

<sup>33</sup> *Ibid.*, at 538

<sup>34</sup> As Justice Ipp explained in *Prast* “...the very aspects of body surfing that make it dangerous; provide the pleasures and thrills that make it popular”: [2000] WASCA 274 at para. [34]

*Prast's* case, that this is really a result of natural conditions and that the risk has been assumed.<sup>35</sup>

### ***Surfboard Riders***

An area of increasing concern is the interaction between surfboard riders especially in crowded surfing areas such as the classic surf spots along the beaches of Sydney, the Gold Coast and Northern NSW. While there are occasionally reports of criminal cases concerning assault there has not been a reported case of two surfers suing each other in a civil action. The 'Law of the Surf Forum' that was convened by Professor Brian Fitzgerald and held in Byron Bay in 2000 and then again at the end of 2001, came to the conclusion that self-regulation through the articulation, communication and enforcement of customary rules of conduct was paramount and a key to avoiding the need for litigation in this area.<sup>36</sup> The most fundamental rule of surfboard riding - "Do not drop in" - is universally recognised.<sup>37</sup> Yet rules beyond that are more difficult to determine. The Surfrider Foundation along with other organisations has issued from time to time a charter of the rules of surfing conduct that they perceive to be commonly accepted.<sup>38</sup> Most surfers would acknowledge that there is a code of conduct expected of surfers in the water and that this lore handed down through generations emanates from a core notion of respect for surfing, the safety of others and the environment.

At the Law of the Surf Forum, Harvard Law Professor Terry Fisher explained (in the context of wind surfing) the limitations of an extra-legal customary code in the following way:

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<sup>35</sup> Cf. the notion discussed by Kirby J in *Woods* [2002] HCA 9 of a "commercial risk-creator": paras [128] & [130]

<sup>36</sup> B. Fitzgerald and G Clarke (eds.), "Law of the Surf Forum" (2001) 5 *Southern Cross University Law Review* 228  
[http://www.scu.edu.au/schools/lawj/law\\_review/law\\_of\\_the\\_surf\\_forum.pdf](http://www.scu.edu.au/schools/lawj/law_review/law_of_the_surf_forum.pdf); B. Fitzgerald and G. Clarke (eds.), "Law, Culture and Knowledge of Surfing" (2002) 6 *Southern Cross University Law Review* 178; M Mason, "Santa Cruz Surfers and Kayakers Butt Heads Over Waves" *AP Breaking News* May 13, 2002; I Gerard, "Overcrowding Rules the Waves" *Weekend Australian* December 30-31 2000; T. Kavanagh, "Tribal Law all the Rage" *Courier Mail* December 22, 2000 "Outdoors" 3.

<sup>37</sup> K. Pearson, *Surfing Subcultures in Australia and New Zealand* (1979) University of Queensland Press, Brisbane, 139-143.

<sup>38</sup> <<http://www.surfrider.org.au>>

Unfortunately, there are two problems with that response. The first is that not everyone abides by the code. Some people refuse to do so on principle. For example, in Internet chat rooms where these issues are debated (believe it or not), some wavesailors openly reject the basic rule that people going out have right of way. Other people violate the customary code, not because they are opposed to it in principle, but because they are impatient or greedy or tired of beginners messing up the waves. When people refuse or fail to obey the customary code, the informal sanctions available on the beach are not very effective. Fistfights are a poor, dangerous, and often unfair system for penalising violators. Other social sanctions highlighted by sociologists - criticism, ostracism, and so forth - do not seem to be working very well either.

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Professor Fisher then outlined what the law might do:

One possibility is that a legislature or court could adopt a formal set of rules, backed by a schedule of penalties, that paid no attention to the customary code. .. Another possibility suggested at the beginning of this conference is that courts could apply to wavesailing collisions the standard criteria of tort law, under which a sailor would be liable when his or her failure to behave like a hypothetical "reasonable person" under the circumstances caused injury to others. Although this suggestion is perhaps more plausible than the first alternative, few observers regard it as satisfactory.

The only way for enlisting the formal legal system that seems to merit serious consideration would involve employing lawyers and courts to reinforce rather than displace the customary norms. How might that work? In extreme cases, criminal law could be brought to bear on persons who violated the customary code. Recently, the Supreme Court of Colorado upheld a manslaughter indictment against a skier who went down a slope at a reckless speed, hit another skier, and killed him. On rare occasions, criminal sanctions might be applied in an analogous fashion to wavesailing accidents. A sailor who, in violation of the customary norms, sailed over the back of a wave, collided with a jumper and killed him could be prosecuted for some form of homicide - perhaps manslaughter or even second-degree murder.

In more routine cases, tort law could be harnessed. Courts could find sailors liable, not when they violated a general norm of "reasonable care" (of the sort I just mentioned), but when they violated the customary code and injuries resulted. There is precedent for such a strategy: Admiralty Courts in the United States and elsewhere sometimes deviate from the international anti-collision rules when those rules are incompatible with local custom. For example, the customs that govern traffic on the Mississippi River do not follow either the international or the inland-waterway rules. When two boats collide on the river, the courts sometimes respect local custom, not the international regulations. So the proposal that tort law should incorporate by reference the existing customary code is not ludicrous.<sup>40</sup>

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<sup>39</sup> B. Fitzgerald and G Clarke (eds.), "Law of the Surf Forum" (2001) 5 *Southern Cross University Law Review* 228 at 249

<sup>40</sup> *Ibid.*, 249-250.

However Professor Fisher was cautious about the role law should play explaining that “it would be costly”, and secondly “it would foster litigiousness.” His more subtle point was that:

Sociologists tell us that it is very difficult for a legal system to capture the nuances of an informal code. That generalization seems plausible in this context. It is fairly easy to see how tort law could incorporate by reference the four customary "rules" I described a minute ago. It is much harder to see, however, how tort law could effectively incorporate the more general principle of courtesy and consideration. Increased reliance upon formal legal sanctions would thus almost certainly reduce the influence of the latter principle. That, in my view, would be unfortunate.<sup>41</sup>

The clear message for surfers and their communities is to articulate and uphold rules of good conduct and respect in the surf. Importantly, such a customary code needs to incorporate notions such as mitigation and reasonableness, as in the “split second” decision making environment of the surf it will, at times, be much easier and thereby beneficial to sacrifice or mitigate a right of way in order to avoid damage.

Facing any lawsuit in this area will be the claim that the plaintiff has assumed the risk of injury. Like the plaintiffs in *Fleuhr* and *Prast*, the surfboard rider chooses to engage nature in what is a physical and potentially dangerous activity.<sup>42</sup> However in line with the decision in *Swain*, will the actions of other participants/surfboard riders bring that human intervention that founds liability? And to what extent will their breach of the customary code determine liability before the courts? We also need to keep in mind that every participant in a sport knows that a certain level of injury is not compensable.<sup>43</sup>

### ***Review of the Law of Negligence***

The Committee of Eminent Persons<sup>44</sup> in the *Review of the Law of Negligence*<sup>45</sup> has made a number of recommendations which promise to have an impact on the law of

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<sup>41</sup> *Ibid.*, 251.

<sup>42</sup> *Department of Natural Resources & Energy v Harper* [2000] VSCA 36

<sup>43</sup> *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; *Prast* [2000] WASC 274 per Wallwork J at para [58].

<sup>44</sup> Justice David Ipp, Professor Peter Cane, Dr Don Sheldon, Mr Ian Macintosh

<sup>45</sup> (August 2002) <<http://revofneg.treasury.gov.au/content/review.asp>>

the surf in particular Recommendations 11 and 14. Recommendation 11 stipulates that the provider of a recreation service is “not liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk.” An obvious risk is defined as “a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the participant”, “risks that are patent or matters of common knowledge” and a “risk may be obvious even though it is of low probability”. A recreational service is defined in Recommendation 12 as “providing facilities for participation in a recreational activity” or “training a person to participate in a recreational activity” or “supervising, adjudicating, guiding or otherwise assisting a person's participation in a recreational activity.” A recreation activity is defined in the same recommendation to mean “an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk”. The Report explains that Recommendation 11 is designed to reinvigorate the defence of voluntary assumption of risk.

Recommendation 14 provides that “a person does not breach a proactive duty to inform by reason only of a failure to give notice or to warn of an obvious risk of personal injury or death, unless required to do so by statute.” When enacted this Recommendation is designed to overturn *Nagle*.<sup>46</sup> The Report notes that “Recommendation 14 applies only to the proactive duty to inform and not to the reactive duty to inform” and that “Recommendation 14 is an important adjunct to Recommendation 11 .. [as] ...exclusion of liability for the materialisation of obvious risks could be circumvented if it were open to a claimant to allege failure to give notice or to warn of the risk”.

One proposed law which seeks to implement these principles is the *Civil Liability Amendment (Personal Responsibility) Bill 2002 NSW*.<sup>47</sup> Section 27 (1) provides

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<sup>46</sup> *Review of the Law of Negligence*, 68.

<sup>47</sup> <<http://www.cabinet.nsw.gov.au/civil.pdf>>

that “A person (the injured person) is not owed a duty of care by another person (the defendant) to take care reasonable care in respect of a risk, or to warn of a risk, that a reasonable person would consider to be an inherent or an obvious risk.”<sup>48</sup>

One commentator has suggested that these recommendations once enacted would override liability for negligence in the *Swain* type case. However the same commentator questions whether the human intervention of placing the flags removes the “obviousness” of risk?<sup>49</sup>

## **Conclusion**

As you feel the white water rush over you this summer at one of Australia’s beautiful beaches you will now be reminded that the ocean like any other landscape is full of legal issues. For those wishing to engage with nature in a soulful activity note the law is tending towards saying you will bear your own risk. However the extent to which local authorities and lifesaving clubs will be held liable for inadequate supervision and warnings is in a state of refinement. A clearer picture will emerge once we know the outcome of the appeal in *Swain*<sup>50</sup> and better understand the effect of the revised negligence laws.

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<sup>48</sup> See generally: ss27-32; 43-44.

<sup>49</sup> B. Charrington, *supra* note 1, 12-14

<sup>50</sup> See also *Richmond Valley Council v Standing* [2002] NSWCA 359; *Mulligan v Coffs Harbour City Council and Ors* [2003]NSWSC49