

leave to appeal to the High Court.

Similarly, in *Mulligan v Coffs Harbour City Council*, the plaintiff was a U.K. citizen holidaying in Australia with his girlfriend in January 1999. He too was rendered a quadriplegic after diving into a creek at Park Beach near Coffs Harbour. Mulligan sued the Council in negligence claiming they owed a duty to take reasonable care to avoid a foreseeable risk. Both the trial judge and the Court of Appeal held that while a duty of care existed, and while the risk of injury was reasonably foreseeable, the scope of that duty did not require the Council to warn of the danger of diving since such dangers were both obvious and inherent.

Mulligan was also granted leave to appeal to the High Court, and both cases were heard separately before the full bench.

Decisions

In a four to three majority, the High Court dismissed Vairy's appeal and found that the Council's duty of care did not extend to providing signs warning against diving in the area.

Similarly, Mulligan's appeal was unanimously dismissed on the basis that it was not essential to post warning signs when the danger of diving into water of variable depth existed at most beaches and waterways.

As stated by Justice Ken Hayne in Vairy:

"It was not reasonable to expect the Council to warn of this particular danger. The Council had done nothing to make the danger worse

and had no knowledge of some feature of this particular area that was not readily discovered by someone contemplating diving or plunging into the water...."

The High Court was, however, critical of the approach taken by the Court of Appeal in both cases. They commented that in assessing the extent of a council's duty to erect warning signs, the correct approach was to examine whether the risk of injury was reasonably foreseeable to the council, not whether it was obvious to the plaintiff.

Implications

The High Court's decisions in these cases reaffirms the approach taken by the courts and the legislature in recent years. Personal responsibility clearly remains a cornerstone of legal decision-making and legislative reform.

These decisions confirm that it is unreasonable to expect councils and public authorities to warn of matters that are obvious or of common knowledge. The courts are making it clear that an individual must take responsibility for their own actions.

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CBP and M+R have formed an alliance providing insurance legal services to clients across the east coast of Australia. Together they number 31 partners and 71 professional staff in two offices.

Welcome to our latest edition of Focused, a publication published jointly by Colin Biggers & Paisley, in Sydney and Monahan + Rowell, in Melbourne. This edition looks at the demise of *Sullivan v Gordon* damages, and the launch of the new General Insurance Code of Practice. We also look at two cases

News in Brief

Philip Rowell (of Monahan + Rowell) with David Miller (of CSR) conducted a workshop on "Asbestos related disease claims: the long tail continues....." at the annual AILA conference in Hobart on 10 November 2005.

Mark Attard (of Monahan + Rowell) who for some years has edited the Insurance chapter in the annual (Vic) Law Handbook, has recently written a new chapter on Domestic Building and Renovation, that will shortly appear in the Law Handbook 2006.

The Partners of Colin Biggers & Paisley are pleased to announce that Stuart Hetherington joined the firm on 4 October 2005 as a Partner in the Insurance Division.

The Demise of Sullivan v Gordon Damages

Previously, injured plaintiffs could recover damages in respect to care they could no longer provide to a friend or relative.

CSR Limited v Eddy
High Court of Australia (21 October 2005)

The Judgment

The High Court, in an unanimous judgment delivered 21 October 2005, has determined that the Australian Common Law does not recognise *Sullivan v Gordon* damages and that all Australian

dismissed by the High Court, on appeal from the NSW Court of Appeal, involving catastrophic injury claims.

We hope you enjoy this edition and we welcome your suggestions, feedback and comments.

The insurance law partners of
Colin Biggers & Paisley
and Monahan + Rowell

Stuart Hetherington has over 30 years experience, with particular expertise in insurance law and will lead a new team at Colin Biggers & Paisley specialising in trade and transport.

In April 2005, Stuart was appointed one of two Vice Presidents of the prestigious Comite Maritime International (CMI) organisation, having served as an Executive Councillor of that organisation for the last five years. He has also served on the Board of the New South Wales Chapter of the Australian Insurance Law Association.

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cases supporting *Sullivan v Gordon* as a principle of Australian Common Law should be overruled.

The judgment of the High Court was given in the case of *CSR Limited v Eddy* [2005] HCA 64.

The Facts

The claim involved a Plaintiff suffering from the asbestos related disease mesothelioma. Liability was admitted and in the Dust Diseases Tribunal of New

The Demise of Sullivan v Gordon Damages

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South Wales, O'Meally P. awarded damages approximating \$465,000.00 of which \$165,000.00 was for *Sullivan v Gordon* damages.

What are Sullivan v Gordon Damages?

Sullivan v Gordon damages are compensation for the Plaintiff's inability to provide personal or domestic services to another person and derive their name from the New South Wales Court of Appeal judgment of 1999 of the same name.

In the present case, the Plaintiff was aged 61 at the time of trial and his wife, aged 60, suffered from osteoarthritis. It was agreed that the Plaintiff was expected to die in 2004 and the award of \$165,000.00 for *Sullivan v Gordon* damages was based on a further 20 years of providing domestic assistance to his wife for 1.5 hours per day at the cost of \$25.00, discounted by 20% for contingencies.

The Effect of the Judgment

As a result of the judgment, Plaintiffs are no longer able to claim *Sullivan v Gordon* damages based on the commercial cost of providing such gratuitous services.

Plaintiffs are permitted to include as part of their claims for general damages (for pain and suffering and loss of enjoyment of life), the fact that they are no longer able to provide the gratuitous services to, for example, their spouse and this can be considered in assessing general damages.

The judgment will have a significant impact on:-

- Asbestos and related disease claims, particularly malignancies of mesothelioma and lung cancer, where such damages have been regularly claimed and allowed in some jurisdictions in the past; and

- Significant injury cases such as brain damage or spinal injury, where the ability of the Plaintiff to provide gratuitous domestic or personal services that they had provided prior to injury, has been lost.

Does this Judgment affect the ability to recover Griffiths v Kerkemeyer Damages?

Griffiths v Kerkemeyer damages are awarded to injured Plaintiffs to cover the commercial cost of nursing and domestic care provided to the Plaintiff by family or friends. These are gratuitous services received by the Plaintiff rather than provided by the Plaintiff to others.

The short answer is no. The joint judgment of Gleeson C J, Gummow and Heydon J J, includes the following passage:-

"Griffiths v Kerkemeyer is well established, no challenge was made to it in this case, and nothing in this judgment is intended to encourage any future challenge."

The rider to that answer is that there must be true *Griffiths v Kerkemeyer* damages, namely the commercial cost of nursing and domestic services which had been provided by family or friends of the Plaintiff and which services the Plaintiff reasonably needs as a result of injuries, subject to the claim.



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New code breaks new ground

On 18 July 2005, the insurance industry, through the ICA, launched its new General Insurance Code of Practice. The new Code replaces the 1994 Code of Practice. ICA President, Michael Hawker said "With more than 41 million insurance policies in force and \$55 million in claims paid each business day in Australia, the improved service standards the Code promotes will have a genuine impact on policy holders".

The objectives of the new Code are to promote more informed relations between insurers and their customers, improved consumer confidence in the general insurance industry, provide better mechanisms for complaints resolution and commit insurers and the professionals they rely upon to provide higher standards of service.

Application

- While the new Code comes into force from 18 July 2005,

there is a transition period of 12 months during which the 1994 Code will remain in force, particularly in respect to old policies and claims.

- The Code does not apply to life and health insurance products issued by life insurers and registered health insurers. The Code covers all general insurance products except worker's compensation, marine insurance, medical indemnity insurance and compulsory third party insurance.
- For the first time, the Code applies to both individual consumers and business customers. Another first is that while the Code covers the products and practices of insurers, it is intended to include the insurer's service providers and authorised representatives.

Buying Insurance

- Sales process will be conducted in a fair, honest and transparent manner.

- If insurance cover is declined, an insurer must provide reasons and refer the customer to either another insurer, the Insurance Ombudsman Service (IOS) or NIBA for information about alternative insurance options.
- If a customer cancels a policy, an insurer must refund any money owed within 15 business days.
- These standards apply to the insurer's authorised representatives.

Claims

- An insurer is to decide whether to accept or deny a claim within 10 business days of the notification.
- If further information about the notification is required, the insurer within 10 business days of receiving the notification, must notify the customer of the information that is required, if necessary appoint a loss assessor or a loss adjuster and provide an initial estimate of the time required to make a decision on the claim.
- Within 5 business days, the insurer must have notified the customer of the details of any appointed loss assessor/adjuster and/or investigator.
- At least every 20 business days, the insurer will keep the customer informed of the progress of their claim.
- The insurer may agree to an alternative time frame in complex claims.
- These standards do not apply if the customer commences legal proceedings.
- Insurers may fast track the assessment and decision process where there is urgent financial need.
- The insurer will accept responsibility for workmanship and materials carried out by authorised repairers.
- These standards apply to the insurer's service providers.

Complaints Handling

- By way of internal dispute resolution, insurers will respond to complaints within 15 business days, provided they have

completed any required investigation and have all the necessary information.

- By way of external dispute resolution, insurers will subscribe to the independent external dispute resolution scheme administered by the IOS.
- External dispute resolution determinations made by a Panel, Adjudicator or Referee of the IOS service are binding on insurers.

Compliance

- An independent Code Compliance Committee will be established, consisting of a consumer representative, an industry representative and an independent chair.
- The Code Compliance Committee will monitor Code Compliance by insurer members and make determinations and impose sanctions where IOS has reported a failure to correct the Code breach.

Conclusion

The requirements of the 1994 Code were largely subsumed by the recent *Financial Services Reform Act*. The new Code imposes more demanding standards on a wider range of insurance personnel. The new Code seeks to benefit a wider range of customers. The pressure is on insurers, their agents, authorised representatives and service providers to deliver higher standards of service. The insurance industry response to the new Code has been positive. The Code is written in plain English and a copy of the Code may be downloaded through the "Code of Practice" link at the Monahan + Rowell website.

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Duty of Care and Foreseeable Risk

On 21 October 2005, the High Court dismissed appeals from two NSW Court of Appeal decisions involving catastrophic injury claims brought by men crippled in separate diving accidents in the 1990s. In both cases, the High Court found that in the particular circumstances, a council would not be expected to warn of the foreseeable risk of a diving injury given the inherent danger associated with such an activity and the general awareness of such dangers in the minds of those participating.

Neither council was held to be negligent, thereby avoiding the multi-million dollar damages originally awarded at trial to the injured parties.

Vairy v Wyong Shire Council
[2005] HCA 63 (21 October 2005)

Mulligan v Coffs Harbour City Council & Ors
[2005] HCA 62 (21 October 2005)

Brief Facts

In *Vairy v Wyong Shire Council*, the plaintiff was rendered a quadriplegic after diving off a rock platform at Soldiers Beach in January 1993. He sued Wyong Shire Council, which had the care, control and management of the platform, claiming they were negligent in failing to erect signs warning against diving in the area. He was successful at first instance and was awarded over \$5 million.

On appeal, the decision was reversed on the grounds that the trial judge had incorrectly found Wyong Shire Council to be in breach of its duty of care. In their decision, the Court of Appeal placed significant emphasis on the obviousness of the risk, finding that the risk of danger was sufficiently apparent so as to neutralise the Council's duty to erect warning signs.

In seeking to have this decision overturned, Vairy was granted