OPINION

Judicial paternalism and the High Court

In a number of recent decisions, for example, *Nagle v Rottnest Island Authority* (1993) Aust Torts Reports 81-211, the High Court of Australia appears to have affirmed a new jurisprudence of 'judicial paternalism', one bearing an astonishing resemblance to that described by Robin West. As she says:

> in important respects a judge is more like an ideal parent than like an ideal legislator: unlike the legislator, but like the parent, her primary attention is directed to the particular, subjective narrative of the individuals before her. Unlike the legislator, but like the parent, she feels enormous pressure to act responsively in that relationship. She could not, should not, and typically does not treat the litigants as 'one and no more than one' — as on a par with all other persons who might find themselves in similar circumstances. The basis for any paternalistic ruling she may be inclined to make for this reason alone is more likely to be a sympathetic response to the litigant's subjective plight than a deductive inference from either implicit or explicit visions of the social good. [West, R.L., 'Taking Preferences Seriously' (1990) 64 *Tulane LR* 659, 692]

This editorial argues that while judicial paternalism may be superficially appealing, its dangers are illustrated by recent decisions of the High Court and these decisions, in fact, show that it is likely to be seriously misplaced and misconceived.

In *Nagle v Rottnest Island Authority* the appellant, an off-duty employee of the precursor to the Island Authority, visited the public recreation area on the island to swim at a natural swimming hole known as the Basin. The Basin was largely surrounded by a rocky 'wave platform' although there was a sandy beach along one side. The appellant approached the Basin from the eastern side along a partially submerged rock ledge forming a natural platform. He dived from this ledge into the water, striking his head on a fully submerged rock (one of six in the immediate vicinity). He became quadriplegic as a consequence. According to the appellant, while he had seen the other rocks in the area, he assumed that the area between them was safe to dive into.

The trial judge found that the Board of Management encouraged swimming and other recreational activities at the Basin, and provided and maintained facilities for this purpose. The trial judge also found that an observer looking towards the sea from the rocky ledge might have his vision partially obscured by glitter from the sea, although this effect could be negated by moving his head. Although the submerged rock could have been partially obscured by the glitter, it would not have been totally obscured. He found that while the appellant's action in diving into the Basin was foolhardy, it was nonetheless foreseeable. On appeal to the Full Court of the Supreme Court of Western Australia, Kennedy and Rowland JJ held that the risk of injury was not reasonably foreseeable, given that the rocks were large and clearly visible in sunny weather.

In the High Court, the majority, Mason CJ and Deane, Dawson, and Gaudron JJ, found that injury to people diving from the eastern rock ledge into the Basin was reasonably foreseeable. They criticised the approach of the Full Court, and noted that the issue of foreseeability went, not to the risk of injury, but to the likelihood an individual diving from the rock ledge into the Basin would be injured. It followed that the respondent had breached its duty of care by not posting a warning notice forbidding diving from the rock ledge. It was immaterial that the appellant had clearly not had reasonable regard for his own safety. Brennan J, dissenting, noted that diving onto one of the rocks adjacent to the wave platform was not the only foreseeable danger of diving into the Basin. Indeed, he took the view that short of prohibiting all diving, any signage would simply have created the illusion that diving in other areas was risk free. As Brennan J noted 'the probability that a warning would have deterred the plaintiff from acting in a foolhardy way does not create a duty to give the warning' (at 62-116).

The decision in *Nagle* imposes an unrealistic standard of care on public authorities. While, undeniably, the decision of the majority constituted a 'sympathetic response' to the plight of the appellant, it also, and unfortunately, suggests that those involved in the management of public recreation facilities owe a positive duty to protect even the most foolhardy of those frequenting them from the potential hazards imposed by their own lack of foresight. The court's paternalistic attitude is truly remarkable.

Similarly in *Louth v Diprose* (1991) 110 ALR 1, the High Court sought to save a hapless Tasmanian lawyer from the (financial) hazards of his own infatuation with a woman who consistently rejected his advances. (See the article by Samantha Hepburn in this issue.) Again, 'the princes of law's empire', accompanied by a lone princess, sallied forth to rescue a wholly improbable plaintiff from the consequences of his infatuation. One cannot help wondering what it is about these particular plaintiffs which has evoked this dramatic upsurge in judicial sympathy and this remarkable outpouring of judicial paternalism. One even wonders if it could have been the apparent total inability of two otherwise normally intelligent male individuals (one, indeed, a legal practitioner) to have reasonable regard for their own interests that so aroused the compassion of that august body, the High Court. The possibility of an otherwise rational High Court being overwhelmed with sympathy for masculine helplessness and embarking on a crusade to ensure that men are saved from their own propensity for risk positive behaviour is surely sufficient to cause substantial concern, even alarm. Quite frankly, it scares the wits out of this somewhat cynical observer.

I can only recall with affection, and even a tinge of regret, that stalwart figure of a bygone era, the reasonable man, together with his more contemporary incarnations, the reasonable person and the reasonable woman. Their replacement by the hapless (one might almost say hopeless) plaintiff, and the paternalistic (or fatherly) judge seems far more a cause for concern than a ground for optimism. It raises real and serious questions concerning the degree to which the legal system ought to protect individuals who, on all accounts, are possessed of sufficient intelligence, education and experience to have regard for their own interests.

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